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 principle custodians of the cultural heritage, the wellspring of tradition and of personal identity–'*te hukinga o te wai matua'*.[2]
> *Sir Hugh Kawharu, 1977*

> We all know how difficult it has been in the past to borrow on the security of Māori land. That difficulty has been one of the main stumbling blocks to development of Māori land, and has been a perennial complaint voiced by Māori in the Māori Land Court and elsewhere. ... I think we will have to wait for the formation of a Māori bank before we are likely to see lending secured on Māori land owned by large numbers of owners. With iwi starting to receive the benefits of Treaty settlements, a Māori bank may be one of the ventures they could consider.[3]
> *Judge Milroy, Māori Land Court Judge, 2007*

The importance of the whenua as the life force of Māori is the over-arching principle to be considered when looking at issues of Māori land development. It is not just about developing the land for economic gain but also for social, spiritual and collective gain. Owners of Māori land require finance in order for such development to occur. The challenge of this dissertation is to provide the framework for a Māori financial institution which can meet the specific needs of Māori land while at the same time ensuring that it

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2 I.H. Kawharu *Māori Land Tenure* (Oxford University Press, Oxford, 1977) preface.

3 Judge Milroy "Judge's Corner" (2007) 36 Te Pouwhenua 3.

operates in a transparent and commercially sound manner.

Māori people and whenua are inextricably linked. As Sir Hugh Kawharu writes, the whenua provides Māori 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 Māori. The whenua also provided, and continues to provide, sustenance to Māori people. The land was cultivated, crops were grown and the whenua was cared for. As kaitiaki over the whenua, Māori 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.

The wheuna has sustained Māori society and it is unsurprising that the widespread confiscation of whenua in the nineteenth and twentieth centuries almost lend to the end of the Māori race. In 1840 there was an estimated 100,000 Māori in Aotearoa, by 1878 that number had fallen to 45 542.[4] By 1865 188,000 square kilometres or 70 per cent of all land in Aotearoa had either been 'purchased' or confiscated.[5] Today, only six percent of land in Aotearoa/New Zealand remains Māori land,[6] however, the Māori population has steadily increased and, according to the 2006 Census of Population and Dwellings, 565 329 people identified themselves as Māori.[7]

While Māori have survived and New Zealand has developed into a thriving economy, economic, social and political indicators all show that Māori are being left behind. In 1998 Te Puni Kōkiri reported on the state of the Māori people and highlighted the division between Māori and non-Māori in several key economic indicators.[8]

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4 Encyclopaedia of New Zealand 1966 *Population: The Census* Te Ara <http://www.teara.govt.nz/1966/P/Population/TheCensus/en> (at 28 January 2008)

5 Controller and Auditor-General *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee* (March 2004) 26-7.

6 Ibid, 25.

7 Statistics New Zealand *Census 2006 Quick Statistics About Māori* <http://www.stats.govt.nz/census/2006-census-data/quickstats-about-Māori/2006-census-quickstats-about-Māori-revised.htm> (at 28 January 2008).

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

Summarising the key findings: In 1992 the life expectancy of Māori was 68 years for males and 73 years for females compared to 73 and 79 years respectively for non-Māoris; in 1997 the average Māori household income was $10,000 per annum less than non-Māori households; and 41 per cent of Māori children live in families earning less than $20,000 per annum compared to 20 per cent of non-Māoris. Further, the 2006 census reported a Māori unemployment rate of 11 per cent,[9] compared to 5.1 per cent for non-Māori.[10] The Report did note that "the economic and social disadvantage experienced by Māori reflects in part the unique demographic characteristics of the Māori population."[11] However, the fact remains that Māori in Aotearoa/New Zealand, as a whole, do not experience the same standard of living as non-Māori. It is the ideal of this paper that with widespread development of the whenua, alongside the continued hard work of committed people within Māoridom, will help close the gap, to borrow a phrase, between Māori and non-Māori.

Māori land, which comprises approximately six per cent of Aotearoa/New Zealand's total land mass, is characterised as under-developed and the securing of finance to develop the land is difficult to achieve. Calls for a Māori financial institution have been frequent over the past twenty years but nothing has eventuated due to the lack of funds available within Māoridom and by governmental refusal to institute such a scheme. As Judge Milroy writes, treaty settlements are providing iwi with much needed funds. Māori are now able to provide for the development of the whenua independent of Government. We have the means, but currently not the will. Recent attempts to establish a Māori financial institution have been rejected by the Government,[12] the time is for Māori to join together.

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9 Statistics New Zealand *Census 2006 Quick Statistics About Māori* <http://www.stats.govt.nz/census/2006-census-data/quickstats-about-Māori/2006-census-quickstats-about-Māori-revised.htm> (at 28 January 2008).

10 Statistics New Zealand *Census 2006 Quick Statistics National Highlights* <http://www.stats.govt.nz/census/2006-census-data/national-highlights/2006-census-quickstats-national-highlights-revised.htm?page=para007Master> (at 28 January 2008).

11 In 1996 Māori aged 0-14 comprised almost 38 per cent of the total Māori population compared to only 20 per cent of the non-Māori population. See Te Puni Kōkiri *Whakapakari No 1* (1998). Available from <http://www.tpk.govt.nz/publications/factsheets/default.asp> (at 28 January 2008).

12 "TPK Backs Away From Māori Bank Proposal" *The Press* (Christchurch, 6 March 2004).

A Māori financial institution is needed to ensure widespread development of the whenua and to improve the standard of living of Māori. Development could also realise Sir Hugh Kawharu's vision that one day the whenua will once again be the 'principle custodian of the cultural heritage, the wellspring of tradition and of personal identity' of Māori.

What follows is a discussion of the issues involved in Māori land tenure and Māori land development. The aim is to discuss the issues and to critique recent government initiatives to show the basis on which a Māori financial institution should be based. The second section looks at customary Māori land tenure, discussing the important role the whenua played in pre-contact Māori society and the principles of customary Māori land tenure. The third section details the two competing land tenure systems in New Zealand and how they came about: Māori land tenure and the English system of land tenure. Understanding the differences between the two systems is important to understanding the difficulties faced by owners of Māori land in accessing finance to develop their land. The fourth section looks at Māori land under the current legislative framework. The specific characteristics of Māori land are discussed, alongside the issues contributing to the problem of accessing finance. In the fifth section I turn my focus to a critique of the proposed Māori Business Aotearoa New Zealand entity which seeks to address issues of Māori economic development. In the sixth and final section I set out the principles on which a Māori financial institution should be established, arguing that a mutual society is the most preferential organisation form. Recent changes to the Farmers Mutual Group will be discussed and contrasted with the proposed Māori Business Aotearoa New Zealand.

II MĀORI CUSTOMARY LAND TENURE[13]

This section opens with a discussion of traditional Māori conceptions of whenua to provide an overview of the belief system of Māori pertaining to land and the significance of whenua to Māori. This conception of whenua informed the Māori customary land tenure system that developed in pre-contact Māori society, a system which 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.

A Whenua

The whenua is integral to Māori identity. To Māori it is at once our ancestor, our creator, our source of life and our final resting place. Māori are Tangata Whenua – the people of the land,[14] and the whenua does not belong to Māori, Māori 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.[15] 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 Māori conception of whenua and the Western conception of land. Whenua encompasses a multi-faceted reflection of the values,

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13 The purpose of this section is not to undertake a thorough analysis of customary Māori land tenure. Such a task is beyond the scope of this paper and would require an in-depth study of the Minute Books to the Māori Land Court and would need to draw on the expertise of those knowledgeable in customary Māori law.

14 Moana Jackson "Land Loss and the Treaty of Waitangi" in Witi Ihimaera (ed) *Te Ao Mārama 2* (Reed Books, Auckland, 1993) 70.

15 *Taonga Māori: Treasures of the New Zealand Māori People* (Australian Museum, Sydney, 2000) 39.

concepts and ideas connecting people and the environment within Māori culture.[16] Land, on the other hand, is a simple commodity, a property right that can be traded for money.[17]

Whenua is the "spiritual sustenance of the Māori."[18] To speak of whenua is to speak of the spiritual relationship, the union, the bond that exists between the Māori people and our whenua:[19]

> To the early Māori, land was everything. Bound up with it was survival, politics, myth and Religion. *It was not part of life but life itself.* Taking culture in its widest sense, there was no part of early Māori culture that was not touched to the land.

