

6 July 2016

Maori Affairs Select Committee
Parliamentary Buildings
Wellington 6011

To the Maori Affairs Select Committee

Re: Submission on the Te Ture Whenua Māori Bill

Thank you for the opportunity to provide comment on the Te Ture Whenua Māori Bill ([the Bill](#)). The IoD submitted to Te Puni Kokiri on the exposure draft of the bill and comments in this submission are consistent with our previous comments.

The reform of Te Ture Whenua Māori (and updating of the 1993 Act) will mean significant change for Māori land owners, including introducing a new governance framework in relation to developing and approving their own governance constitutions and appointment of kaitiaki (governors).

By way of general comment, the Institute of Directors in New Zealand Inc (IoD) believes that the purpose of governance is to create and add value.

Boards and directors do this by acting in the best interests of the entity to help it achieve its fundamental purpose as articulated and subscribed to by its shareholders and stakeholders. While the form and substance of governance may differ because of business structure or sector in which practices occur, the IoD considers the principles that underpin good governance are ultimately the same.

Summary

Our submission focuses on the duties and responsibilities of kaitiaki and their immunity from personal liability (clauses 203 and 204 respectively) including the following matters:

- Is any distinction intended between the duties and responsibilities for kaitiaki of different types of governance bodies?
- Do kaitiaki have a duty to act in the best interests of governance bodies and/or future landowners?
- How will the duties and responsibilities of kaitiaki and their liability fit with other legislation?
- What is the intent and meaning of clause 204 (the immunity of kaitiaki from personal liability)?

About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to raising governance standards in New Zealand. We represent a diverse membership of over 7,500 members drawn from NZX-listed corporations, private companies, small to medium enterprises, public sector organisations, not-for-profits and charities. Our chartered membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

Commentary on the Bill

The Bill provides that the following may be appointed as a governance body (clause 158):

- a Māori incorporation (under various legislation and regulations)
- the trustees of an ahu whenua trust or a whenua tōpū trust
- new and existing Rangatōpū
- statutory bodies (Māori Trust Board, Māori Trustee, Public Trust, trustee companies); and
- entities representing hapu or iwi associated with the land.

The need for robust, transparent and accountable governance of Māori land was a common theme of submissions that led to drafting of this Bill and also the need for duties and obligations of trustees and other governance bodies to align with the laws that apply to general land and corporate bodies. With respect to good governance the ultimate aim of Te Ture Whenua Māori reform is to produce capable governors and stewards with an appropriate level of oversight.

Clause 5: Kaitiaki

Clause 5 states that kaitiaki in relation to a governance body, means

- a) if the body is a Public Trust or a Māori Trust Board, a member of the board of the body:
- b) if the body is the Māori Trustee, the Māori Trustee:
- c) if the body is a Māori incorporation, a member of the committee of management:
- d) if the body is a board of trustees, a trustee:
- e) in any other case, a person occupying a position in the body that is comparable with that of a director of a company.

Our comments specifically focus on the duties, responsibilities and liability of kaitiaki of governance bodies set out in clauses 203 and 204. Clause 154(2) of the Bill provides that ‘A governance body, whether it is a body corporate, the trustees of a trust, or a statutory office holder, is managed by its *kaitiaki, being the persons who occupy a position in the body that is comparable with that of a director of a company*’ (emphasis added).

Clause 203: Duties and responsibilities of kaitiaki

Clause 203 sets out the duties and responsibilities of the kaitiaki of a governance body.

It is not clear to us if any distinction is intended between the duties and responsibilities for kaitiaki of different types of governance bodies, for example for kaitiaki governing a body corporate compared to kaitiaki governing a trust. We consider it would make sense that these duties are consistent, which would also provide clarity for kaitiaki.

It is also not clear how the new Te Ture Whenua Māori Act will ‘fit’ with other legislation, for example the duties and liabilities for directors under the Companies Act 1993 and how they will apply to kaitiaki governing a company.

We comment on each of the three subparts of clause 203.

Subpart (a)

Subpart (a) states that a kaitiaki of a governance body must ‘act honestly and in good faith’. We support the inclusion of these two key duties and they correlate with existing director duties. However the fiduciary obligations of kaitiaki are not clear to us, for example to act in the best interests of the governance body and/or the landowners.

Section 131 of the Companies Act 1993 states that the central duty of a New Zealand director is to act in good faith and in the best interests of the company. This reflects a fundamental fiduciary principle that directors must live by and is an important cornerstone of good corporate governance. It can also help directors to navigate potentially conflicting interests.

For kaitiaki to have duties and responsibilities that are comparable with those of company directors it is important to have a duty to act in the best interests of the body (legal entity) they are governing. The fiduciary principle is also applicable to governors in other contexts and is fundamental to the role of a trustee. For example section 13F of the Trustees Act 1956 preserves the duty for trustees to exercise trustee powers in the best interests of all present and future beneficiaries. It is not clear to us the extent to which kaitiaki of governance bodies that are trusts have a duty to act in the best interests of current and future landowners.

Subpart (b)

The duty set out in subpart (b) that a kaitiaki of a governance body must 'act, and ensure the governance body acts, in accordance with the governance agreement and the requirements of Parts 1 to 9' is clear and consistent with other statutory requirements for directors and other governors.

Subpart (c)

Subpart (c) states that a kaitiaki of a governance body must 'exercise the degree of care and diligence that a reasonable person with the same responsibilities would exercise in the circumstances.'

The intent and meaning of this clause appears to create a standard of proof about what a reasonable kaitiaki would do in the circumstances. This is an objective test. We note that section 137 of the Companies Act 1993 has a similar requirement but also requires the court to take into account - (a) the nature of the company; and (b) the nature of the decision; and (c) the position of the director and the nature of the responsibilities undertaken by him or her'.

It may be reasonable to apply the same guidance to the kaitiaki role.

Clause 204: Immunity of kaitiaki from personal liability

Clause 204 of the Bill states that 'a kaitiaki of a governance body is not, by reason only of being a kaitiaki, personally liable for –

- a) any obligation of the governance body; or
- b) any act done or not done by the governance body in good faith in the performance or intended performance of the duties and responsibilities of the governance body.'

The intent and meaning of this clause is not clear to us and should be more clearly drafted to reflect already established legal principles such as those set out in the Companies Act 1993.

Under the Companies Act, company directors who fail to meet the key legal requirements are answerable for the decisions they take. A degree of personal liability is imposed on directors, which is well understood and which is common across other comparable jurisdictions.

Trustees can be personally liable in the situation where beneficiaries claim loss or damage suffered as a result of acts or omissions on the part of trustees.

The IoD believes it is important to ensure balance so that liabilities are not so onerous that they deter directors and others from putting themselves forward to serve on boards and in governance roles. However, by limiting or avoiding liability for a breach of duty, the importance of the duties can be undermined, as may the vigilance of governors in carrying out their duties.


For example, if kaitiaki are to have duties and responsibilities that are comparable to those of directors we suggest similar duties and powers of liability should apply and Part 6 of the Bill should be more closely aligned with [Part 8](#) (particularly sections 131 – 138A) of the Companies Act 1993.

Conclusion

Kaitiaki have an important role to play in the good governance and stewardship of Te Ture Whenua Māori. We welcome further clarification of kaitiaki duties and responsibilities in the new Te Ture Whenua Māori Act to help enable good governance and add value to Māori land owners.

The IoD appreciates the opportunity to make a submission on behalf of its members and we would be happy to discuss this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Simon Arcus', written in a cursive style.

Simon Arcus
Chief Executive
Institute of Directors