

**SUSTAINABLE
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**The Treaty, Tikanga Māori, Ecosystem-Based Management, Mainstream
Law and Power Sharing for Environmental Integrity in Aotearoa New
Zealand – Possible Ways Forward**

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Tūhonohono - Tikanga Māori me te Ture Pākehā ki Takutai Moana Research Project

This report was prepared by Dr Robert Joseph, Mylene Rakena, Mary Te Kuini Jones, Dr Rogena Sterling and Celeste Rakena from the research group Te Mata Hautū Taketake – the Māori and Indigenous Governance Centre, Te Piringa Faculty of Law, University of Waikato for Ngā Moana Whakauka – Sustainable Seas National Science Challenge, 2018.

Ngā Moana Whakauka – Sustainable Seas National Science Challenge is committed to the appropriate protection, management and use of mātauranga Māori within its research, outputs and outcomes. This is expressed through the respect and integrity of our researchers, both Māori and non-Māori, and in our approach to ethics and the management of intellectual property. Where mātauranga Māori is sourced from historical repositories, we recognise the obligation to take all reasonable steps to ensure its protection and safeguard for future generations. We also acknowledge the findings of the Waitangi Tribunal in relation to *Ko Aotearoa Tēnei: A report into claims concerning New Zealand law and policy affecting Māori culture and identity* and are committed to working with Māori researchers and communities to refine our approach.

Executive Summary

When Māori signed the Treaty of Waitangi in 1840, rangatira (chiefs) expected the Crown to protect their rangatiratanga (authority) over the taonga (valued natural resources) for as long as they wished, and that the taonga would continue to be available, accessible and affordable. In return, Māori shared governance authority acknowledging the mana of both Treaty partners. The New Zealand Crown then, is under a clear constitutional and legal duty under the Treaty to ensure that Māori community mana over taonga is protected. The exercise of mana for Māori communities on the other hand includes, inter alia, the tikanga Māori right and responsibility to ensure the protection and perpetuation of natural resources for future generations.

The impacts of climate change however, compounded by the neoliberal effects of developing global economies, industry, growing populations and overconsumption of resources have led to the dramatic degradation and destruction of terrestrial and marine ecosystems globally, as well as in New Zealand, and all New Zealanders are affected negatively as a result. The resounding awareness of the importance of repairing, restoring and maintaining our environment for the future has highlighted the need to radically amend current resource management policy, practices, laws and institutions that are more collective, targeted, effective and cohesive across the New Zealand landscape and marine and coastal estate.

Ecosystem-based management (EBM) has become an appropriate international response for addressing the alarming global environmental degradation. EBM is designed and executed as an adaptive, learning-based process that applies the following common international principles:

- the connections and relationships within an ecosystem;
- the cumulative impacts that affect marine welfare;
- focus on maintaining the natural structure and function of ecosystems and their productivity;
- incorporate human use and values of ecosystems in managing the resource;
- recognise that ecosystems are dynamic and constantly changing;
- are based on a shared vision of all key participants; and
- are based on scientific knowledge, adopted by continual learning and monitoring.

The New Zealand Sustainable Seas National Science Challenge agrees with the above EBM principles and has adopted them but has adapted them to an Aotearoa New Zealand theoretical approach that fundamentally acknowledges mātauranga and tikanga Māori law hence the following Aotearoa New Zealand EBM principles:

- a co-governance and co-design structure that recognises the Māori constitutional relationship and mana whenua at all levels (whānau, hapū, iwi), together with the guiding principles of mauri, whakapapa, kaitiakitanga, mātauranga-a-iwi and mātauranga-a-hapū;
- is place and time-specific, recognising/understanding the ecosystem as a whole in all its ecological complexities and connectedness and addressing cumulative and multiple stressors;
- acknowledges humans as ecosystem components with multiple values;
- views long-term sustainability as a fundamental value, in particular maintaining values and uses for future generations;
- includes collaborative and participatory management throughout the whole process, considering all values and involving all interested parties from agencies and iwi to industries, whānau, hapū and local communities;
- has clear goals and objectives based on knowledge; and

- includes adaptive management, appropriate monitoring and acknowledgement of uncertainty.

This report focuses on analysing EBM through the incorporation of mātauranga and tikanga Māori and power sharing through Treaty partnerships over the marine and coastal estate.

The report analyses the legal enablers and challenges at this law interface over natural resources and proposes that we embrace the above EBM approach in an Aotearoa New Zealand context that could place us in a powerful position as a global leader. A similar approach occurred with the Great Bear Initiative in B.C, Canada, where power sharing and consensus building among Governments, stakeholder partners, and First Nations communities' shifted significantly. EBM could potentially allow Māori to take a similar proactive role in the governance and management of the coastal marine environment as originally envisaged in the Treaty of Waitangi. A well-executed inclusive EBM approach that enhances the principles of partnership underscored by the Treaty and that meets the diverse commitments to Indigenous peoples enunciated in the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) provides an opportunity to normalise Māori participation in sustainable resource governance and management on the world stage.

Māori environmental perspectives deserve to be fully integrated, not treated as an add-on, afterthought, or a group of matters placed in opposition to (or as grudging concessions to) a dominant mainstream New Zealand Western paradigm. To treat them as a separate theme would deny their potential for synergies with other matters including EBM over the natural resources and would partition Māori challenges from their broader systemic context.

The report then supports the adoption and adaptation of EBM within this mātauranga and tikanga Māori and mainstream New Zealand law context because they could provide an incredible opportunity for New Zealand to become a world leader in implementing EBM and tailoring any potential EBM strategy around our unique legal, political, cultural and constitutional contexts and in a manner that is compatible with who we are and who we aspire to be as a bicultural and multicultural, prosperous and environmentally sustainable, nation.

The report affirms the adoption of authentic Māori power-sharing arrangements to implement EBM through Treaty settlements, as well as the effective implementation of current mātauranga and tikanga Māori statutory provisions already included in the Resource Management Act 1991 and other important statutes such as the Conservation Act 1987, Hauraki Gulf Marine Park Act 2000, Local Government Act 2002, Māori Fisheries Act 2004, Marine and Coastal Area (Takutai Moana) Act 2011, and the Exclusive Economic Zone and Continental Shelf Act 2012. The report moreover, affirms Marine Protected Areas and regulations such as the Fisheries (Kaimoana Customary Fishing) Regulations 1998 for establishing taiāpure and mātaitai reserves, along with important initiatives such as the Hauraki Sea Change – Tai Timu Tai Pari Marine Spatial Plan 2013 and the Auckland Unitary Plan 2017, as prudent options going forward for incorporating mātauranga and tikanga Māori and Treaty partnership power sharing within an EBM context. Rangatiratanga denotes not only the mana to possess resources but to also govern and manage them in accordance with one's preferences.

To the above ends, adopting and adapting EBM constructed on international best practices and specific compelling comparative case studies such as the Great Bear Initiative and UNDRIP, but fit for purpose for Aotearoa New Zealand, are essential. The Aotearoa New Zealand approach then needs to acknowledge the Treaty partnership and to integrate mātauranga and tikanga Māori that may appear to be radical but are actually measured options to consider as possible viable ways for significantly improving sustainable resource management in Aotearoa New Zealand that are suitable and sustainable for Māori, for the environment, and for the nation.

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The Treaty, Tikanga Māori, Ecosystem-Based Management, Mainstream Law and Power Sharing for Environmental Integrity in Aotearoa New Zealand – Possible Ways Forward

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A Introduction

The British Government seems to colonize in a very empirical way: there is no investigation of the laws, usages, and customs of the natives - no attempt made to suit any laws to their particular conditions: how they can expect to succeed is to me marvellous. - Octavius Hadfield, 1847.⁶

Numerous challenges have emerged for Māori within the New Zealand mainstream legal system including in criminal justice,⁷ health,⁸ economic development,⁹ land,¹⁰ housing,¹¹ education,¹²

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⁶ Hadfield MSS, Hadfield / Vennh, 18 May 1847. Cited in Sinclair, K, *The Origin of the Māori Wars* (New Zealand University Press, 1957) at 107.

⁷ See for example, Jackson, M, *Māori and the Criminal Justice System: A New Perspective, He Whaipanga Hou*, (Study Series 18, Policy and Research Division, Department of Justice, 1987); JustSpeak, *Māori and te Criminal Justice System: A Youth Perspective*, (Position paper by JustSpeak, March 2012) and Department of Corrections, 'Trends in the offender population,' (Department of Corrections, Wellington, 2013) at 8 online at: <http://corrections.govt.nz> (Accessed October 2018).

⁸ Refer to Durie, M, *Whaiora: Māori Health Development*, (2nd Ed, Oxford University Press, 1998); Ajwani, S, Blakely, T, Robson, B, Tobias, M & Bonne, M, *Decades of Disparity: Ethnic Mortality Trends in New Zealand, 1980-1999*, (Ministry of Health and University of Otago, 2003); and the New Zealand Health and Disability Bill, (As Reported to the Health Committee: Commentary, Wellington, November 2018).

⁹ See Te Puni Kokiri, *Māori in the New Zealand Economy*, (Ministry for Māori Development, Wellington, 2002), New Zealand Institute of Economic Research, Ministry of Māori Development, *Māori Economic Development Te Ōhanga Whanaketanga Māori* (NZIER, Wellington, 2003), Nana, G, Stokes, F & Molano, W, *The Asset Base, Income Expenditure and GDP of the 2010 Māori Economy* (BERL Report, Te Puni Kokiri, Wellington, 2011) and Marriot, L & Sim, D, 'Indicators of Inequality for Māori and Pacific Peoples,' in *Journal of New Zealand Studies*, (Issue 20, 2015) at 24-50.

¹⁰ See Asher, G & Nauls, D, *Māori Land*, (Planning Paper 29, New Zealand Planning Council, Wellington, 1987), Kawharu, H, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977); Walker, R, *Ka Whawhai Tonu Matou: Struggle Without End*, (Penguin Press, 2004), and Te Puni Kokiri, *Te Ture Whenua Māori Act 1991 Review Panel: Discussion Document* (Te Puni Kokiri, Wellington, 2013).

¹¹ See Hunn, J, *Report on the Department of Māori Affairs*, (RE Owen, Wellington, 24 August 1961), Marriot, L & Sim, D, *Indicators of Inequality for Māori and Pacific People*, (Working Paper 09, Working Papers in Public Finance, Victoria Business School, Wellington, August 2014); and Te Toi Ora, *Housing and Health*, (Te Toi Ora – Public Health, Bay of Plenty District Health Board, July 2008).

¹² See Simon, J, *Nga Kura Māori: The Native Schools System, 1867-1969*, (Auckland University Press, Auckland, 1998); and Walker, R, 'Reclaiming Māori Education,' in Morgan, J & Hutchings, J, (Eds), *Decolonisation in Aotearoa: Education, Research and Practice*, (New Zealand Council for Education Research, Wellington, 2016) at 19-38.

language,¹³ culture preservation,¹⁴ and environmental partnership, participation and protection. These disturbing features of our legal system have a variety of complex causes including historic (and some would argue contemporary) colonial policies and practices, associated socio-economic difficulties, and even cultural tensions given that the New Zealand legal system was monoculturally based with little recognition of Māori norms, values, laws and institutions. Nevertheless, the Māori renaissance during the 1970s civil rights period stemmed the colonial tide and ushered in a new era of biculturalism with the resurrection of the Treaty of Waitangi, the establishment of the Waitangi Tribunal, and the recognition of tikanga Māori cultural norms within the legal system including for natural resource management.

Four decades later, the interface of mātauranga and tikanga Māori and mainstream New Zealand law today is much more accommodating and inclusive, but also complex and challenging. This report provides an extensive analysis of some of these complexities and challenges but also some of the enablers at this interface specifically over the marine and coastal estate.

The report commences with an extensive analysis of Māori cultural norms and mātauranga and tikanga Māori law followed by a brief discussion on ecosystem-based management (EBM) and its possible utility in Aotearoa New Zealand. We then analyse how tikanga Māori and EBM align and how they could apply within the resource management normative framework of Aotearoa New Zealand to stem the current trend of environmental degradation that is occurring at a rapid and alarming pace. The report moreover, discusses some of the environmental, political and cultural challenges as they apply to Māori, especially in the Resource Management Act 1991, and other key statutes such as the Conservation Act 1987, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Marine and Coastal Area (Takutai Moana) Act 2011, Exclusive Economic Zone and Continental Shelf Act 2012, and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; regulations such as the Kaimoana Customary Fisheries Regulations 1998, and initiatives such as the Auckland Unitary Plan 2017 and Hauraki Sea Change – Tai Timu Tai Pari Project 2013.

The report then briefly analyses the Canadian Great Bear Initiative as a compelling comparative model of EBM in practice that is worthy of further consideration for Aotearoa New Zealand for its credibility and efficacy. The report overall analyses whether adopting EBM and adapting tikanga Māori and other related Māori and mainstream laws and institutions may disrupt the socio-political status quo while simultaneously stemming the alarming environmental degradation tide over our whenua.

The next section then will focus on Māori culture and the efficacy of mātauranga and tikanga Māori law including over the natural environment.

¹³ See Benton, R, *Who Speaks Māori in New Zealand?* (New Zealand Council for Educational Research, Wellington, 1979); Benton, R, *The Māori Language: Dying or Reviving?* (Reprinted, New Zealand Council for Educational Research, Wellington, 1997), Williams, D, *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices*, (Waitangi Tribunal, Wellington, 2001) and Waitangi Tribunal, *Te Reo Māori Claim*, (Wai 11, Department of Justice, Wellington, 1989).

¹⁴ See Spoonley, P, *The Politics of Nostalgia: Racism and the Extreme Right in New Zealand*, (Dunmore Press, Palmerston North, 1987); McCreanor, T, 'When Racism Stepped Ashore: Antecedents of Anti-Māori discourse in New Zealand, in *New Zealand Journal of Psychology*, (Vol. 26, 1997) at 43-57 and above, n. 12, (Walker, R).

B Māori Culture and Tikanga Māori

Culture consists in those patterns relative to behavior and the products of human action that may be inherited and passed on from generation to generation independently of biological genes.¹⁵ Traditions, established patterns of behavior transmitted from generation to generation and their attached values are inherent parts of culture.¹⁶ Culture and its related traditions help establish one's sense of identity and fill the vital human need to belong. Culture is also humankind's primary adaptive mechanism.¹⁷ Culture therefore, influences how we look and dress, the foods we eat or not and how we think and act individually and collectively, as well as our perceptions of other groups.

Like the amorphous definition of culture, articulating, a worldview as *the* worldview of a culture is similarly problematic given that all cultures experience heterogeneity and diversity. Still, a worldview generally orientates the human being and their community to their world so that it is rendered understandable and their experience of it is explainable.

Canon Māori Marsden's economical definition of a culture's worldview is instructive in this respect:

Cultures pattern perceptions of reality into conceptualisations of what they perceive reality to be, of what is to be regarded as actual, probable, possible or impossible. These conceptualisations form what is termed the 'worldview' of a culture. The worldview is the central systematisation of conceptions of reality to which members of its culture assent and from which stems their value system. The worldview lies at the very heart of the culture, touching, interacting with and strongly influencing every aspect of the culture.¹⁸

A traditional Māori cultural worldview, like other Indigenous and tribal peoples, was based on the Māori cosmogony (creation stories) that provided a blueprint for life setting down innumerable precedents by which communities were guided in the governance and regulation of their day-to-day existence. Māori worldviews generally acknowledged the natural order of living things and the kaitiakitanga (stewardship) relationship to one another and to the environment. The overarching principle of balance underpinned all aspects of life and each person was an essential part of the collective. Māori worldviews are therefore ones of holism and physical and metaphysical realities where the past, the present and the future are forever interacting. The maintenance of the worldviews of life are dependent upon the maintenance of the culture and its many traditions, practices and rituals.

¹⁵ Parson, T. *Essays in Sociological Theory* (Glencoe, Illinois, 1949) at 8.

¹⁶ Kroeber, A.L., & Kluckhohn, C. *Culture: A Critical Review of Concepts and Definitions* (Harvard University Peabody Museum of American Archeology and Ethnology Papers, 1952) at 47.

¹⁷ Damen, L. *Culture Learning: The Fifth Dimension on the Language Classroom*. (Reading, MA: Addison-Wesley, 1987) at 367.

¹⁸ Royal, C.T, *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Estate of Rev. Māori Marsden, 2003) at 56. See also Royal, C, *The Purpose of Education: Perspectives Arising from Mātauranga Māori: A Discussion Paper* (Report Prepared for the Ministry of Education, Version 4, January 2007) at 38.

Importance of Values

As noted above, the Marsden definition draws the link between worldview and values. By understanding the worldview of a culture, we can come to an understanding of its values and its normative behaviour. New Zealand public institutions have acknowledged (albeit sometimes begrudgingly) the importance of understanding Māori worldviews and values. The New Zealand Environment Court for example, concluded that to understand Māori views of the landscape and how it affects Māori conduct, one must step deeply inside Māori thinking. One must see the world through Māori eyes, and assess Māori values within a Māori worldview.¹⁹ A culture cannot be understood fully in terms of the worldview of another.²⁰

The Waitangi Tribunal²¹ also concluded that ‘the values of a society, its metaphysical or spiritual beliefs and customary preferences are regularly applied in the assessment of proposals without a thought as to their origin.’²² The Tribunal added that the ‘current’ values of a community:

... are not so much to be judged as respected. We can try to change them but we cannot deny them for as Pascal said of the Christian religion, ‘the heart has its reasons, reason knows not of.’ That view alone may validate a community’s stance.²³

The importance then of acknowledging Māori culture, worldviews and values is essential in an environmental metaphysical context.

