



## Maori Trustee and Maori Development Amendment Bill 2007

<b>Date of Introduction:</b>	22 November 2007
<b>Portfolio:</b>	Maori Affairs
<b>Select Committee:</b>	As at 01 February, 1st Reading not held.
<p><b>Published: 01 February 2008</b></p> <p>Prepared by John McSoriley BA LL.B, Barrister Legislative Analyst P: (04) 471-9626 (Ext. 9626) F: (04) 471-1250</p>	<p>Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status.</p> <p>Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.</p>

### Purpose

"The Bill introduces changes arising out of a review of the Maori Trustee and Maori Trust Office and out of work looking at ways to bring together functions supporting Maori business being undertaken by Te Puni Kokiri, the Maori Trustee, and potentially other organisations. The Bill amends the title of the Maori Trustee Act 1953 to the Maori Trustee and Maori Development Act 1953 ..." <sup>1</sup>.

### Background

#### The Maori Trust Office

In 1976, a description of the functions of the Maori Trustee was published as follows: "The office of the Maori Trustee was set up in 1922 to perform the same functions for Maori as those carried out by the Public Trustee for the general population. Although the legal status of the Maori Trustee is separate from that of Secretary of the department of Maori Affairs, both positions have for the past 35 years been held by the same men, as the work of the Maori trustee is closely involved with the work of the department. As the Maori Trustee is a separate legal entity, he can hold property, join in contracts, be a party to legal proceedings, and perform other acts in his own right. As such, he is able to perform a number of functions for Maoris which the department cannot undertake.

There is no separate staff; every officer of the department is also an officer of the Maori Trust Office. In the same way, every district officer of the department is the local representative of the Maori Trustee. An important part of the Maori Trustee's work is lending to Maoris for farming, housing, business, and

<sup>1</sup> Maori Trustee and Maori Development Amendment Bill, 2007 No 181-1, Explanatory note, General policy statement, p. 1.

other purposes. The loan is usually secured over land owned by the borrower. There are two funds, advances from which come under the control of the Maori Land Board:

- The Common Fund, which is money held in trust and available for loan. It can be lent only under the same statutory conditions as all trust funds, e.g., it can be lent only on mortgage up to three-fifths of the valuation of the assets over which it is secured and interest must be charged at the current trustee lending rate;
- The General Purposes Fund, which is money owned by the Maori Trustee made up of his profits and commissions. He can lend from this fund on different terms and for wider purposes than from the Common Fund.

Title improvement is another function in which the Maori trustee plays an important role. The passing down from generation to generation of blocks of land owned by large numbers of owners has resulted in a confused state of the title of many blocks. This has held up the effective use of land for housing, leasing, subdivision, and for farming. The title improvement activities are intended to clear up title difficulties which prevent the land being dealt with economically by the owners. This may involve amalgamating a number of small interests, or making arrangements to prevent economic holdings from being split up.

The functions of the Maori Trustee can be summed up as:

- administering the estates of deceased Maoris and the affairs of Maoris who are subject to some disability or legal restraint, e.g. minors, mental patients, and persons not competent to handle their own financial problems;
- administering under various statutory trusts, areas of land in different parts of the country, such as the Maori reserved lands and the Maori vested lands;
- administering lands under special trusts created by the Maori Land Court, such as trusts to subdivide or lease Maori land;
- lending money to Maoris, on the security of their lands for housing, business, and land development purposes;
- completing the legal work connected with sales, mortgages, leases, etc., as agents for the owners;
- collecting and paying the proceeds of the alienation of Maori land;
- operating the conversion scheme under the control of the Maori Land Board to counteract the fragmentation of ownership in Maori land titles; and
- distributing unclaimed money and acting as agents for Maoris whose addresses are unknown<sup>2</sup>.

### Government reorganisation of Maori Affairs (1989)

In 1989 following the Maori Loans affair<sup>3</sup>, and other upheavals, and in the context of a general reorganisation of governmental activities, the then Government decided to reorganise its administration of Maori Affairs. In the policy statement, *Tu Urupare Rangapu*<sup>4</sup>, the Government set out its proposals and, in particular, proposed:

- "measures to restore and strengthen the operational base of iwi"; and

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<sup>2</sup> Department of Maori Affairs, Department of Maori Affairs, A. R. Shearer, Government Printer, Wellington, 1976.