The whenua was life itself. Life which preceded human existence. All aspects of Māori society revolved around the whenua. As Kawharu notes, 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:[20]

> 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 *Papatuanuki* (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.[21]

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16 I.H. Kawharu *Māori Land Tenure* (Oxford University Press, Oxford, 1977), 40.

17 The ideal of land as a property right in Western society is further discussed in section III, subpart B and section IV, subpart 1.

18 *Taonga Māori: Treasures of the New Zealand Māori People* (Australian Museum, Sydney, 2000), 35.

19 George Asher and David Naulls *Māori Land* (New Zealand Planning Council, Wellington, 1987) 3 [emphasis added].

20 *Taonga Māori,* above n 17, 40 [emphasis in original].

21 I.H. Kawharu *Māori Land Tenure* (Oxford University Press, Oxford, 1977), 41.

Lenihan writes that because of this relationship between whenua and tangata, Māori viewed whenua holistically. Everything in Māori society is connected through our tipuna and an appreciation of this connection allows an understanding of the value placed by Māori on whenua:[22]

> When Māori looked at 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.

Development of the remaining Māori land will ensure that the whenua continues to nourish and provide for Māori. I opened this paper with the passage from Sir Hugh Kawharu in which he recognised that the widespread loss of whenua has resulted in Māori turning to other 'symbols of identity.' Yet he still aspired for whenua to continue to be the 'principle custodian of the cultural heritage, the wellspring of tradition and of personal knowledge.' For this to arise, the vast tracts of un- and under- developed Māori land needs to be developed in order to once again provide sustenance for Māori. Further, such development needs to adhere to Māori customs and tikanga in order for whenua to be restored to the primary position it once held in Māori society reflecting the connection with our tipuna.

B Māori Customary Land Tenure

The significance of whenua in Māori 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, "it provided Māori with a sense of identity, belonging, and continuity."[23] Individual ownership was unknown, occupation and use rights were allocated with the consent of the group and alienation was rare.

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22 S Te Marino Lenihan "Māori Land in Māori Hands" (1998) Auckland U L Rev 570, 571-572.

23 Ibid, 572.

1 Ownership

The notion of individual ownership was completely foreign to Māori society prior to European contact. As discussed above the whenua is of great significance and is viewed as, amongst other things, our ancestor. The whenua did not belong to Māori, Māori belonged to the whenua and no individual owned land to the exclusion of others.[24]

However, hapū and iwi exercised Manawhenua over tribal territories. Lenihan writes that Manawhenua embodies political authority over the whenua and the spiritual connection with the whenua.[25] Authority over the land was exercised by the rangatira although such authority was exercised as an expression of his social status and not as an expression of any claim to ownership of the whenua.[26]

It was the role of the Rangatira to act in the interests of the hapū or iwi and, ultimately, the authority of the Rangatira was expected to be respected in the face of competing claims over the whenua. An often cited example is that of Wiremu Kingi who, in speaking for the people of Te Atiawa as Rangatira, overruled the claimed authority of Te Teira, a member of the Ngati Rahiri hapū, to sell Waitara to the Government. Wiremu Kingi emphasised on many occasions that Waitara was not for sale and on one occasion stated emphatically that "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."[27] 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 with a right to sell the land without the consent of the iwi. In exercising political authority, regard was had to the spiritual significance of the whenua to the hapū and iwi. In this way, the interests of the hapū and iwi came before the interests of the individual and the whenua could thus be classified as a communal asset and not an individual property right as it is under the western, or liberal, system.

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24 Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast et al (eds) *Māori Land Law* (2nd edition, LexisNexis, Wellington, 2004) 43.

25 Lenihan, above n 21, 573.

26 Raymond Firth *Economics of the New Zealand Māori* (2nd edition, Wellington, 1959) 375.

27 As cited in W. Martin *The Taranaki Question* (Auckland, 1860) 41 in Raymond Firth *Economics of the New Zealand Māori* (2nd edition, Wellington, 1959) 369.

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 complex and clearly defined system of occupation and use rights.[28] Metge writes that within the hapū, whānau 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."[29] Such rights could be, and commonly were, transferred by individuals through inheritance or gift[30] although at all times such individual rights were subject to the authority of the hapū.[31] Further, the principle of ahikaa required that for individuals or whānau to maintain their rights "people were expected to reside within the hapū locality, comply with group norms, and when required participate in group activities."[32] Māori society was a communal society and participation within the group was required for individuals and whānau to benefit from the resources of the group.

3 Alienation

The whenua was very rarely alienated, when it was is was often by way of gift. The ideal that the whenua should not be alienated is based on the cultural, physical and political significance of whenua to Māori. Lenihan writes of the important links between Māori and the whenua and provides and insight into why the whenua was not to be alienated:[33]

> 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 or ancestors and in the knowledge held by members of a hapū, of the landscape.

Firth notes instances where land was gifted to celebrate peace; as compensation for

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28 Dr Bill Maughan and Tanira Kingi "Te Ture Whenua Māori: Retention and Development" [1998] NZLJ 27–31, 28.

29 Joan Metge *The Māoris of New Zelanad*, *Rautahi* (Revised Edition, Routledge and Kegan Paul, 1976, London) 121.

30 Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast et al (eds) *Māori Land Law* (2nd edition, LexisNexis, Wellington, 2004) 53.

31 Metge, above n 28, 121.

32 Erueti, above n 29, 47.

33 S Te Marino Lenihan "Māori Land in Māori Hands" (1998) Auckland U L Rev 570, 572.

breach of tapu, for a murder or for people killed in war; for assistance in war; and to re-equip relatives who had suffered a calamity.[34] Firth concludes that "in general, the cession of land to another tribe seems to have been regarded as one of the most valuable gifts, to be made only on occasions of great significance."[35]

The Māori custom of utu requires that "anything received (whether it was an act of violence of a gift of some description) should be met with an appropriate return."[36] Even where the whenua had been gifted to make redress for a wrong committed the requirement for reciprocity "ensured a continuous cycle of exchange … to reinforce and maintain kinship ties."[37]

This ideal that the whenua should not be alienated is reflected today in the principle of retention in Te Ture Whenua Māori Act 1993. The Act does allow alienation but tightly prescribes the conditions under which land can be alienated. The restriction against alienation in the Act is based not just on the traditional conceptions of the whenua but also as a response to the widespread loss of Māori land throughout the Nineteenth and Twentieth century.

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34 Raymond Firth *Economics of the New Zealand Māori* (2nd edition, Wellington, 1959) 388.

35 Ibid, 390.

36 Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast et al (eds) *Māori Land Law* (2nd edition, LexisNexis, Wellington, 2004) 44.

37 Ibid, 44.

III LAND TENURE IN NEW ZEALAND

Two systems of land tenure operate side by side in Aotearoa/New Zealand. The vast majority of privately owned land is held as freehold title under the Torrens system of land tenure and is governed by the Land Transfer Act 1952. A second system governs the approximately six per cent of land that is not held under the Torrens system, generally referred to as Māori land and governed by Te Ture Whenua Māori Act 1993. This section traces the development of these two land tenure systems in Aotearoa/New Zealand and analyses the two systems as they exist today.

A The Two 'Revolutions'

New Zealand land law, in its current form, owes its existence to two revolutions,[38] the victory of William I at the Battle of Hastings in 1066 and the acquisition of sovereignty over Aotearoa by the Queen Victoria in the 1800s.[39] Both revolutions replaced allodial (or absolute) ownership of land with the doctrine of tenure and estates although the second 'revolution' retained some of the characteristics of the previous system of land tenure.

Following the Battle of Hastings, William I introduced a feudal land system into England. Feudalism is based around relationships between classes, the land is held by a Lord under the authority of the King and tenants are granted use rights.[40] The system is generously described by Bennion as a reciprocal relationship with the tenants "providing material goods and military and other services, the [landlord] providing protection."[41] The King became the "absolute owner of the soil and all others held interests directly or indirectly from him. All title could be traced back to the one supreme overlord, a system

38 Tom Bennion (ed) *New Zealand Land Law* (Brookers, Wellington, 2005) 2.

39 Philip Joseph, drawing on the writings of Professor Jock Brookfield, 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. See Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007).

40 Tom Bennion (ed) *New Zealand Land Law* (Brookers, Wellington, 2005) 2.

41 Ibid, 2.

that became known as tenure."[42] Individuals did not own the land itself, rather they owned an estate in land "which confers certain rights to use of the land."[43] While the feudal system was abolished in the 1600s[44] the King or Queen, now the Crown, remains as the absolute owner of land.

