

Regulatory Impact Statement

Māori Purposes (Number One) Bill

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by Te Puni Kōkiri.

It provides an analysis of options to address:

1. the lack of direct financial accountability between Māori Trust Boards and their beneficiaries under the Māori Trust Boards Act 1955 (MTBA);
2. the involvement of the Crown in the administration of the Estate of Pukepuke Tangiora and the risk that the death of the last life beneficiary will trigger distribution of the estate before appropriate arrangements have been made for the future administration of the estate; and
3. technical difficulties and inconsistencies within Te Ture Whenua Māori Act 1993 (TTWMA)

All of the preferred options provided for in this RIS have been developed through in-depth analysis of the identified problems, full consideration of all of the available options and assessment of the options against relevant criteria. Key stakeholders have also been consulted and engaged during this policy development.

Options for reform for both the MTBA and the Estate of Pukepuke Tangiora have been critiqued against principles of good governance and align with wider initiatives to reduce the level of Crown involvement in Māori collective entities.

There are competing views amongst the beneficiaries of the Estate of Pukepuke Tangiora around the appropriate length of time to prohibit distribution of the estate. Te Puni Kōkiri considers that five years from the death of the last beneficiary will be a sufficient length of time for beneficiaries to agree upon governance arrangements and put them in place. Te Puni Kōkiri considers that extending the period any further would unduly prolong the Crown's involvement in the estate and disincentivises the trust from dealing with the matter expeditiously.

Amendments to the MTBA have been informed by repeated concerns raised by Trust Boards and the Office of the Auditor-General. Further work will be required to assist some Trust Boards in transitioning between the current and proposed regimes under the MTBA. The Office of the Auditor-General will also be required to identify and work with those Trust Boards who still have outstanding audits and fees.

Proposed changes to address technical difficulties and inconsistencies within TTWMA are supported by Judges of the bench of the Māori Land Court. Further identification of the issues and analysis of options to address these have been worked through in consultation with the Ministry of Justice and the Māori Land Court.

Because of the way information is recorded in the Māori Land Information System, anecdotal evidence has been relied upon in some instances, particularly when assessing the magnitude of some of the problems identified.

In all cases regulatory change is considered the most effective means of addressing the problems identified. Whilst proposals relating to the MTBA may impose additional compliance costs for Trust Boards, these costs are considered justified in terms of ensuring proper accountability and good business practice and will counteract removal of the Crown's oversight of Trust Boards. There are no other foreseeable impacts for businesses, market incentives or common law principles.

Dave Samuels, Director, Resources and Wealth, Te Puni Kōkiri

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Executive Summary

Māori Purposes (Number One) Bill

A Māori Purposes Bill is an omnibus bill amending acts relating to Māori Affairs. This Regulatory Impact Analysis provides an analysis of options to address policy proposals included in the Māori Purposes (Number One) Bill.

Māori Trust Boards Act 1955

Currently, the Māori Trust Boards Act 1955 (MTBA) requires Māori Trust Boards to be financially accountable to the Crown.

It is proposed to amend the MTBA to provide for direct accountability between Māori Trust Boards and their beneficiaries.

Estate of Pukepuke Tangiora

Previous Māori Purposes Acts have provided for an unusual degree of Crown involvement in the administration of the Estate of Pukepuke Tangiora. In addition, the death of the last life beneficiary will trigger distribution of the estate, and this may occur before appropriate arrangements have been made for the future administration of the estate.

Statutory amendments are proposed to withdraw the Crown from the administration of the estate and extend the period of distribution for the estate to five years after the death of the last life beneficiary.

Technical amendments to Te Ture Whenua Māori Act 1993 and MIC Regulations

A number of minor technical amendments to Te Ture Whenua Māori Act 1993 (TTWMA) and the Māori Incorporation Constitution Regulations 1994 (MICR) are proposed.

Status quo and problem definition

Māori Trust Boards Act 1955

There are currently 15 Māori Trust Boards governed under the Māori Trust Board Act 1955.