The Environmental Defence Society recently provided a link between normative legal theory and worldviews when it stated:

¹⁹ *Ngāti Hokopu ki Hokowhitu v Whakatāne District Council* (2002) 9 ELRNZ 111 (NZEnvC). Refer also to the 1921 decision of the Judicial Committee of the Privy Council, *Amodu Tijani v Secretary, Southern Nigeria*, (1921), 2 AC 399 and the USA Supreme Court decision of *Jones v Meehan* (1899) 175, US 1. In *Amodu Tijani*, the Privy Council concluded that Indigenous property rights should be conceptualized in *its own* terms, and not in terms of English rules of law [emphasis added]. In a similar manner, while referring to the interpretation of a Treaty with the native American Indians, the US Supreme Court concluded in *Jones v Meehan*: ‘A treaty between the United States and an Indian tribe must be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.’ The international law term for such an approach is the doctrine of *contra proferentum* which is Latin for ‘against the offeror’ and refers to standard contract law when a contract promise, agreement or term appears to be ambiguous, the preferred meaning is the one that works against the interests of the party who drafted the clause. See the 2008 England and Wales High Court decision *Oxonica Energy Ltd v Neuftec Ltd*, (2008) EWHC 2127 (Pat) items 88-93 and Cserne, P, *Policy Considerations in Contract Interpretation: The Contra Proferentum Rule from a Comparative Law and Economics Perspective*, (Hungarian Association for Law and Economics, 2007).

²⁰ Understanding a culture in its own terms is difficult when simply writing in English will convey meanings that do not exactly fit with the comprehension and worldviews of Māori and when the understanding of difference is sought through comparative studies. See Clifford, J, & Marcus, G, (Eds), *Writing Culture: The Poetics and Politics of Writing Ethnography* (University of California Press, 1986). Refer also to the important discourse on Kaupapa Māori methodology, led by Professor Linda Tuhiwai Smith, which emerged, inter alia, as an affirmation of Indigenous (Māori) ways of knowing and worldviews and making space for post-colonial transformation. See Smith, L, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, London, University of Otago Press, 1999); Battiste, M, *Reclaiming Indigenous Voice and Vision* (UBC Press, Vancouver, 2000) and Friere, P, *Pedagogy of the Oppressed*, (Penguin, London, 1996).

²¹ Waitangi Tribunal, *The Manukau Report* (Wai 8, Government Printer, Wellington, 1985). The Waitangi Tribunal is a permanent commission of inquiry that was established under the Treaty of Waitangi Act 1975 to make recommendations on claims brought by Māori relating to Crown actions and inactions, which allegedly breach the promises made in the Treaty of Waitangi 1840. Refer to its website: <https://www.waitangitribunal.govt.nz/> (Accessed August 2018).

²² *Ibid*, at 78.

²³ *Ibid*, at 124.

A normative legal theory, which can be described as expressing a particular *worldview*, is one that says what the law should be.²⁴

The report continued:

Normative approaches to resource management are therefore linked to ethical discussions of what is right and what is wrong.²⁵

While Māori displayed a variety of cultural patterns and traditions, Māori as a people lay claim to a set of these abstract values and ways of organising social life, ethical norms that determine what is right and what is wrong, which are distinctively Māori and refer to these ways as tikanga Māori. Tikanga is sometimes described as values, principles, ethics or norms that determine appropriate conduct, the Māori way of doing things, and ways of doing and thinking held by Māori to be just and correct. Tikanga are established by precedents and validated by more than one generation, and vary in their scale, as rules of public through to private application.

The traditional Māori legal system then was based on tikanga Māori customary law as well as kawa (rituals) which were generated by the performative social practice and acceptance as distinct from 'institutional law, which is generated from the organs of a super-ordinate authority such as Parliament.²⁶ The principles of tikanga Māori provided the jural order that embodies core ethical values and principles that reflect doing what is right, correct or appropriate. 'Tika' means correct, right or just and the suffix 'nga' transforms 'tika' into a noun thus denoting the system by which correctness, justice or rightness is maintained.²⁷ The late and highly respected Anglican Bishop, Manuhua Bennett, defined tikanga as 'doing things right, doing things the right way, and doing things for the right reasons.'²⁸ He also added:

Each generation leaves its imprint on it, and our generation and my generation and the generation before me got mixed up with Pākehās, and we have left our print on it, and that's what makes it very meaningful to us today because we let Pākehā imprint as well as Māori.²⁹

Professor Hirini Mead comprehensively described tikanga as embodying:

... a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents

²⁴ Severinsen, G and Peart, R, *Reform of the Resource Management System - The Next Generation* (Environmental Defence Society (EDS) Working Paper 1, 2018) at 34. The EDS Report cited Burton, S.J, 'Normative legal theories: The case for pluralism and balancing,' in *Iowa Law Review*, (Vol. 98, 2012-2013) 535 at 537.

²⁵ Ibid.

²⁶ Durie, E, 'Custom Law,' (Unpublished Draft Paper, Address to the New Zealand Society for Legal and Social Philosophy, January 1994) at 4.

²⁷ Williams, J, 'Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law,' in *Waikato Law Review: Taumauri*, (Vol. 21, 2013) at 2. See also Joseph, R, 'Re-Creating Space for the First Law of Aotearoa-New Zealand,' in *Waikato Law Review: Taumauri*, (Vol. 17, 2009) at 74-97.

²⁸ Cited in Benton, R, Frame, A & Meredith, P, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*, (Te Mātāhauriki Research Institute, University of Waikato, Victoria University Press, 2013) at 431.

²⁹ Ibid.

through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do.³⁰

Mead continued:

Tikanga are tools of thought and understanding. They are packages of ideas which help to organize behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us through some huge gatherings of people and some tense moments in our ceremonial life. They help us to differentiate between right and wrong in this sense have built-in ethical rules that must be observed. Sometimes tikanga help us survive.³¹

People were socialised - taught from a young age what was tika (right, correct) and they, in effect, governed themselves. Tikanga Māori then, is the traditional body of values, principles and ethical norms developed by Māori to govern themselves personally and collectively.

British Law and Tikanga Māori Contrast

In terms of contrasting British (and New Zealand) newcomer and Māori customary law, Durie highlighted the former as being rules-based Western law (literate) while the latter is governed by values to which the community generally subscribed (non-literate and performative).³² While Western culture tends to make a clear distinction between morality and the law, the Māori legal system sees values, ethics, practices and rules as being very much interrelated. Metge noted however, that 'Western laws are also values-based; the values concerned being interpreted by the law makers.'³³ Mulgan added:

All law, Pakeha as well as Māori, arises out of social norms and the need to enforce these norms within society. The ultimate source of Pakeha law is not the courts or statutes but the social values reflected by Parliament in statutes and by judges in their decisions.³⁴

Metge concluded that the main difference between Western law and Māori customary law or tikanga Māori originates in their respective sources and in the contrast between oral and written modes of communication:

Tikanga arise out of on-going community debate and practice and are communicated orally; as a result they are adapted to changing circumstances easily, quickly and without most people being consciously aware of the shift. Western laws are formulated and codified by a formal law-making body and are published in print; their amendment, while possible, is a complex and lengthy process. As a result laws often lag behind

³⁰ Mead, H, 'The Nature of Tikanga,' (Unpublished Manuscript Paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000) at 3-4.

³¹ Ibid.

³² Durie, E *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, 1994) 24 V.U.W.L.R. at 3.

³³ Metge, J, 'Commentary on Judge Durie's Custom Law,' (Unpublished Custom Law Guidelines Project Paper, 1997) at 5.

³⁴ Mulgan, R, 'Commentary on Chief Judge Durie's Custom Law Paper from the Perspective of a Pakeha Political Scientist,' (Unpublished Paper, Law Commission, 1997) at 2.

community opinion and practice; at times, however, they can be ahead and formative of it.³⁵

Although Māori values, customs and norms were largely idealised, they were 'law' in a jurisprudence context and they constituted a legal system, given that the application or neglect of customs and norms would have provoked a predictable response. Most anthropologists nowadays accept that all human societies have law (legal principles and legal processes), whether or not they have formal laws and law courts. Metge commented:

Except in times of exceptional crisis, all human societies pursue as key aims the maintenance of order, the reinforcement of accepted values and the punishment of breaches. Large-scale, complex state societies codified into a system courts and judges. Small-scale societies with simpler political structures use means which are mainly informal, implicit and serve other purposes as well.³⁶

In some circles, the study of customary law has been described as legal anthropology,³⁷ which Rouland points out is the study of law in society.³⁸ It begins from the premise that all societies have law. Rouland identified that there are over 10,000 distinct known legal systems operating in the world today. A study of those systems indicates the following generalisations can be made:

- Law emerges with the beginning of social existence;
- The complexity of law in a society will depend on the complexity or simplicity of that society; e.g. How many strata in that society, the nature of its economy etc.;
- All societies possess political power that relies to some degree on the coercive power of law, while the modern state is only present in some of these societies;
- Where the state exists, customs and ritual may have been codified or reduced to judgment by the instruments of the state e.g. the common law imported into New Zealand from Britain in 1840;
- In all societies law represents certain values and fulfils certain functions; however, the common principles of law are:
 - the search for justice; and
 - the preservation of social order and collective security;
- Law is obeyed in different societies because individuals are socialised to obey, they believe in the just nature of the law, they seek the protection of the law, or they fear sanctions associated with non-observance.³⁹

On this approach, laws are nothing more than societal rules, which have to be practically sanctioned in the here-and-now. Legal anthropology sets itself the objective of understanding

³⁵ Above, n. 33 (Metge) at 5.

³⁶ Ibid, at 2.

³⁷ Wickliffe, C, Maranui, K & Meredith, P, 'Access to Customary Law,' (Visible Justice: Evolving Access to Law, Wellington, 12 September 1999) at 1-2.

³⁸ See generally Rouland, N, *Legal Anthropology*, (The Athlone Press, London, 1994) and the discussion by R, Boast, R, 'Māori Customary Law and Land Tenure,' in Boast, R, Erueti, A, McPhail, D and Smith, N, *Māori Land Law*, (Butterworths, Wellington, 1999) at 2.

³⁹ Ibid.

these rules of human behaviour,⁴⁰ which must be designed to address wrongdoing and, inter alia, be capable of being socially and practically enforced in the interests of the community. Only then will they be considered part of the legal domain of a society.⁴¹

Tikanga Māori Legal System

The traditional Māori legal system was one that could be observed when experiencing and living life as Māori in the culture, namely in tikanga Māori and Māoritanga (Māoriness). The maintenance of traditional tikanga Māori was dependent upon the maintenance of the culture and its many practices and rituals.

A key difference between Māori and Pākehā law was that while Pākehā had formulated their views into a formal system which separated the areas of life into 'religious' or 'spiritual' and 'secular,' 'public' and 'private' domains, the world view of Māori was not formalised and no such dichotomy existed between the sacred and profane, secular and spiritual, public and private domains. Consequently, Māori considered spiritual matters to be a natural part of daily existence. All behaviour was ordered according to the demands of the spiritual world based on tikanga laws and values, which underlay all existence. Tikanga ceremonies and kawa rituals addressed to the spiritual realm preceded and accompanied every stage of life and every significant daily undertaking.

Still, history points to Māori and their culture being constantly open to evaluation and questioning in order to seek that which is tika – the right way. Maintaining tika or tikanga was the means whereby values for law and order, appropriate conduct, and social control could be identified and tikanga was fundamentally underpinned by taha wairua (spirituality).

In summary, the principles of tikanga Māori provided the traditional base for the Māori jural order and, for this report, tikanga embodied core spiritual values and principles that reflect doing what was right, correct or appropriate in a personal, collective and institutional context. Tikanga refers to the correct or proper courses of action as seen by Māori.

The Māori legal system based on tikanga Māori then governed decisions regarding, inter alia:

- leadership and governance concerning all matters including Māori land and other natural resources and matters of religion;⁴²
- intra and inter-relationships with whānau (extended families) hapū (sub-tribes), iwi (tribes/nations);⁴³
- relationships with Pākehā including missionaries and traders;⁴⁴

⁴⁰ Ibid.

⁴¹ Above, n. 37 (Wickliffe, et al) at 2.

⁴² Above, (Wickliffe, et al) and above, n. 38 (Boast) at 30-37. See also Iorns, C, 'Māori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment,' in *Widener Law Review*, (Vol. 21, 2015) at 1-55 and Iorns, C, 'Improving the Global Environmental Rule of Law by Upholding Indigenous Rights: Examples from Aotearoa New Zealand,' in *Global Journal of Comparative Law*, (Vol. 7, 2018) at 61-90;

⁴³ Above, (Boast) at 33-37, 38-41.

⁴⁴ Above, at 28-30.

- determining rights to land and other resources based on take tūpuna (discovery), take tukua (gift), take raupatu (confiscation) and ahi kaa (occupation);⁴⁵
- the exercise of kaitiakitanga⁴⁶ (stewardship) practices including the imposition of rāhui⁴⁷ (bans on the taking of resources or the entering into zones within a territory) and other similar customs and exercising responsible stewardship over the community on all matters;⁴⁸
- regulating use rights for hunting, fishing and gathering and sanctioning those who transgressed tikanga Māori or Māori rights and responsibilities (or both) in natural resources;⁴⁹
- regulating Māori citizenship rights to resources.⁵⁰

From this worldview come the cardinal customary tikanga values of:

- Whānaungatanga – maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights and obligations that follow from the individuals place in the collective group;
- Wairuatanga – acknowledging the metaphysical world - spirituality - including placating the departmental Gods respective realms,
- Mana – encompasses intrinsic spiritual authority as well as political influence, honor, status, control, and prestige of an individual and group;
- Tapu – restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose – to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects;
- Noa – free from tapu or any other restriction; liberating a person or situation from tapu restrictions, usually through karakia and water;
- Koha - gift exchange;
- Utu – maintaining reciprocal relationships and balance with nature and persons;
- Rangatiratanga – effective leadership; appreciation of the attributes of leadership;
- Manaakitanga – enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honor requires;
- Aroha – charity, generosity;
- Mauri – recognition of the life-force of persons and objects;
- Hau – respect for the vital essence of a person, place or object;
- Kaitiakitanga – stewardship and protection, often used in relation to natural resources.

⁴⁵ Erueti, A, 'Māori Customary Law and Land Tenure' in above, n. 30 (Boast), at 42-45; Asher, G & Naulls, D, *Māori Land* (New Zealand Planning Council, Wellington, 1987) at 5-6; and Kawharu, H, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 55-56.

⁴⁶ See the in depth discussion on kaitiakitanga in Rakena, M & Rakena, C, 'Tikanga Māori and the Marine Estate: Literature Review - Draft,' (Draft MIGC Report, University of Waikato, November 2018).

⁴⁷ Refer to the in depth discussion on rāhui in Daymond, Api and Rakena, C, 'Rāhui at the Interface of Tikanga and New Zealand Law - Draft,' (Draft MIGC Report, University of Waikato, November 2018).

⁴⁸ Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22, Government Printer, Wellington, 1988) at 181.

⁴⁹ Ibid, at 58-61.

⁵⁰ Above, n. 45 (Kawharu) at 39, (Erueti) at 33 - 35, (Asher and Naulls) at 7; and above, n. 26 (Durie) at 5.

Tikanga also include adherence to a proper form and process in karakia (incantations), waiata (songs), whakapapa (genealogical recitations), whaikōrero (oratory) and debate.⁵¹

Tikanga Māori then, reflects a metaphysical cosmology, which is pervasive in determining how Māori relate to landforms and all forms of life⁵² including how they relate to each other and outsiders. Their conception of the origin of all things on earth determines their ritenga (ritual), tikanga (law or customary values) and their perceptions of what is tika (right) or hē (wrong). Their law is aspirational, setting standards of best conduct based on ancestral exploits, with prescription mainly reserved for ritenga (custom) including the propitiation of hara (spiritual offences).⁵³

Compliance was largely self-enforced, driven by whakamā (shame), mataku (fear of spiritual retribution) or community acceptance, ostracism or even capital punishment for serious hara (offences). Muru (community stripping of the goods of a whānau) was also practised, as utu (redress or restoration of balance) for some aituā (misfortune) like the careless loss of life or property or some breach of social laws. Muru was usually undertaken with the full acquiescence of the whānau kua hē (the family or community in the wrong).⁵⁴ Furthermore, each iwi (tribe) and hapū (sub-tribe) had its own variation of the values and customs listed – some will have slightly different ideas as to the values that inform tikanga.

Tikanga Māori is moreover, values based and aspirational, setting desirable standards to be achieved.⁵⁵ Thus, where state law sets bottom lines, or Pākehā aspire to minimum standards of conduct below which a penalty may be imposed, tikanga Māori sets top-lines, describing outstanding performance where virtue is its own reward.