In the 1800s Queen Victoria acquired sovereignty over Aotearoa/New Zealand. This second 'revolution' differed from the first because the two systems of land tenure continued to operate side by side. As noted above, the acquisition of sovereignty imported the English common law doctrines of tenure and estates although these were subject to Māori customary law. [45] The Queen, now the Crown, acquired what is known as 'radical' title to the land in Aotearoa although Māori remained absolute owners until the title was extinguished by the Crown. Accordingly, "the doctrine of tenure and estates only comes into existence when the Crown has extinguished the Māori customary interest, and not before."[46] Radical title is "a technical and notional concept"[47] and differs from the absolute title enjoyed by King William I. Bennion writes that "it 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."[48]

Two systems of land tenure were able to co-exist in Aotearoa/New Zealand. Māori 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. To some extent,

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42 Ibid, 3.

43 *Re Van Enckevort (A bankrupt)* NZConvC 190,589, 190,93 (HC).

44 Dr Bill Maughan and Tanira Kingi "Te Ture Whenua Māori: Retention and Development" [1998] NZLJ 27–31, 31.

45 In *R v Symonds* (1847) NZPCC 388 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 recognised 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.

46 Tom Bennion (ed) *New Zealand Land Law* (Brookers, Wellington, 2005) 9. See also Elias CJ in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) where Her Honour said at page 652: "… the Crown's notional "radical" title, obtained with sovereignty, was held to be consistent with and burdened by native customary property."

47 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643, 655 per Elias CJ.

48 Bennion, above n 45, 9.

this distinction remains today although the majority of land is held according to the English system (now the Torrens system) following the widespread extinguishment of Māori land rights through sale or legislative acquisition. The Māori land system, although still separate, has evolved from the pre-contact Māori customary land tenure system described in the previous section into its current form set out in Te Ture Whenua Māori Act 1993.

B The Torrens System

The Torrens system of land tenure was introduced into New Zealand by the Land Transfer Act 1870 and is now represented with the Land Transfer Act 1952. Its architect, Sir Robert Torrens, "sought to cure the defects of uncertainty and insecurity of title"[49] that plagued land tenure in the Commonwealth. The purpose of the Torrens system is to:[50]

> … 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 the Register trumps all other interests that may exist. If it is not recorded, it is not a legal title or interest. This allows for certainty of land title.

Certainty of title is one of the keys to economic efficiency. Maughan and Kingi, in their discussion on the differences in the two land tenure systems[51] set out the model of economic efficiency, a model based on Western economic theory. Economic efficiency requires property rights to have the following characteristics: exclusivity; universality;

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49 Elizabeth Toomey "Māori Land" in Tom Bennion (ed) *New Zealand Land Law* (Brookers, Wellington, 2005) 38.

50 Opening Statement to the Report of the Real Property Commission in November 1961 (SA): Parliament Paper No 192 (1861).

51 Dr Bill Maughan and Tanira Kingi "Te Ture Whenua Māori: Retention and Development" [1998] NZLJ 27–31.

enforceability; transferability; and acceptability. The Torrens system, by providing a system of land tenure based on a Register of land titles provides these characteristics.
The Ownership of land blocks can be readily ascertained and easily transferred to new owners reflecting the most economic use of the land. As will be discussed in the following section, the difference between the two systems is that the Māori land tenure system lacks the characteristic of transferability because of the restrictions on alienation both under Māori customary law and imposed by Te Ture Whenua Māori Act 1993.

C Te Ture Whenua Māori Act 1993

The Act arose out of a lengthy period of discussion within Māori society and it sought to give effect to the desires of Māori in modern society. It sets out restrictions on the use and management of Māori Land and the Māori Land Court has jurisdiction to supervise activity and consent must be gained from the Court before certain activities can occur.

1 Kaupapa

The kaupapa of the Act is set out in the Preamble, section 2, and section 17.

Preamble
Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to the Māori people and, for that reason, to promote the retention of that land for the benefit of its owners, their whānau, and their hapū: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles

Section 2 Interpretation of Act generally
(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble to this Act.

(2) Without limiting the generality of subsection (1) of this section, it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whānau, their hapū, and their descendants, and that protects wahi tapu.

(3) In the event of any conflict in meaning between the Māori and the English versions of the Preamble, the Māori version shall prevail.

Section 17 General Objectives
(1) In exercising its jurisdiction and powers under this Act, the primary objective of the Court shall be to promote and assist in—

(a) The retention of Māori land and General land owned by Māori in the hands of the owners; and

(b) The effective use, management, and development, by or on behalf of the owners, of Māori land and General land owned by Māori.

There are two main themes permeating throughout the Act: Retention and Utilisation. Māori Land is a taonga tuku iho to be passed down through the generations and as such it should not be alienated outside of the whānau, hapū or iwi. It is also the life force of Māori society and as such it needs to be utilised to continue to provide practical, economic sustenance for Māori.

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

2 Statuses of Land

All land in New Zealand has one of six statuses:[52]

1: Māori customary land; being land held by Māori in accordance with tikanga Māori.[53]

2: Māori freehold land; being land, the beneficial ownership of which has been determined by the Māori Land Court by freehold order.[54]

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52 Te Ture Whenua Māori Act 1993, s 129(1).
53 s 129(2)(a).
54 s 129(2)(b).

3: General land owned by Māori; being land alienated from the Crown for a subsisting estate in fee simple and owned by a Māori or a group, of which a majority is Māori.[55]
4: General land; being land alienated from the Crown for a subsisting estate in fee simple.[56]
5: Crown land; land that has not been alienated from the Crown for a subsisting estate in fee simple.[57]
6: Crown land reserved for Māori; being Crown land that has been set aside or is reserved for the use or benefit of Māori.[58]

The first two categories are known collectively as "Māori land" and such land holdings are subject to the jurisdiction of Te Ture Whenua Māori Act 1993 and the Māori Land Court. General land owned by Māori is for all accounts simply general land, although its owners have the option of subjecting the land to the jurisdiction of the Māori Land Court. General land is any other land alienated from the Crown. It is fully transferable and only subject to the provisions of the Land Transfer Act 1952 and the Torrens system. Crown land is land still held by the Crown.

The remainder of this dissertation focuses on Māori freehold land. The special characteristics of Māori freehold land are described in the following section. These characteristics, it will be argued, are the reason why owners of Māori land face difficulties in accessing finance to develop their land. Māori customary land, although being governed by Te Ture Whenua Māori Act 1993, will not be discussed.

55 s 129(2)(c).
56 s 129(2)(d).
57 s 129(2)(e).
58 s 129(2)(f).

IV MĀORI FREEHOLD LAND

This section looks at Māori freehold land under the current legislative framework – Te Ture Whenua Māori Act 1993 ("The Act"). I begin by discussing the nature of Māori freehold land today, noting the distribution of the land throughout Aotearoa and the economic realities of Māori land. Focus then turns to applications made under s 135 of Te Ture Whenua Māori Act 1993 to change the status of Māori land to General land. Applications made under this section make apparent the difficulties facing owners of Māori land in accessing finance to develop their lands. The final part of this section seeks to 'unpack' the access to finance problem by discussing the main structural and non-structural issues which contribute to the problem. It is only when the problem is clearly defined that steps can be taken to address it.

A Characteristics of Māori Freehold Land

According to the 2004 Report of the Controller and Auditor-General on the Client Service Performance of the Māori Land Court and Māori Trustee, Māori land comprises approximately 1.5 million hectares or about six per cent of all land in Aotearoa[59] and about twelve per cent of all land in the North Island.[60] In regions such as Waiariki, Aotea, Tairawhiti and Te Tai Tokerau up to 25 per cent of all land is Māori land.[61] Only 0.3 per cent of land in Te Waipounamu remains as Māori land.[62]

The Report of the Controller and Auditor-General also notes that Māori land is characterised by multiple ownership, a limited range of productive use, lack of development, with large tracts of land landlocked. Bennion sets forth four characteristics of Māori freehold land: multiple ownership; the control of the Māori Land Court; restrictions on alienation, because of the preferred class of alienees and the confirmation

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59 Controller and Auditor-General *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee* (March 2004) 25.

60 Richard Boast "The Implications of Indefeasibility for Māori Land" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 101 – 114, 101.