The MTBA currently requires Māori Trust Boards to be directly accountable to the Minister of Māori Affairs and the Crown for their financial arrangements. In particular, Trust Boards are required to have their financial statements audited by the Auditor-General and passed onto the Minister for Māori Affairs who is empowered to comment on them.

Since the MTBA was enacted in 1955, Māori Trust Boards have assumed a wider role, with many now administering, or likely to soon administer, a large and diverse asset base. The only direct accountability between a Māori Trust Board and its beneficiaries occurs through the requirement to hold triennial elections.

This lack of direct accountability is inconsistent with other similar governance entities. In particular the requirement for public audit of Māori Trust Boards is considered unnecessary. The Auditor-General has consistently recommended legislative reform to address the appropriateness of its role in auditing the financial statements of Māori Trust Boards.¹

Estate of Pukepuke Tangiora

The will of Pukepuke Tangiora, which came into effect in 1936, provided for her Estate (consisting of numerous landholdings in Hawke's Bay) to be managed for the benefit of her son, his wife, and their nine children. Changes affecting the administration of the Estate have been included in successive Māori Purposes Acts (MPA) between 1943 and 1976. This has resulted in the Crown being more extensively involved in the administration of the Estate than is now considered appropriate, particularly relating to the appointment of Trustees, the fixing of Trustees' salaries and the expenditure of certain Estate funds.

In addition, the Māori Purposes Act 1943 removed the will's original requirement for there to be a 20-year period between the death of the last life beneficiary and the distribution of Estate property. As a result, all Estate property will be distributed to individual beneficiaries upon the death of the last grandchild of Pukepuke Tangiora. There is a risk that when this happens, Trustees and beneficiaries will not have agreed on an appropriate future governance entity.

Hariata Baker, one of the last two remaining grandchildren, petitioned Parliament in 2005 requesting that the will be revived in its original form through legislation. In considering the petition, the Māori Affairs Committee (MASC) recommended that the Government make legislative provision to:

- a. establish a more appropriate Trustee appointment process; and
- b. reinstate a prohibition on partitioning, selling, leasing, mortgaging, charging, or encumbering corpus land until 20 years after the death of the last beneficiary.

The Government response supported the establishment of a more appropriate Trustee appointment process, but stated that more information was required before a response could be given to the recommendation regarding the 20-year prohibition.

Technical amendments to Te Ture Whenua Māori Act 1993 and Māori Incorporations Constitution Regulations 1994

Te Ture Whenua Māori Act 1993 (TTWMA) provides the legislative framework governing Māori Land. The Act provides the Māori Land Court with jurisdiction to determine the status of Māori land and to oversee all dealings with that land. The Act

¹ Auditor-General reports 2008: Controller and Auditor General-Central Government: Results of the 2007-08 Audits, Part 8 First report for 1993, pages 23-26; First report for 1995, pages 99-125; Second Report for 1998, pages 57-75; Central Government: Results of the 2005/06 audits, pages 77-84; and Central Government: Results of the 2006/07 audits, pages 61-63

also regulates the different ownership structures and governance entities that can operate over Māori land.

A number of sections within TTWMA require amending to address inconsistencies and technical difficulties that exist with their current form. These are:

TTWMA and Māori Incorporations Constitution Regulations 1994: Māori incorporations' powers of constitutional amendment.

A Māori incorporation is a corporate entity similar to a company, operating under Part 13 of TTWMA and the MIC Regulations (MICR). Under section 268(1) of TTWMA every Māori incorporation is required to have a standard form of constitution governing its internal management. Section 268(3) permits an incorporation to “alter, add to, or replace its constitution in accordance with any provision of this Act or any regulations made under this Act” by “special resolution of the shareholders”.

The intention behind the section was to ensure that Māori incorporations possessed powers of constitutional amendment commensurate to those possessed by companies.² The wording of section 268(3) can be interpreted as limiting Māori incorporations to powers of constitutional amendment specifically mentioned within TTWMA or the MIC regulations.