Fundamental to tikanga Māori is a conception of how Māori should relate to the Gods, land, water, all lifeforms and each other. It is a conception based on:

- Whakapapa or the physical descent of everything; and
- Wairuatanga or the spiritual connection of everything.

Justice Eddie Taihakurei Durie noted an important difference between tikanga and kawa:

Tikanga described Māori law, and kawa described ritual and procedure ... ritual and ceremony themselves were described by kawa ... [which] referred also to process and procedure of which karakia (the rites of incantation) formed part.⁵⁶

⁵¹ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25-32. See also Patterson, J, *Exploring Māori Values* (Dunmore Press, 1992) at 3-4.

⁵² Korero by Te Rangikaheke on āwhina, among other topics, as cited in Grey, G, *Polynesian Mythology* (Whitcombe & Tombs, Wellington, 1956) at 15.

⁵³ Above, n. 51 (Patterson).

⁵⁴ See the topic 'Muru' in Benton, R, Frame, A, Meredith, P, *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 254.

⁵⁵ Above, n. 51 (Mead) at 3-4.

⁵⁶ Above, n. 26 (Durie) at 3.

Karetu added a number of the significant traditional kawa or traditional performative rituals significant to Māori culture:

Before the coming of the Pākehā [European] to New Zealand... all literature in Māori was oral. Its transmission to succeeding generations was also oral and a great body of literature, which includes haka [dance], waiata [song], tauparapara [chant], karanga [chant], poroporoaki [farewell], paki waitara [stories], whakapapa [genealogy], whakatauki [proverbs] and pepeha [tribal sayings], was retained and learnt by each new generation.⁵⁷

Tikanga Adapts

It is important to also emphasise here that traditional mātauranga and tikanga Māori were neither static nor unchanging. All cultures adapt and evolve with time, space, conflict and new technology and mātauranga and tikanga Māori were certainly capable of adaptation as illustrated in the shifts in tikanga Māori religion and conversions to Christianity. While the traditional tikanga Māori principles and values were deeply embedded and enduring, they were always interpreted, differentially weighted and applied in practice in relation to particular contexts, giving ample scope for choice, flexibility and innovation. If anything can be identified as originating in and handed down from pre-European Māori society unchanged, it was not any particular social form or particular tikanga practices such as kaitiakitanga (stewardship), but the principle of creative adaptation itself.

Kaitiakitanga Evolves

To illustrate the point further, we will analyse here somewhat extensively the tikanga concept of kaitiakitanga as a key example of tikanga evolving and adapting. The tikanga Māori concept kaitiakitanga is provided for in s. 7, Resource Management Act 1991 (RMA) which provides that all persons exercising functions and powers in relation to managing the use, development and protection of natural and physical resources are required to have 'particular regard to' certain specified matters, including kaitiakitanga. Kaitiakitanga is defined in the RMA as:

The exercise of guardianship; and in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself.⁵⁸

Opposition to non-Māori claiming the status of kaitiaki and the interpretation of kaitiakitanga by the Courts resulted in 1997 an extension of kaitiakitanga to mean:

[T]he exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship.⁵⁹

Specific current statutes that refer to kaitiakitanga include:

1. Fisheries Act 1996,
2. Marine and Coastal Area (Takutai Moana) Act 2011,
3. Ngāti Kuri Claims Settlement Act 2015,

⁵⁷ Karetu, T 'Language and Protocol of the Marae', in King, M (ed) *Te Ao Hurihuri: The World Moves On* (3rd Ed)(Longman Paul Press, Auckland, 1981).

⁵⁸ Resource Management Act 1991, s. 2(1).

⁵⁹ Resource Management Amendment Act 1997, s. 2(4).

4. Nga Wai o Maniapoto (Waipa River) Act 2012,
5. Ngaa Rauru Kiihahi Claims Settlement Act 2005,
6. Ngāti Tamaoho Claims Settlement Act 2018,
7. Ngāti Koroki Kahukura Claims Settlement Act 2014,
8. Environment Canterbury (Transitional Governance Arrangements) Act 2016,
9. Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014,
10. Ngāti Pūkenga Claims Settlement Act 2017,
11. Game Animal Council Act 2013,
12. Iwi and Hapū of Te Rohe o Te Wairoa Claims Settlement Act 2018,
13. Te Aupouri Claims Settlement Act 2015,
14. Ngāti Hauā Claims Settlement Act 2014,
15. Ngati Kahu ki Whangaroa Claims Settlement Act 2017,
16. Rangitāne Tū Mai Rā (Wairarapa Tamaki nui-ā-Rua) Claims Settlement Act 2017,
17. Te Uri o Hau Claims Settlement Act 2002,
18. Ngāti Awa Claims Settlement Act 2005,
19. Environmental Reporting (Topics for Environmental Reports) Regulations 2016,
20. Ngāti Manuhiri Claims Settlement Act 2012,
21. Ngati Toa Rangatira Claims Settlement Act 2014,
22. Kaikōura (Te Tai o Marokura) Marine Management Act 2014,
23. Tapuika Claims Settlement Act 2014,
24. Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014,
25. Raukawa Claims Settlement Act 2014,
26. Waitakere Ranges Heritage Area Act 2008,
27. Maraeroa A and B Blocks Claims Settlement Act 2012, and
28. Fiordland (Te Moana o Atawhenua) Marine Management Act 2005.

The above list excludes the numerous regulations and legislative notices that include kaitiakitanga. The inclusion of such a key tikanga concept begs the question, how was kaitiakitanga referred to historically and how has the concept evolved into its current legislative definition of ‘the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship?’

To fully appreciate and even understand kaitiakitanga and how it applies to the takutai moana, one cannot simply refer to a sterile account in a dictionary that provides a meaning and derivation of words and concepts. In this respect Bentham,⁶⁰ Hart⁶¹ and Harris all concluded:

Legal concepts cannot be defined, but only described by reference to illustrative cases. ... two judges have overlooked that lesson, by trying to define Māori culture with the help of conventional dictionary definitions.⁶²

To understand the legal system of other cultures such as mātauranga and tikanga Māori, mainstream New Zealand needs to understand the legal, cultural and political contexts of Māori culture, mātauranga and tikanga Māori. The purpose of the context is to enable everyone (non-

⁶⁰ Bentham, J, *Deontology together with A Table of the Springs of Action and Article on Utilitarianism* (Vol. 1, Athlone Press, 1983) at 99.

⁶¹ Hart H, ‘Definition and Theory of Jurisprudence,’ in *LQR* (Vol. 70, 1954) at 37.

⁶² Harris D, *The Concept of Possession in English Law,* (Oxford Essays in Jurisprudence, 1968) at 69.

Māori and Māori alike) to understand the circumstances in which mātauranga and tikanga Māori arise, and to judge their credibility, legitimacy, authority and efficacy. As noted by Lord Cooke: 'In law ... context is everything.'⁶³

To this end and in the authors' opinions, the best reference to start for exploring mātauranga and tikanga Māori concepts such as kaitiakitanga is the seminal work by Benton, Frame and Meredith – *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*⁶⁴ (*Te Mātāpunenga*). Benton, Frame and Meredith provided comprehensive examples of kaitiakitanga as follows:

Kaitiakitanga. To do with being a watcher or guard; in modern usage this word has come to encapsulate an emerging ethic of guardianship or trusteeship, especially over natural resources. A combination of kai- 'agent' (from Proto Eastern Oceanic *kai 'people of a place'); tiaki guard, keep; watch for, wait for' (from Proto Eastern Polynesian tiaki to guard; wait for'); and the nominalising prefix -tanga, which denotes the place, time, circumstances or associations of the word to which it is suffixed.

The wide range of protective duties encompassed by this concept is traversed by the Entries below and elsewhere in *Te Mātāpunenga*.⁶⁵ Many Entries focus on land and the management of natural resources, but the term may also cover responsibilities in relation to artefacts, buildings and social relations.⁶⁶

The following 12 excerpts are illustrative of the long history and application of kaitiakitanga by Māori as documented in *Te Mātāpunenga*⁶⁷ which is drawn on extensively here.

[KAITIAKITANGA 01] An unnamed person from Ngati Ruanui related aspects of his life in a short piece of writing dated 21 February 1846, possibly under missionary influence. This Taranaki person was taken as a slave by Waikato and seems to have spent some time with the Methodist missionary John Whitely at Ahuahua, Kawhia, around the early 1840s. The writer recounted as a child observing the appropriate rites to ensure a plentiful kumara harvest. These rites were performed by his father as the tohunga and he was destined to assume this responsibility as kaitiaki:⁶⁸

Te Reo Māori

E ai ki te whakaaro o nga kaumatua
ka hikitia ahau e toku matua ki nga
wahi e kore ai e tae atu nga tangata noa,
nga tangata haere ki nga kauta,
e kore ratou e kai tahi mai ki ahau,
e kore ratou e haere mai ki oku moenga
he tangata noa ratou, e ai te whakaro

English translation by Te Mātāhauariki

In keeping with the elders' point of
view, I would be taken by my father
to places where common people
cannot venture, people who go in
to the cooking sheds cannot eat
with me, they cannot come to my
sleeping places, they are profane from

⁶³ *McGuire v Hastings District Council* [2001] NZRMA 557 at 561.

⁶⁴ Benton R, Frame A, and Meredith P, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*. (Wellington: Victoria University Press, 2013).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, at 105.

⁶⁷ *Ibid.*

⁶⁸ Hare Hongi (1859-1944) writing as HM Stowell, 'Reliable Ancient Māori History,' (Unpublished Manuscript, ATL gMS-929).

o toku matua, ka mea te whakaaro
o toku matua, ko ahau hei **kai tiaki**
mo te whakapakoko i muri i tona
matenga, ka mea toku matua ki ahau,
kaua koe e haere ki nga kauta, ka
mate koe i te atua rakau,
ka matakū ahau ki taua kupu,
me te kai ratou i te tangata ...

my father's viewpoint; my father's
intention is that I will be the **caretaker**
of the image after his death.
My father instructed me, do not go into
the cooking sheds, you will die by the
god stick, those words terrified me, it
seemed that they ate people...

[Translation by Te Mātāhauariki].

[KAITIAKITANGA 02] In a Native Land Court hearing into the Mataitai Block in 1866, Ngatai of Te Urikaraka claimed the piece known as Rotopiro, asserting that:⁶⁹

Pokai, Te Waiero, & Haupa are the ancestors through whom I claim this land, it was ceded to them by the ancestors of these people. The person who was the guardian (**Kaitiaki**) for this land was Hori Pokai... The whole of the Urikaraka claimed this land. Te Haupa, Te Waeoro & Hori Pokai are the old men of Te Urikaraka.

[KAITIAKITANGA 03] In the Native Land Court hearing into the Pukekura Block in 1867, Wiremu Whitu, of Ngati Kahukura living at Maungatautari, stated:⁷⁰

We there are the sole owners. Te Raihi, Te Hakiniwhi; also the persons called "Hawe kuihi you mentioned yesterday are the owners. The whole of Ngatikaukura [sic] were left as **kaitiaki** of the land. I am their putake.

[KAITIAKITANGA 04] A Māori known only as Te Wehi expresses his support in an open column (22 September 1874), *Te Waka o Te Iwi*, for the conservation of forests and the concept of kaitiakitanga:⁷¹

E whakatika rawa ana au ki taua
mahi tiaki ngaherehere. Na matou
auatikanga, no mua mai ano no o
matou tupuna a tae noa mai ki tenei
takiwa... He mea nui ki a matou
o matou ngaherehere, he taonga no
matou nga rakau; nga rata, nga matai,
nga miro, nga pukatea, nga kahikatea
nga rimu, nga totara, nga maire, me
nga tini rakau e kainga aua e te tini
o nga manu o te ngaherehere me nga
karaka me nga kiekie hei kai ma nga
tangata.. Inaianei kua kore te manu

I entirely approve of protecting and
preserving forests. It has ever been
considered an important matter
among the Māoris, from the time
of our ancestors down to the present
time... We consider our forests a rich
possession, and our trees a valuable
property, our rata trees, and our matai,
miro, pukatea, kahikatea, rimu, totara,
maire, and all other kinds of trees upon
which the birds of the forest feed, and
also the karaka and kiekie which
produce food for man...In the present

⁶⁹ *Hauraki Native Land Court* (MB 1 186) at 49.

⁷⁰ 'Enclosure A, Proceedings of Native Land Court', *AJHR*, 1873. Vol 3, G-3, p.14.

⁷¹ Te Wehi, *Te Waka o Te Iwi*, (Vol. 10, No. 19, 22 September 1874).

kua mate kua ngaro te kaka
me te kakariki ...

day the birds are but few, but the kaka
and the kakariki have almost
disappeared.

[KAITIAKITANGA 05] Te Awhiorangi is a *toki*, or adze, and is said to be one of the possessions of the Māori. It is said that in the beginning, when Tane separated Rangi the Sky and Papa the Earth, it was with this adze that he cut the sinews that bound them together. The Māori text here is a contemporary account of the finding of Te Awhiorangi by Wiremu Kauika in 1887. The adze had been lost for seven generations. The account appeared in 1888 in issue 71 of the Māori newspaper *Te Korimako*. Tomairangi, a young woman, admitted she was the one who had inadvertently come upon the sacred place where Te Awhiorangi was placed:⁷²

Ka ki atu a Tomairangi, 'Ko au,
Kahore au i mohio he wahi tapu tera.
Engari kotahi te mea i kite ai au i reira,
ano he atua, ka nui taku matakū.
Katahi ka tikina, ka tirohia, ka mohio
ratou katoa ko Te Awhiorangi. E noho
ana ano nga **Kaitiaki**, ara, nga uri o
Tutangatakinō raua ko Mokohikuarō.
Katahi ka karakiatia e Te Rangi
Whakairione. Ka mutu, katahi ka
tangohia mai e ratou, katahi te iwi ra
ka tangi; ka mutu, ka tangohia te Toki
ram ki ko mai o te kainga takoto ai.

Then the young woman Tomairangi
Said, 'I did not know that the place
was sacred, but I saw something
there, and it was like a god, and I was
very much afraid'. So they went
looked, and all of them knew that this
Te Awhiorangi. It was watched
over by **guardians**, the descendants
Then Te Rangi Whakairione chanted
incantations, and after this they
brought it away, and wept over it, then
They took the axe, and laid it down a
short distance from the settlement.

[Translation in *Te Ao Hou*]

[KAITIAKITANGA 06] In a Māori newspaper of 1878, several individuals published a notice reporting a meeting held at Te Hauke concerning the taking of eels from Lake Rotorua despite a *rāhui* (prohibition). The meeting appointed *kaitiaki* for the lake's future protection:⁷³

Whakataua ana e taua whakawa ko Renata
Kawepo, Arihi Teinahu, Watene Hapuku,
Renata Pukututu i nga **kai-tiaki**
mo taua Roto kei haere pokanoa
tetahi tangata ki taua Roto mahi ai,
maua tangata e mau enei o ratou ingoa
e whakarite kia mahia, ka haere ai te
katoa ki te mahi, ki te whakahe tetahi i muri
iho o tenei whakaotinga, ka hinga te ture kia
a ia. RENATA KAWEPO, ARIHI TEINAHU,
WATENE HAPUKU, RENATA PUKUTUTU
Te Hauke, October 23 1878.

We have appointed Renata Kawepo, Arihi
Teinahu, Watene Hapuku, and Renata
Pukututu as **guardians** of that lake. Let not
any one take fish out of that lake unless
authorised by the above named persons.
RENATA KAWEPO, ARIHI TEINAHU, WATENE
HAPUKU, RENATA PUKUTUTU,

Te Hauke, October 23, 1878. *Te Wananga*,
Vol. 5, No. 44, November 1878, p 55
[Translation in the original source].

⁷² 'Te Kitenga o Te Awhiorangi: The Finding of Te Awhiorangi', reproduced in *Te Ao Hou*, (No. 51, June 1965) at 40.

⁷³ *Te Wananga*, (Vol. 5, No. 44, 2 November 1878) at 550.

[KAITIAKITANGA 07] Under the Native Land Act 1865, titles to land blocks were in practice limited to ten owners. Parliament intended that the ten named owners would be trustees for the rest of their tribe. The issue of trustees and how this might be understood by Māori was raised during the Commission of Inquiry into the Horowhenua Block in 1896. Tamehana Te Hoia was asked whether he understood what *kaitiaki* meant in the context of trusteeship:

229. At that time you perfectly understood what *kaitiaki* meant? – I understand it means that when ten men are into an order of the Court that they are to take care of the land for the rest of the people.

230. It was the custom of the Court to put in an explanatory word to the ten names? - Yes but they were caretakers and the Court used to tell them that they were caretakers for the land.

231. You and Hunia at that time quite clearly understood what *kaitiaki* meant in regard to the land?-Yes; we heard it and understood it because the Court explained it to us.

232. And have you since heard the pakeha word 'trustee'?-Yes

233. And do you quite understand that it means the same as *kaitiaki*? - Now I know it.⁷⁴

[KAITIAKITANGA 08] Angiangi Te Hau, writing to *Te Toa Takitini*, cited a song by Eraiha composed for the opening of the Te Aitanga a Hauiti meeting house, in relating the account of the fight at Te Toka a Kuku, a fortified pā of Te Whanau Apanui. This was the last major battle between Te Whanau Apanui and the Ngāti Porou and Ngāti Kahungunu. The East Coast tribes professing Christianity decreed that no man was eaten during this conflict. However, prisoners were hanged on *whata* (platforms) in sight of the besieged:

Koira hoki te kaupapa o te waiata a Eraiha i te whakapuaretanga o te whare o Te Aitanga a Hauiti, e mea ra: "Ki a Hikataurewa, **te kaitiaki** o taku whata kao i Toka a Kuku.'

