

Tikanga or Ture?

The intersection between custom and law in the occupation of Maori land

John Koning and Spencer Webster
Koning Webster Lawyers
Papamoa, New Zealand

20 November 2018
World Indigenous Law Conference 2018
Windsor, Ontario

The logo consists of the letters 'KWL' in a bold, white, sans-serif font, centered within a solid black square. The background of the slide features a grey area with a fine, diagonal line pattern, which is separated from the white upper section by a wavy black line.

KWL

Background

- Maori land administered under Te Ture Whenua Maori Act 1993 (**Act**)
- Act creates a separate regime for administration and management of Maori land
- Act recognises Maori land as taonga tuku iho of special significance to Maori people
- Purposes of Act to promote retention, development and occupation of Maori land for benefit of owners

Maori land

- 1.4 million hectares being approximately 5% of New Zealand
- Maori land located predominantly in centre and east coast of North Island
- 27,137 separate titles to Maori land with 2.3 million ownership interests
- Maori land varies significantly in size, ownership, governance and income

Maori Land Court

- Under the Act the Maori Land Court (**MLC**) has jurisdiction over Maori land
- MLC has wide jurisdiction over administration and management of Maori land
- MLC maintains title record within 7 separate districts
- MLC hears and determines contentious and non-contentious applications relating to Maori land
- Appeal to Maori Appellate Court and Chief Judge's power to correct title record

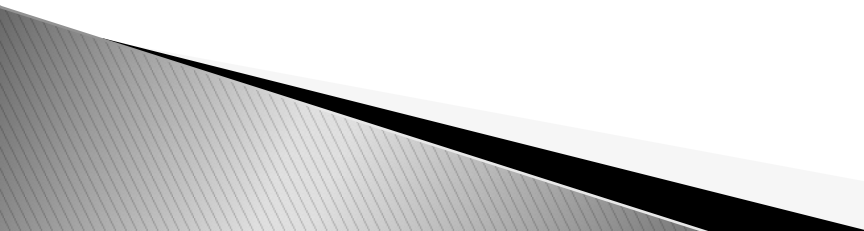
19th century

- Native Lands Act effected tenurial revolution where legal ownership based on fixed shareholding
- Native Lands Act provided no mechanism for individual or collective occupation of Maori land
- Native Land Court did not develop any associated jurisprudence
- Occupation still based on custom and kinship

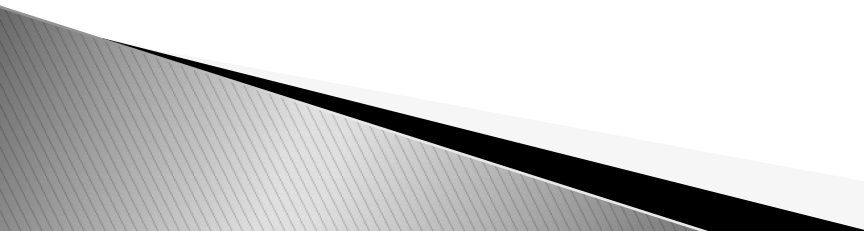
20th century developments

- Purpose of Maori Affairs Act 1953 and subsequent amendments to facilitate economic development of Maori land
- s 438 trusts created over entire blocks to promote development
- Legal principle of whatever is affixed to land belongs to the land (*quicquid plantar solo, solo cedit*)
- MLC developed mechanism to clarify ownership of dwellings on trust land
- Orders under s 30(1) determining ownership in favour of owners