The subsection should clearly provide that Māori incorporations may alter, add to, or replace their constitutions in any way so long as such amendments do not contravene any mandatory provision of TTWMA or the MICR.

Ability for Māori Land Court (MLC) to include awards of interest on orders for Judgement Sums under section 18 TTWMA

TTWMA does not expressly provide a power for the Māori Land Court to award interest in relation to judgement sums. This is inconsistent with other Courts which all have the ability to award interest explicitly laid out in statute. This has been interpreted by the Māori Land Court as preventing them from making orders of this kind.³ As a result successful plaintiffs are not fully compensated for losses.

MLC orders for payment of money under section 81 TTWMA: Enforceability in the High Court:

58. Section 81 of TTWMA enables MLC orders for the payment of money to be enforced in the District Court, but does not explicitly state that such orders can subsequently be transmitted for enforcement in the High Court. This potentially limits the range of enforcement remedies available. For example, bankruptcy is only available as a remedy in the High Court.

Removal of words “belonging to the estate of” from provisions relating to testamentary promises and family protection (section 106(1) and 106(2))

Section 106(1) and 106(2) which determine the interface between TTWMA and testamentary promises and family protection legislation contain a minor drafting error and superfluous wording that render them circular.

Sections 150A(3)(b), 150B(3)(b), 150C(3)(b) and 160: Confirmation by the MLC Registrar of alienations of Māori freehold land:

There are inconsistencies in the different forms of alienation over Māori freehold land that are required to be confirmed and noted by the Registrar of the MLC. These inconsistencies create inaccuracies in the MLC records.

² 29 March 1994, Hansard p. 831 - 833

³ Paeroa East 4B2C2 (2002) 267 ROT 80 Judge Savage

Objectives

Māori Trust Boards Act 1955

To ensure that, in line with generally accepted practice for governance entities, Māori Trust Boards are directly accountable to their beneficiaries for their financial arrangements.

Estate of Pukepuke Tangiora

To ensure governance arrangements for the Estate of Pukepuke Tangiora align with principles of good governance and that these can be established prior to distribution of the estate.

Technical amendments to Te Ture Whenua Māori Act 1993 and Māori Incorporations Constitution Regulations 1994

To remove inconsistencies in TTWMA and ensure that provisions are drafted in a manner that best gives effect to their policy intent.

Regulatory impact analysis

Māori Trust Boards Act 1955

All of the options considered were to address the governance arrangements and financial accountabilities under the Māori Trust Boards Act 1955. They will have direct impacts and benefits for the 15 Māori Trust Boards administered under this Act, and potential wider impacts for their beneficiaries. Options were critiqued against principles of good governance and their alignment with wider initiatives to reduce the level of Crown involvement in Māori collective entities.

Consideration was given to the option of repealing the MTBA and replacing it with entirely new legislation that would enable Māori Trust Boards to transition to an alternative legal entity. This option was subsequently picked up in a separate governance work stream culminating in the Waka Umanga (Maori Corporations) Bill. This option would have required Trust Boards to expend time and resources in transitioning to an entirely new governance framework. The Waka Umanga Bill was discharged from the Order Paper on 21 December 2009.

As such the preferred option is to make changes and improvements to the existing legislative framework. Changes to the MTBA to make Māori Trust Board directly accountable to their beneficiaries would be relatively straight forward and provide an immediate solution to the problems identified.

Officials considered a range of options for the appropriate level of accountability between Boards and their beneficiaries. Requirements were critiqued in terms of what was appropriate given the size, assets and level of activity of Māori Trust Boards. Proposals that were considered overly onerous, such as, requiring beneficiaries to approve Trust Boards' annual accounts, were discarded. Some of the recommended proposals may impose additional compliance costs for some Trust Boards. For example, introducing the requirement for Māori Trust Boards to hold AGMs will create additional costs for those Trust Boards who do not already perform this obligation. These additional costs are, however, considered justified in terms of ensuring good governance. It is considered that on the whole Trust Boards and beneficiaries will benefit from the proposed changes.