<sup>3</sup> R. S. Deane, Chairman, State Services Commission, Maori Affairs Department: Overseas Borrowing Initiatives, State Services Commission, Wellington, 1986.

<sup>4</sup> Department of Maori Affairs, *Te Urupare Rangapu: Te Rarangi Kaupapa (Partnership Response: Policy Statement)*, Hon. Koro Wetere, Minister of Maori Affairs, November, 1988.

- "ways of improving the responsiveness of government agencies"<sup>5</sup>.

"The success of the Government's proposals depends on strengthening the iwi and helping restore their independence. The Government is keen to see iwi develop their own structures - with their own administrative procedures, negotiating skills and measures of performance - so that they can make their own decisions about what is important to them. That is, it wants to see the iwi ultimately become independent and self-sustaining".

"To enable this to happen, the Department of Maori Affairs will be restructured into an 'Iwi Transition Agency'. Its task will be to assist iwi to develop their operational base over a five year period<sup>6</sup>. A Ministry of Maori Affairs would also be set up. "The principal function of the ministry, however, will be to provide advice on all matters of government policy making that affect Maori affairs"<sup>7</sup>.

Among the benefits of these proposals were to be:

- "Iwi will be able to work towards self-reliance on their own terms";
- "The future relationship between the iwi and government agencies will encourage iwi to determine their affairs in a way that accepts Maori perspectives and aspirations";
- "The moves towards greater efficiency and effectiveness are aimed at improving the way Maori people are served by government agencies";
- "[the proposals] provide an opportunity for Maori people to use their traditional institutions and structures for designing and delivering their own programmes and services"<sup>8</sup>.

These proposals were made in the context of other state sector reforms. "These proposals are in line with a number of other changes which the Government has taken in reforming the state sector. In the education area, for example, the development of policy will be the task of a new and compact ministry, and responsibility for administration will be largely transferred to the community"<sup>9</sup>.

In relation to the Maori Trust Office, Te Urupare Rangapu stated: "The Maori Trustee will be freed from all outside responsibilities in order to devote full-time effort to trustee duties. The Trustee and staff will be officers of the Iwi Transition Agency - although the Trustee will continue to act independently in specific Trust Office matters". It was also recommended that the Government set up a review of the functions and future organisation of the Maori Trust Office. "One of the important principles underlying this review will be that as much as possible of the affairs of Maori people will be placed in their hands"<sup>10</sup>.

### The Henare/Wright review 1989

This review (the 1989 review) was conducted by M.R.H. Henare and D. Wright<sup>11</sup>. The review committee "... recommend[ed] the demise of the Maori Trustee as a separate entity"<sup>12</sup>. In particular the review committee was "... forced to conclude" that the Maori Trustee could not continue to survive in the then current and proposed climate. "His functions must be devolved along with other activities in the Maori Affairs Department to the Maori people"<sup>13</sup>. In fact, the review committee recommended that

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<sup>5</sup> Ibid, p. 5.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid., pp. 5 and 6.

<sup>8</sup> Ibid., p. 6.

<sup>9</sup> Ibid., p. 6.

<sup>10</sup> Ibid., p. 33.

<sup>11</sup> M.R.H. Henare and D. Wright, Review of The Maori Trustee and the Maori Trust Office 1989, Department of Maori Affairs, Wellington, 1989, p. 3.

<sup>12</sup> Ibid., p. 54.

<sup>13</sup> Ibid., p. 4.

the Maori Trust Office be split up. The land management functions of the office should be accommodated in the Justice Department (where the Maori Land Court was going). However the part of the office which dealt with "the control and usage of monies collected from the use of the properties" and the mortgage portfolio should go to the Maori Development Corporation<sup>14</sup>. It was also recommended that "... disability and deceased estates should transfer to the Public Trustee. Wills held by the Maori Trustee should also be transferred"<sup>15</sup>. The review committee also referred to a possible conflict of interest between the roles of trustee and the chief executive of the department (now Te Puni Kokiri) and this was seen as another justification for moving the office to the Department of Justice<sup>16</sup>.

