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Study Paper 8

DETERMINING REPRESENTATION RIGHTS UNDER TE TURE WHENUA MĀORI ACT 1993

AN ADVISORY REPORT FOR TE PUNI KŌKIRI

February 2001
Wellington, New Zealand

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Preface

ON 23 AUGUST 2000 the Commission provided an Advisory Report to Te Puni Kōkiri on proposed changes to section 30 of Te Ture Whenua Māori Act 1993 in relation to representation processes.

Subsequently, changes to the Act have been recommended by the Māori Affairs Committee in its report to Parliament.[1] At pages 4 and 5 of the report the Māori Affairs Committee said:

> The amendments we propose to [s 30] are extensive. They represent, in our eyes, a progressive shift away from the approach taken in the past by the Court in imposing decisions on parties, to a Court interested in facilitating the resolution of differences by the parties themselves or by mediation. Six of the proposed new sections provide either directly or indirectly for mediation.
>
> These amendments were developed through an extended process involving a special consultation committee convened by officials with key interest group representatives to assist in its development. Quality submissions were made by participants resulting in the useful identification of particular issues and valuable discussion on their possible remedy. We also considered a very useful advisory report from the Law Commission.

The proposed changes to section 30 which are reflected in the Bill attached to the Māori Affairs Committee's report are set out in an appendix to this study paper. The Commission, with the consent of the Chief Executive of Te Puni Kōkiri and the Māori Affairs Committee, has decided to publish its advisory report as a study paper so that those people who use the new processes are aware of the reasons advanced by the Law Commission for the changes. Those reasons would not, otherwise, be readily available publicly.

The Commissioner responsible for preparing the Advisory Report was Paul Heath QC. Research was undertaken by Meika Foster and Michael Josling. The Commission wishes to express its thanks for the invaluable contribution to the preparation of the paper by Denese Henare, a former Commissioner, who assisted on these issues as a consultant to the Commission.

[1] Te Ture Whenua Māori Bill–Māori Land Amendment Bill. Government Bill as reported from the Māori Affairs Committee, 336-2.

1
Introduction

1 TE PUNI KŌKIRI (TPK) HAS SOUGHT ADVICE from the Law Commission (in a letter dated 30 June 2000) on proposed changes to section 30 of Te Ture Whenua Māori Act 1993.[2] Specifically, the Commission was asked to consider the effect of those proposed changes; and whether section 30 is adequate to address the current problems arising from representation issues. The Commission has both the function and power to provide advice and assistance to any Government department or organisation considering the review, reform, or development of any aspect of the law of New Zealand.[3] In addition, the Commission is required to have regard to te ao Māori in making its recommendations.[4]

2 Materials forwarded to the Commission for our consideration under cover of TPK's letter are listed in appendix A. We were asked to report by 26 August 2000. In the time available to us, we were able to review only the materials in appendix A and the decisions of the Māori Land Court. We have not been able to undertake further consultation. Accordingly, our advice must be viewed in that narrow context. We understand that our advice will be put before the Māori Affairs Select Committee when it considers the proposed amendments to section 30 later this year.

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[2] See paras 15–19 for the amendments proposed to Te Ture Whenua Māori Act 1993 s 30.

[3] Law Commission Act 1985 ss 5(1)(c), 6(2)(d).

[4] Above n 2, s 5(2)(a).

2
Section 30
Te Ture Whenua Māori Act 1993

3 AS IT CURRENTLY STANDS, section 30 of the Te Ture Whenua Māori Act 1993 (the Act) provides:

> **30 Power of Māori Land Court to give advice or make determination as to representatives of class or group of Māori—**
>
> (1) The Māori Land Court may—
>
> (a) At the request of any court, commission, or tribunal, supply advice, in relation to any proceedings before that court, commission, or tribunal, as to the persons who, for the purposes of those proceedings, are the most appropriate representatives of any class or group of Māori affected by those proceedings; and
>
> (b) At the request of the Chief Executive or the Chief Judge, determine, in relation to any negotiations, consultations, allocation of funding, or other matter, the persons who, for the purposes of the negotiations, consultations, allocation, or other matter, are the most appropriate representatives of any class or group of Māori affected by the negotiations, consultations, allocation, or other matter.
>
> (2) No person shall make a request under subsection (1)(b) of this section unless that person is first satisfied that reasonable steps have been taken to determine the representatives of the class or group of Māori affected and that those steps have been unsuccessful.
>
> (3) A request under this section shall be deemed to be an application within the ordinary jurisdiction of the Māori Land Court, and the Māori Land Court shall have full power and authority accordingly to hear the request and to give such advice or to make such determination, as the case may require, on the request as the Māori Land Court thinks proper.
>
> (4) A court, tribunal, or commission may accept as evidence any advice given to it under this section by the Māori Land Court and the Chief Executive or the Chief Judge may accept as conclusive, for the purpose of any negotiations, consultations, allocation of funding, transfer of assets, or other matter, any determination made under this section by the Māori Land Court.

4 It will be seen from the provisions of section 30 of the Act that the discretionary jurisdiction conferred upon the Māori Land Court covers:

- the supply of advice, at the request of any court, commission or tribunal in relation to any proceedings before the relevant body, *as to the persons, who for the purposes of those proceedings*, "are the most appropriate representatives of any class or group of Māori affected by those proceedings": section 30(1)(a) of the Act (the advisory jurisdiction); and
- determinations, *in relation to any negotiations, consultations, allocation of funding, or other matter*, made at the request of the Chief Executive of TPK or the Chief

Judge of the Māori Land Court of "the persons who for the purposes of the negotiations, consultations, allocation, or other matter, are the most appropriate representatives of any class or group of Māori affected by the negotiations, consultations, allocation, or other matter": section 30(1)(b) of the Act (the adjudicative jurisdiction).

5 Accordingly, there are two types of jurisdiction which can be exercised by the Māori Land Court under section 30 of the Act. The first, under section 30(1)(a), is advisory in nature and has, therefore, no binding effect. The second type of jurisdiction, under section 30(1)(b), is adjudicative in nature – it may be regarded as conclusive by the Chief Executive of TPK or the Chief Judge under section 30(4).