Estate of Pukepuke Tangiora

The options considered will have implications for the Trustees and beneficiaries of this particular Estate. Options were critiqued against principles of good governance and align with wider initiatives to reduce the level of Crown involvement in Māori collective entities.

Consideration was given to the option of retaining Crown involvement in the administration of the estate and including amendments removing Crown involvement as part of the long-term decision-making process currently being undertaken by estate beneficiaries and trustees regarding a possible transition to a new governance entity. This option was dismissed because of the need to remove the Crown from inappropriate involvement in the administration of the estate at the first available opportunity, so long as beneficiary interests in the estate are not adversely affected.

Consideration was also given to the option of leaving the Estate distribution period as set out in the Māori Purposes Act 1943 in place so the Estate will come to an end upon the death of the last remaining life beneficiary, and that Estate property will vest in individual beneficiaries. This option was dismissed because of concern that the Estate beneficiaries and Trustees would not have sufficient time to make decisions on the establishment of a new trust entity in the event that the two remaining life beneficiaries pass away.

Finally, consideration was given to the option of reinstating a prohibition on partitioning, selling, leasing, mortgaging, charging, or encumbering corpus land until 20 years after the death of the last beneficiary in-line with MASC's recommendation. This option was dismissed, firstly because such a prohibition would seriously adversely affect the ability of Estate Trustees to administer Estate property for the benefit of beneficiaries, and secondly because such a prohibition was wider in its scope than the original provisions of the will, which provided that Estate residue was to be held on trust for 20-years (this is not the same as a total prohibition on all dealings with regard to the land).

The preferred option is for amendments to the legislation affecting the will in order to remove Crown involvement in the administration of the Estate and extend the period of distribution by a period of time after the death of the last remaining life beneficiary in order to allow the trustees and beneficiaries time to come to agreement on the establishment of a new governance entity. Five years is considered a sufficient period of time to allow for a robust decision-making process without unduly interfering with the legitimate expectation of the beneficiaries to inherit their interest in Estate property in accordance with the will as modified by legislation.

Technical amendments to Te Ture Whenua Māori Act 1993 and Māori Incorporations Constitution Regulations 1994

Options to address inconsistencies in TTWMA will impact the procedural operation of the Māori Land Court and potentially individuals and governance entities who own Māori land.

In particular, Māori Incorporations will be directly impacted by changes that clarify their constitutional powers of amendment.

Officials have analysed the relevant sections according to how they best give effect to the policy intent underpinning TTWMA. In all cases it is considered that these technical amendments are necessary to improve the quality of the legislation and to address apparent gaps and inconsistencies.

Consultation on options

Māori Trust Boards Act 1955

In 2008, Te Puni Kōkiri officials consulted with the 15 Māori Trust Boards on the proposed changes. Nine Trust Boards responded, with eight indicating they supported the amendment. One Trust Board considered that the requirement to hold an AGM would be overly onerous given the size of its boundary. The remaining six Trust Boards provided no response. While there will be some additional compliance costs associated with the requirement that Māori Trust Boards hold an AGM, these cost increases may be somewhat offset by reduced audit fees.

In 2009, Māori Trust Boards were consulted separately on the proposed amendment relating to completion of audited accounts. Nine of the eleven responses received during this consultation supported these further proposals.

Estate of Pukepuke Tangiora

Officials have consulted with the Trustees and beneficiaries of the estate of Pukepuke Tangiora regarding Hariata Baker's petition, the MASC recommendations, the need to extend the period of distribution, and the need for the estate to consider a transition to a new governance entity. More recently, officials have informed Trustees of the decision to include amendments to legislation affecting the estate in a Māori Purposes Bill.

The Trustees of the Estate stated that they support the amendments proposed. All beneficiary feedback has supported the removal of the Crown from involvement in the affairs of the estate and the extension of the distribution period. Agreement, however, has not been able to be reached on the appropriate length of time by which to extend the distribution period. Based on previous correspondence between Te Puni Kōkiri and members of the Estate, it is evident that there are a small number of beneficiaries who will likely oppose any extension of the distribution period. There are also beneficiaries who will likely oppose any extension of the distribution period that falls short of the 20-year prohibition recommended by MASC.