That is the theme of Eraiha's song when the house of Te Aitanga a Hauiti was opened, it was sung 'To you Hikataurewa the **caretaker** of my sweet-kumara storehouse at Toka a Kuku' (Translation by Te Mātāhauriki).⁷⁵

[KAITIAKITANGA 09] The Rev. Māori Marsden (1924-1993) of Ngāpuhi was a tohunga, scholar, writer, and philosopher of the latter part of the twentieth century. In a paper titled *Kaitiakitanga: A Definitive Introduction to the Holistic World View of the Māori* he included this description of spiritual guardians in a section defining *kaitiakitanga*:

The ancient ones (tawhito), the spiritual sons and daughters of Rangi and Papa were the Kaitiaki or guardians. Tane was the **Kaitiaki** of the forest, Tangaroa of the sea, Rongo of herbs and root crops; Hine Nui Te Po of the portals of death and so on. Different tawhito had oversight of the various departments of nature. And whilst man could harvest those resources they were duty bound to thank and propitiate the guardians of those resources. Thus the Māori made ritual acts of propitiation before embarking upon hunting, fishing, digging root crops, cutting down trees and other pursuits of a similar nature.⁷⁶

⁷⁴ Horowhenua Commission Report and Evidence, AJHR 1896, (Vol 3,G-2) at 165.

⁷⁵ *Te Toa Takitini*, (No. 9, October 1930) at 2161.

⁷⁶ Te Ahukaramū Charles Royal (ed.) *The Woven Universe: Selected Writings of Re Māori Marsden*, (Otaki, Estate of Rev. Māori Marsden, 2003) at 67.

[KAITIAKITANGA 10] George Graham (1874-1952), an Auckland lawyer, wrote newspaper and journal articles on Māori subjects. Writing on the succession rights of adopted children, he noted the mana associated with the obligation of 'care and management' (Kaitiaki) of such property as patuna or eel weirs.

Patuna: Because of the perennial value as a sure source of food supply these pa-tuna were of great economic importance. Hence the bestowal of the care and management (**manaaki-tanga**) by virtue of an ohaki gave the donee much prestige with his adopted tribe. Only he could exercise the fishing rights to such a pa-tuna or give assent to others to so do, and only to those within the tribal group.⁷⁷

[KAITIAKITANGA 11] In an appeal from a decision of the Regional Council to grant consents for an oyster farm on the foreshore at Paritata Bay, Raglan Harbour, Judge Treadwell commented on s.7, RMA directing the Tribunal to have regard to kaitiakitanga:⁷⁸

Unfortunately this expression is now defined in the Act. The definition is an all embracing definition in that it does not use the word 'includes: Had that word been used, then the general concept of **Kaitiakitanga** would have been relevant. However, this word which embraces a Māori conceptual approach now has a different meaning ascribed to it by statute, a meaning which we as the Tribunal are bound by law to and a meaning which we gather does not find favour with the appellants. Further, use of the word in the way it has been used, brings it within the statute itself as a general application causing us to comment as we did in the *Rural Management Ltd v Banks Peninsula District* (W34/94) that the concept of guardianship is now applicable to any body exercising any form of jurisdiction under this Act. Thus it would be competent for the Tribunal to inquire whether a consent authority other than tangata whenua was in fact exercising **Kaitiakitanga** in the manner envisaged by the Act.

[KAITIAKITANGA 12] The inclusion of the principle of *kaitiakitanga* in the Resource Management Act 1991 has created a statutory obligation for Local Government to consider the issue. Many Councils have reflected this requirement in their District Plans. The Wellington City Council's District Plan which details the objectives, policies and rules describes *kaitiakitanga* under 'Issues for Tangata Whenua' and provides a summary of the Māori Environmental Management System as follows:⁷⁹

2.2.3 Kaitiakitanga

Kaitiakitanga or guardianship is inextricably linked to tino rangatiratanga and is a diverse set of tikanga or practices which result in sustainable management of a resource. Kaitiakitanga/guardianship involves a broad set of practices based on a world and environmental view. The root word is tiaki, to guard or protect, which includes the ideas and principles of:

- guardianship
- care
- wise management

⁷⁷ Graham, G, 'Whangai Tamariki,' *JPS* (Vol 57, No. 276, 1948) note 10.

⁷⁸ *Greensil v Waikato Regional Council* (W17/95, 6 March 1995).

⁷⁹ Online at <https://wellington.govt.nz/your-council/plans-policies-and-bylaws/district-plan/volume-1-objectives-policies-and-rules> (Accessed September 2018).

- resource indicators, where resources themselves indicate the state of their own mauri.

The prefix *kai* denotes the agent by which tiaki is performed. A kaitiaki is the person or other agent who performs the tasks of guardianship. The addition of a suffix brings us kaitiakitanga or the practice of guardianship, and contains the assumption that guardianship is used in the Māori sense meaning those who are genealogically linked to the resource.

Kaitiakitanga is practised through:

- maintaining wahi tapu/sacred sites, wahi tupuna/ancestral sites and other sites of importance
- the management and control of fishing grounds
- good resource management
- environmental protection through formal processes such as the Waitangi Tribunal or informal ones such as protesting the dumping of raw sewage adjacent to wahi tapu/sacred sites.

Kaitiaki can be iwi, hapu, whanau and/or individuals of the region. While tribal authorities themselves may not be considered kaitiaki, they can represent kaitiaki and can help to identify them.

2.2.6 Summary of the Māori Environmental Management System

The goal of environmental management is the maintenance of mauri/life essence through the exercise of kaitiakitanga/guardianship. Sustainable management involves sustaining the mauri of natural and physical resources.

Selwyn Hayes of Ngai Tai and Whakatohea offered a critique of the statutory recognition of the concept of *kaitiakitanga*. Viewing the traditional Māori system of environmental management as holistic, Hayes states:

The ***kaitiaki...*** acts as both benefactor and beneficiary, in the sense that they protect the resource from harm while still reaping the benefits of the resource. An intrinsic part of this concept is the recognition that each generation has an inherited responsibility to protect and care for the natural world. Kaitiakitanga carried with it an obligation not only to care for the natural world, but also for each successive generation, by ensuring that a viable livelihood is passed on... Concern remains however, in regard to the use of the words 'guardianship' and 'stewardship' to define kaitiakitanga. Both terms tend to cloak the concept of kaitiakitanga in Pakeha terms of lesser importance and entirely different origins. The role of kaitiaki is considerably more significant than simply that of a guardian or steward. It is a vital component in the spiritual and cultural relationship of tangata whenua with their land.⁸⁰

Anthropologist and author Dr Merata Kawharu of Ngati Whatua, in an article developed from her doctoral thesis, argued that while the term *kaitiakitanga* is commonly used in legal and environmental contexts, particularly since the RMA, there are other dimensions and applications of the concept, especially in the social realm:

⁸⁰ Hayes, S, 'Defining Kaitiakitanga and the Resource Management Act 1991,' in *Auckland University Law Review* (Vol 8 1996-1999 No 3) at 893, at 894 and 898.

Māori philosophy emphasises that kaitiakitanga is a socio-environmental ethic. While policy-makers have commonly given attention to its relevance in bio-physical resource management, its application is primarily concerned with social relations. The customary framework for giving relevance to kaitiakitanga is whakapapa, a structural principle which weaves together a triadic relationship between human beings, their environment and the spiritual realm.⁸¹

Dr Kawharu argues that kaitiakitanga cannot be understood without regard to other key concepts, including mana (rangatiratanga), mauri, tapu, rāhui, manaaki a tuku.⁸²

Furthermore, two Te Tau Ihu informants referred specifically to kaitiakitanga in our 2018 MIGC interviews as follows:

We act as eyes and ears on behalf of the Iwi watching over environmental matters that may affect their values and concerns.⁸³

Another challenge our Iwi has is that we are becoming isolated as most of our younger generation move away in search of work so those left behind are few. So that knowledge of practicing kaitiakitanga or harvesting that kaimoana slowly disappears because you only have a handful left.⁸⁴

The above analyses of kaitiakitanga provided a somewhat modest insight into how tikanga Māori generally and kaitiakitanga specifically has evolved over time with settler contact and the dynamic changes that occurred at the interface of these two legal systems such as the Native Land Court translation of trustee for kaitiakitanga. What the analysis shows is, inter alia, how tikanga Māori is dynamic and adaptable.

A dynamic society will evolve as it encounters other societies and other knowledge systems and there will be ongoing maintenance of the customary traditional values and their relevance. Da Cunha's observations are germane in this respect:

Culture is production and not a product, we must be attentive in order to not be deceived; what we must guarantee for the future generations is not the preservation of cultural products, but the preservation of the capacity for cultural production.⁸⁵

Selbin similarly referred to agency and culture in revolution that acknowledges how culture allows for individual agency and navigation for cultural adaptation and change.⁸⁶

However, what is critical with cultural adaptation, including for tikanga Māori, is that Māori should be controlling the process of cultural change and adaptation rather than being controlled

⁸¹ Kawharu, M, 'Kaitiakitanga: A Māori Anthropological Perspective of the Māori Socio- Environmental Ethic of Resource Management,' *JPS* (Vol 109, 2000) at 366-367.

⁸² Idem.

⁸³ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

⁸⁴ Ibid.

⁸⁵ Da Cunha, M.C, 'The Case of Brazilian Indians,' in Stephens, S., (ed), *Children and the Politics of Culture*, (Princeton University Press, 1995) at 282-291.

⁸⁶ Selbin, E, 'Agency and Culture in Revolutions,' in Foran, J, (ed.), *Theorising Revolutions*, (Routledge, 1997).

by external factors. The ability to adapt and adjust while maintaining the group's cultural uniqueness, tikanga values and customary norms was crucial for Māori with settler and missionary contact. The ability for Māori to adapt their culture to fit new forms and functions was also evident with their mass conversions into the sectarian Churches, the adoption of settler technology, and the incredible economic and political development of early and mid-19th century New Zealand. The key is Māori were adapting and negotiating what was tika – the right way - as they perceived their situation according to tikanga Māori.

Perhaps a new approach to environmental management that Māori and New Zealand ought to seriously consider, negotiate, adopt and adapt within this general tikanga Māori and kaitiakitanga specific context, is ecosystem-based management which is discussed in the next section.

C Ecosystem-Based Management and Tikanga Māori

The impacts of climate change compounded by the neoliberal effects of developing global economies, industry, growing populations and overconsumption of resources have led to the dramatic degradation and destruction of terrestrial and marine ecosystems globally including in Aotearoa New Zealand. The resounding awareness of the importance of repairing and maintaining our environment for the future has highlighted the need to radically amend current resource management policy, practices, laws and institutions that are more effective, targeted to specific environmental challenges, and are cohesive across the New Zealand landscape, marine and coastal estate, as well as other jurisdictions.

Ecosystem-based management (EBM) has become a new panacea for the alarming environmental degradation occurring globally and for ocean management and is described as being:

... concerned with the processes of change within living systems and sustaining the services that healthy ecosystems produce. Ecosystem-based management is therefore designed and executed as an adaptive, learning-based process that applies the principles of scientific method.⁸⁷

Most scholars are reluctant to provide a clear definition of EBM however, instead preferring to delineate the elements and principles that comprise an ecosystemic approach. There is a certain degree of correlation across scholarship with most sources citing EBM's defining elements as including a multi-disciplinary approach as well as the inclusion of humans as ecocentric 'integral components' of ecosystems as opposed to separate anthropocentric external actors.⁸⁸

How EBM has been interpreted and applied has varied from place to place and has developed immensely from its early beginnings in the 1970s. Although the interpretations are not necessarily identical across the board, when observing scholarship broadly, we do find common

⁸⁷ Secretariat of the Convention on Biological Diversity, *The Ecosystem Approach* (Secretariat of the Convention on Biological Diversity, Montreal, QC, Canada, 2004).

⁸⁸ United Nations Environment Programme, *Ecosystem-based Management: Markers for assessing progress* (UNEP/GPA 2006).

considerations that more or less provide a sense of congruence throughout EBM practices that set EBM apart from alternative management approaches. These EBM commonalities include:

- The connections and relationships within an ecosystem;
- The cumulative impacts that affect marine welfare; and
- Multiple, simultaneous objectives that may be versatile in nature.⁸⁹

The International World Wildlife Funds⁹⁰ asserted the following six EBM principles:

- Focus on maintaining the natural structure and function of ecosystems and their productivity;
- Incorporate human use and values of ecosystems in managing the resource;
- Recognise that ecosystems are dynamic and constantly changing;
- Are based on a shared vision of all key stakeholders; and
- Are based on scientific knowledge, adopted by continual learning and monitoring.

The New Zealand Sustainable Seas National Science Challenge also has agreed EBM principles that specifically and importantly include tikanga Māori:⁹¹

- A co-governance and co-design structure that recognises the Māori constitutional relationship and mana whenua at all levels (whānau, hapū, iwi), together with the guiding principles of mauri, whakapapa, kaitiakitanga, mātauranga-a-iwi and mātauranga-a-hapū;
- Place and time-specific, recognising/understanding the ecosystem as a whole in all its ecological complexities and connectedness and addressing cumulative and multiple stressors;
- Acknowledgement of humans as ecosystem components with multiple values;
- Long-term sustainability as a fundamental value, in particular maintaining values and uses for future generations;
- Collaborative and participatory management throughout the whole process, considering all values and involving all interested parties from agencies and iwi to industries, whānau, hapū and local communities;
- Clear goals and objectives based on knowledge; and
- Adaptive management, appropriate monitoring and acknowledgement of uncertainty.⁹²

The following National Science Challenge diagram illustrates these key principles of EBM in a New Zealand context:

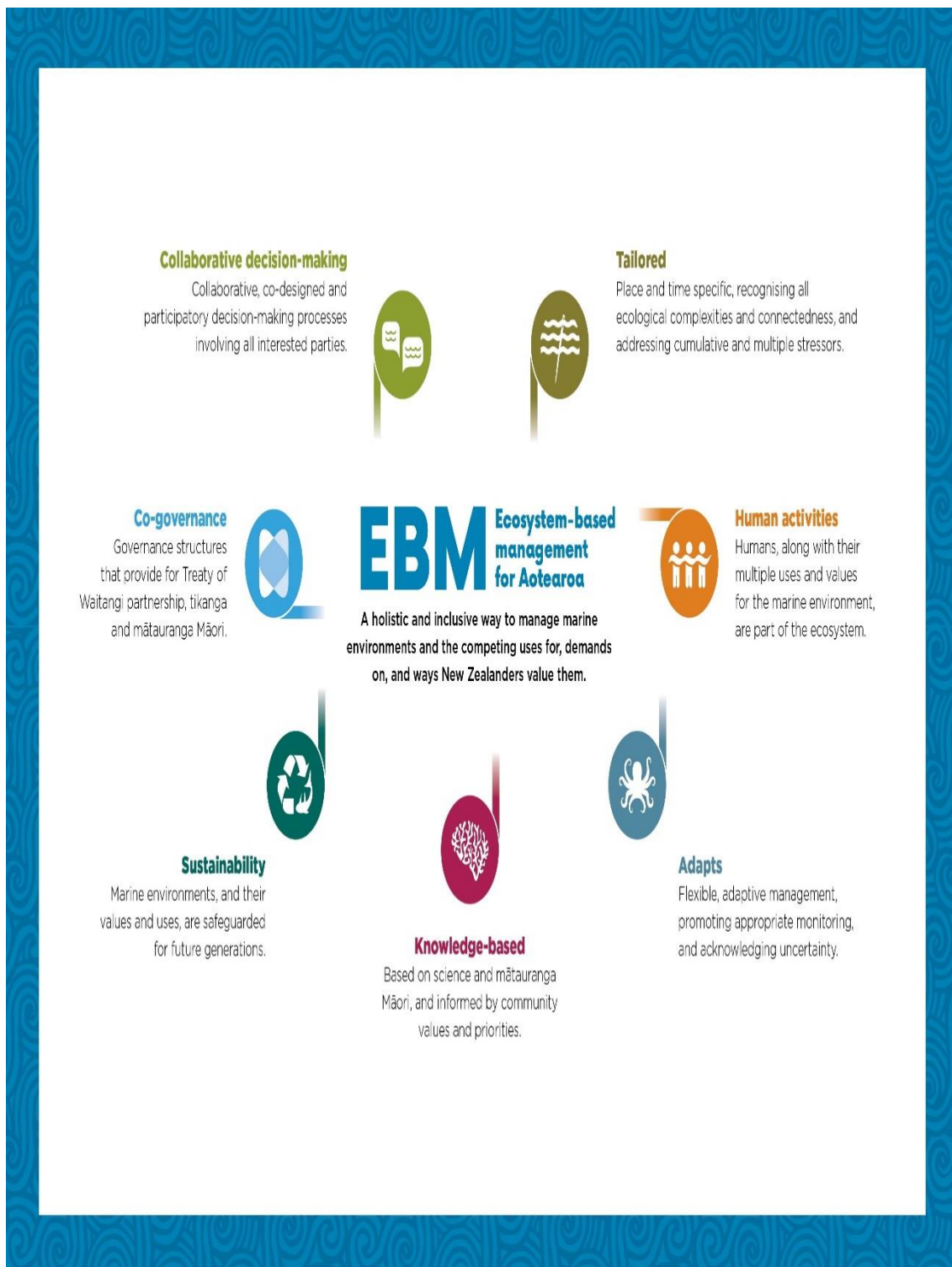
⁸⁹ McLeod, K and Leslie, H, *Ecosystem Management for the Oceans* (Island Press, Washington DC, 2009) at 325.