But the extent to which it may bind those who are *heard* by the Court is unclear. It is unclear whether a person who initiates a request under section 30(1)(b) (by asking the Chief Executive of TPK or the Chief Judge to make a formal request) will be bound by the Court's determination. It is also unclear whether those who oppose the determination sought will be bound. There are dangers, if the latter were bound, that opponents would prefer to not make submissions to the Māori Land Court rather than be bound by the determination. And furthermore, any determination made without input from opponents would be of little value.[5]

The opening words of section 30(1) make it clear that the Court's threshold decision, whether to provide advice or to make any determination, is discretionary in nature.

6 Neither the Chief Executive nor the Chief Judge is entitled to make a request under section 30(1)(b) of the Act unless:[6]

> . . . that person is first satisfied that reasonable steps have been taken to determine the representatives of the class or group of Māori affected and that those steps have been unsuccessful.

In our view, this qualification on the ability for either the Chief Executive or the Chief Judge to initiate a request for a determination under section 30(1)(b) should be viewed as a legislative intention that the Court not make "determinations" except as a matter of last resort.

7 A request to the Māori Land Court under section 30 of the Act is deemed to be an application within the ordinary jurisdiction of the Māori Land Court. The Court is given full power and authority to hear the request and to give such advice, or to make such determination, as the case may require.[7]

8 There are two important consequences of deeming a request to the Māori Land Court under section 30 to be an application within the ordinary jurisdiction of the Court. First, under section 37(3) of the Act the Court may, subject to the rules of the Court, proceed to exercise any other part of its jurisdiction, where the Court considers it necessary or desirable. The Court may do so without further application, and upon such terms (as to notice to parties and so on) as it sees fit.

Second, the power of a judge of the Court to call conferences and to give directions is brought into play. Under section 67(1) of the Act, for the purpose of

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[5] Te Ture Whenua Māori Act 1993 s 30(4). See also *Cracknell v Treaty of Waitangi Fisheries Commission* (1993) Tairawhiti MB 152, discussed at para 24.

[6] Above n 4, s 30(2).

[7] Above n 4, s 30(3).

ensuring that any application may be determined in a convenient and expeditious manner and that all matters in dispute may be effectively and completely determined –

> . . . a judge may at any time, either on the application of any party or intended party or without any such application, and on such terms as the judge thinks fit, direct the holding of a conference of parties or intended parties or their counsel presided over by a judge.

During the course of such a conference, the presiding judge may (inter alia) give directions as to service and as to the public notification of the application and any hearing under section 67(2)(c) of the Act. In relation to questions of notice and service the provisions of rules 20–38 of the Māori Land Court Rules 1994 (SR 1994/35) are also relevant. In particular, rules 27 and 34 provide:

> 27 NOTICE TO OTHER PERSONS—
>
> The Court may, before hearing or proceeding further with the hearing of an application, require the applicant or the Registrar to give such notice or copies of any paper or plans filed in Court as the Court considers necessary to any person who may appear to the Court to be affected by the application.
>
> 34 FURTHER ADVERTISING OF APPLICATION—
>
> A Judge may, for the purpose of bringing an application to the notice of persons who may be affected by it, direct that that application, in addition to being listed in the Panui, shall be notified through the media.

9 When considering issues of representation or mandate, important questions arise as to the right to be heard of members of the "class" or "group" of Māori concerned. The ability of members of the "class" or "group" to be heard depends, to a great extent, on the nature of the notice of the hearing which has been given and the procedural orders made by a judge prior to the substantive hearing of the case. It is unclear from the materials that have been made available to us precisely what steps have been taken by the Court to enable interested persons to attend and make submissions or, indeed, to call evidence or cross-examine at a section 30 hearing.

10 In respect of the advisory jurisdiction, the requesting court, commission or tribunal *may* accept as evidence any advice given to it under section 30 by the Māori Land Court. In respect of the adjudicative jurisdiction, the Chief Executive or the Chief Judge *may* accept *as conclusive*, for the purpose of any negotiations, consultations, allocation of funding, transfer of assets, or other matter, any determination made by the Court under section 30.[8]

11 When the Māori Land Court considers a request under section 30(1) of the Act, the Chief Judge is required to appoint two or more additional members (not being judges of the Māori Land Court) to the Court to consider the request.[9] Each person appointed by the Chief Judge is required to possess knowledge and experience relevant to the subject matter of the request.[10] Before an additional

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[8] Above n 4, s 30(4).

[9] Above n 4, s 33(1).

[10] Above n 4, s 33(2).

member of the Court is appointed, the Chief Judge must consult, to the extent required by the nature of the case, with the parties to the proceedings or with persons involved in the negotiations, consultations, allocation or other matter, about the knowledge or experience that any such person should possess.[11] As mentioned later, issues to be considered by the Court under section 30 may involve questions of tikanga.[12]

12 The legislation must be judged against the backdrop of the circumstances in which it may be used. Many of the cases raise questions of mandate and representation in relation to claims made under the Treaty of Waitangi Act 1975 on behalf of a "group" of Māori.[13] There are three distinct phases involved in Treaty claims under that Act:

(1) The prosecution of a claim before the Waitangi Tribunal on behalf of a "group" of Māori. The ability to prosecute a claim simply entitles a person to put complaints before the Waitangi Tribunal which may or may not justify recommendations that (a) principles of the Treaty have been breached, and (b) some form of relief is required from the Crown.

(2) The negotiation of a claim towards achieving settlement and the right to represent a claimant group in negotiations. This includes issues of mandate and representation that may follow a recommendation by the Waitangi Tribunal that the principles of the Treaty have been breached and that relief ought to be granted.

(3) Post settlement designation of rights of representation for (a) receipt of assets transferred as part of the settlement process and (b) administration of those assets for the benefit of the claimant group. Separate issues involving dispute resolution within the "group" also arise; however those issues go beyond the scope of this report.