61 Controller and Auditor-General, above n 58, 25.

62 Controller and Auditor-General, above n 58, 27.

requirements of the Act; and the Incompleteness of registration. The implications of these structural issues will be discussed in Part C of this section. For present purposes it is sufficient to set out the problematic characteristics of Māori freehold land.

1 Multiple Ownership and Fragmentation of Title

Multiple ownership and the fragmentation of Māori land is perhaps the defining characteristic of Māori freehold land. It has resulted in land being difficult to use and develop because of the difficulties in securing agreement among owners[63] and, as will be discussed in a later section, is considered one of the main reasons why finance is often denied to owners of Māori land.

The Report of the Controller and Auditor-General notes that the ownership of Māori 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, ten per cent of land blocks have an average of 425 owners, the average number of owners for a block of Māori land is 62 and some Māori Land Incorporations have over 5000 beneficial owners.[64] An additional problem is the incomplete nature of ownership records for many land blocks. Of the 26,000 land blocks some 50 per cent have not been surveyed and 58 per cent are not registered with the Land Transfer Act 1952.[65] Of the 111,000 client accounts operated by the Māori Trustee[66] only 37 per cent have valid contact addresses.[67] While this is merely a snapshot of the true position it indicates that even locating the owners of Māori land blocks is going to be difficult, adding to the complexities involved in accessing finance for development.

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63 George Asher and David Naulls *Māori Land* (New Zealand Planning Council, Wellington, 1987) 59.

64 Refer Wellington Tenths Trust which has X beneficial owners for example.

65 Controller and Auditor-General *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee* (March 2004) 28.

66 For more on the role of the Māori Trustee in administering Māori land see section V part A below.

67 Controller and Auditor-General, above n 64, 75.

2 The Māori Land Court

Māori freehold land is governed by Te Ture Whenua Māori Act 1993 and subject to the jurisdiction of the Māori Land Court. The Court has extensive powers of oversight and confirmation of activities pertaining to Māori land arising from the recognition of land as a 'taonga tuku iho' – a treasure to be passed down through the generations. Whenua is of special significance to Māori and it is therefore important that it is retained in Māori ownership. The Act is designed to ensure that Māori land remains in Māori hands.

There has been some criticism of the role of the Māori Land Court in supervising activity on Māori land. The supervisory nature of the Act has been linked to higher transaction costs when dealing with Māori land which in turn reduces development and encourages owners of Māori land to remove land from the Māori land system. It is also posited as the reason why iwi, when receiving land from the Crown, do not elect to have such land classified as Māori freehold land.[68] Supervision by the Court over activities such as leases,[69] sales,[70] or change of status orders[71] incurs court costs and creates time delays which may discourage development.

Another criticism is that the supervision of the Court is paternalistic and that hapū and whānau should have the authority to determine what to do with their whenua. Requiring confirmation from the Māori Land Court undermines the mana of the hapū and whānau. Regardless of the merits of such an approach, it remains that the Māori Land Court has jurisdiction over Māori freehold land and activities such as leases, sale and change of status orders requires confirmation by the Court.

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68 Craig Linkhorn, *Māori Land and Development Finance* (Discussion Paper No 284/2006, ANU Centre for Aboriginal Economic Policy Research, 2006) 2. Linkhorn cites section 22 of the Waikato Raupatu Claims Settlement Act 1995 which provides that the Land Holding Trust is not subject to the provisions of Te Ture Whenua Māori Act 1993. The Trust is the body responsible for land returned to the iwi under the Te Tiriti o Waitangi settlement.

69 Long term leases (longer than 21 years) are required to be noted by the Registrar.

70 Refer to subpart 3 (above) in this section for discussion on sales (alienations).

71 Refer to part B of this section (below) for the discussion on change of status orders.

3 Restrictions on Alienations

The Act places heavy restrictions on the alienation of Māori land. No Māori freehold land can be alienated unless in accordance with the provision of Te Ture Whenua Act 1993.[72] Alienation is defined in section 2 as including any sale of land, any granting or varying of a lease and any contract to dispose of Māori land. Any person wishing to alienate any of their interest in Māori freehold land by sale or gift must seek the approval of the preferred class of alienees.[73]

The preferred class of alienees include the children of the alienating owner; whānaunga of the alienating owner who are associated with the land in accordance with tikanga Māori; other beneficial owners of the land who are members of the hapū; and descendents of any former owner who is or was a member of the hapū associated with the land.[74] This provision is a shield protecting all of the preferred class (members of the hapū associated with the land) from outsiders entering the title.[75] Thus, the land remains in the hands of the hapū which 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 when 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.[76] Given that many land blocks have large numbers of beneficial owners or incomplete ownership records[77] this requirement can be difficult for owners to satisfy. All land alienated, either to Māori or non-Māori, remains as Māori freehold land until an order changing the status of the land to general freehold land is made.[78]

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72 s 146.
73 s 147A.
74 s 4.
75 *In Re Nuhaka 2E3C8A2B* (1994) 92 Wairoa MB 214.
76 See s 150A(1)(a) for trusts, s 150B(1)(a) for incorporations and s 150C(1)(a) for owners in common.
77 See discussion on Multiple Ownership and Fragmentation of title at subpart 1 above.
78 See discussion on Change of Status Orders at part B below.

4 Location and Quality of the Land

The size and location of individual blocks of Māori land is another defining characteristic. Joan Metge succinctly summarises the quality of Māori land:[79]

> 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 [and also in Taranaki], 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 ...

60,000 hectares of Māori Land (or forty per cent of all Māori land) is under-developed while eighty per cent of Māori land is considered non-arable and thus can only support a limited range of productive uses and/or is in a remote area. This is not surprising given that large tracts of Māori land are located in the Tairawhiti, Waiariki and Te Tai Tokerau regions. Finally, upwards of thirty per cent of Māori land is landlocked and this reduces the use of Māori land because of access issues and constraints on the land by surrounding land activity.[80]

5 Economic Characteristics of Māori Land

Despite the above characteristics the asset base of Māori land trusts and Incorporations is substantial. Te Puni Kōkiri reports that in 2001 Māori land trusts and Incorporations controlled $1.52 billion of total assets and reported a total combined income of $300 million, up 55 per cent from 1998. Gross profit over the same period increased by 122 per cent to $51 million. Total Māori-owned commercials assets were estimated to be worth nearly $9 billion in 2001. Thus, Māori land assets account for approximately 17 per cent of total Māori assets.[81] These figures highlight the importance of Māori land in providing

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79 Joan Metge *The Māoris of New Zelanad*, *Rautahi* (Revised Edition, Routledge and Kegan Paul, 1976, London) 110.

80 Controller and Auditor-General *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee* (March 2004) 28.

81 Te Puni Kōkiri *The Māori Asset Base* (Fact Sheet 24, January 2004). (Available from www.tpk.govt.nz/publications/factsheets/).

the continued sustenance of Māori. With forty per cent of Māori land under-developed and eighty percent of Māori land classified as non-arable, the potential benefits from the development of Māori land are substantial. Already land is one of the key drivers of the Māori economy and with large tracts of Māori land waiting to be developed Kawharu's vision of the land once more providing the life force of Māori society could be realised.

B Change of Status Orders

In is through applications made under section 135 of the Act that the problem of accessing finance on Māori land becomes apparent. Section 135 allows owners to apply to the Māori Land Court for an Order changing the status of their land from Māori freehold land to General land. The effect of this is to take land outside the jurisdiction of the Māori Land Court where it can thence be sold outside the whānau, hapū or iwi without restriction, further advancing the loss of land held by Māori.

Given the importance of the retention of Māori land, as recognised 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[82] can have its status changed to General land provided that "the land can be managed or utilised more effectively as General land."[83] Under section 137 land vested in a trust or Māori Incorporation can have its status changed to General land if the status change is "clearly desirable … for the rationalisation of the land base,"[84] such rationalisation will involve the acquisition of other land by the trust or Māori Incorporation,[85] and the requirements imposed with regards to quorum and voting under the alienation provisions[86] are impractical.[87]

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82 Except where the trust is imposed by s 250(4).
83 Section 136(d).
84 Section 137(1)(c).
85 Section 137(1)(d).
86 Sections 145-150.
87 Section 137(1)(e).