⁹⁰ See the World Wildlife Funds website at: http://wwf.panda.org/our_ambition/our_global_goals (Accessed November 2018).

⁹¹ Refer to <https://www.sciencelearn.org.nz/resources/2506-looking-at-ecosystem-based-management-ebm-draft> (Accessed August 2018).

⁹² See also the very useful discussion paper by Taylor, L, Te Whenua, T and Hatami, B, '*Discussion Paper: How current legislative frameworks enable customary management and ecosystem-based management in Aotearoa New Zealand – the contemporary practice of rāhui*,' (Landcare Research Contract Report LC3103, Sustainable Seas National Science Challenge: Cross Programme 1.1 Enabling EBM in the current legislative framework, April 2018) at 37; and See also Rakena, M, 'Indigenous Peoples Customary Rights to Participate in the Marine Estate Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).

National Science Challenge EBM Diagram⁹³



⁹³ National Science Challenge EBM diagram online at: https://www.sciencelearn.org.nz/system/documents/files/000/000/667/original/Sustainable_Seas_Challenge_EBM_.pdf?1507494794 (Accessed August 2018). The above diagram is the latest National Science Challenge EBM iteration.

The literature highlights that EBM represents an approach that is largely still under-developed yet boasts the flexibility to accommodate changing conditions in rapidly declining environments. EBM possesses several other advantages including flexibility - EBM does not negate different paradigms and worldviews, rather it seeks to balance those interactions. Unlike other approaches to management, EBM can be implemented concurrently with other existing management plans hence it need not be considered a cut and dry replacement to any existing scheme. Furthermore, EBM is an integrative and cooperative approach between sectors, stakeholders and users at every level of society hence EBM should be more accessible and inclusive of sections of society that would not have the ability to participate otherwise. EBM in this sense can be perceived as a democratisation of ocean management.⁹⁴

A major advantage of EBM is this flexibility in application thus being able to be applied on a case-by-case basis according to the unique needs and circumstances of a particular marine environment and its respective jurisdiction. Flexibility is partly due to the open interpretation of the varying definitions of EBM yet the flexibility must be balanced with measures to ensure consistency, fairness and equity.

The most significant challenge to implementing EBM however, is striking the elusive balance between neoliberal economic interests and environmental sustainability goals. The two objectives have often been thought to be mutually exclusive. Innovative thought however, needs to be applied to creating economic opportunities in a way that ensures the welfare and longevity of ecosystems while mitigating the trade-offs that often take place between the two goals.

Ecosystem-based management then provides a new way to conceptualise resource management in a way that redefines our relationship with our environment not just as anthropocentric users, but as ecocentric participants who are important components of the living ecosystem. Adopting such a view creates a new and unique opportunity for Aotearoa New Zealand as a nation to align our practices with our values as a bicultural, prosperous and environmentally sustainable nation built upon the foundations of the Treaty of Waitangi based on a good faith partnership between Māori and Pākehā. In this respect, there is an opportunity for New Zealand to contribute to the developing definition of EBM by adding to the existing rhetoric of authentic power sharing models at the interface of tikanga Māori and mainstream New Zealand environmental law, policy and practice where Indigenous communities are authentically represented thus normalising the presence of Indigenous peoples within an EBM context.

Aswani referred to the value of Indigenous customary practices and traditional ecological knowledge (TEK) that shapes them. Indigenous peoples have an affinity and a familiarity with the world around them that has gradually been developed over time and space. As noted above with tikanga Māori, Indigenous people's legal systems are generally non-prescriptive, non-adversarial and non-punitive and tend to be based on ecocentric metaphysical relationships within the environment. In Te Ao Māori, as noted above, this relationship between humans and nature can be understood through tikanga concepts such as whānaungatanga (inter-relationships) and whakapapa (ancestral links to the physical and metaphysical environment).

⁹⁴ Kearney, J, Berkes, F, Charles, A, Pinkerton, E and Wiber, M, 'The Role of Participatory Governance and Community-Based Management in Integrated Coastal and Ocean Management in Canada' in *Coastal Management*, (Vol. 79, No. 35, 2007) at 86. See also Berkes, F, 'Implementing Ecosystem-based Management: Evolution or Revolution?' in *Fish and Fisheries*, (Vol. 13, 2011) at 465.

Kahui and Richards even shared some similarities between tikanga Māori and EBM by asserting that prior to colonial contact, Ngāi Tahu, the largest South Island tribe, practiced EBM through kaitiakitanga among other tikanga practices but the authors did warn that such a comparison be approached cautiously.⁹⁵ Indigenous customary management practices may reflect EBM in some ways but it is also important to regard them as independent. Aswani referred to such similarities as being mere intersections that allow for hybridisation.⁹⁶ Rather than a synonymous approach to resource management, Aswani asserted that a worldview – expressed as a normative approach - that correlates harmoniously with what EBM is capable of achieving, should be the focus for Indigenous peoples hence his enthusiasm for hybridisation.⁹⁷ It is also important that Indigenous peoples retain traditional ecological knowledge and customary practices separate and distinct from EBM so that Indigenous practices are not co-opted and redefined by political processes, as is the current case in New Zealand with some tikanga Māori concepts such as kaitiakitanga for example. An acknowledgement of the distinct nature of both tikanga Māori and EBM would ensure that the role of Māori as kaitiaki for example, will not be dulled by policy, mainstream law and misinterpretation, which allows Māori to retain the mana to decide how kaitiakitanga is to be enacted within an EBM hybrid context, or conversely, how EBM is to be implemented within a kaitiakitanga framework.

Tikanga Māori then could correlate harmoniously with EBM generally by focusing on what EBM is striving to achieve, not necessarily how to achieve its ends highlighting again the flexibility of EBM. In saying that, a similar advantage of tikanga Māori is also its flexibility, which is context specific. It would appear however that given tikanga Māori focuses on relationships and the physical and metaphysical world, process is as important as the outcomes sought to maintain mana (rights, interests and responsibilities), rangatiratanga (authority) and tautuutu (reciprocity and balance).

It is important to also involve Māori as Treaty of Waitangi partners to progress EBM in New Zealand in a meaningful way. A word of caution however. Given the commercial drivers behind many Māori corporations, another challenge is whether the wairua (spirit) of tikanga Māori such as kaitiakitanga would be subdued by neoliberal economic interests. Kia tupato – be careful!

While Indigenous involvement is important, it is just as important to ensure that processes for adopting and adapting EBM are carried out in a manner that is inclusive of local Māori communities along with others who are directly invested in the sustainability, longevity and wellbeing of the local environment. EBM moreover, allows for power to be shared more with Māori and other Indigenous peoples. According to the Great Bear Initiative and the Marine Plan Partnership for the Pacific North Coast in British Columbia, Canada, power sharing and consensus, building among stakeholder partners, including First Nations communities, shifted significantly.⁹⁸ Thus, EBM could potentially allow Māori to take a more proactive role with authentic power sharing in the management of coastal marine environments as envisaged in the Treaty of Waitangi.

Placing tikanga Māori at the forefront and sharing power with Māori through authentic Treaty partnerships when implementing EBM in New Zealand would place New Zealand in a powerful

⁹⁵ Kahui, V and Richards, A, 'Lessons from Resource Management by Indigenous Māori in New Zealand: Governing the Ecosystems as a Commons,' in *Ecological Economics*, (Vol. 102, No. 1, 2014) at 1.

⁹⁶ Aswani, S, 'The way Forward with Ecosystem-based Management in Tropical Contexts: Reconciling with Existing Management Systems,' in *Marine Policy* (Vol. 36, 2012) at 1.

⁹⁷ Ibid.

⁹⁸ Refer to Price, K, Roburn, A and MacKinnon, A, 'Ecosystem-Based Management in the Great Bear Rainforest,' in *Journal of Forest Ecology and Management* (Vol. 258, 2009) at 495-503; and Tiakiwai, S, Kilgour, J and Whetu, A, 'Indigenous Perspectives of Ecosystem-Based Management and Co-governance in the Pacific Northwest: Lessons for Aotearoa,' in *AlterNative: An International Journal of Indigenous Peoples* (Vol. 13, Issue 2, 2017) at 1.

position as a global leader in carrying out transformative ecosystem-based management. A well-executed approach that magnifies the principles of good faith and partnership underscored by the Treaty of Waitangi and that meets the diverse commitments to Indigenous peoples enunciated in the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) provides an opportunity to normalise Indigenous participation in sustainable resource management on the world stage.

Furthermore, the adoption and adaption of EBM within a tikanga Māori and mainstream New Zealand law interface context creates an incredible opportunity for New Zealand to become a world leader in implementing EBM that results in the revolutionary change that Berkes⁹⁹ referred to. EBM and tikanga would also allow us to tailor any potential EBM strategy around our unique legal, political and constitutional circumstances and in a manner that is compatible with who we are and who we aspire to be as a bicultural, multicultural, prosperous and environmentally sustainable nation.

The next section will discuss in some detail the application of the Resource Management Act 1991 and how Māori have attempted to reconcile, adopt and adapt tikanga Māori and mainstream environmental law to suit their rangatiratanga aspirations within an ecosystem-based management context.

D The RMA and Māori Interests – Right to Culture Model

Compared to many other countries, New Zealand has an alleged robust regulatory process for environmental regulation of natural resources that includes important protections for mātauranga and tikanga Māori interests. Environmental law in New Zealand was comprehensively reformed in the decade from the mid-1980s which reflected a major ideological shift in approach to New Zealand's natural resources from one that was primarily exploitative to one more focused on environmental well-being. The enactment of the Environment Act 1986 established the Ministry for the Environment and the Parliamentary Commissioner for the Environment. Both organisations focused on Māori issues largely than they did historically.

In 1989, a large-scale re-organisation of the Local Government sector was undertaken that reduced the number of Local Councils with regulatory powers over planning and land use which resulted in City and District Councils. In addition, Regional Councils were established to control the key environmental parameters of water use, air quality and erosion.

The final part of this environmental law reform was the enactment of the Resource Management Act 1991 (RMA) which is the principal legislation for regulating the use of New Zealand's physical environment as noted above. Prior to the enactment of the RMA, the Crown rarely acknowledged that it had a Treaty of Waitangi-based duty to exercise stewardship over the environment, to include Māori in decision-making, nor did it pay any heed to the impact of environmental change on Māori. Consequently, Māori were pushed into the social, political and economic margins.

The enactment of the RMA was an omnibus measure designed to bring together under a single rationalised and integrated system the dozens of often single-issue and even contradictory statutes relating to the environment that existed at the time. Local Authorities would drive the

⁹⁹ Berkes, F, 'Implementing ecosystem-based Management: Evolution or Revolution?' in *Fish and Fisheries*, (Vol. 13, 2011) at 465.

new RMA system by applying the high level principles set out in Part 2 RMA (set out below)¹⁰⁰ to environmental management using locally derived District and Regional Plans that would provide for the allocation of the resources of the District or Region in accordance with the principles of the RMA and priorities set by the relevant Councils.

The Ministry for the Environment in Wellington would generate environmental policies that would filter into the system through law reform, national policy statements on matters of national environmental importance, and the judicious exercise of the Minister's call in powers regarding major projects with national implications.

The Parliamentary Commissioner for the Environment on the other hand would be an independent advocate for the environment itself with the responsibility for overseeing the effectiveness of environmental management processes and agencies and was answerable only to Parliament itself.

The enactment of the RMA in 1991 then ushered in a new era of environmental sustainability and acknowledgement of Māori interests in the environment as noted in s 5, RMA whose statutory purpose is to 'promote the sustainable management of natural and physical resources.'¹⁰¹ Sustainable management is defined in the RMA as:

... managing the 'use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while' sustaining potentiality of resources to meet future needs, safeguarding the life-supporting capacity of the ecosystems, avoiding, remedying and mitigating adverse effects on the environment.¹⁰²

Along with the purpose in s 5, there are three other (although not exclusive) key Māori sections – Part 2, RMA, ss 6, 7, and 8 – that form the completion of this compulsory and integral component of the RMA. Accordingly, all decision makers must 'recognise and provide for ... the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu [sacred sites], and other taonga [treasures]' in s. 6(e),¹⁰³ have 'particular regard' to 'kaitiakitanga' [guardianship by the tangata whenua (local Māori community)] in s. 7(a),¹⁰⁴ and to 'take into account the principles of the Treaty of Waitangi' in s. 8.¹⁰⁵

All planning and decision-making then under the RMA are subject to these sections within the purpose of the RMA which includes any recommendations made by Local Authorities under s. 171 (recommendations of local authorities).¹⁰⁶ The 2001 Judicial Committee of the Privy Council decision of *McGuire v Hastings District Council*¹⁰⁷ indicated that these sections – ss. 6, 7 and 8, RMA - override directions of later sections of the RMA including those of s. 171 when they are

¹⁰⁰ Resource Management Act 1991, s 6, 7 and 8 for example. Refer also to Sterling, R, 'Resource Management Act 1991 Legal Analysis Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).

¹⁰¹ RMA 1991, s 5(1).

¹⁰² RMA 1991, s 5(2).

¹⁰³ RMA, s 6(e).

¹⁰⁴ RMA, s 7(a).

¹⁰⁵ RMA 1991, s 8.

¹⁰⁶ RMA, s. 171(1) Recommendation by territorial authority. When considering a requirement and any submissions received, a territorial authority must, subject to Part 2 [ss. 5-8], consider the effects on the environment of allowing the requirement. *McGuire v Hastings District Council* [2001] NZRMA 557 (Judicial Committee of the Privy Council) at 567. Refer to the full text of s. 171, RMA in Appendix 2.

¹⁰⁷ *Ibid.*

in conflict.¹⁰⁸ Moreover, these sections, though not exclusively tikanga Māori per se, do contain critical elements to enable the upholding of tikanga Māori customs, laws and institutions. In recent case law, the strength of the ss. 6(e), 7(a) and 8, RMA provisions protecting Māori interests were required to be borne in mind at every stage of the planning process in the 2014 Environment Court decision of *Ngāti Makino Heritage Trust v Bay of Plenty Regional Council*. The Court concluded:

[19] We acknowledge that *McGuire v Hastings District Council* emphasised the provisions of Part 2 of the Act, sections 6, 7 and 8 - in particular the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga be recognised and provided for, and particular regard be given to kaitiakitanga and the principles of the Treaty of Waitangi.¹⁰⁹

All decision-makers then must take these sections into account when exercising functions and powers under the RMA including the important place of the 'principles' of the Treaty of Waitangi. For example, when Councils act as consenting authorities, there is a general requirement for them to take account the purpose and Part 1 RMA principles in deciding individual resource consent applications, as must the Environment Court on appeal.

These Māori interests under the RMA and other statutory provisions reflect a 'right to culture model' in that they focus on 'stewardship,' the 'relationship' of Māori with their environment, and 'effective participation' in decision-making that may impact on Māori, not 'ownership' or an authentic 'partnership' with political authority guaranteed to Māori as envisaged in Treaty of Waitangi in 1840.

Treaty of Waitangi Principles

The Treaty of Waitangi is the founding constitutional document of New Zealand society. One of New Zealand's greatest jurists, Lord Cooke of Thorndon, speaking extra-judicially concluded that the Treaty of Waitangi/Te Tiriti o Waitangi 1840 is simply the 'most important document in New Zealand's history.'¹¹⁰ The Judicial Committee of the Privy Council added that 'the Treaty records an agreement executed by the Crown and Māori, which over 150 years later is of greatest constitutional importance to New Zealand'¹¹¹ that provides Māori the opportunity to walk in both worlds.¹¹² Unfortunately, the legal status and political significance of the Treaty has ebbed and flowed through time from being a 'sacred compact'¹¹³ to a 'simple nullity',¹¹⁴ from a

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ngāti Makino Heritage Trust v Bay of Plenty Regional Council* [2014] NZEnvC 25 (New Zealand Environment Court) at [19]; upholding *McGuire v Hastings District Council*, above n 106, at 567.

¹¹⁰ Lord Cooke of Thorndon, 'Introduction,' Special Waitangi Issue,' in *New Zealand University Law Review*, (Vol. 14, 1990-1991) at 1.

¹¹¹ *New Zealand Māori Council v Attorney-General*, [1994] 1 NZLR 513 at 517 (Judicial Committee of the Privy Council).

¹¹² *Gill v Rotorua District Council* [1993] 2 NZRMA 604 (New Zealand Planning Tribunal) at 616–617.

¹¹³ See *R v Symonds* (1847) NZPCC 387 and *Kauwaeranga Judgment* (1870) Chief Judge F.D Fenton. See also Frame, A, 'Kauwaeranga Judgment,' in *Victoria University of Wellington Law Review*, (Vol. 14, 1994) at 227-229.