13 As currently drafted, section 30(1)(b) of the Act recognises that the Māori Land Court may determine the appropriate representatives of any class or group of Māori for the purpose of negotiations or allocation of funding. However the words used in the section raise questions as to the scope of its intended use. The words of section 30(1)(b) seem to contemplate that its adjudicative jurisdiction should be restricted to pre-settlement issues. While the use of the term "allocation of funding" seems to reinforce that conclusion (as funding is only required until such time as settlement is implemented) section 30(4) of the Act refers to a "transfer of assets" as well as to any "other matter" (a reference also found in section 30(1)(b) of the Act). The terms "transfer of assets" and "other matter" could both refer to the post settlement phase, where assets are transferred to named representatives to hold for the benefit of the "group" concerned.

14 In the context of the advice which we have been asked to provide, it will be necessary to consider whether the jurisdiction conferred by section 30 of the Act is an appropriate jurisdiction for the Māori Land Court to exercise, having regard to the following matters:

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[11] Above n 4, s 33(3).

[12] See para 32.

[13] Treaty of Waitangi Act 1975 s 6(1).

- the jurisdiction exercised under section 30(1)(a) is advisory in nature;
- the jurisdiction exercised under section 30(1)(b) is adjudicative in nature;
- the jurisdiction exercisable under section 30(1)(a) and (b) is discretionary;
- the Act is unclear on whom determinations are binding;
- any determination may or may not be accepted as conclusive by the Chief Executive of TPK or the Chief Judge under section 30(4);
- the Act is unclear on whom service of any request should be effected;
- section 30 of the Act is confused in its scope;
- there remains a question as to whether the issues of mandate and representation contemplated by section 30 are truly justiciable in nature.

3
Proposed amendments to section 30

15 THERE ARE TWO BILLS currently before Parliament which would affect section 30 of the Act. Specifically, they are:

- clause 6 of the Māori Purposes Bill 1999;
- clause 10 of Te Ture Whenua Māori Amendment Bill 1999.

16 Clause 6 of the Māori Purposes Bill[14] proposes to insert a new section 30(2A) into the Act. The new section would, if passed in its current form, state –

> (2A) The Māori Land Court may, at the request of the Chief Executive or the Chief Judge,—
> (a) Review the representatives of a class or group of Māori determined by the Court under subsection (1)(a) or subsection (1)(b); and
> (b) On a review under paragraph (a),—
> (i) Add to or reduce the number of representatives; or
> (ii) Replace any of the representatives; or
> (iii) Exercise both its powers under subparagraph (i) and its powers under subparagraph (ii).

The Explanatory Note to the Māori Purposes Bill states, in relation to clause 6:

> Clause 6 amends section 30 of the Act to enable the Māori Land Court (at the request of the Chief Executive or the Chief Judge) to review and add to, reduce or replace the representatives of a class or group of Māori determined by the Court.

17 *Hansard* records that the promoters of this Bill considered that the amendment was not controversial and that its purpose was simply to "tidy up" the situation where, for example, a representative retired or died.[15] Several Members of Parliament however, expressed concern about the proposed changes to section 30; in particular, the ability it would give for a Māori Land Court judge to add to or dismiss representatives in order to affect the outcome of a vote.[16] We agree that the proposed amendment goes further than curing the particular problem identified by the promoters of the Bill – prima facie it gives to the judges an unfettered discretion to review earlier decisions.

18 Clause 10 of Te Ture Whenua Māori Amendment Bill[17] proposes to add three new subsections: sections 30(1A), (3A) and (3B). Those provisions, if passed in their present form, would read as follows:

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[14] Māori Purposes Bill, 1999, 306-1.

[15] 13 July 1999; NZPD 17965, 17982.

[16] Ibid at 17967 (Rt Hon Winston Peters), 17971–17972 (Sandra Lee) and 17984 (Nanaia Mahuta).

[17] Te Ture Whenua Māori Amendment Bill 1999, 336–10.

(1A) Any advice supplied or determination made under sub section (1) as to the most appropriate representatives of any class or group of Māori may identify those representatives for either general or specific purposes relating to the proceedings, negotiations, consultations, allocation, or other matter.

(3A) The Māori Land Court may specify a date after which advice supplied or a determination made under sub section (1) ceases to have effect.

(3B) The Māori Land Court must, before specifying a date under sub section (3A), consult the parties to the proceedings or the persons involved in the negotiations, consultations, allocation or other matter.

In the Explanatory Note to this Bill, under the heading of "General Policy Statement", it is noted that one of the purposes of the Bill was to better define –

> . . . the scope of the Māori Land Court's power to mandate representatives of Māori groups in proceedings and negotiations.

Te Ture Whenua Māori Amendment Bill currently before Parliament reflects consultation from 18 hui held around New Zealand as well as matters arising from regional and specialist focus groups which have been considering principles underpinning Māori land legislation.

19 Should both clause 10 of Te Ture Whenua Māori Bill and clause 6 of the Māori Purposes Bill be passed in their current form section 30 will read as follows:[18]

30 Power of Māori Land Court to give advice or make determination as to representatives of class or group of Māori—

(1) The Māori Land Court may—

(a) At the request of any court, commission, or tribunal, supply advice, in relation to any proceedings before that court, commission, or tribunal, as to the persons who, for the purposes of those proceedings, are the most appropriate representatives of any class or group of Māori affected by those proceedings; and

(b) At the request of the Chief Executive or the Chief Judge, determine, in relation to any negotiations, consultations, allocation of funding, or other matter, the persons who, for the purposes of the negotiations, consultations, allocation, or other matter, are the most appropriate representatives of any class or group of Māori affected by the negotiations, consultations, allocation, or other matter.

(1A) Any advice supplied or determination made under subsection (1) as to the most appropriate representatives of any class or group of Māori may identify those representatives for either general or specific purposes relating to the proceedings, negotiations, consultations, allocation, or other matter.

(2) No person shall make a request under subsection (1)(b) of this section unless that person is first satisfied that reasonable steps have been taken to determine the representatives of the class or group of Māori affected and that those steps have been unsuccessful.

(2A) The Māori Land Court may, at the request of the Chief Executive or the Chief Judge,

(a) Review the representatives of a class or group of Māori determined by the Court under subsection (1)(a) or subsection (1)(b); and

(b) On a review under paragraph (a),—

(i) Add to or reduce the number of representatives; or

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[18] The proposed amendments have been inserted in bold type.

(ii) Replace any of the representatives; or

(iii) Exercise both its powers under subparagraph (i) and its powers under subparagraph (ii).