### The Charters, Sykes and Nikora review 1991

This review of the Maori Trust Office<sup>17</sup> (the 1991 review) came to a contrary view to the 1989 review in finding that "... there is a need for the Maori Trust Office to continue".

However, the review team made some important points:

- "The Maori Trustee operates a Common Fund and a General Purposes Fund. In most cases interest earned on the Common Fund is by Statute credited to the Maori Trustee's General Purposes Fund and not to the Common Fund beneficiaries. Effectively, statute empowers the Maori Trustee to operate on beneficiaries income. This is unique and may be compared to a solicitor using the interest on his clients' funds to run his business; a procedure that would incur the heaviest sanctions from the Law Society. Any benefits from the Maori Trustee's activities, do not in the main relate to a benefit to any of the beneficiaries who have provided the capital from which the income is earned. There is no comparable Trustee who has this power to use beneficiary funds in this way. The beneficiaries should receive the income on their funds. That income should go back to those districts from whence the income was earned and disbursed to tribal groups for use in providing economic development, employment, trade training and education"<sup>18</sup>. "The majority of the funds in the General Purposes Fund is income derived from the Common Fund. It is our view therefore that the majority of the funds in the General Purposes Fund also belong to the beneficiaries and not the Maori Trustee. It would seem that the Maori Trustee is operating in deficit to an amount of \$735,500.00 per annum. It would appear that the Maori Trustee is using capital funds (mainly mortgage repayments) to keep his Office operating. In other words, he is using beneficiaries' capital to pay for his operating expenses. This should stop"<sup>19</sup>;
- "Many of the activities carried out by the Office of the Maori Trustee are normally provided by the State. These are social and economic development functions. The lack of provision for these activities, would mean that the State would lose resources, from which to obtain employment, tax, rates, overseas funds and the purchase of goods and services. In this category we place the administration of land and leases, the provision of title documentation and beneficiary addresses, land development Advisory Services, Estates, and the provision of services for Disabled Persons, Minors and Mental Patients. Some fees will be recovered for this work. However, it is strongly considered that these activities should be continued by the Maori Trust Office, with some State funding. The alternative, at this time would be chaos"<sup>20</sup>;
- "It is apparent that the Maori Trustee has been involved in Risk Investment as a result of his requirement to be involved in economic development. This activity conflicts with his duties as a Trustee and is an activity more suited to a body such as the Maori Development Corporation. The Review Team consider that a Maori Trustee Board of Investment should be established with strict

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<sup>14</sup> Ibid., pp 6, 7 and 8.

<sup>15</sup> Ibid., pp. 7 and 8.

<sup>16</sup> Ibid., p. 6.

<sup>17</sup> Richard Charters, Annette Sykes, and Tama Nikora, Review of the Office of the Maori Trustee, Maori Trust Office Review Team, Rotorua, 1991.

<sup>18</sup> Ibid., p. 3.

<sup>19</sup> Ibid., p. 4.

<sup>20</sup> Ibid., p. 4.

conservative trustee-like investment criteria. Fifty percent (50%) of the income should be distributed to the beneficiaries and fifty percent (50%) retained to ensure growth and protection against inflation. In providing this service the Board should be strictly accountable to the Minister of Maori Affairs and to its beneficiaries"<sup>21</sup>.

## Maori Trustee Amendment Act 1996

This Act made certain amendments to the Maori Trustee Act 1953, but not in relation to any of the recommendations and points made in each of the above reviews as described and quoted above.

## Select Committee report 2001

In a report<sup>22</sup> in 2001, the Maori Affairs Select Committee drew the attention of the Government to a number of issues in relation to the Maori Trustee. These were:

- the definition of the proper role of the Trustee;
- the determining of the type and level of services to be provided by the Trustee;
- the resolution of the "debt" owed by the Trustee to the Crown<sup>23</sup>;
- consideration as to whether the funding received by the Trustee was at an appropriate level, and directed in an appropriate manner, for the Trustee to fulfil his roles;
- whether the governance and accountability surrounding the Trustee's form as a corporation sole was appropriate;
- the consideration of what funding responsibilities the Government had.