¹¹⁴ In *Wi Parata v Bishop of Wellington*, (1877) 3 NZ Jur (NS) 72 (SC), Prendergast CJ questioned the validity of the Treaty of Waitangi and infamously concluded: 'So far as that instrument purported to cede the sovereignty – a matter with which we are not directly concerned – it must be regarded as a simple nullity.'

‘fraud’¹¹⁵ to the ‘Māori Magna Carta,’¹¹⁶ from being part of the ‘fabric of New Zealand society’¹¹⁷ to an ‘agreement of greatest constitutional importance to New Zealand.’¹¹⁸

In 1987, a significant High Court decision by Chilwell J suggested that Māori cultural and spiritual values should be considered when determining the general interests of the public, which redefined the legal position of the Treaty of Waitangi at the time. Justice Chilwell held:

There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation to have resort to extrinsic material.¹¹⁹

To this end, the High Court was of the opinion that the Treaty was relevant despite the fact it was not part of legislation at the time. By identifying the Treaty as ‘part of the fabric of New Zealand society,’ Chilwell J also came close to regarding the Treaty as a constitutional document that could, in effect, influence all legislation. It was a major departure from the earlier views that a Treaty was a ‘simple nullity’ or that a Treaty of cession, such as the Treaty of Waitangi, could only be enforced in the Courts if it had been incorporated into municipal law.¹²⁰

Regarding the incorporation of the Treaty of Waitangi being incorporated into municipal law and as noted above, Part II, s 8, RMA explicitly states:

8. Treaty of Waitangi — In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Although there has been controversy over the interpretation of the two texts of the Treaty of Waitangi/Te Tiriti o Waitangi, the Courts and the Waitangi Tribunal have referred to the ‘principles’ of the Treaty which are referred to above in s 8, RMA. To summarise, the Treaty principles include, inter alia:¹²¹

- Duty to act in good faith and in partnership,¹²²

¹¹⁵ ‘The Treaty is a fraud’ were common slogans used during the 1970s civil rights movement protests in New Zealand that expressed the frustration and impatience of Māori land rights movements during that period. Refer to Walker, R, *Ka Whawhai Tonu Matou – Our Struggle Without End*, (Penguin, Auckland, 1990).

¹¹⁶ See McHugh, P, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, (Oxford University Press, 1992).

¹¹⁷ *Huakina Development Trust v Waikato Valley Authority* [1987] NZHC 130.

¹¹⁸ *New Zealand Māori Council v Attorney-General*, [1987] 1 NZLR 641 at 642.

¹¹⁹ *Huakina Development Trust v Waikato Valley Authority* [1987] NZHC 130; [1987] 2 NZLR 188. See also *Barton-PreScott v Director-General of Social Welfare* [1997] 3 NZLR 178, 184 where Gallen and Goddard JJ stated: ‘We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute. We also take the view that the familial organisation of one of the people’s party to the treaty must be seen as one of the taonga, the preservation of which is contemplated.’

¹²⁰ *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308.

¹²¹ See Te Puni Kokiri & Gover, K, *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*, (Te Puni Kokiri, Wellington, 2001).

¹²² *New Zealand Māori Council v Attorney-General*, [1987] 1 NZLR 641 at 642.

- Protection of Māori interests, taonga and development – the duty of the Crown is not just passive but extended to active protection of Māori people in the use of their lands and waters ‘to the fullest extent practicable’;¹²³
- The Government must be able to make informed decisions;
- To remedy past Treaty of Waitangi grievances;¹²⁴ and
- The Government has the right to govern in exchange for the exercise of rangatiratanga (control and authority) over resources as listed in Article 2 without unreasonable and undue ‘shackles.’¹²⁵

All persons exercising functions and powers then under the RMA as cited in s. 8 ‘shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).’¹²⁶ The word ‘shall’ introduces a compulsory element for consideration within decision-making of Part 2 provisions in the RMA, and as such, affect[s] the discretion [of the decision-maker].¹²⁷ The compulsion to take into account the Treaty was supported by the 2014 Supreme Court decision of *Environmental Defence Society Inc. v New Zealand King Salmon Co Ltd*.¹²⁸ The decision emphasised the obligatory requirement of s 8, RMA, for decision-makers which also encapsulates s 6(e) and s 7(a), RMA at the same time¹²⁹ and has both procedural and substantive implications.¹³⁰

An important Treaty principle noted above is the right of the Crown ‘to govern’, which means Parliament can make laws and decisions for the community.¹³¹ The right to govern then does not permit unreasonable restrictions on the right of a duly elected Government to follow its chosen policy.¹³² However, this Treaty of Waitangi right to govern was in exchange for the protection of the exercise of rangatiratanga (control and authority) over resources as listed in Article 2 of the Treaty.¹³³ Furthermore, the Treaty principles make it clear that this right to govern is a ‘duty to act reasonably and in good faith as a partnership between Pākehā (non-Māori) and Māori.’¹³⁴

Another key Treaty principle is the active duty to protect Māori interests, which includes protecting taonga (all that is treasured), and to identify the full history and evidence of taonga¹³⁵ under s 6(e), RMA.¹³⁶ The duty to protect Māori interests then is a relationship of tangata whenua with the natural resources¹³⁷ that obliges an assessment of any impact on Māori interests in the resources.¹³⁸

¹²³ Ibid, at 664.

¹²⁴ Ibid, at 664–665.

¹²⁵ Ibid, at 665–666, 716.

¹²⁶ RMA, s. 8.

¹²⁷ *Haddon v Auckland Regional Council*, [1994] NZRMA 49 at 60–61.

¹²⁸ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 (New Zealand Supreme Court of New Zealand) at 619.

¹²⁹ Ibid, at 619. See also *Hokio Trusts v Manawatu-Wanganui Regional Council* [2017] NZHC 1355 (New Zealand High Court) at [35–36].

¹³⁰ *Sustainable Matatā v Bay of Plenty Regional Council*, [2015] NZEnvC 90 at 210.

¹³¹ *New Zealand Māori Council v Attorney-General*, [1987] 1 NZLR 641 at 716.

¹³² Ibid, at 665–666.

¹³³ *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*, [2017] NZEnvC 73, at 107.

¹³⁴ *New Zealand Māori Council v Attorney-General*, [1987] 1 NZLR 641 at 642.

¹³⁵ *Sustainable Matatā v Bay of Plenty Regional Council*, [2015] NZEnvC 90

¹³⁶ *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 (New Zealand Environment Court) at [466].

¹³⁷ *Ngāti Ruahine v Bay of Plenty Regional Council*, [2012] NZHC 2407 at 72–74.

¹³⁸ *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*, [2017] NZEnvC 73, at 107.

Consultation is another important Treaty of Waitangi principle where the Government, inter alia, 'must make sure that it was [is] informed in making decisions relating to the Treaty.'¹³⁹ Furthermore, when drafting District and Regional Plans, Councils must give effect to the Part 2, RMA operational mechanisms by consulting with tangata whenua and by taking into account the iwi's own planning documents – iwi management plans – in preparing those plans.

Substantively, consultation requires being fully informed by having full and timely information¹⁴⁰ and being informed:

... sufficiently as to the full implications for the hapū of what exactly was proposed, or of how to give effect to some of the hapu's customary practices, early enough in the decision-making process.¹⁴¹

Procedurally, consultation requires a procedurally active inquiry. Consultation then is not merely passing on information for the iwi/hapū 'to deal with' - a passive action - but is a high test or an active inquiry with Treaty partners.¹⁴² Consultation as a Treaty principle requires the fulfilment of both the substantive and procedural elements. All Local Authorities and even a public listed company 'cannot purport that it has no obligation to consider tangata whenua issues or to consult with the relevant parties'¹⁴³ which inaction is 'hurtful and disrespecting of rangatiratanga.'¹⁴⁴ Performing consultation in such an active manner would indicate that the Crown and Local Authorities are fulfilling their duty to act reasonably and in good faith.

The Treaty principle of remedying past grievances is another important principle negotiated by the National Government but it is not a responsibility of Local Authorities and hence does not come within the scope of s 8, RMA.¹⁴⁵ Section 8 does not grant power to remedy Treaty claims, however, as noted in the 2012 Environment Court decision of *Norris v Northland Regional Council*¹⁴⁶:

[10] A hapū or iwi's history, traditions and relationship with a site, how it was acquired or lost by the iwi or hapū, and the kaitiaki role the iwi or hapū play in relation to a site, are matters that we assume may be canvassed in support of a Treaty claim and can also be explored in the RMA process.¹⁴⁷

Although the RMA is not an avenue to remedy Treaty claims, associated with those claims are challenges that Local Authorities can recognise and inevitably will provide for through Treaty settlements.

¹³⁹ Hayward, J, 'Flowing from the Treaty's Words: The Principles of the Treaty of Waitangi,' in Hayward, J, & Wheen, N, (Eds), *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi*, (Bridget Williams Books, Wellington, 2004) at 29-40.

¹⁴⁰ *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*, [2017] NZEnvC 73, at 108–111.

¹⁴¹ *Haddon v Auckland Regional Council*, [1994] NZRMA 49 at 61.

¹⁴² *Gill v Rotorua District Council* [1993] 2 NZRMA 604 (New Zealand Planning Tribunal) at 616–617.

¹⁴³ *Ngāti Ruahine v Bay of Plenty Regional Council*, [2012] NZHC 2407.

¹⁴⁴ At [27].

¹⁴⁵ *Hauraki Māori Trust Board v Waikato Regional Council* (High Court Auckland CIV-2003-485-999, 3 April 2004) at [28].

¹⁴⁶ *Norris v Northland Regional Council* [2012] NZEnvC 124 (New Zealand Environment Court) at [8–12].

¹⁴⁷ Above.

To carry the point further, the High Court recently in its 2017 decision of *Attorney-General v The Trustees of the Motiti Rohe Moana Trust and New Zealand Māori Council*¹⁴⁸ afforded Regional Councils and the Minister of Conservation authority to:

... exercise functions in respect of the coastal marine area to manage the effects of fishing not directly related to the biological sustainability of the aquatic environment as a resource for fishing needs, but only to the extent strictly necessary to manage those effects ... [and] a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for Māori interests under the Fisheries Act 1996.¹⁴⁹

The Department of Conservation is responsible for the New Zealand Coastal Policy Statement, the Ministry for Primary Industries is responsible for administration and protection of fisheries, and Regional Authorities deal with freshwater, land, air and coastal waters. This devolution of powers to Regional Authorities then may indicate the Government's recognition that Local Authorities may be better placed to address complex, ecosystem-based challenges such as poor terrestrial management that results in loss of biodiversity and poor ecosystem health across land, freshwater and coastal boundaries. The High Court decision may also open an opportunity for the Government and its agencies to share or even transfer its powers with local Māori authorities where relevant and appropriate such as ss. 33, 36B and 188, RMA (discussed briefly below).¹⁵⁰

A further seminal common law development impacting on Treaty of Waitangi principles was the recent 2017 Supreme Court decision of *Proprietors of Wakatu v Attorney-General*.¹⁵¹ Although not a Treaty claim per se, the decision was a claim about the rights of Māori land owners to hold the Crown to account in circumstances where the Crown agreed to act on their behalf in fulfilling the terms of an early land purchase contract in New Zealand. The Supreme Court determined that the Crown had a legal fiduciary duty to Māori owners to act on their behalf in fulfilling the terms of the purchase contract and that it failed to act in their best interests as any trustee of property or land is required to do.

The Crown argued that it did not have such a legal fiduciary duty in relation to the Māori landowners and that it was acting in its Governmental capacity. And in that capacity, the Government was acting in a manner similar to the rationale of Prendergast CJ in the infamous 1877 *Wi Parata v Bishop of Wellington*¹⁵² decision of the Supreme Court where he held that 'the Crown is the sole arbiter of its own justice' when acting in its Governmental capacity. The Crown therefore had no legal duties that applied to itself and it could acquit itself. The Supreme Court disagreed on the basis that the Crown was acting on behalf of Māori landowners in relation to their land and was then acting as a trustee with concomitant fiduciary duties. The decision will increase the scope of Treaty claims by Māori landowners and alleged Crown breaches of fiduciary duties although the full implications of the decision are still evolving.

The above Treaty of Waitangi principles as enunciated by the New Zealand Courts and the Waitangi Tribunal along with the specific Māori provisions within the RMA appear then to provide sufficient legal protection of tikanga Māori rights, responsibilities and interests as well as plenty of scope for Māori participation in environmental natural resource governance and management.

¹⁴⁸ *Attorney-General v The Trustees of the Motiti Rohe Moana Trust and New Zealand Māori Council* [2017] NZHC 1429.

¹⁴⁹ *Ibid.*

¹⁵⁰ Refer to Appendix 2 for the texts of ss. 33, 36B and 188, RMA.

¹⁵¹ [2017] NZSC 17 (Supreme Court of New Zealand).

¹⁵² *Wi Parata v Bishop of Wellington*, (1877) 3 NZ Jur (NS) 72 (SC)

RMA Contradictory Objectives

Ironically, the main overriding political intent of the RMA has been to reduce regulation of land and water resources in order to expand agricultural exports and to increase value in the global economy.¹⁵³ Such a contradiction has actually weakened the interpretation and application of the legislation enabling primary production without sufficiently protecting ecosystems, or associated Māori and other cultural values, on which it depends.¹⁵⁴

Regional and Territorial Councils also have legislated responsibilities under the Local Government Act 2002 (LGA) to provide for democratic and effective Local Government that recognises the diversity of New Zealand communities.¹⁵⁵ A 'quadruple bottom line' approach to local resource management is supposed to ensure attention to cultural wellbeing alongside economic, social and environmental well-being which policy reflects responses to the historic marginalisation of Māori from Central and Local Government planning and legislation.¹⁵⁶

Both the RMA and LGA are potentially enabling statutes for Māori, requiring decision-makers to 'consider' the Treaty principles of partnership, participation and protection. The RMA provides specific recognition of Māori rights and interests including special regard to Māori in Part 2. The Part 2, RMA sections for the first time enabled explicit recognition for cultural values in statutory planning processes, not only tangible aspects but also 'the relationship of Māori and their culture and traditions with natural resources' which emphasises the need to consider Māori world views.

Elusive Balancing Acts

Effectively the Part 2 RMA Māori provisions are a balancing exercise that are ultimately subordinate to the RMA's purpose. The incorporation of Māori values to fit the Crown's agenda to expand agricultural exports and to increase the nation's competitive value in the global economy means that in practice, Māori perspectives are a 'consideration' to be weighed alongside other considerations, rather than a fundamental feature of the planning system.¹⁵⁷

Recent case law highlights this challenge in *Hokio Trust v Manawatu-Wanganui Regional Council*¹⁵⁸ which was an appeal against an Environment Court decision dismissing an appeal from Independent Commissioners for the Manawatu-Wanganui Regional Council granting a resource consents for restoration activities at Lake Horowhenua. The appeal concerned the treatment of evidence by the Environment Court which was claimed to breach s. 8, RMA provisions of 'taking into account' the principles of the Treaty of Waitangi.

¹⁵³ Swaffield, S, 'Sustainable practices in New Zealand agricultural landscapes under an open market policy regime,' in *Landscape Research*, (Vol. 39, Issue 2, 2014) at 190-204. Online at <https://doi.org/10.1080/01426397.2013.809058> (Accessed August 2018).

¹⁵⁴ Memon, P.A & Kirk, N, 'The Role of Indigenous Māori People in Collaborative Water Governance in Aotearoa/New Zealand,' in *The Journal of Environmental Planning and Management*, (Vol. 55, No. 7, 2012) at 941-959.

¹⁵⁵ Refer to Dr Rogena Sterling's literature review on Co-Governance Mechanisms in the Local Government Act 2002 and Resource Management Act 1991 - Draft (MIGC Literature review, University of Waikato, November 2018).

¹⁵⁶ Rickys, P, 'Local Government Reform and Māori 1988-2002,' (Te Ngutu o Te Ika Publications, Auckland, 2004).

¹⁵⁷ White, P, 'The New Zealand Māori Council claim to the Waitangi Tribunal and Water Management in New Zealand,' in *New Zealand Science Review*, (Vol. 69, 2012)

¹⁵⁸ [2017] NZHC 1081.

The appeal was dismissed by the High Court who held that the Environment Court had appropriately ‘not only acknowledged but had ‘given weight to’ the Hokio Trust’s evidence particularly regarding the risk created by weed harvesting (one of the proposed activities) to whānau kaitiakitanga values and wāhi tapu. Evidence in favour of the proposal was given by parties representing other Māori interests in the area, as well as by non-Māori parties.

The High Court held that the Environment Court had taken the correct approach in giving equal priority to all of the parties’ evidence, and in directing its evaluation of the proposal to determining whether the aim to improve the ecological and cultural health of the ecosystem of Lake Horowhenua was achieved in line with the sustainable management purpose of the RMA.¹⁵⁹

The Environment Court held that the weight of expert evidence supported a conclusion that the proposed activities would have no adverse effects that were more than minor.¹⁶⁰ In applying the correct legal test, the Environment Court fulfilled its procedural obligations under s. 8, RMA.¹⁶¹ The High Court concluded that the correct approach regarding s. 8, RMA is that ‘the Environment Court is not properly concerned with giving effect to the Treaty, but taking into account the principles of the Treaty.’¹⁶²

The High Court therefore signified the impact of a legislative regime that focuses on adverse effects as well as the impact of weak statutory language specifically regarding the Treaty of Waitangi. Consequently, although s. 8, RMA should provide an avenue to counter other weaknesses in the RMA such as the need for adverse effects, it has not done so and is therefore a severe limitation on acknowledging and strengthening the constitutional Treaty partnership of Māori thereby rendering the RMA weak at least for protecting Māori interests. Hence the elusive statutory balance is not tipped to favour the other Treaty partner but to simply ‘take into account the Treaty principles’ not giving effect to the Treaty.