(3) A request under this section shall be deemed to be an application within the ordinary jurisdiction of the Māori Land Court, and the Māori Land Court shall have full power and authority accordingly to hear the request and to give such advice or to make such determination, as the case may require, on the request as the Māori Land Court thinks proper.

(3A) The Māori Land Court may specify a date after which advice supplied or a determination made under subsection (1) ceases to have effect.

(3B) The Māori Land Court must, before specifying a date under subsection (3A), consult the parties to the proceedings or the persons involved in the negotiations, consultations, allocation, or other matter.

(4) A court, tribunal, or commission may accept as evidence any advice given to it under this section by the Māori Land Court and the Chief Executive or the Chief Judge may accept as conclusive, for the purpose of any negotiations, consultations, allocation of funding, transfer of assets, or other matter, any determination made under this section by the Māori Land Court.

4
Original purpose of section 30

20 AMONG THE MATERIALS made available to us by TPK was a helpful memorandum by (the now former) Chief Judge Durie which succinctly captured the intention of section 30 of the Act in its original form. The Chief Judge said:[19]

> The section may be defined by reference to the malady that the Legislature has sought to cure. The malady in this case would appear to be that persons seeking to effect negotiations, consultations, funding allocations or the like, in respect of Māori groups, are uncertain as to who may have an appropriate mandate to effect such negotiations or consultations or as to who may give a valid receipt. The section is designed to give that certainty so that outside parties may treat or be treated with. Conversely, the section does not appear to be designed to enable the Court to determine the appropriate representatives of a group for all or a wide number of purposes. The purpose must relate to some matter of business that is pressing at the time.
>
> It must also be established that the question of representation for the particular purpose described has not and cannot be settled outside of the Court.
>
> . . .
>
> The section may be read in the context of past Legislative history. The legislature empowered the Māori Land Court to determine appropriate tribal representatives for a range of purposes in the [Runanga Iwi Act 1990], but then repealed that Act [Runanga Iwi Act Repeal Act 1991]. This supports the view that the current section limits the Court to determining representation in the light of specific representation problems that arise, and is not a mandate to determine the representation of a group for all or for a wide ranging number of purposes of no immediate concern.
>
> The words "or other matter" should be read in the context of the words preceding them. The common denominator for the preceding words is that some outside person wishes to treat with a Māori group, or vice versa.

21 With regard to the specificity required, the former Chief Judge also made the following observations:[20]

> [Section 30] is a general section and should not substitute for specific enactments for the cure of representation issues. The specific enactments may include:
>
> - Section 6A Treaty of Waitangi Act 1975 for the determination of questions of custom and customary entitlement for the purposes of proceedings before the Waitangi Tribunal;
> - Section 6 Māori Fisheries Act 1989 (as amended by section 14 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992) enabling the Commission to develop a procedure for identifying beneficiaries and beneficial interests and for effecting allocations for the purposes of that Act;

[19] Memorandum of Chief Judge Durie attached to letter of 22 November 1993 from Deputy Chief Judge McHugh to the Chief Executive, Ministry of Māori Development.

[20] Above, n 19.

- Section 61 Te Ture Whenua Māori Act 1993 enabling the High Court to state a case to the Māori Appellate Court.

22 Generally, we agree with the sentiments expressed by Chief Judge Durie in relation to the way in which section 30 was intended to work in practice. Unfortunately, the way in which (in particular) section 30(1)(b) of the Act has been expressed tends to reveal a wider adjudicative jurisdiction than that which was originally contemplated.[21] In determining whether the concepts underlying the advisory and adjudicative jurisdictions can be given workable effect it is necessary to consider the core elements of the section. The essential features, which we take from the existing terms of the statute,[22] are:

(a) Requests for the exercise of the Court's advisory jurisdiction should be fact specific. This is clear from the terms of section 30(1)(a) which require the requesting court, commission or tribunal to make its request "in relation to any proceedings before that court, commission or tribunal". Furthermore, the same provision makes it clear that the request must seek advice as to the persons who, "for the purposes of those proceedings", are the most appropriate representatives of any class or group of Māori affected by those proceedings.

(b) In relation to the adjudicative jurisdiction, the Chief Executive and the Chief Judge should act as filters to ensure that only properly justiciable issues are referred to the Court for determination.[23] The role of both the Chief Executive and the Chief Judge as a filter is reinforced both by the terms of section 30(1)(b) (which give those persons the right to make a request for a determination) and by section 30(4) (under which it is a matter for the Chief Executive or the Chief Judge to accept as conclusive any determination made by the Court).

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[21] Section 30(1)(b) may be so wide as to infringe the rule of law's requirement for certainty, see *Finnis Natural Law* cited in *Cooper v Attorney-General* [1996] 3 NZLR 480.

[22] Set out in para 3.

[23] A good example of the way in which the Chief Judge can act as a filter is to be found in the judgment of the Māori Appellate Court in *Re Rangitane o Tamaki Nui-a-Rua (Inc)* [1996] NZAR 312–314. The Appellate Court noted that the Tararua District Council had sought, by letter to the Chief Judge, to invoke s 30(1)(b) and have the Chief Judge request the Māori Land Court to determine the most appropriate representatives of Māori within the Tararua district. The District Council had sought determination which included defining the meaning and input of tangata whenua for the purposes of the Resource Management Act 1991 and the Local Government Act 1974; the request also asked the Chief Judge for the Court to determine tangata whenua status in the Tararua district. The Appellate Court said:

> . . . the Chief Judge found that this would be inappropriate. In a memorandum dated 14 April 1994 forwarded to all parties, the Chief Judge stated:
>
> > I doubt that it is the proper function of the Māori Land Court to determine the meaning of the words [tangata whenua] in an Act under the aegis of the Planning Tribunal [now the Environment Court] save to the extent that it is absolutely necessary to resolve a matter under s 30 Te Ture Whenua Māori Act. As to the second point, it could be that Māori customary relationship in the district had such overlaps that it is not possible to so define the areas. That may or may not be so, but to state the task in the terms described could be to make presumption.
>
> The Chief Judge then framed the reference to the Māori Land Court under s 30(1)(b) by requesting the Court to determine the most appropriate representatives of the hapu, iwi or general Māori of the Tararua district for the purposes of the negotiations, consultations, allocations, notices, advices, agreements or arrangements that the Tararua District Council may be obliged or disposed to make when exercising functions or jurisdiction under any enactment under which it is authorised or required to act.