Technical Amendments to Te Ture Whenua Māori Act 1993 and Māori Incorporations Constitution Regulations 1994

The technical amendments to TTWMA are recommended on the basis of consultations with the MLC.

Amendments relating to the Māori incorporations powers of amendment respond to concerns raised by one particular Māori incorporation.

Consultation on RIS

Te Puni Kōkiri has also consulted with the Treasury, the Ministry of Justice, the Ministry of Economic Development, the Ministry of Fisheries, the State Services Commission the Office of the Auditor-General, the Māori Land Court, and the Parliamentary Counsel Office during the preparation of this RIS. The Department of Prime Minister and Cabinet has been informed of the contents of this RIS.

Conclusions and Recommendations

Māori Trust Boards Act 1955

Under the preferred option the MTBA would be amended to:

- a. require each Māori Trust Board to hold an Annual General Meeting (AGM), and to report to its beneficiaries on its activities and plans for the future, including presentation of audited annual accounts and annual budgets and other supporting financial material.

Nine Maori Trust Boards already hold AGMs. This amendment will create consistency by ensuring that all Maori Trust Boards are required to meet similar accountability requirements.

The six Maori Trust Boards who do not currently hold AGMs are likely to face compliance costs in holding such meetings (feedback indicates the average cost of holding an AGM to be approximately \$10,000). These compliance costs may be somewhat offset by the reduced costs associated with moving to independent audit (see below).

- b. replace the requirement that a Māori Trust Board forward its financial statements to the Auditor-General, with a requirement that these same financial statements be audited by an auditor who is a Member of the Institute of Chartered Accountants or an overseas qualified auditor who is recognised by the Registrar of Companies.

This should reduce compliance costs and further recognise Trust Boards' independence from the Crown. Audits of public entities take into account wider considerations than private audits and as such may take additional time and resources to complete. The only public money Māori Trust Boards receive from the Crown is by way of compensation or is funding for services that is accounted for and controlled through mechanisms in funding agreements. For this reason, the requirement for public audit of Māori Trust Boards appears unnecessary. The amendment will also implement the Auditor-General's recommendation that they no longer audit Māori Trust Boards' accounts.

- c. require each Māori Trust Board to have their financial statements audited not later than five months after the end of each financial year to which they relate.

The MTBA does not specify a deadline for completing the annual audit. This amendment will set a statutory time frame consistent with the standards currently set by the Auditor-General and will create certainty over when Trust Boards can be considered as failing in the requirement to have financial statements audited. Since most Māori Trust Boards have a balance date of 30 June, their audits will be due to be completed by 30 November each year. The audits for the four Māori Trust Boards with a 31 March balance date will be due to be completed by 31 August each year. Audits not completed within five months of the balance date will be regarded as being in arrears.

- d. replace the requirement that the Auditor-General forward the audited accounts and annual budget to the Minister of Māori Affairs for approval with a requirement that the Māori Trust Boards supply the Minister of Māori Affairs with the audited accounts and an annual budget for his or her information.

These amendments will assist in shifting accountability away from the Minister of Māori Affairs and towards Māori Trust Boards' beneficiaries.

Estate of Pukepuke Tangiora

Under the preferred option the Māori Purposes Acts 1943 and 1951 will be amended to:

- a. withdraw the Crown from involvement in administering the estate of Pukepuke Tangiora.

This amendment will shift the responsibility of appointing and dismissing trustees and hearing matters relating to the administration of the estate to the MLC.⁴ Beneficiaries will be able to challenge trustee decisions through the MLC, which has the appropriate jurisdiction and expertise in this area and has already heard matters relating to the estate.

- b. extend the period of distribution for the Estate to five years after the death of the last life beneficiary.

