

Thinking of establishing a Whānau Trust? Here's what you need to know.

The following is introductory information about Whānau Trusts. It is intended to form a starting point in your decision making process if you are considering establishing a Whānau Trust. The Ngāi Tahu Māori Law Centre recommends that you seek legal advice regarding your whānau's specific circumstances.

What is a Whānau Trust?

A Whānau Trust is a legal structure of ownership for Māori land interests. The structure allows a small number of people called trustees to make all day-to-day decisions relating to the land shares in the trust. The benefit of this is that all beneficiaries do not need to be consulted on every decision – so the land shares can be utilised more efficiently. However, trustees cannot make big decisions, such as a decision to sell the land shares, without agreement of the beneficiaries. Another benefit is that no further succession needs to happen – when a new baby is born into the whānau they automatically gain a beneficial interest in the land shares. A Whānau Trust exists forever or until its beneficiaries, or the Court, decide to terminate it.

These trustees “legally own” the land shares – but this is a type of partial-ownership because it is limited by the “beneficial interest” which is held by all of the beneficiaries of the land shares. This means if you gift your land shares to a Whānau Trust you will no longer own them or be able to decide what happens to them on your own. Trustees are under a legal obligation to manage the land shares in the best interests of all beneficiaries, down to a new-born baby in the whānau.

What does a Whānau Trust need?

- *Māori Freehold Land, or general land owned by Māori; and*
- *A tupuna and their descendants as beneficiaries; and*
- *A trust deed; and*
- *Trustees.*

Māori Freehold Land:

The land must be gifted from the people that own it individually to the Whānau Trust. Titi Island interests are an exception and are not vested into any trust.

The first step is to identify the land you own that you want to put into a Whānau Trust. Most people choose to put all their Māori land interests into a Whānau Trust, but you may choose to retain some personally.

If putting general land into a Whānau Trust then you will need to provide the legal title to the land court as well as whakapapa evidence that the owner is Māori.

Tupuna and beneficiaries:

A tupuna or tipuna refers to an ancestor or grandparent. It has a special legal meaning in regards to Whānau Trusts: tupuna means the person or people whose descendants will be the beneficiaries of the Whānau Trust. If you are forming a Whānau Trust with your own lands for you, your children and all of your descendants then the tupuna would be you; if you are forming a Whānau Trust with your brothers and sisters for yourselves and all of your respective descendants then the tupuna will be whichever of your parents the land originated from. You can also tailor the tupuna clause (in the trust deed) if need be, i.e., if one of your brothers and sisters does not wish to gift their land to the trust then their family line can be excluded as beneficiaries of the trust. Likewise you can specify that the beneficiaries' clause include or exclude whāngai and/or children legally adopted in or out of a whānau.

Trust deed:

The trust deed is the founding document of the trust and holds all rules specific to your Whānau Trust. These are usually quite simple and brief, with the key rule being that the trust, the trust's land, and any income that comes to the trust are all utilised in the interests of all beneficiaries of the trust. Trust Deeds can also be more complicated – such as prescribing what benefits the beneficiaries will get. The more rules you impose on trustees the less flexibility they have; but the more certainty beneficiaries have. The fewer rules you impose on trustees the larger their scope to act in the best interests of the beneficiaries in unknown future circumstances. There are pros and cons to both; usually with Whānau Trusts, trustees are given wide discretion.

We recommend you visit the Māori Land Court website (www.maorilandcourt.govt.nz) for example trust deeds you can adapt, or request one from the Ngāi Tahu Māori Law Centre.

Trustees:

Trustees are the people with the legal authority to administer the land shares. With this responsibility come legal obligations to the beneficiaries – through both the trust deed and general trust law in New Zealand. Trustees need to be well aware of their responsibilities. If obligations are breached by one or more trustee, all trustees (whether they personally breached or not) may be personally liable. Some, but certainly not all, key legal obligations of trustees include:

- Keeping a record of beneficiaries and their contact information as a whānau grows;
- Keeping trust money separate from other money by opening a separate bank account;
- Using trust money only for trust purposes (i.e., improving the land);
- Keeping records of trust income and spending;
- Keeping all the beneficiaries informed of the trusts actions including income and spending (this can be once a year, not each individual transaction);
- File a tax return for the trust each year;
- Representing beneficiaries in matters relating to the land shares.

Trustee positions are voluntary. The trustees cannot be paid for their time administering the trust unless you choose to include this power in the trust deed. Most Whānau Trusts do not allow trustees to be paid for time, but will allow them to be compensated for expenses that they incur in administering the trust.

Trustees should be people with the right skills to administer the trust and uphold their obligations under the Trust. They should also be people who can work together now and in the future. Trustees are chosen by agreement of the beneficiaries at a whānau hui, or sometimes through a series of letters or discussions. Once chosen, the trustees must also be accepted as appropriate people by the Māori Land Court. Matters that the Māori Land Court may consider when deciding if each individual trustee is appropriate are: ability, experience, and knowledge; age; residence location; beneficiary support; prior convictions for dishonesty or other disqualifying offences; current criminal or civil proceedings before a Court; un-discharged bankruptcy; current compulsory detention or treatment order under the Mental Health Act; previous removal as a trustee by a Court; and anything else that may be relevant to a position of management and advocacy for the beneficiaries. We recommend that you speak to the Ngāi Tahu Māori Law Centre or a lawyer for further information on these considerations.

Still thinking of establishing a Whānau Trust?

A Whānau Trust must be formally established by an order of the Māori Land Court. To do this you will need to make an application to the Māori Land Court including:

1. What land will be put in the trust, who is gifting the land, their written and witnessed consent; and
2. A trust deed, including the name of the tupuna; and
3. Names of the proposed trustees as well as their written consent to be appointed as trustees, and evidence of whānau support for this; and
4. A \$60.00 filing fee.

Visit the Māori Land Court website (www.maorilandcourt.govt.nz) for further information about Whānau Trusts and the process of establishing them. An application form to establish a trust can be downloaded from this website.

If you are Ngāi Tahu, or live in the Ngāi Tahu rohe (area) then the Ngāi Tahu Māori Law Centre may be able to assist you with establishing a Whānau Trust if need be. Please contact us on 0800 626 745 or email us at info@ngaitahulaw.org.nz for further information.