(c) Both the advisory and adjudicative jurisdictions of the Māori Land Court under section 30 should be regarded as remedies of last resort. The reason for this is clear: the Court is being asked to exercise an intrusive jurisdiction which takes the choice of representatives of a particular class or group of Māori out of the hands of the people affected by that choice. Such a power is not given, in respect of people of mature age and full capacity, to any other court exercising jurisdiction in New Zealand. In that regard, we refer with approval to the observations of the Māori Land Court in *Re Ngati Paoa Whanau Trust*where the Court said:[24]

> In our view the Court should not lightly make an order under this section. While appointment by the Court is a means to settling disputes it transgresses the right of the tribe to appoint its representatives. It will invariably place the appointee in a position of strength. We believe that a Court imposed solution will not be as acceptable as one reached by the tribe and that the tribe should be encouraged to resolve any disputes over representation through traditional means.

EXAMPLES OF EXERCISE OF SECTION 30 JURISDICTION

23 It is clear that the applications that have been lodged with the Māori Land Court under section 30 of the Act have not been limited to the type of cases to which we refer in para 22. Examples of the type of cases in which the Court's assistance has been sought under section 30 are summarised below:

- representation for all purposes;[25]
- representation for bringing claims in the Waitangi Tribunal;[26]
- representation for negotiating agreements following Waitangi Tribunal recommendations;[27]
- other negotiations;[28]
- receipt of fisheries quota;[29] and
- consultation and other dealings with local authorities.[30]

24 Further, in *Cracknell v The Treaty of Waitangi Fisheries Commission*,[31] the Māori Land Court was faced with an application for an interim injunction to prevent any distribution by the Fisheries Commission pending a determination under section 30 as to who should receive the quota. Deputy Chief Judge McHugh

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[24] (1995) 96A Hauraki MB 155 at 160.

[25] *Whakatohea Raupatu Claim* (1993) 68 Opotiki MB 262.

[26] For example, *Whakatohea Raupatu Claim* (1993) 68 Opotiki MB 262; *Ngati Pahauwera* (1994) 92 Wairoa MB 66; *Ngati Paoa Whanau Trust* (1995) 96A Hauraki MB 155.

[27] *Ngati Pahauwera* (1994) 92 Wairoa MB 66.

[28] *Ngati Toa Rangatira* (1994) 21 Nelson MB 1; *Ngati Paoa Whanau Trust* (1995) 96A Hauraki MB 155.

[29] *Ngati Pahauwera* (1994) 92 Wairoa MB 66; *Ngati Paoa Whanau Trust* (1995) 96A Hauraki MB 155; *Ngati Toa Rangatira* (1994) 21 Nelson MB 1.

[30] *Ngati Pahauwera* (1994) 92 Wairoa MB 66; *Ngati Paoa Whanau Trust* (1995) 96A Hauraki MB 155; *Ngati Toa Rangatira* (1994) 21 Nelson MB 1.

[31] (1993) Tairawhiti MB 152.

dismissed the application because (inter alia) any determination under section 30 would not be binding on the Fisheries Commission. He said:

> The determination made by the Māori Land Court following an inquiry under section 30(1)(b) may be in terms of section 30(4) accepted as conclusive by the Chief Judge but there the matter rests. The determination is not binding on any other party. It is certainly not a determination that has any binding effect beyond the Chief Executive or Chief Judge although those respective persons may convey the determination by way of advice to third parties. The whole purpose of the legislation is to determine the most appropriate group of Māori with whom a third party such as the Crown or a State-owned Enterprise or a local authority may deal with some impunity that might later avoid the double jeopardy of [having] paid out monies or awarded land to the wrong persons.

25 Similarly, in cases involving requests by local authorities in respect of consultation issues under the Resource Management Act 1991, the Māori Land Court has emphasised that any determination made by it would not absolve local authorities in relation to their statutory duties.[32]

26 In *Re Ngati Paoa Whanau Trust* the Māori Land Court said:[33]

> What the Court is asked to do is appoint a representative for Ngati Paoa to consult with regional and District Councils in the context of the Resource Management Act. The Court is not asked to resolve who are tangata whenua in a particular area. While Ngati Paoa can ascribe to a particular rohe or territory it need not be the sole tangata whenua within that area. Councils have a requirement to consult under the Resource Management Act and it is their responsibility to consult with the tangata whenua and in fact establish who are tangata whenua. Appointment of the Whanau Trust to represent Ngati Paoa does not mean that they are the only tangata whenua within the areas they nominate. Where Ngati Paoa are tangata whenua they may not be the sole body with which the authorities should consult.

27 Those observations are consistent with the judgment of the Māori Appellate Court in *Re Rangitane o Tamaki Nui-a-Rua (Inc)*[34] in which the Appellate Court stated:[35]

> This Court comments briefly on aspects of tangata whenua and representation. Both parties approached the hearing endeavouring to establish their respective claims as tangata whenua within the district. While such determination was not required under the terms of reference issued by the Chief Judge, it is pertinent to note that since the application arose from a request by the Tararua District Council bound by the need to consult with tangata whenua in terms of the Resource Management Act 1991, the determination of tangata whenua is intrinsically interwoven with the request by the District Council.
>
> Section 2 of the Resource Management Act contains the following definition:

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[32] See *Re Rangitane o Tamaki Nui-a-Rua (Inc)* [1996] NZAR 312 at 318 (MAC) on appeal from *Re Tararua District Council* (1994) 138 Napier MB 85 and *Re Ngati Paoa Whanau Trust* (1995) 96A Hauraki MB 155.

[33] *Re Ngati Paoa Whanau Trust* (1995) 96A Hauraki MB 155 at 190.

[34] [1996] NZAR 312 (MAC).

[35] Above n 33, 318. See also the observations made by the Māori Land Court in *Re Tararua District Council* (1994) 138 Napier MB 85, from which the appeal in *Re Rangitane o Tamaki Nui-a-Rua (Inc)* was brought.