An analysis of 21 applications between 2004 and 2006 under section 135[88] indicates that the Māori Land Court "is very well aware of the difficulties in obtaining funding to develop Māori freehold land. It is a recurrent theme before all Judges throughout Aotearoa. Almost all Māori freehold land would be more attractive security to a lender were it General land."[89]

The evidence from the applications is that owners are having great difficulty accessing finance to develop their land while the land is classified as Māori land. Judge Harvey 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."[90] 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 Māori freehold land. To counter this a procedure has developed which involves changing the status of the land from Māori freehold land to general land under s 135 and instituting a trust over the land which requires the trustees to apply to the Māori Land Court for an order returning the land to Māori freehold land once the mortgage has been repaid. These are commonly known as 'whata' orders.

While sufficient to satisfy the financial institutions, 'whata' orders are problematic for two reasons. Firstly, 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 Māori Land Court for an order changing the status of the land back to Māori freehold land. Secondly, it is a tacit acceptance by the Māori Land Court that Māori 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*[91] the Hanita Incorporation[92] applied for a change in

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88 See Appendix 1 for the list of cases.

89 *Re Papamoa 2A1* 20 APWM 167 (MAC).

90 *Re Ruaohinetu 25* (2005) 162 GIS 17-20, 19 (MLC).

91 Application A20660013740 by the Hanita Incorporation to the Māori Land Court for a change of status order under section 135 of Te Ture Whenua Māori Act 1993 dated 26 April 2006.

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 Māori Incorporation is designed to deal with the problems associated with Māori land,[93] including the problem of accessing finance. Incorporation brings together all the owners into a single entity and establishes a governance and management structure to organise and run the business, in much the same was as an incorporated company is organised and run. There is a clear market failure if the entity designed to provide legal and structural certainty is unable to access finance for development.

While there have been numerous applications to the Māori Land Court for a change of status order it is clear that such orders will not be readily awarded. In most cases the Court is vigorous in its application of the balancing exercise between retention and utilisation that the 'kaupapa' of the Act requires. The emphasis on 'kaupapa' shifts the focus from the owners to the whenua itself. The Court acknowledges that the wishes of the owners are an important consideration but the Act requires that the principle of retention and the connection of the wider hapū to the land be recognised. It is in this that Māori freehold land is distinct from general land. The Act developed over a long period of time and the balance required between retention and utilisation in the 1980s remains as valid, and even more so, today. The pressure to develop is ever-increasing and many of the grievances of the past remain unresolved. Caution should continue to be exercise in considering application for a change of status from Māori freehold land to general land, the retention of Māori land in Māori hands remains important.

C The Access to Finance Problem Defined

Judge Milroy has observed that borrowing on the security of Māori land is the main inhibitor to the development of Māori land.[94]As discussed in the previous section,

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92 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).

93 As was discussed in Characteristics of Māori land in part A above.

94 Yvonne Tahana "Māori Bank Needed for Big Developments – Land Court Judge" *Waikato Times* (Hamilton, 18 November 2006).

applications for a change of status in order to access finance for development are frequently sought. Many writers agree that accessing finance is difficult when land is classified as Māori land. Where they disagree is the reasons why such difficulty exists.

To some, the problem is structural. I.e. the problem lies with the inherent characteristics of Māori freehold land. To others, the problem is non-structural. I.e. the problem lies with the 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 Te Ture Whenua Māori Act 1993. As already noted, this paper is working on the premise that the balance struck by the drafters of the Act is the appropriate one, thus such an option is untenable. What is required is a financial institution designed to account for the specific, inherent characteristics of Māori land. If we accept 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 Māori land.

The reality is that the problem is likely a combination of structural and non-structural issues. What follows is a discussion of the issues, focussing 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 report on Māori Economic Development[95] prepared for Te Puni Kōkiri identified multiple ownership, asset location, and asset specificity and quality as issues which "may place a greater constraint on asset development." In 2004 the Controller and Auditor-General reported on the client service performance of the Māori Land Court and the Māori Trustee. The report identified multiple ownership and restrictions on alienations as

[95] New Zealand Institute of Economic Research *Te Ohanga Whanaketanga Māori – Māori Economic Development* (2003).

the reasons why Māori land is sometimes not considered sufficient collateral for lending. In order to understand the problem these issues need to be 'unpacked'. Multiple ownership and the restrictions on alienation are discussed below.

(a) Multiple Ownership

Multiple ownership is often advanced as the main reason for problems in accessing finance. Judge Milroy,[96] Te Puni Kōkiri,[97] and the Auditor-General[98] have all identified multiple ownership as a constraint on accessing finance. The Auditor-General Report notes that multiple ownership "can lead to problems in obtaining agreement about land use and development, and also reduces the economic return to individual owners."[99] However, the same can be said for companies with large and diverse shareholdings. Even within large companies there will be disagreements over developments and new projects. For example, there was major disagreement among farmers (shareholders) when Fonterra was formed, and there is likely to be even more disagreement among farmers over Fonterra's planned listing on the stock exchange. Mark Grey argues that the multiple ownership issue is no longer convincing, citing that over 80 per cent of all Māori land is under some sort of management structure.[100] 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[101] is addressed within the Māori land system by land Trusts and Māori Incorporations "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."[102] However, where Trusts and

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96 Yvonne Tahana "Māori Bank Needed for Big Developments – Land Court Judge" *Waikato Times* (Hamilton, 18 November 2006).

97 New Zealand Institute of Economic Research *Te Ohanga Whanaketanga Māori – Māori Economic Development* (2003).

98 Controller and Auditor-General *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee* (March 2004).

99 Ibid, 31.

100 Mark Grey *Māori Land as Collateral – A Problem Definition* [2003] Te Whakahaere 47-63, 48.

101 Discussed above in part A, subpart 1 of this section.

102 Dr Bill Maughan and Tanira Kingi "Te Ture Whenua Māori: Retention and Development" [1998] NZLJ 27–31, 30.

Incorporations differ from companies is in their transparency and accountability. Companies are characterised by audits, contestable directorships and by voluntary transfer of shares.[103] The restrictions on alienations[104] 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 organisation[105] and the confidence of any financial institution when dealing with the organisation.[106] 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 Act for the retention of Māori land. While Trusts and Incorporations may outwardly appear to resemble companies important differences exist to explain the difficulties they face in accessing finance.

Hone Harawira, speaking to the Farmers' Mutual Group Bill in the House of Representatives, commented on the argument that multiple ownership is a constraint on accessing finance and called it a "strange argument" considering that "companies with multiple shareholders seem to get finance easily for the development of their businesses."[107] While this is undoubtedly the case for established companies, start-up ventures also face large difficulties in accessing finance. A 2003 Report prepared by Pricewaterhouse Coopers for the Ministry of Economic Development as part of their Access to Finance Research Work Programme, stated that "banks will lend to start-ups only if there is guaranteed or likely cash flow and sufficient collateral (such as residential property) backing the loan."[108]

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103 Ibid, 30.

104 Discussed in subpart B (below).

105 Dr Bill Maughan and Tanira Kingi "Te Ture Whenua Māori: Retention and Development" [1998] NZLJ 27–31, 31.

106 It should be noted that lack of accountability and transparency is not confined to the Māori sector. Even when firm guidelines are in place companies fail because of poor accountability and poor transparency practices.

107 (2007) 639 New Zealand Parliamentary Debates 11154-11155 (Hone Harawira).

108 Pricewaterhouse Coopers *Bank Lending Practices to Small and Medium Sized Enterprises* (July 2003), 49.

The report noted that the reluctance of banks to lend was based on four criteria: (1) the risk involved it is not the role of banks to fund start-up ventures; (2) a high proportion of start-up ventures fail within a few years; (3) it is often difficult for start-up ventures to satisfy bank lending criteria; and (4) banks often do not have the necessary skills to deal with the new venture.[109] These are the same conclusions that Mark Grey reaches as to why banks are reluctant to lend on Māori land.[110]

The issue is not merely one of multiple ownership. Rather, difficulties most likely arise because Māori land development is, in many ways, akin to new business ventures. A 2004 report by Infometrics, again 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:[111]

> 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 Māori land development is to identify the informal supplies of capital to fund development. Taking that a step further, it is to recognise that the informal supplies of capital can be provided by established Māori entities (land trusts and incorporations, iwi entities and Māori businesses) and, by making the informal formal through the creation of a Māori financial institution, the problems inherent in Māori land circumventing access to finance can be overcome.

(b) Restrictions on Alienations

The preamble to Te Ture Whenua Māori Act 1993 states that "land is a taongo tuku iho of special significance to the Māori people" and all efforts must be made "to promote the retention of that land for the benefit of its owners, their whānau, and their hapū." It is for

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109 Ibid, 49.