Further limitations for Māori involvement in the application of ss. 6(e), 7(a) and 8, RMA, include the absence of compulsion to accord weight to Māori rights and interests and to provide meaningful outcomes for Māori and the lack of incentives to trigger s. 33 RMA transfer of powers to Māori authorities¹⁶³ – which it appears has not been implemented.¹⁶⁴ Furthermore, s. 36B RMA joint management agreements have seldom been used and Māori authorities have similarly not triggered the s. 188,¹⁶⁵ RMA provision that enables iwi to be heritage management authorities. Other limitations include the lack of capacity building and funding initiatives and the lack of Central Government direction given there is currently no consistent direction for Māori to engage in marine and coastal areas or across all environmental management using Māori and EBM frameworks and systems. Accordingly, critics argue that current New Zealand legislation cannot provide for an authentic shared bicultural partnership to natural resource governance

¹⁵⁹ Ibid, at 59.

¹⁶⁰ Ibid, at 74.

¹⁶¹ Ibid, at 63.

¹⁶² Ibid, at 75-76.

¹⁶³ Refer to Appendix 2 for the text of s. 36B, RMA.

¹⁶⁴ The Waitangi Tribunal noted that s.33 RMA has never been invoked in favour of iwi despite several attempts to do so and it appears there is little iwi can do to achieve its use. See Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, (Wai 262, Legislation Direct, Wellington, 2011) at 113. Ngati Porou is currently trying to invoke s.33, RMA in Gisborne but there is a lengthy process to follow. Refer to footnote 178.

¹⁶⁵ Refer to Appendix 2 for the text of s. 188, RMA.

and management or even an opportunity for Māori to manage resources in a manner consistent with mātauranga and tikanga Māori cultural practices and EBM.¹⁶⁶

The current legislative framework recognition of key tikanga Māori cultural concepts and values under the RMA and other statutes is still important. However, the balance often tips against Māori interests. Furthermore, the Treaty of Waitangi partnership and Māori concepts are often adopted and adapted from Māori traditional forms and foundations based on mātauranga and tikanga Māori, which means that Māori concepts in legislation are often ‘lost in translation’ by being wrenched out of cultural context and are in effect redefined within the legal system.¹⁶⁷ The cultural and political contexts are crucial to understanding the cultural concept and its appropriate application in resource management as noted earlier by Lord Cooke of Thorndon who observed: ‘In law, context is everything.’¹⁶⁸

One of the main challenges then of integrating the principles of the Treaty of Waitangi and specific tikanga Māori concepts into legislation such as kaitiakitanga, rāhui, wāhi tapu and mana whenua is that it depends on the decision-makers – Independent RMA Commissioners, Local and Regional Councils, the Environment and High Court, and others – who often have little to no expertise or understanding of, or connection with, mātauranga and tikanga Māori.

Despite good intentions and cultural sensitivities, the incorporation of mātauranga and tikanga Māori comes with its own challenges and limitations. Legislative incorporation requires interpretation of mātauranga and tikanga Māori that is mātauranga and tikanga Māori consistent and in cultural context. Such an approach was articulated in the 2002 Environment Court decision of *Ngāti Hokopu ki Hokowhitu v Whakatāne District Council*,¹⁶⁹ where the Court concluded that ‘the meaning and sense of a Māori value should primarily be given by Māori.’¹⁷⁰

The Court added that ‘assessments should be made within the Māori world from where they came.’¹⁷¹ The Court reflected on the requirement to consider the relationships of Māori with the natural environment and the need to consider evidence in the form of facts and concluded:

Since section 6(e), RMA does refer to Māori culture and traditions; we have to be careful not to impose inappropriate ‘Western concepts.’ The appellants expressed concerns about that in various ways. Implicit in much of the appellants’ evidence is the idea that each culture can only be explained in its own terms. This depends on the relativistic notion that classifications in any one language or culture are not determined by how the world does not come quietly wrapped up in facts. Facts are the consequences of ways in which we represent the world.¹⁷²

In addition, Māori are not always empowered to act in such a way and in many cases are given little opportunity, if any, to influence decisions in a meaningful way. Where Māori are able to provide assistance, that input is often procedural meaning they may have little influence over the substantive outcome of how something will be governed or managed which reflects the right to culture model.

¹⁶⁶ Ibid.

¹⁶⁷ See Joseph, R, ‘Legal Challenges at the interface of Māori Custom and State regulatory systems: Wāhi Tapu,’ in *Yearbook of New Zealand Jurisprudence*, (Vol. 14, No. 13-14, 2010-2011) at

¹⁶⁸ Quote by Lord Steyn in *McGuire v Hastings District Council* [2001] UKPC 43 (Judicial Committee of the Privy Council); [2001] NZRMA 557 at 561.

¹⁶⁹ (2002) ELRNZ 111 (EnvC) at 46.

¹⁷⁰ Ibid, at 46 and 53.

¹⁷¹ Idem.

¹⁷² Idem.

Consequently, through the legal recognition of mātauranga and tikanga Māori, integrated policy and legislation have the potential to create space for mātauranga and tikanga Māori knowledge, customary practices and involvement in resource management typically denied in other post-settler nations. Nevertheless, an inherent contradiction exists in the current New Zealand resource management policy and legislative regime whereby policy and regulatory systems recognise Māori rights, interests, values and concepts but they are still not adequately provided for or are given effect to in practice. Practical implementation is a key challenge.

Recently, the Environmental Defence Society even noted:

Māori matters are not simply things the system has to address or ‘do’, akin to legislative design or consenting mechanisms. They need to pervade all tiers of the system – norms, system architecture and mechanisms – so that Māori perspectives are fully integrated, not treated as an add-on, afterthought, or a group of matters placed in opposition to (or as grudging concessions to) a dominant Western paradigm. To treat them as a separate theme would deny their potential for synergies with other matters and partition Māori issues from their broader systemic context. That said, and for the same reasons, they must receive particularly close attention within themes.¹⁷³

These mātauranga and tikanga Māori interests then reflect a right to culture model in that they are not aimed at granting political authority to Māori but rather focus on stewardship, the ‘relationship’ of Māori with their environment, and effective participation in decision-making that may impact on them.¹⁷⁴ As a result of these provisions, when a Local Council draws up development plans or grants resource consents to carry out some activity, it must first consider the implications of the plan and consent on the tangata whenua’s tikanga customary law as it relates to kaitiakitanga for example.¹⁷⁵

However, these interests do not appear to be advancing the interests of Māori. As the Waitangi Tribunal has stated many times, iwi and hapū feel side-lined by the RMA consent process.¹⁷⁶ Part of the challenge lies with the weak statutory directions to ‘take into account’ the principles of the Treaty, as noted above, and the fact that Māori groups are one of many stakeholders and Māori interests are one of several other competing interests including the overall commitment to sustainable development. Additionally, s. 36A, RMA¹⁷⁷ explicitly states that neither an applicant nor a local authority has a duty to consult any person (including Māori).

The RMA was amended in 2005 to strengthen the role for Māori by creating an obligation to consult with tangata whenua in the preparation of a proposed policy statement or plan if Māori may be affected by the policy or plan. A further amendment provided for public authorities and iwi to enter into ‘joint management agreements’ (JMAs) where decisions made have the legal effect of a decision of the Local Authority under s.36B, RMA.¹⁷⁸ But JMAs have only been used

¹⁷³ Above, n. 24, (Severinsen) at 23.

¹⁷⁴ Resource Management Act 1991, s 6, 7 and 8.

¹⁷⁵ Above, n. 46, (Rakena).

¹⁷⁶ Above, n. 164 (Waitangi Tribunal, *Ko Aotearoa Tenei*). See also, Ruru, J, ‘Indigenous restitution in settling water claims: The developing cultural and commercial redress opportunities in Aotearoa,’ in *New Zealand Pacific Rim Law & Policy Journal*, (Vol. 22, No. 2, March, 2013) at 311-342. Ruru noted in 2013 that: ‘Since the enactment of the RMA in 1991, there have been about twenty instances where Māori, as objectors, have appealed council decisions that approved resource consents to take water, discharge wastewater into water, or dam water.’

¹⁷⁷ Refer to Appendix 2 for the text of s. 36A, RMA

¹⁷⁸ See ss. 2 and 36B, Resource Management Act 1991. See for example the agreement between Taupo District Council and Ngāti Tuwharetoa; at <http://www.taupodc.govt.nz/our-council/policies-plans-and-bylaws/joint-management-agreements/Documents/Joint-Management-Agreement.pdf> (Accessed August 2018). Some iwi have entered into

on a few occasions. In addition, Local Authorities now must have regard to iwi management plans in the preparation of their own plans and policy statements. Regional policy statements must set out the resource management issues of significance to the region's iwi authorities. There is also provision under the RMA for local authorities to transfer functions to iwi authorities in s. 33, RMA as noted earlier, after following a requirement of special consultation under the Local Government Act 2002.

Despite the recognition of the principles of the Treaty and mātauranga and tikanga Māori in the RMA and other legislation, the introduction of enhanced enabling consultation requirements, and Māori participation and provision for the consideration of iwi management plans, the current RMA regime has not empowered iwi. A major challenge, for example, has been the weak impact of iwi management plans. Regional or District plans are not required to be consistent with iwi management plans. There is no requirement to consider iwi management plans when determining whether to grant resource consents. The RMA is also silent as to the purpose and content of iwi management plans. Consequently, iwi management plans tend to be uneven in style and content. Furthermore, iwi management plan quality depends on the extent to which iwi have the resources 'to get legal and technical advice, consult on and develop the plan, and to engage in RMA processes,'¹⁷⁹ as one Te Tau Ihu informant noted:

We are under resourced so we have pittance of a settlement, and now in that tiny settlement, we are supposed to provide an environmental plan and comment on annual plans, 10 year plans, water plans and coastal marine plans! Well if Iwi hired people with that kind of expertise, our settlement money would be gone in just a few weeks.¹⁸⁰

Māori communities often struggle to keep up with the paperwork associated with resource consent applications and iwi management plans which the Waitangi Tribunal commented on:

... how time consuming - and protracted - the processes can be. Indeed ... for some claimant groups, and for those members who shoulder the responsibility, the task of staying abreast ... so that taonga can be protected is relentless. ... All the claimants we heard from were volunteers for their hapū. The sheer size of the files that they had assembled about particular projects to which they had objected provided some indication of the extent of the work required of them, which was done in their own time.¹⁸¹

Another Te Tau Ihu informant asserted:

Legally, we rely on the Treaty and RMA to enforce our legal rights. However, we don't have much resources to meet our needs. We use a representative from our trust to

joint management agreements. Ngāti Porou recently entered into such an agreement with the Gisborne District Council in relation to the Waiapu River. The purpose of the JMA is 'to provide a mechanism for Ngā Hapū o Ngāti Porou to share in RMA decision-making ... within the Waiapu Catchment.' The 'broader aspiration of Ngāti Porou hapū is to move to a transfer of powers under s. 33 of the Resource Management Act 1991, within five years.' See www.gdc.govt.nz/assets/Uploads/15-346-X1-Appendix-reduced.pdf (Accessed August 2018).

¹⁷⁹ Above, n. 164, (*Ko Aotearoa Tēnei*) at 254.

¹⁸⁰ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

¹⁸¹ See, Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, Legislation Direct, Wellington, 2011) at 94. Similar challenges arise with all other resources including land, forestry, fisheries, flora and fauna, the economy, health, housing, education, the coastal marine estate and so on.

work with Local Council and science organisations to ensure our interests are protected in the marine coastal space. In the past, Māori didn't have a say and as Council's seemed to have it all, they did not take Māori seriously. Council are now getting better, as more power sharing is happening. Iwi are able to protect a lot more.¹⁸²

On the other hand, another Te Tau Ihu informant opined:

At no stage did MPI [the Ministry for Primary Industries] do any consultation on behalf of Iwi when we were doing our settlements, and whenever we applied for anything in the marine space, we never got assistance from MPI that a certain foreign company gets, so not only are we disappointed that the Treaty obligations were overlooked, but he's gone straight to put resources from MPI into assisting a foreign owned company. That makes absolutely no sense to us.¹⁸³

Another te Tau Ihu informant referred to some of the bureaucratic governance challenges of working with Councils:

We've always had a voice on the Council and the efficiency of that relationship varies but we don't have to fight for it like other organisations. Do they get it wrong? Sure. Do they need to be educated on that? Sure and we should do that. However, it's become inefficient. Why? Because we put a provision in the settlement Act about RMA stuff, and if you interpret that literally, they are doing their job by sending us every stupid consent that has no real significance for us. So we've got to redefine the things and say more precisely exactly what we want to see.¹⁸⁴

The Waitangi Tribunal has even called upon the Ministry for the Environment to 'step up with funding and expertise, to ensure that [Māori] are not prevented from exercising their proper role by a lack of resources or technical skills'¹⁸⁵ which a Te Tau Ihu informant agreed with who stated:

We simply don't have the capacity or expertise to manage all the complex Government processes so there should be some provision within Government to provide resources for Iwi to feed into the planning and resource management processes because at the moment, we have to do it all ourselves out of our settlement. And the settlement wasn't for carrying out obligations of the Government so there's some confusion there. The settlements were for Article 2, but the resource work is an Article 3 issue. Therefore, it should be the responsibility of the Government to resource that, and that's been overlooked.¹⁸⁶

Another major limitation for Māori then is a lack of capacity and a lack of sufficient resources and funding.

¹⁸² MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Above, n. 181, at 283.

¹⁸⁶ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

Mana Whakahono a Rohe – Iwi Participation Arrangements

Due to the shortcomings noted above, in December 2015, the Government introduced a proposal to amend the RMA in the Resource Management Amendment Bill 2015 in December that year and included in the suite of changes the notion of Mana Whakahono a Rohe (MWAR) ‘iwi participation arrangements’ (IPAs).¹⁸⁷ Parliament subsequently enacted the Resource Legislation Amendment Act on 6 April 2017. The amendment offers the potential to improve Treaty partnerships with Māori communities given IPAs are intended to strengthen current iwi management plans.¹⁸⁸ The amendment further aims to provide more meaningful and effective iwi participation in resource management processes by placing a statutory obligation on Local Authorities ‘to invite iwi to form an iwi participation arrangement.’¹⁸⁹ The proposal provides a statutory process for negotiation between an iwi and Local Authorities as well as a mechanism for reviewing and monitoring of that relationship. It is hoped that by introducing a compulsory requirement to invite iwi to establish IPAs, the amendment will improve consistency in iwi engagement in plans development.¹⁹⁰

Since the Resource Management Legislation Bill was introduced to Parliament, an alternative to IPAs was proposed in relation to the management of freshwater resources.¹⁹¹ The Ministry for the Environment (MFE) *Next Steps for Fresh Water: Consultation Document* (February 2016) proposed the new mechanism of Mana Whakahono a Rohe (MWAR), which shares many similarities with IPAs hence the inclusion of Mana Whakahono a Rohe in s. 58M, RMA.¹⁹² However, unlike the IPA process, the MWaR process is iwi-initiated.¹⁹³ In addition, the scope of MWaR in 2016 went further than participation in plan-making processes to include ‘consenting, appointment of committees, monitoring and enforcement, bylaws and regulations and other Council statutory responsibilities.’¹⁹⁴

The most recent MFE document in 2018 however, barely mentioned iwi and hapū except as stakeholders with Regional Councils and other practitioners.¹⁹⁵ The document provides guidance for stakeholders involved in the freshwater planning process, which gives effect to the limit-setting requirements of the National Policy Statement for Freshwater Management 2014. The document was amended in August 2017 but did not fundamentally alter the limits in the Statement. The most recent 2018 Land and Water Forum document stated that outstanding iwi rights and interests create uncertainties in the freshwater management system and should be

¹⁸⁷ Resource Management Legislation Bill 2015.

¹⁸⁸ Resource Management Act 1991, s 58M as amended in the Resource Legislation Amendment Act 2017. Section 58M states: ‘The purpose of Mana Whakahono a Rohe is –

- a) To provide a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under this Act; and
- b) To assist local authorities to comply with their statutory duties under this Act, including through the implementation of sections 6(e), 7(a) and 8.

¹⁸⁹ Resource Management Act 1991, s 58L as amended in the Resource Legislation Amendment Act 2017.

¹⁹⁰ Ministry for the Environment, Department Disclosure Statement at 4: at <http://disclosure.legislation.govt.nz/assets/disclosures/bill-government-2015-101.pdf> (Accessed August 2018).

¹⁹¹ See Ministry for the Environment *Next steps for fresh water: Consultation document* (February 2016) at 29. <http://www.mfe.govt.nz/sites/default/files/media/Fresh%20water/next-steps-for-freshwater.pdf> (Accessed August 2018).