This amendment will allow the beneficiaries to consult amongst themselves and come to agreement regarding a possible transition to a new governance entity for the estate. It is possible that some of the beneficiaries may oppose the extension of the distribution period, and that others will oppose any extension that falls short of the 20-year prohibition as recommended by MASC. This must be balanced against the risk that the estate will come to an end before a new entity can be established. A five year period is considered to be an appropriate length of time that will allow for robust decision making without unduly interfering with the legitimate expectation of beneficiaries to inherit under the will.

Because the terms of the will of Pukepuke Tangiora have previously been amended through successive Māori Purposes Acts, legislative amendment is the most appropriate way to progress the proposed changes.

Technical amendments to Te Ture Whenua Māori Act 1993 and Māori Incorporations Constitution Regulations 1994

In relation to technical amendments to TTWMA and the MICR, the following amendments are the preferred options:

- a. amend wording in section 268(3) to clarify Māori incorporations ability to amend their constitutions in any way that does not contravene the mandatory provisions of TTWMA or the MICR;
- b. amend Regulations 2 and 4(h) of the MICR to include a reference to section 268(3);
- c. include a new section 18A TTWMA to provide the MLC with the power to award interest in relation to judgement sums in a similar manner to section 87 of the Judicature Act 1908;
- d. amend section 81 to provide that orders made by the MLC for the payment of money can be enforced in the High Court;
- e. reinforce the meaning of provisions relating to testamentary promises and family protection orders by replacing superfluous wording “belonging to the estate of” with “to” in section 106(1) and 106(2) of TTWMA;
- f. amend wording in sections 150A(3)(b), 150B(3)(b), 150C(3)(b) and 160 by replacing exhaustive lists of forms of alienation with a reference to alienations generally. This will ensure consistency in the way in which alienations of Māori land are confirmed and noted by the MLC Registrar;

These amendments will remove technical difficulties and inconsistencies from TTWMA and the MICR. There are not likely to be any wider impacts or risks from implementing these changes.

⁴ Under Part 12 of TTWMA the MLC has broad powers in relation to trusts administering Māori land

Implementation

Māori Trust Boards Act 1955

The proposed changes to the MTBA will be given effect to as follows:

Provisions relating to the preparation and audit of financial statements and the role of the Minister of Māori Affairs will take effect on the earlier of either:

- a. A date to be appointed in respect of each Māori Trust Board by the Governor-General by Order in Council; or
- b. The beginning of the financial year two years after the enactment of the Māori Purposes (Number One) Bill in respect of each Māori Trust Board where an Order of Council has not been made earlier.

Transition to these requirements is expected to be relatively straightforward.

Māori Trust Boards will be required to hold their first AGM no later than two years following the enactment of the Māori Purposes (Number One) Bill.

Transition to complying with the requirement to hold an AGM requires an amount of time and expense which some of the Trust Boards are not used to expending. This arrangement will allow Trust Boards to appoint an independent auditor immediately, or allow them time to develop their accountability processes, including the holding of an AGM.

Estate of Pukepuke Tangiora

The MLC and Estate Trustees and beneficiaries will be directly consulted with in relation to these changes and their implementation.

Technical Amendments to Te Ture Whenua Māori Act 1993 and Māori Incorporations Constitution Regulations 1994

Te Puni Kōkiri officials have worked with the MLC to develop these proposed amendments. Māori incorporations will be notified of the amendments in due course. Given the suggested amendments are of a minor and technical nature, no further steps will be necessary for their implementation.

Monitoring, evaluation and review

Māori Trust Boards Act 1955

Te Puni Kōkiri will monitor the implementation of all of the above amendments.

Estate of Pukepuke Tangiora

As a key purpose behind the proposed policy changes is to remove the involvement of the Crown in the affairs of the Estate, there are no plans for future review.

Technical Amendments to Te Ture Whenua Māori Act 1993 and Māori Incorporations Constitution Regulations 1994

Given the suggested amendments are of a minor and technical nature, there are no plans for future review. However, Te Puni Kōkiri will monitor their effectiveness through discussions with the MLC.