## What this Bill is intended to achieve

The Bill is intended to:

- establish the Maori Trustee as a stand-alone organisation, and able to appoint employees;
- amend the way in which the Maori Trustee is appointed to enable the Minister of Maori Affairs to appoint the Maori Trustee for a renewable term of up to five years with specified grounds for removal from office and remuneration to be determined by the Remuneration Authority;
- include the Maori Trustee on Schedule 4 of the Public Finance Act 1989 to apply certain reporting requirements to the Maori Trustee;
- amend the way in which interest paid on money held in trust in the Common Fund is determined to better reflect appropriate market rates and to keep them under review;
- require the Maori Trustee to pay the interest earned on money held in trust in the Common Fund, less an administrative fee;

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<sup>21</sup> Ibid., p. 5.

<sup>22</sup> Report of the Maori Affairs Committee: Forty-sixth Parliament (John Tamihere, Chairperson), *Inquiry into the performance and current operations of the Maori Trustee*, House of Representatives, 2001

<sup>23</sup> Ibid p. 1202: "The Trustee is a statutory body, constituted as a corporation sole under the Maori Trustee Act 1953. The Maori Trust Office, which is an office within TPK [(Te Puni Kokiri - the Ministry of Maori Development)], exists to provide funding to the Trustee through the provision of personnel, accommodation and corporate support. In the 1999/2000 year, the Crown provided \$4.225 million to TPK to meet the costs of providing support to the Trustee, through the services of the Maori Trust Office. While the Crown expects this funding to be repaid the Trustee has not been doing so. As of January 2001, a debt of \$37.119 million was owed to the Crown. This debt is growing by between \$3.5 million and \$4.6 million per year".

- establish a new independent statutory corporation with the working name of Maori Business Aotearoa New Zealand (MBANZ), the board of which will be chaired by the Maori Trustee, with the remaining board members appointed by the Minister of Finance and the Minister of Maori Affairs.

"The MBANZ Fund will comprise a significant contribution from the Government, a contribution of \$35 million transferred from the General Purposes Fund (one of the funds for which the Maori Trustee is responsible under the Maori Trustee Act 1953) and, potentially, future contributions from other organisations. Combining these contributions in the new fund will mean that a more cohesive and focussed approach to development can be taken by the new corporation"<sup>24</sup>.

## Main Provisions

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### Name of Act changed

The Bill changes the name of the Act from the Maori Trustee Act 1953 to the Maori Trustee and Maori Development Act 1953 (*Part 1, Clause 5*).

### Maori Trustee established

Currently, Section 4 of the Act provides that there must be a Maori Trustee and a Deputy Maori Trustee who are officers of the Ministry of Maori Development. The chief executive of that Ministry may from time to time, with the prior consent of the State Services Commissioner, confer on an officer of the Ministry of Maori Development the office of Maori Trustee or of Deputy Maori Trustee. Such conferment is not deemed to be an appointment for the purposes of the State Sector Act 1988. In the absence of any such conferment of office, the chief executive of the Ministry of Maori Development shall be the Maori Trustee. The next most senior officer of the Ministry of Maori Development shall be the Deputy Maori Trustee. The Maori Trustee would continue to be a corporation sole with perpetual succession. The capacity and powers of the Maori Trustee are set out and the independence of the Maori Trustee acting in his or her fiduciary capacity from direction or instruction by the Crown is provided for (*Part 1, Clause 7 of the Bill repealing Sections 3 to 6 of the Act and replacing them with New Part 1, New Sections 3 - 6E*).

### Creation of an Appropriation Account in the Maori Trustee's Account

The Bill establishes a new account in the Maori Trustee's Account, the "Appropriation Account" and provides that money received by way of Crown appropriation must be credited to that Appropriation Account. The Bill further provides that money may be paid out of the Appropriation Account " ... for the purposes that are agreed to from time to time between the Maori Trustee and the Crown" (*Part 1, Clause 8 - 10, amending the heading of Section 7 and amending Sections 17 and 23 of the Act*).