110 Mark Grey *Māori Land as Collateral – A Problem Definition* [2003] Te Whakahaere 47-63.

111 Infometrics *New Zealand's Angel Capital Market: The Supply Side* (June 2004), 4.

this reason that the Act sets out strict restrictions on the any alienation of Māori land. These restrictions are the main underlying cause of the access to finance problem. 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:[112]

> 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.

Under the current system of Māori land tenure the restrictions on alienations are such that they operate to reduce the economic efficiency of the resource – the land. The lack of transferability of Māori land results in Māori land having a lower economic value because of its status. This lower economic value reduces the desirability of the land as collateral from the perspective of the financial institutions as on default of any debt obligations it may be difficult to firstly sell the land, and secondly, to sell and recover the debt. The land cannot simply be transferred to the highest 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:[113]

> 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 Māori is well-documented,[114] and discussed in detail above.[115] It is suffice to say here that Māori land is a taonga tuku iho – it is a treasure of great importance to be passed down through the generations. One of the

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112 Dr Bill Maughan and Tanira Kingi "Te Ture Whenua Māori: Retention and Development" [1998] NZLJ 27–31, 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 Māori land the authors conclude that the only constraint on economic efficiency, and thus on economic development, is the lack of transferability.

113 Ibid, 27-28.

114 This will be discussed in detail in section 2.

115 See section II.

key themes of the Act is the retention of Māori land in Māori hands. The alienation provisions of the Act[116] seek to give effect to this. Section 4 of the Act defines an alienation as "every form of disposition of Māori land, or of any legal or equitable interest in Māori land, whether divided or undivided."

For greater certainty, the Act then sets outs what is and what is not an alienation. A mortgage is an alienation and the Act requires the Māori 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, on its face, there appears to be no restrictions on financial institutions selling Māori land in order to satisfy any debt obligations defaulted on. It is on this superficial analysis that writers have been quick to point out that there are no structural constraints operating on the land. That since Māori land can be sold through a mortgagee sale there is no problem. Linkhorn writes:[117]

> 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 secutiy 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 Māori land after a mortgagee sale and, therefore, is still subject to the jurisdiction of the Māori Land Court. Financial institutions are able to sell the land at a mortgagee sale without restriction, however the market to whom they can sell is severely restricted because the land has the status of Māori land. Any further alienation by the new owners requires them to offer first right of refusal to the preferred class of alienees and to seek confirmation of alienation from the Māori Land Court. This lack of transferability limits the economic efficiency of the land, resulting in a cautious approach by financial

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116 Section 145-150.

117 Craig Linkhorn *Māori Land and Development Finance* (Discussion Paper No. 284, Centre for Aboriginal Economic Policy Research, Australian National University, 2006) 22.

institutions when considering applications for finance and thus constraining economic development.

It is for structural reasons that the access to finance problem exists. Māori land is much more than an economic resource and the Act reflects this. It is for this reason that a Māori financial institution is required so that development can occur while at the same time recognising and protecting the spiritual and cultural significance of land to Māori.

2 Non-Structural Issues

While non-structural issues are important constraints on the development of Māori 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 Māori management are in charge there still remains a difficulty in accessing finance. Despite the ongoing work undertaken to address these issues, Māori land trusts and incorporations still have difficulties in accessing finance to develop their whenua.

The 2003 report on Māori Economic Development prepared for Te Puni Kōkiri identified the following non-structural issues as constraints on accessing finance: a lack of understanding about the process of securing finance; a failure to meet a lending institution's credit criteria; a lack of complete knowledge about financing options, both debt and equity; an inability to identify an agent or agency from which to seek advice and assistance; a diffidence or fear about dealing with unfamiliar people or systems; and lack of business skills and expertise. [118]

Mark Grey, an academic and practitioner in the Māori financial sector, has concluded that the difficulties in accessing finance stem from an inability to convince financial institutions that the owners have the ability to service the loan and not from multiple

[118] New Zealand Institute of Economic Research *Te Ohanga Whanaketanga Māori – Māori Economic Development* (2003) 84-85.

ownership.[119] However, as discussed above, the issue is more complex then the single issue of multiple ownership. 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 Māori land face are no different than those faced by other borrowers, Grey goes on to advocate alternative forms of security:[120]

> If you eliminate Māori land as an option to secure finance, 90% of the problems in satisfying [bank] 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 available to them alternative forms of security on which finance can be secured.[121] However, with 40 per cent of all Māori land underdeveloped and 80 per cent classified as non-arable it is apparent that for a large amount of Māori land blocks no alternative forms of security will exist. I have seen first hand the difficulties inherent in development of Māori land, having the opportunity of being shown numerous Māori land blocks inland of Ruatoria in Tairawhiti. Little development has occurred, large amounts of land have been neglected and are covered in gorse and climatic conditions are less than ideal for pastoral farming. Where local farmers have taken the time and effort to develop the land it remains that such land cannot compare to the productive farm land in the Waikato and Taranaki. It is difficult to see how financial institutions would be convinced to lend on land in this area, even less likely is the likelihood that alternative forms of security exist. This is only one example.

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119 Mark Grey *Māori Land as Collateral – A Problem Definition* [2003] Te Whakahaere 47-63, 61.

120 Ibid, 62.

121 A Te Puni Kōkiri list of alternative security options includes non-Māori freehold land, life insurance policies, leasehold interests, shares and bonds, debtors books, forestry rights, fishing quota, livestock, ships, vehicles and chattels. See Te Puni Kōkiri *A Guide To Loan Securities* (1998), available from www.tpk.govt.nz/publicatios/subject/ subject heading Business.

V MĀORI BUSINESS AOTEAROA NEW ZEALAND

This section will assess the proposed Māori Business Aotearoa New Zealand (MBANZ) economic entity designed to address Māori economic development. The government has recognised the need for a specific entity to deal with Māori economic development. However, the vehicle they propose is flawed in that the focus is solely on economic development to the exclusion of land development. It is likely that the land Trusts and Incorporations who 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 on it. Further, the Māori Trustee, who has a statutory duty to ensure the development of the land blocks which it is administrating, is under-performing in this role. This, alongside the difficulties owners of Māori land blocks face in accessing finance from the private sector point to a market failure which needs to be addressed. This will be discussed in section VI. This section opens with a summary of the performance of the Māori Trustee in administering land blocks. Focus then shifts to the proposed MBANZ: its roles and functions and the problematic funding arrangements required to establish the fund.

A The Māori Trustee

The Māori Trustee is an office under the Māori Trustee Act 1953 responsible for the administration of 2125 largely uneconomic Māori land blocks.[122] Approximately 105,000 of the 1.5 million hectares of Māori land is administered by the Māori Trustee.[123] Of the 2125 land blocks, 1809 are leased for less then $10,000 per annum. These land blocks total 75,925 hectares, covering 143,501 beneficial owners and earn a total rentals of $4,730,611. This amounts to an average of $32.96 per owner per year.[124] This is less than one quarter of the average income across all owners of Māori land.[125] Across all land

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122 Māori Trust Office *Annual Report of the Māori Trust Office April 2005 – March 2006* (2006) 13. Available from http://www.tpk.govt.nz/about/structure/mto/annual_rep.asp

123 ibid, 4.

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

125 Section1 noted combined income of $300 million from Māori land trusts and incorporations in 2001, spread across 2.3 million beneficial owners. This provides average income of $130.43 per annum.

holdings of the Māori Trustee the average yearly income is only $60.38. The Māori Trustee is clearly underperforming in the role of promoting the development of Māori land. Indeed, when 81 per cent of land blocks administered by the Māori Trustee are leased it is difficult to envisage how the Māori Trustee can carry out widespread development activities.[126]

B Māori Business Aotearoa New Zealand (MBANZ)

The Māori Trustee and Māori Development Amendment Bill was introduced to the House of Representatives in November 2007 by the Minister of Māori Affairs Parekura Horomia. The Bill intends to amend the Māori Trustee Act 1953 by modernising the operations of the Māori Trustee and establishing a statutory incorporation known as Māori Business Aotearoa New Zealand.[127] Clause 15 of the Bill inserts into the 1953 Act a new part 2 establishing MBANZ. The purpose of the MBANZ is set out in the proposed section 55 of the 1953 Act:

> 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 subsection 2:

> (2) In carrying out its principle 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 fulfilling its principle function.

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126 Ibid, 13.