Current framework

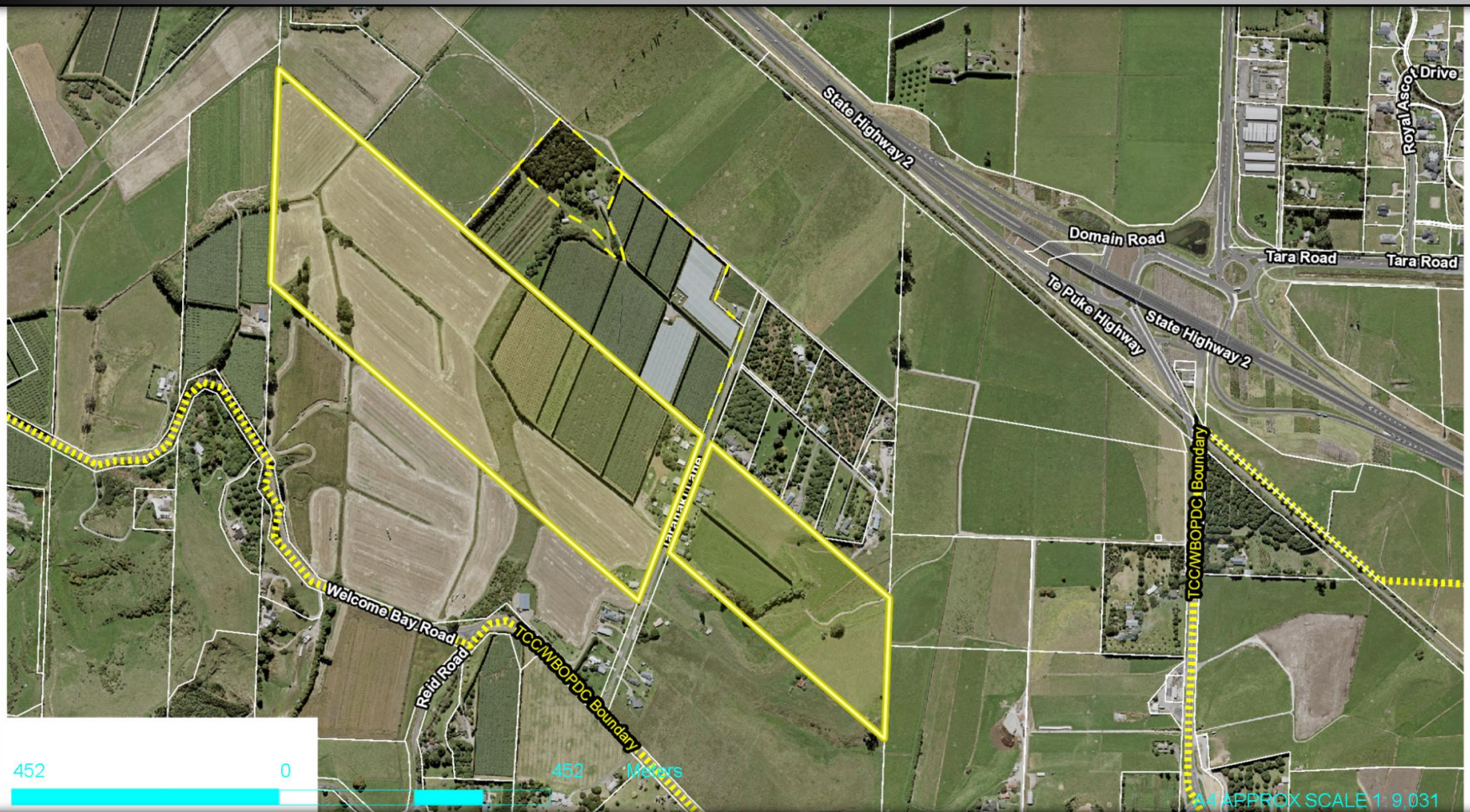
- The MLC continues with orders determining ownership of dwellings under s 18(1) of the Act
 - Ahu whenua trusts are empowered to grant site licence to occupy under trust orders
 - New option being an occupation order granted by the MLC under s 328 of the Act
 - Maori reservation under s 338 of the Act for the purposes of a village site
 - Formal lease is another option but not commonly used by trustees and owners
- 

Law displaces custom

- The current legal framework only provides for occupation by owners and to a lesser degree their descendants
 - Members of the wider kin group associated with block have no legal entitlement
 - Occupation of block generally at discretion of trustees and MLC without reference to custom
 - Tension between law and custom particularly acute with older dwellings
- 

Representative case law

- *Faulkner v Egan – Matapihi* 3A2C1C2C (2006) 86 Tauranga MB 141
- *Flight v Trustees of Waipapa Tokaanu Maori Lands Trust - Waipapa* 1D 2B 3B (2017) 2017 Maori Appellate Court MB 96
- *Tau v Tahere – Rangihamama X3A and Omapere Taraire E* (2016) 137 Taitokerau MB 68



Information shown on this plan is indicative only. Tauranga City Council accepts no liability for its accuracy and it is your responsibility to ensure that the data contained herein is appropriate and applicable to the end use intended. Cadastral information is sourced from the LINZ Data Service <http://data.linz.govt.nz/layer/772-nz-primary-parcels/>. Crown Copyright Reserved.



Information shown on this plan is indicative only. Tauranga City Council accepts no liability for its accuracy and it is your responsibility to ensure that the data contained herein is appropriate and applicable to the end use intended. Cadastral information is sourced from the LINZ Data Service <http://data.linz.govt.nz/layer/772-nz-primary-parcels/>. Crown Copyright Reserved.



Information shown on this plan is indicative only. Tauranga City Council accepts no liability for its accuracy and it is your responsibility to ensure that the data contained herein is appropriate and applicable to the end use intended. Cadastral information is sourced from the LINZ Data Service <http://data.linz.govt.nz/layer/772-nz-primary-parcels/>. Crown Copyright Reserved.