### Money held in the Common Fund

The Bill provides that all money held in trust in the Common Fund is invested in that fund and interest is payable on that money in accordance with a set formula (total income received minus the total amount of management fees the Maori Trustee is entitled by regulations to charge). The Maori Trustee is required to review on a quarterly basis the interest paid to account holders so as to ascertain that the interest paid is in line with fair market rates paid on funds of a comparable size to those of the Common Fund, and subject to comparable conditions. Interest on investments in the Common Fund must be paid out of the General Purposes Fund (*Part 1, Clause 11, substituting Section 26 of the Act and inserting new Sections 26A and 26B into the Act; Clause 13 substituting Section 52 of the Act (regulations for the imposition of conditions in relation to the obligation of the Maori trustee to pay interest under New Section 26)*).

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<sup>24</sup> Maori Trustee and Maori Development Amendment Bill, 2007 No 181-1, Explanatory note, General policy statement, pp. 1 and 2.

## Reimbursement of the Crown

The Bill provides that the Maori Trustee must pay out of the General Purposes Fund any money required by the Minister of Finance for the recovery of former Maori Trust Office salaries and other expenses, to the extent that they were incurred before 1 July 2008 (the date this Bill is intended to come into force and thus the date of the disestablishment of that Office (*Part 1, New Section 12, substituting Section 41 of the Act*)).

## Maori Business Aotearoa New Zealand (MBANZ) and fund donation

The Bill establishes a new statutory corporation, Maori Business Aotearoa New Zealand (MBANZ), provides for its establishment, functions, powers, and independence, and establishes the MBANZ Fund. This fund consists of cash or assets to the sum of \$35 million transferred from the General Purposes Fund of the Maori Trustee as a contribution to the MBANZ Fund (*Part 1, Clause 15, inserting New Part 2 into the Act, New Subpart 1, New Sections 54 - 60*).

### *Comment*

The Charters, Sykes and Nikora review 1991 (see above) made particular reference to the question of the legal (or equitable) ownership of certain monies in the General Purposes Fund (see bullet point on page 4 of this Bills Digest). For the avoidance of any doubt about the right of the Maori Trustee to donate certain monies from the General Purposes Fund to MBANZ, the Bill may need to be amended to deal with that issue, taking into account any common law rights to compensation which may apply<sup>25</sup>.

## Governance

The Bill provides for the governing body of MBANZ and its powers and duties. The members are appointed by the Minister of Finance and the Minister of Maori Affairs (responsible Ministers). Subsidiaries may be established by the Board of MBANZ. (*Part 1, Clause 15, inserting New Part 2 into the Act, New Subpart 2, New sections 61 to 65*).

## Accountability

The Bill provides for the accountability requirements for MBANZ. These include a strategic plan, the annual report and financial statements, and requirements to supply information to the responsible ministers as requested, the convening of at least one meeting each year for members of the public to consider the performance of MBANZ, and the commissioning an independent review of the performance of MBANZ, the first in 2013 and then at five-yearly intervals (*Part 1, Clause 15, inserting New Part 2 into the Act, New Subpart 3, New Sections 66 to 74*).

## Transitional arrangements

The Bill provides for transitional matters relating to the change from the "old Maori Trustee" under the Maori Trustee Act 1953 to the "New Maori Trustee" under this Bill. The transitional matters cover the vesting of the assets of the former Maori Trustee, the dissolution of the Maori Trust Office, and standard arrangements that relate to the transition of contracts and other instruments, the status of existing securities, the continuation of proceedings, the transfer of employees, and protection of their employment conditions, including membership of the Government Superannuation Fund (*Part 2, Clauses 17 to 29*).

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<sup>25</sup> Where a statute takes private property. and that statute is silent respecting compensation, it will be interpreted by the Courts as implicitly requiring compensation to be paid (Peter W. Hogg, *Liability of the Crown*, Law Book Co., North Ryde, NSW, 1989, p. 105). Two Canadian cases are relevant: *Manitoba Fisheries v. the Queen* [1979] 1 S.C.R. 101 and *The Queen v. Tener* (1985) [1985] 1 S.C.R. 533. See a background discussion of relevant issues in [Bills Digest 1252](#).

## Schedules

The Bill substitutes a new schedule in the Maori Trustee and Maori Development Act 1953 and sets out consequential amendments to other Acts (*Schedules 1 and 2*).

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