> 'Tangata whenua', in relation to a particular area, means the iwi, or hapu, that holds manawhenua over that area:

It is to be noted that the definition refers particularly to manawhenua over land. Evidence before the lower court showed that Kahungunu and Rangitane were of common ancestry, and owners of land within the district claimed allegiance to one or other of these tribes. On the basis that these are related iwi with an acknowledged presence in the area, we pose the question to the parties as to how an iwi could claim manawhenua over land when the owners of that land do not recognise that iwi and claim allegiance to and membership of a related iwi.

The above postulation is merely made by way of comment, but it does appear to this Court that the recognition of iwi by owners of land would be an important ingredient in establishing tangata whenua of an area. We would also comment that the Resource Management Act gives recognition to the people of the land and there is no reason why there could not be more than one tangata whenua in any given area.

The lower court referred to Māori society being not static, but subject to evolution and change. If owners of Māori land, regardless of its origins, change their allegiance or adherence to another iwi with historical and customary rights or links in the area, surely this is part of the process of change and evolution that the Court is entitled to have regard to in determining questions of representation.

5
Problems with section 30: our analysis

28 WE HAVE BEEN ADVISED that there are a number of issues for reform which were raised at hui held throughout New Zealand as part of the review of Te Ture Whenua Māori Act 1993 which have not been addressed either in the Māori Purposes Bill or in Te Ture Whenua Māori Amendment Bill. As we understand it, those issues can be summarised as follows:

- Whether it is appropriate for the Māori Land Court, as currently constituted, to act as a forum to determine representation issues generally; and, more specifically, to act in situations where Māori land is not directly affected by the outcome.
- Whether the advisory jurisdiction should be available not only in relation to extant proceedings but in respect of intended proceedings.
- Whether a request for a determination under section 30(1)(b) should properly be brought by persons other than the Chief Executive and the Chief Judge, for example, whether a member of the public could initiate such a request.
- Whether there should be specific provisions requiring a determination under section 30(1)(b) to be expressed as conclusive and binding for particular purposes.
- What mechanisms should exist for the review, reassessment and accountability of representatives.
- What appeal procedures should exist.

All of these matters are fundamental to the purpose of section 30 of the Act. In our view, it is inappropriate to amend section 30 in the manner proposed by either the Māori Purposes Bill or Te Ture Whenua Māori Amendment Bill (or both) while such fundamental questions remain unanswered. It is desirable that the purpose and scope of these provisions be adequately addressed and debated fully before any further amendments are made to the statute.

29 An examination of the cases brought under section 30 to date suggest that an approach has been taken to the Court's jurisdiction which is inconsistent with the original purpose of the jurisdiction outlined in the memorandum of former Chief Judge Durie.[36] Examples are:

- The courts have not insisted on the need for an immediate problem requiring a curial determination rather than a decision of the people. On matters of representation a democratic method of resolving issues is to be preferred,

[36] See para 20.

generally, to a court-imposed solution. Methods of selecting leaders will invariably differ from hapu to hapu; often the issues will involve questions of tikanga.

- Some requests have ignored the specific statutory obligation of other bodies to resolve questions of allocation and entitlement; reference is made in particular to the fisheries claims[37] (see para 21).
- While views on representation have been expressed, some of the judgments have recognised the practical limits on the advice or determinations which can be given. We refer, in particular, to the issue involving local authorities under the Resource Management Act 1991. Local authorities seek assistance under section 30 so that they know the persons with whom they should treat, yet the Court has made it clear that the obligation is to consult tangata whenua and that that obligation is not discharged only by treating with those in whose favour the representation determination has been made.

30 In addition, we believe that there are further fundamental problems with section 30 which require debate and resolution. A summary of the issues follows.

Appropriate jurisdiction

31 Is it appropriate for the Māori Land Court to make orders as to mandate and representation which require people within the "class" or "group" of Māori concerned to be subject to representation by those persons? If it is appropriate, should the jurisdiction be limited to urgent cases involving specific fact situations or existing proceedings?

Process

32 Even if the issues are regarded as justiciable, questions of process arise. In particular:

- No factors are identified in the legislation to determine how the various discretions should be exercised. Neither are there any procedural rules to indicate the process which should be followed by the Court in determining threshold questions, such as whether it is necessary in any particular case to give an advisory opinion or make an adjudicative determination. For example, there are no specific provisions dealing with service of those who form part of the "class" or "group" of Māori for the purposes of section 30(1). We question whether the Court can ensure that all members of the "class" or "group" have had an adequate opportunity to be heard on the question of representation in the absence of a settled procedure dealing specifically with section 30 issues.[38]
- A further question arises as to whether it is appropriate or useful for a court to give an advisory opinion on matters which are not before it for any other purpose. Generally speaking, courts in New Zealand resolve disputes and do not give advisory opinions. Is it really appropriate for the Māori Land Court to advise other judicial authorities on who should be heard in matters arising within their own jurisdiction?

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[37] *Ngati Pahauwera* (1994) 92 Wairoa MB 66, *Ngati Toa Rangatira* (1994) 21 Nelson MB 1 and *Ngati Paoa Whanau Trust* (1995) 96 A Hauraki MB 155.

[38] See paras 8 and 9 for a discussion of the general provisions relating to service and notice.

Principles for the determination of "representation"

33 There are significant questions about the general principles which should apply in determining "representation" requests. As noted by the Māori Land Court in *Re Tararua District Council:*[39]

> The case before us takes place at a time when the Māori social political order is under stress. The words of the Chief no longer bind all members of the body. The full membership of the body is not always known. The desire for people to draw hapu and individuals together under the name of iwi is resisted by others who wish to promote hapu or re-establish different iwi as a basis for identity.
>
> The conflict grows as some people believe the only authentic system is that of the iwi. Others argue that authenticity must flow from consensus within the people. They also insist old forms cannot be transplanted to perform new functions. Rather an adapted form must be built around the new functions which Māori need to cope with.