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

MBANZ is solely concerned with economic development. Indeed, it appears from the language of the Bill that any Act by MBANZ which 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 organisation. Sir Apirana Ngata, in establishing the land development schemes in the 1930s, was concerned not solely with the economic development of Māori but also with the social and cultural development of Māori.[128] The source of funding for the MBANZ requires that the focus be on social and cultural development alongside the economic development of Māori but the MBANZ itself does not require such development. This is discussed in greater detail in the following paragraphs.

The MBANZ Fund is initially intended to be established by the transfer of money from the Māori Trustee alongside a contribution from the Crown.[129] The Māori Trustee has agreed to transfer the sum of $35 million from his General Purposes Fund (GPF) to establish the fund to be used by MBANZ in order to pursue its functions. The Government will provide a 'significant contribution' to the fund.[130] The transfer of funds from the GPF to an organisation whose sole focus is one of economic development is problematic for two reasons. Firstly, the GPF is used for goals wider than economic development and secondly, it should not be assumed that the GPF is the Māori Trustee's 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 Māoris,'[131] a very wide-ranging power which theoretically entitles the Māori Trustee to lend/grant funds for social and cultural development. The fund could be used to establish hostels to accommodate Māori and to 'establish and

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128 Ngata, in describing his vision for Māori land development in 1929 said: "Efforts to educate the youth of the race, to correct the malign influence of certain elements of European culture – all these would fail to produce enduring results unless they are centred round and assisted in an industrial development based principally on the cultivation of the land." Sir Apirana Ngata *AJHR* (1931, G-10) p.vii.

129 Māori Trustee and Māori Development Amendment Bill 2007 (2007 No 181-1), cl 15 (New clause 59 to be inserted into 1953 Act).

130 Ibid, explanatory note, 2.

131 Māori Trustee Act 1953, s 32(1)(a).

maintain training centres or farms for the care and instruction of Māoris';[132] the fund could also be used to purchase and maintain properties and buildings,[133] to maintain and develop properties vested in the Māori Trustee,[134] to acquire land on behalf of Māori,[135] and to acquire land to provide sites for Māori dwellings.[136] Thus, the GPF is not solely concerned with economic development but also on 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 Māori Trust Office considers the GPF to be the fund of the Māori Trustee[137] and thus his to deal with. The fund comprises fees and commissions earned by the Māori Trustee in his dealings with Māori freehold land held under trust by the Māori Trustee and money earned as a result of the interest rate differential. It is because of the money arising from the interest rate differential that requires a close look into the ownership of the fund. Most of the land controlled by the Māori Trustee is, and has been, leased land.

The Māori Trust Office organises 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 until the end of the financial year, prior to which they had been invested by the Māori Trustee. While the Māori Trustee is required to pay interest on the money distributed, the rate is set by Regulation and it has been common for the rate set to be lower than the interest rate received on the money invested by the Māori Trustee.

This results in a surplus of funds and over time a substantial amount of money has accumulated within the GPF. In this sense, the GPF properly belongs to the beneficial owners of the land and not the Māori Trustee. However, with no individual records the

132 Māori Trustee Act 1953, s 33.
133 Māori Trustee Act 1953, s 36.
134 Māori Trustee Act 1953, s 38.
135 Māori Trustee Act 1953, s 39.
136 Māori Trustee Act 1953, s 40.
137 Māori Trust Office *Annual Report of the Māori Trust Office April 2005 – March 2006* (2006).

fund cannot be allocated to individuals or land blocks. This is important because the proposal is for an institution designed to promote economic development and it appears unlikely that it will be used as a vehicle to develop the land held by the Māori Trustee. As noted above, the Māori Trustee leases 81 per cent of land blocks which he manages. 85,000 hectares of Māori land is being leased out at minimal rentals while the Māori Trustee is about to transfer a fund worth $35 million to an institution which has no obligation to further the development of Māori land.

The functions, as described above, 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 Māori 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 Bill gets around this dilemma by enacting over any rights the owners of Māori land might possess over the GPF. The new section 60 allows for the Māori Trustee to transfer any asset under section 69 "whether or not any enactment or agreement relating to the asset permits a transfer or requires any consent to the transfer." Thus any claims to ownership of the GPF by the owners of Māori land or any requirement for the funds transferred to be put to the same purpose which they were required to be used under the 1953 Act are expressly extinguished by statute.

The proposed MBANZ is applying funds to the development of Māori 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 Māori economic development through its contribution to the fund of the MBANZ. However, the GPF is designed to be used to develop the economic, social and cultural well-being of Māori using the whenua as the basis of such development. The fund would be better served in an entity designed to provide financial services to owners of Māori land who desire to develop their land - not only for economic development, but also for the social and cultural development of Māori.

VI FRAMEWORK

The previous sections have attempted to define the problem facing owners of Māori 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 organisation through which owners of Māori land can access finance for development. This section looks at a possible solution – an institutional entity which often arises when there is a market failure. Mutual societies were common in the early twentieth century as a response to market failures. It will be argued that a mutual society is an appropriate organisational entity to pursue the development of Māori land. Using the principles developed by the Law Commission for the design of a representative Māori entity, the appropriateness of a mutual society to address to 'access to finance problem' will be assessed. 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 specialised services to a specific group.

A Principles

The Law Commission in its discussion paper 'Waka Umanga: A Proposed Law for Māori Governance Institutions'[138] devoted significant time and energy to the principles which should be applied in the formation of representative Māori entities.[139] The principles correspond to tikanga Māori and to international standards of indigenous rights and as such these principles should be considered in the formation of a Māori financial institution. The principles are:

- The principle of autonomy.
- The principles of cultural match and mandated vision.
- The principles of community empowerment and participatory democracy.
- The principles of consensus and assisted dispute resolution.
- The principles of fair process, protection of minorities and access to law.

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

139 Ibid, Chapter 6.

- The principle of choice.
- The principle of diversity.
- The principle of maintaining economies of scale.
- The principle of rationalisation.
- The principle of early entity development.
- The principle of recognition.
- The principle of ensuring good governance.

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

B Mutual Societies

A mutual is a specific organisational form where the stakeholders (customers) are the owners, not shareholders who may have no interest in the organisation outside their ownership in it. Mutuals often arise when the market is failing producers or consumers.[140] The Farmers' Mutual Group discussed below arose from the failure of foreign firms to provide affordable fire insurance to New Zealand farmers in the early 1900s. As discussed previously, the market is clearly failing owners of Māori land seeking finance to develop their land assets. It is perhaps surprising that no form of mutual society has developed in response to this market failure. According to Arun et al there are five 'attractions' of a mutual:[141]

(i) reciprocity, or the inbuilt borrowing at short notice which serves as a kind of access to a liquidity-guaranteeing function which is especially important to business;

(ii) being able to save in small instalments;

(iii) provision of a disciplined environment for saving;

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140 Kay Brown "Mutuality for the 21st Century" (1999) 519 Law Talk, 8.

141 Arun et al "Finance for the poor: The way forward?" in Christopher Green, Colin Kirkpatrick and Victor Murinde (eds) *Finance and Development: Surveys of Theory, Evidence and Policy* (Edward Elgar Publishing Inc, Cheltenham, United Kingdom, 2005) 307.

(iv) convenience and absence of formalities; and

(v) 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 together and to use that fund to provide loans or assistance where it is needed. It operates similar 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 Māori land is un- or under-developed, it is also true that there are many land Trusts and Incorporations and Iwi organisations with substantial assets. By pooling together some of the assets controlled by these Māori organisations a mutual society can develop. This mutual would be able to provide finance to owners of Māori land who want to develop their land as well as for Māori generally, in establishing or growing a business. Such an institution will remove the need for reliance on the government to fund Māori economic development as it is proposing to do with the Māori Business Aotearoa New Zealand entity.

Not only does this provide Māori with autonomy in controlling our own affairs, it enables Māori to operate according to tikanga and could be a key institution in the drive towards tino rangatiratanga. Māori will have the choice of investing in our own financial institution designed to benefit our own people. It would also negate any problems with using Māori land as security for loans. A ‘Māori Mutual’ would have the necessary expertise and knowledge to understand the complexities of working with Māori land and can design solutions which 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 form of reciprocity is a cornerstone of both mutual societies and Māori society.