Having said that, the Court proceeded to develop principles to guide it on questions of representation. The principles applied in that particular case were:

- he ritenga ano;[40]
- he rourou;[41]
- he au rere tonu;[42]
- marae;[43]
- customary authority.[44]

The application of these principles was upheld, on appeal, in the particular case.[45]

Problems concerning advisory jurisdiction

34 Other courts, commissions or tribunals may find it helpful to be able to seek advice from the Māori Land Court as to the persons who, for the purposes of particular proceedings before that court, commission or tribunal, are the most appropriate representatives of any class or group of Māori affected by those

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[39] (1994) 138 Napier MB 85, 87–88.

[40] The Court should assess the historic circumstances of the group seeking to be appointed representative.

[41] Representation is an expression of obligations more than an assertion of rights: an adversarial approach should be discouraged.

[42] Given the changes in social organisation, the economy and society in general, the Court should not consider itself bound by the exact manner in which land title was determined in the 19th century. Ascertainment of tangata whenua status requires a more dynamic approach.

[43] The Court should look to local marae in matters of customary authority. The marae is probably the single most enduring institution within Māoridom. The functioning of the marae can be seen as the expression of authority through customary practices.

[44] Many hapu, for a number of reasons, were assimilated with or integrated into other hapu and their separate identity became submerged. In recent times they have re-emerged and claimed their former status. This process is only valid when there is acceptance by all of their re-emergence. In the absence of war it is important to note that tribal bodies wishing to reassert their former status ought to do so through a consensual process relying on customary concepts such as whanaungatanga.

[45] *Re Rangitane o Tamaki Nui-a-Rua (Inc)* [1996] NZAR 312 (MAC).

proceedings. However, the usefulness of the ability to make such a request will depend upon the ability of the Māori Land Court to respond to it.

35 Assuming that it is decided that some form of advisory jurisdiction is appropriate, its utility depends wholly on the ability of the Māori Land Court to respond in a timely fashion and on its being resourced to respond accordingly. Thus, there is a need to reappraise how the advisory jurisdiction can work in practice and what processes are required to enable it to be used efficiently. While the concept of an advisory jurisdiction is a good one, the difficulty is in developing a process with practical application. For example, the Environment Court may be faced with an issue involving discharge of waste into a river. While it may be helpful to the Environment Court to request assistance from the Māori Land Court under section 30(1)(a) of the Act, any response will only be helpful if it can be provided within a sufficiently short timeframe to enable the Environment Court to act on it effectively. Also, the speed with which the Māori Land Court respond may be a factor which the requesting body takes into account when deciding whether to act on the Court's advice – if the Māori Land Court has not had time to ascertain and hear all interested parties its advice may be viewed as of less value.

36 The value of the advisory jurisdiction under section 30(1)(a) of the Act lies in the ability of courts and tribunals to aid and assist each other. Other examples include: the use of Waitangi Tribunal reports by the High Court and the Court of Appeal, and the ability of a Māori Land Court Judge to act as an alternate Environment Judge when the Principal Environment Judge, in consultation with the Chief Māori Land Court Judge, considers that necessary.[46]

Differences between advisory and adjudicative jurisdiction

37 While it will be necessary to reappraise whether both the advisory and adjudicative jurisdictions are appropriate having regard to the questions posed in para 31 of this report, consideration will also need to be given as to whether the advantages which could accrue to other courts, commissions or tribunals by their use of the advisory jurisdiction under section 30(1)(a) might differentiate that jurisdiction from the adjudicative jurisdiction under section 30(1)(b). Certainly, on the basis of the information which we have seen to date, we incline provisionally to the view that there is more merit in retaining section 30(1)(a) than a jurisdiction akin to that currently contained in section 30(1)(b).

38 The question is whether it is appropriate to leave these matters (paragraphs 31–37) to the Court to develop or whether there should be some attempt, if the section is to remain, for criteria to be embodied in the Act.

39 In some cases, questions of tikanga will arise: in others they may not. Ultimately, if one looks at a question of representation, the following issues arise:

- What is the "class" or "group" of Māori in question?
- How does that particular group choose its leaders or representatives?

Tikanga can relate to both of these matters; the answer to the second of the questions set out above will differ from group to group.

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[46] Resource Management Act 1991, s 252(1).

40 We are of the view that it would be inappropriate at this time to proceed with the amendments to section 30 which have been foreshadowed by the Māori Purposes Bill and Te Ture Whenua Māori Amendment Bill. There are too many issues of a fundamental nature arising from the existing legislation which have yet to be addressed. Because those issues have arisen out of consultation at hui held to gather views on a review of Te Ture Whenua Māori Act 1993, it is appropriate that those matters be resolved at a fundamental level before any amendments to the statute proceed. Also we are firmly of the view that all of the matters which the proposed amendments wish to address are, in fact, matters which the Court can already deal with adequately in the exercise of its discretion to give advice or make determinations under section 30.[47]

41 As part of a wider review we suggest it is appropriate to consider the incentives which should be available to encourage members of a group of Māori to submit to a process to determine representation. Whether such a process is necessary will differ from group to group depending upon the group's own tikanga and the way in which leaders are customarily chosen. A process-based solution (based on facilitation) may provide greater incentives for all interested parties to determine representation issues after collective consultation among themselves, more than a court-imposed solution, which may be made after hearing only some of the people who wish to be heard. Such a process-based solution could, logically, be considered in conjunction with the nature and scope of mediation services which may be appropriate for the Māori Land Court. It is noted that TPK's post-election advice refers to some proposals for mediation services: "Cabinet has also approved in principle proposals for Kaumatua to sit on the Māori Land Court Bench, for a court mediation service and a court advisory service. Officials of the departments concerned are developing the proposals for further consideration".[48]

42 Long term, we believe that a process-based solution may work better than a court-imposed solution. Courts are generally available to resolve disputes, not to appoint people to represent various groups (see paragraph 22(c)). Indeed, under the High Court Rules 1985 and the District Court Rules 1991 a representation order can only be made in a particular proceeding where the court is satisfied that two or more people have the same interest in the subject matter of the proceeding and it is appropriate for one of them to sue or be sued on behalf of all persons interested.[49] In *Ryder v Treaty of Waitangi Fisheries Commission*,[50] the plaintiffs sought orders in the following terms (inter alia):

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[47] Many of the problems identified in the proposed amendments can be addressed adequately by appropriate drafting. An example of the way in which drafting techniques have been used in practice can be found in the Māori Appellate Court decision in *Re Rangitane o Tamaki Nui-a-Rua (Inc)* [1996] NZAR 312 at 319–321. A question arose as to the jurisdiction of the Māori Land Court to make a final order yet reserve the right to amend or vary that order in the future. The Appellate Court had "considerable difficulty" in seeing how such an order could be made but, in amending the order made by the lower court, effectively achieved the same result by appointing the representatives for a fixed term. Similarly, questions of additions to, reductions from or replacement of representatives could be addressed by fresh requests under s 30(1) without the amendments proposed.

[48] Te Puni Kōkiri : Advice to Incoming Government, 1999, pages 164–165.

[49] High Court Rules 1985 r 78, District Courts Rules 1991 r 80.

[50] [1998] 1 NZLR 761.

1. **An order directing that the First and Second Plaintiffs may sue the Defendants on behalf/and or for the benefit of all Māori in the following categories:**

   1.1 Māori who wish to enter fishing on a non-iwi or multi-iwi basis.

   1.2 Māori who do not know to which iwi they are affiliated.

   1.3 Māori who, for religious reasons or because of their political opinions, reject traditional tribal affiliation or treat such affiliation as of less importance than being a Māori or belonging to a pan-Māori organisation (including all the members of iwi morehu).

   1.4 Māori who by reason of their social and/or economic lack of status are in need of special consideration in their receiving or assistance from TOKM [Te Ohu Kai Moana] and the Settlement and in the distribution of the benefits of the Settlement.

   1.5 Māori who, because of their distance from their ancestral base are unable to play an active part in their tribal community and fear that they will not share in the benefits of the Settlement because of that remoteness.

   1.6 Māori who associate together in non iwi communities.[51]

Gallen J declined to make an order under rule 78 because he was concerned that any representation order would pre-empt, to an extent, the substantive question in the proceedings, that of which persons or organisations could speak for or represent Māori. The judge also noted that members of the proposed classes did not have the same interest in the subject matter of the proceedings as the plaintiffs and the classes were not defined with sufficient particularity.

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[51] Above n 50, 762–763.

6
Recommendations

43 WE RECOMMEND THAT a more fundamental appraisal of the workings of section 30 of Te Ture Whenua Māori Act 1993 be concluded. The question of the organisation best suited to undertake such a review or, indeed, whether such a review might best be carried out by an *ad hoc* Working Group, should be left to the Minister of Māori Affairs to determine.

44 Whatever outcome is achieved through that more fundamental review will need to take account of the fact that section 30 of the Act, in its current form, achieves little practical effect. This is because currently –

(a) it is unclear on whom determinations are binding;

(b) determinations may or may not be accepted as conclusive by the Chief Executive of Te Puni Kōkiri or the Chief Judge;

(c) advice given by the Māori Land Court may or may not be accepted by the bodies who request the advice; and

(d) the ability of the Māori Land Court to respond in a timely manner to requests made has implications for resourcing of the Court.

Consequently it will be necessary to decide what practical utility is to be served by section 30 in its final form.

APPENDIX A

Relevant materials included in Commission considerations

- Application by Mana Cracknell under section 30 of Te Ture Whenua Māori Act 1993 (the Act).
- C Callaghan "The Representation of Māori – Can Te Ture Whenua Act 1993 Solve the Dilemma?" Seminar Paper, 7 September 1993.
- *Cracknell v The Treaty of Waitangi Fisheries Commission* (13 October 1993) unreported, Māori Land Court, 91 Wairoa MB 152.
- Crown Law Office, Letter to Attorney General, Minister of Fisheries and Minister of Justice, 13 October 1993.
- Crown Law Office, Opinion regarding TPK's draft booklets and representation issues, 1 September 1998.
- Deputy Chief Judge McHugh, Letter to TPK, 22 November 1993, together with annexed preliminary opinion on section 30 by Chief Judge Durie.
- National Māori Congress, Letter to Minister of Māori Affairs with submission on Te Ture Whenua Māori Bill, 8 February 1993.
- National Māori Congress Iwi Affiliates, Memorandum to Minister of Māori Affairs with submission on the Bill, 14 January 1993.
- *Ngati Pahauwera* (13 June 1994) unreported, Māori Land Court, 92 Wairoa MB 66.
- *Ngati Paoa Whanau Trust* (17 November 1995) unreported, Māori Land Court, 96A Hauraki MB 155.
- *Ngati Toa Rangatira* (8 December 1994) unreported, Māori Land Court, 21 Nelson MB 1.
- Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (Wellington, 1999).
- Office of Treaty Settlements, Letter regarding draft booklets being prepared by TPK, 23 September 1999.
- *Tararua District Council* (1 October 1994) unreported, Māori Land Court, 138 Napier MB 85.
- T Bennion "Who Represents Māori Groups?" [1994] Māori Law Review 2–3.
- TPK, Summary of submissions received during consultation hui as at 18 December 1998.

- TPK, Extract from briefing paper to Minister of Māori Affairs, 26 June 2000, regarding section 30.
- TPK, Undated internal paper regarding section 30 of the Act.
- TPK, Risk assessment paper regarding Deeds of Mandate of Te Uri o Hau te Wahapu o Kaipara and Te Uri o Hau ki Otamatea, together with attached letters; TPK to the Minister of Māori Affairs, 17 April 2000, and TPK to William Wright and Esther Gray, 17 April 2000.
- TPK *Treaty Claims and Mandating: Volumes 1, 2 and 3* (draft only) (Wellington, draft form).
- TPK, Internal memorandum regarding section 30 of the Act, 23 July 1998.
- TPK, Internal memorandum regarding section 30 of the Act, 29 April 1998, with annexed summary of applications filed, 30 April 1998.
- TPK, Summary of applications filed, 22 August 1997, with annexed internal paper regarding section 30 of the Act, 22 May 1996.
- TPK, Internal memorandum regarding section 30, 24 April 1996, with annexed TPK seminar paper, 14 July 1994.
- *Whakatohea Raupatu* (18 October 1993) unreported, Māori Land Court, 68 Opotiki MB 262.

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