C Farmers' Mutual Group (FMG)

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."[142] The mutual was formed in 1903 when a group of farmers rebelled against excessive prices and poor service provided by foreign fire insurance companies.[143] In 2007, FMG sought to modernise its powers and functions. The previous regime was considered to be too inflexible and constrained the activities of the Mutual.[144] The 2007 Act sought to give the Mutual the same powers as a company registered under the Companies Act 1993 had, as well as to establish a governance regime based on that in the 1993 Act.

Although the main function of FMG is to provide risk insurance to its members,[145] it also provides loans to finance the purchase of farming equipment. Being a farming-centred organisation, FMG is able to tailor the terms of its loans to suit the realities of the business environment that its customers operate in. Recognising that cash flows in the rural community fluctuate over the seasons, FMG provides for flexible repayments tailored to suit the individual's cash flows.[146] Such flexibility is one of the advantages of a mutual society.

The changes to the Farmers' Mutual Group provide an example of how a mutual society designed to deal with Māori economic, social and cultural development could be established. Like the FMG, the 'Māori Mutual' would be a creature of statute, with the capacity, powers, and validity of actions of a company registered under the Companies Act 1993[147] as well as being subject to the requirements of the Financial Reporting Act 1993.[148]

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142 Farmers' Mutual Group Bill 2007 (2007 116-1) explanatory note, 1.
143 Farmers' Mutual Group *History* <http://www.fmg.co.nz/19.html> (at 20 November 2007).
144 Farmers' Mutual Group Bill 2007 (2007 116-1) explanatory note, 1.
145 Farmers' Mutual Group Act 2007, s 6.
146 Farmers' Mutual Group *Finance* <http://www.fmg.co.nz/4.html> (at 20 November 2007).
147 See, for example, the Farmers' Mutual Group Act, s 7(1).
148 Ibid, s 37.

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 means that the ‘Māori Mutual’ would be accountable to Māori – to its owners/customers. This is in direct contrast to the Māori Business Aotearoa New Zealand entity which is only accountable to the Government.

APPENDIX 1: CHANGE OF STATUS ORDERS

Land Block	Minute Book	Date	Application[149]
1: Te Awa o Te Atua 7B2B	178 NA 164-165	12/02/2004	151/93

Application modified to a s 151 application.

2: Araiwhenua A 296 ROT 44-45 2/09/2006 Whata

Application made upon the grounds that: "The banks we have approached for a mortgage will not approve finance while the status is Maori freehold land." Application granted.

3: Allotment 72B3W2B1D1 Matata Parish
106 WHK 28-30 2/01/2005 Whata

Application made upon the grounds that: "The banks we have approached for a mortgage will not approve finance while the status is Maori freehold land." No supporting evidence. Application granted.

4: Te Reti A 37 Block 159 AOT 287-299 10/11/2005 135/93

Application granted for health reasons.

5: Karamu Parish Lot 201A2A2B1
111 W 272-274 3/10/2005 135/93

Application granted on the basis that the banks appear willing to lend providing status changed.

6: Te Au O Waikato 7E2B2B1
111 W 268-269 3/10/2005 Whata

Application granted: "The change of status is required so that the owners can refinance and obtain funds to carry out essential repairs to the property."

7: Park Allotment 148 Town of Richmond
106 WHK 120-121 4/08/2005 135/93

Land declared to be General land under s 2(2)(f) Maori Affairs Act 1953.

8: Kohumaru B2D2 102 WH 165-183 19/6/2005 135/93

Application granted to enable owner to access finance for development.

9: Allotment 95F2B Te Papa Parish Block
80 T 159-162 31/3/2005 Whata

Application granted: "In this case Mr Mikaere [the applicant] was unable to obtain loan finance from the major trading banks using the property as security"

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[149] 135/93 refers to applications to change status from Maori freehold land to general freehold land under s 135 of Te Ture Whenua Maori Act 1993. Whata refers to the informal orders granting a change in status under s 135 while establishing a trust over the land. The trustees undertake to restore the land to Maori freehold land once the debt has been discharged.

10: Ruaohinetu 25 162 GIS 17-20 6/01/2005 Whata
Application granted: Evidence by Mr Selwyn Pohatu (applicant) that he wanted to buy another property but that the "ANZ won't use the Maori land as security." "What normally happens Mr Pohutu is that nine times out of ten, applications for change of status are declined. The one out of ten that are not declined are usually for the building of houses and that sort of thing. Maori owners come to us and say we want to get a loan to build a house to stay in on our own land and the bank won't give us any money so those are usually the only exceptions, not exclusively though."

Judge Harvey: "… if the status change is contemplated, nine times out of ten it is to raise finance to develop that block."

11: Kohuturoa 3 A BLK (Hanita Inc.)
A20060013740 26-Apr-06 135/93
Application for a change of status on the basis that a mortgage has expired and the Incorporation is unable to get an advance from lending institutions because of the status of the land. Application granted.

12: Wakatu Incorporation 113 SI 143-144 20-Dec-05 135/93
Residual titles changed to General land - see 24 Nelson MB 101-102 dated 10 December 1999.

13: Waikokopu 3B2 164 GIS 183-185 1-Mar-06 Whata
Application granted: "Retention is a very big issue. Retaining Land as Maori Land is an extremely important matter that the Court has to consider and take into account before it can grant an Order to change status. Usually people come to us and it is fair to say that in the great bulk of those cases the reasons why people want to change status is because they can't access finance through major trading banks. Nearly all of the trading banks except for Westpac, have a policy of not lending on Maori land solely unless there are only a small number of owners … and there is alternative security."

14: Raupunga Township Section 21
109 WR 184-187 4-Nov-05 135/93
Required evidence that the banks would not lend before he would grant an Order, was prepared to subpoena the bank if necessary.

15: Kaiapoi MR 873 Blk XI Sec 248
113 SI 168-169 18-Jan-06 135/93
Application granted to allow for the sale of part and better utilisation of the remainder of the land.

16: Orete 3J1 89 OPO 211 2-Nov-05 135/93

Application dismissed after "further discussions have been held with Westpac Banking Corporation that the bank is prepared to accept the current certificate of title (Maori freehold land) as adequare security for its advance"

17: Awarua 4C15F1A2F 160 AOT 9-12 11-Oct-05 135/93
Evidence submitted by Mr Brian Herlihy (Counsel for applicant): "Over recent years I have been asked to assist in the sale of properties both rural and urban and have each time instructed a registered valuer. In most cases an unencumbered value is supplied. The encumbered value being that what one could expect to receive for a property with a Maori land status. The encumbered value is usually about 10% lower than the unencumbered value"

18: Kaiwhaiki 1C2A2C 158 AOT 141-145 20-Sep-05 135/93
Status Change sought to obtain finance for a mortgage but applicant did not know what he would use the proceeds for, potentially to build a home for his children. Judge Harvey required evidence that banks would not lend on his land.

19: Kaiwhaiki 1C2A2C 159 APT 284-286 11-Oct-05 Whata
Corrospondence received from Asset Finance Ltd, PSIS and ANZ Wanganui all declining applications for finance. Application granted to enable owner to build a second home on his property

20: Mangahauini 7A Sec 4 70 RUA 227-229 1-Sep-05 135/93
Application granted: The BNZ required a change in status to ensure the land could be used as collateral.

21: Hamua 17A3A Block 113 SI 23-28 3-Oct-05 135/93
Letters from Blue Star Finance and SBS confirming the availability of mortgage finance on the condition that the status of the property be changed to General land
Judge Wainwright noted that there are banks in the South Island who will lend on Maori land: "If the Maori Land Court rolled over and put up its hands every time someone said the bank would prefer this to be General land there would be a great deal less Maori land in this country."

Summary
Of the 21 applications for a change in status order, 15 were granted. Of those, 11 change of status orders were granted to enable the owner to obtain finance to develop their land. Further, of the 21 applications analysed, 16 cited problems accessing finance as the reason for the application.

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- s 7(1)
- s 37

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- s 32(1)(a)
- s 33
- s 36
- s 38
- s 39
- s 40

Māori Trustee and Māori Development Amendment Bill 2007 (2007 No 181-1)

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- s 4
- s 129(1)
- s 129(2)(a)
- s 129(2)(b)
- s 129(2)(c)
- s 129(2)(d)
- s 129(2)(e)
- s 129(2)(f)
- s 136(d)
- s 137(1)(c)
- s 137(1)(e)
- s 137(1)(d)
- s 146
- s 147A
- s 150A(1)(a)

- s 150B(1)(a)
- s 150C(1)(a)
- s 250(4)

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