¹⁹² At 30.

¹⁹³ RMA, s. 58O.

¹⁹⁴ Ibid.

¹⁹⁵ Ministry for the Environment, *A Draft Guide to Limits under the National Policy Statement for Freshwater Management 2014 (as amended in 2017)*, (Ministry for the Environment, Wellington, 2018) at 4. <https://www.mfe.govt.nz/publications/fresh-water/draft-guide-limits-under-national-policy-statement-freshwater-management> (Accessed August 2018).

resolved between the Crown and iwi otherwise the long-term durable framework for management of freshwater will be difficult, costly and time consuming.¹⁹⁶ Perhaps an ominous sign for Māori authorities is the fact that neither of the latest documents include Mana Whakahono a Rohe mechanisms.

Under the 2016 policy, it may have been possible under the MWaR programme for iwi to negotiate agreements that were akin to those negotiated by iwi in Treaty of Waitangi settlements such as the co-management agreements contained in the Waikato-Tainui and Whanganui River Treaty settlements referred to below. However, the latest 2018 policy shift emphasised that outstanding iwi rights and interests be resolved at the national, rather than the local level, with the Crown.

Still, in a broader resource management context, Mana Whakahono a Rohe have recently been included in ss. 58M-58U, RMA, which legislative amendment is a promising opportunity for empowering iwi and hapū rangatiratanga and enabling mātauranga and tikanga Māori. Time will tell how effective or not these provisions will be although one of the Te Tau Ihu informants referred to the RMA Mana Whakahono a Rohe provisions and concluded:

Whilst the [mana] whakahono agreement amendments to the RMA are positive, we need something with more teeth than that. There are some people, individuals within the Councils who are very supportive of us but unfortunately, it's the framework that needs a change because the framework within Councils and the framework that surrounds the planning side of the region are supposed to take into consideration, the values of iwi but that's not enough.¹⁹⁷

Auckland Unitary Plan 2017

On the other hand, some Local Authorities are incorporating other specific provisions to enable rangatiratanga and kaitiakitanga, including provisions that promote customary management. The Auckland Unitary Plan in 2017 for example, is commendable in this respect because it recognised the following issues of significance to Māori and iwi authorities in the region:

- Recognition of the Treaty of Waitangi/Te Tiriti and enabling the outcomes that Treaty settlement redress is intended to achieve;
- Protection of mana whenua culture, landscapes and historic heritage;
- Enabling of mana whenua economic, social and cultural development on Māori land and Treaty settlement land;
- Recognition of the interests, values and customary rights of mana whenua in the sustainable management of natural resources including integration of mātauranga and tikanga in resource management processes;
- Increasing opportunities for mana whenua to play a role in environmental decision-making, governance and partnerships; and
- Enhancing the relationship between mana whenua and Auckland's natural environment including customary uses.¹⁹⁸

¹⁹⁶ See Land and Water Forum, 'Land and Water Forum advice on improving water quality: preventing degradation and addressing sediment and nitrogen' (Land and Water Forum, May 2018) at 1 and 7. See <http://www.landandwater.org.nz> (Accessed August 2018).

¹⁹⁷ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

¹⁹⁸ Auckland Council, 'Unitary Plan Update,' (Auckland Council, August 2017), Chapter B6.

The latest Auckland Unitary Plan in June 2018 recognises the following for Māori authorities in the region:

- Recognition of the principles of the Treaty of Waitangi and of mana whenua values through involvement of mana whenua in resource management decision-making
- Mana whenua input into management plans, involvement in built heritage and archaeological matters, and undertaking kaitiakitanga responsibilities including in relation to monitoring, discovery procedures and providing mātauranga Māori input.
- Establishment of an ongoing Mana Whenua Forum.¹⁹⁹

The Auckland Unitary Plan's strategic legislative framework ensures that objectives and policies are supported by rules that direct and enable engagement with Māori and iwi authorities in order to achieve those relevant objectives and policies.

E Authentic Treaty of Waitangi Partnerships?

The continued ability for Māori to exercise rangatiratanga over the natural environment as anticipated by the Treaty of Waitangi/Te Tiriti o Waitangi in 1840 is inadequately provided for under the current legislative regime, including the RMA, given that Māori are not positioned as equal partners in decision-making and management processes. Rather, the Crown's institutions and frameworks such as the RMA position Māori as stakeholders reinforcing the marginalisation, compromise, redefining, minimising or even exclusion of mātauranga and tikanga Māori from environmental management in substantive ways. In effect, the current hegemony of legislation and policy challenges the progressive potential of mātauranga and tikanga Māori resource management practices which is a significant barrier to enabling holistic ecosystem-based management and empowering Māori governance and management that must be addressed in future policy and legislative frameworks.

When rangatira signed the Treaty of Waitangi in 1840, what was ceded and guaranteed has been a matter of intense political debate. The English version alleges that rangatira ceded their right to govern or sovereignty (kawanatanga) to the Crown but they retained their chieftainship (tino rangatiratanga) over Māori resources and taonga (all that they treasure) as emphasised above. The principle of partnership was emphasised in the 1987 Court of Appeal decision of *New Zealand Māori Council v Attorney-General*²⁰⁰ where the Court concluded:

The treaty signified a partnership between Pākehā and Māori requiring each partner to act towards the other reasonably and with the utmost good faith.²⁰¹

The Courts have confirmed that the Treaty partnership does not give Māori a veto power,²⁰² nor does it exempt Māori from the law.²⁰³ In a resource management context, partnership is about providing weight and balance in decision-making processes to ensure Māori interests and rights

¹⁹⁹ Auckland Council, 'Unitary Plan Update Request Memorandum,' (Auckland Council, 23 June 2018) para. 5.23 at 19-20.

²⁰⁰ *New Zealand Māori Council v Attorney-General*, [1987] 1 NZLR 641 at 642.

²⁰¹ *Ibid.*

²⁰² *Watercare Services Ltd v Minihinnick* (1997) 3 ELRNZ 511 (New Zealand Court of Appeal) at 527.

²⁰³ *Thames-Coromandel District Council v Pemberton* [2016] NZEnvC 221 (New Zealand Environment Court) at [10-12].

are taken into consideration.²⁰⁴ The 2014 Environment Court decision of *Ngāti Makino Heritage Trust v Bay of Plenty Regional Council*²⁰⁵ added:

[33] As we understand the Treaty of Waitangi, if the principle of partnership is to be applied, it requires a mutual respect between the Treaty partners, and by broader implication between members of the community, to the relationship and requirements of each party in respect of the resource.²⁰⁶

In reconciling concepts of enduring rangatiratanga with Crown governance in a modern environmental resource management context, the Waitangi Tribunal asserted:

The Treaty gives the Crown the right to govern, but in return requires the Crown to protect the tino rangatiratanga (full authority) of iwi and hapū in relation to their 'taonga katoa' (all that they treasure). The courts have characterised this exchange of rights and obligations as a partnership.²⁰⁷

In a resource management context then, the Treaty allows the Crown to put in place laws and policies to control the sustainable use and development of the environment such as the RMA. But in doing so, the Crown must, to the greatest extent practicable, protect the authority of iwi and hapū in relation to— lands, forests, fisheries, and other taonga – inter alia, freshwater, the marine estate, flora and fauna and the ecosystems that support them, wāhi tapu, pā and other important sites – so that they can fulfil their obligations as kaitiaki.²⁰⁸

Thus, one of the key continuing Treaty of Waitangi partnership responsibilities held by Māori since time immemorial is to exercise rangatiratanga in the governance and management of natural resources through their own forms of local, regional and even national self-governance and/or through joint-management regimes, iwi planning agreements, Mana Whakahono a Rohe arrangements, and co-management agreements at the various levels.

The Treaty relationship between the Crown and Māori is now characterised by the principles of the Treaty of Waitangi, which are an attempt to achieve an authentic harmonious partnership between both groups in a modern constitutional context. But the Crown and its respective agencies have reinforced their authority granted through kawanatanga from Article I of the Treaty of Waitangi to make laws and govern in accordance with the constitutional process, while the promises from Article II to uphold the principle of rangatiratanga have not been met. Consequently, what has ensued is the marginalisation and displacement of Māori and their respective mātauranga and tikanga Māori which have been replaced by formal statutory and judge-made law.

The challenge for Māori and the Crown then is for Māori to exercise rangatiratanga and to practice customary governance and management within contemporary New Zealand society, which means that new and innovative post-colonial alternatives to the current failing resource management system are required such as EBM that embraces mātauranga and tikanga Māori.

²⁰⁴ *Ngāti Ruahine v Bay of Plenty Regional Council*, [2012] NZHC 2407 (New Zealand High Court) at [62].

²⁰⁵ *Ngāti Makino Heritage Trust v Bay of Plenty Regional Council*, [2014] NZEnvC 25 (New Zealand Environment Court) at [33].

²⁰⁶ *Ibid.*

²⁰⁷ Above, n. 164, (Waitangi Tribunal *Ko Aotearoa Tenei*). Available online at www.waitangitribunal.govt.nz (Accessed September 2018).

²⁰⁸ *Ibid.*

The following sections will consider the application in more depth of tikanga Māori and shared governance and management over natural resources and empowering opportunities in law for Māori to exercise rangatiratanga over specific marine estate areas including for Māori commercial and customary fisheries, aquaculture, the Coastal Marine (Takutai Moana) Act 2011, the exclusive economic zone, marine protected areas, the Kermadecs Ocean Sanctuary Bill, Treaty of Waitangi settlements and other special legislation.

F. Tikanga Māori and Commercial and Customary Fisheries

Article II of the Treaty of Waitangi 1840 guaranteed to Māori the 'full, exclusive and undisturbed possession of their fisheries for so long as they desired.' The history of the loss of Māori customary and commercial responsibilities for fishing however, were deliberately eroded away 'while the ink was still drying.' Such actions were a breach of the Treaty as well as tikanga Māori as Bess and Rallapudi noted:

During the colonial settlement of New Zealand, Māori viewed the signing of the Treaty of 1840 as a way to preserve their autonomy and retain control of their land and sea. ... Soon after the Treaty was signed, Government actions and legislation began to erode Māori rights until most, if not all, that were guaranteed by the Treaty were alienated from them.²⁰⁹

Since 1866, the Crown regulated fishing in New Zealand. Despite a number of different management regimes, all of them failed to acknowledge mātauranga and tikanga Māori over fisheries, and to respect Māori fishing rights including any right to participate in the control and management of the fisheries.²¹⁰ And the few Māori fisheries provisions in force were fundamentally limited by the following views:

- that Māori interests should be accommodated by reserving particular fishing grounds for Māori,
- that Māori fishing had no commercial component and grounds reserved must be for personal needs,
- that Māori participation in the commercial fishing industry should be on no other terms than those provided for all citizens,
- that no allowances should be made for Māori fishing methods, gear or rules for resource management, and
- that the recognition of fishing should be an act of State; only Parliament should authorise the reservation of fishing grounds; there should be no provision for the courts to recognise rights on proof of customary entitlement.²¹¹

²⁰⁹ Bess, R and Rallapudi, R 'Spatial conflicts in New Zealand fisheries: The rights of fishers and protection of the marine environment,' in *Marine Policy* (2007) Vol. 31, 2007) 719 at 721–722. Refer also to Toki, V, 'The Māori Fisheries Settlement Process – A Critique – Draft,' (Unpublished Draft MIGC Report, University of Waikato, September 2018).

²¹⁰ Munro, J, 'The Treaty of Waitangi and the Sealord Deal,' in *Victoria U. Wellington L. Rev.* (Vol. 24, (1994) 389 at 399. See also the Waitangi Tribunal, Ngāi Tahu Report, (Government Printer, Wellington, 1991) 295.

²¹¹ Waitangi Tribunal, *Muriwhenua Report* (Government Printer, Wellington, 1988) at 222.

The introduction of the Quota Management System²¹² (QMS) during the neoliberalism period in the 1980s granted private property rights through the Fisheries Amendment Act 1986²¹³ but it also breached Article 2, Treaty of Waitangi of ‘full, exclusive and undisturbed possession of [Māori] fisheries.’

The QMS was erroneously based on the assumption that Māori had no proprietary right to fisheries and the ownership of the resource resided entirely with the Crown and was therefore the Crown's to distribute.²¹⁴ Such an approach was/is in fundamental conflict with the guarantees to Māori in the Treaty²¹⁵ as well as with mātauranga and tikanga Māori.

Bess and Rallapudi added:

The 1986 [Fisheries] Act made no reference to Māori having customary or Treaty-based fishing rights. Many Māori objected to the QMS, as it was seen to force their severance from the ocean, raid their sea resources and sell their right to participate in fisheries while others were allowed access to their fishing grounds.²¹⁶

Subsequently, Māori obtained by way of interim relief from the 1990 High Court and Court of Appeal decision *Te Rūnanga o Muriwhenua Inc v Attorney- General*,²¹⁷ a declaration that the Crown should not to take further steps to bring fisheries within the QMS which prompted the Crown to negotiate a Treaty settlement with Māori. Bess and Rallapudi continued:

In 1987, the High Court declared an injunction against further ITQ [individual transferable quota] allocations. Māori and the Crown entered into negotiations on how Māori fisheries might be given effect in light of tino rangatiratanga. While implementation of the QMS prompted Treaty-based claims to large areas of fisheries, it proved to be an effective means of resolving these claims through the transfer of existing ITQ holdings and new holdings on the introduction of further species into the QMS. The Crown also enacted legislation to provide for and recognise the exercise of customary fishing rights.²¹⁸

The first step was an interim arrangement, effected by the Māori Fisheries Act 1989 (MFA) for the recognition of Māori commercial fishing rights. The MFA provided to the Māori Fisheries Commission or Te Ohu Kai Moana (TOKM),²¹⁹ a proportion of quota holdings or the equivalent value in cash (\$10 million at the time) as compensation for commercial fishing claims and TOKM was tasked with promoting Māori involvement in the business and activity of fishing.

²¹² Refer s. 2 and Part IV, Fisheries Act 1996 for full definition.

²¹³ Furthermore, s. 88(2), Fisheries Act 1983, states: ‘Nothing in this Act shall affect any Māori fishing rights.’

²¹⁴ Waitangi Tribunal, *Ngāi Tahu Report*, (Government Printer, Wellington, 1991) 133.

²¹⁵ Many Māori feel that there is a ‘fundamental incongruity’ between Māori values and the QMS: ‘They draw uncomfortable parallels with the history of Māori tribal lands where ... conferment of individual ownership was a major part of a process of alienation. ITQ's run contrary to the concept of communal guardianship (not ownership) of and access to the fish resource.’ See Ministry of Agriculture and Fisheries Management Planning ITQ Implications Study - Second Report (Community Issues) FMP Series No 20, 48 as cited in Munro above n. 202.

²¹⁶ Above, n. 209 (Bess and Rallapudi) at 721–722.

²¹⁷ *Te Runanga o Muriwhenua Inc v Attorney- General* [1990] 2 NZLR 641.

²¹⁸ Above, n. 209 (Bess and Rallapudi) at 721–722.

²¹⁹ Established pursuant to the Māori Fisheries Act 1989.

A Deed of Settlement, dated 23 September 1992, was entered into between the Crown and Māori, effectively settling the commercial fishing claims by Māori. On 14 December 1992, Māori agreed with and Parliament passed the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (sometimes referred to as the 'Sealords Deal') to give effect to the settlement of claims relating to Māori fishing rights provided for in the Deed of Settlement which included:

- a) the reconstitution of the Māori Fisheries Commission as the Treaty of Waitangi Fisheries Commission (TOKM);
- b) payment of cash to the TOKM (which was to be used to purchase a 50% shareholding of Sealord Products Ltd hence the 'Sealord's Deal');
- c) provision for the allocation of 20% of quota for any new species brought into the quota management system;
- d) provision for the making of regulations to recognise and provide for customary food gathering by Māori; and
- e) the empowerment of TOKM to hold the assets and develop a model to allocate the assets to Māori.

In return, Māori agreed:

- a) that the Settlement would extinguish all commercial fishing rights and interests;
- b) that the Settlement settled all Māori commercial fishing rights and interests;²²⁰
- c) they would 'endorse' the Quota Management System;
- d) to accept regulations for customary fishing;²²¹
- e) to stop litigation relating to Māori commercial fisheries;
- f) to support the implementing legislation to give effect to the Settlement; and
- g) the Waitangi Tribunal should be stripped of its powers to consider commercial fisheries matters.²²²

While some iwi consented to this extinction of rights, others did not. Nonetheless, all were bound and constrained by the legislation. The Preamble of the Fisheries Act 1996 furthermore reaffirmed that nothing in the Act shall affect Māori fishing rights.' Furthermore, both Māori commercial and customary fishing rights are included in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

The 1992 Treaty settlement also established the new post-settlement governance entity, TOKM with legislative directions²²³ to establish a framework for the allocation of the settlement assets to iwi.²²⁴ The initial Settlement Asset allocation process comprised of two stages, the pre-settlement assets (PRESA) and post settlement assets (POSA). The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 empowered TOKM to allocate PRESA and POSA to 'iwi.'²²⁵ PRESA were those assets secured by the 1989 interim settlement that was affected by the Māori

²²⁰ Section 9, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

²²¹ Ibid, s. 10.

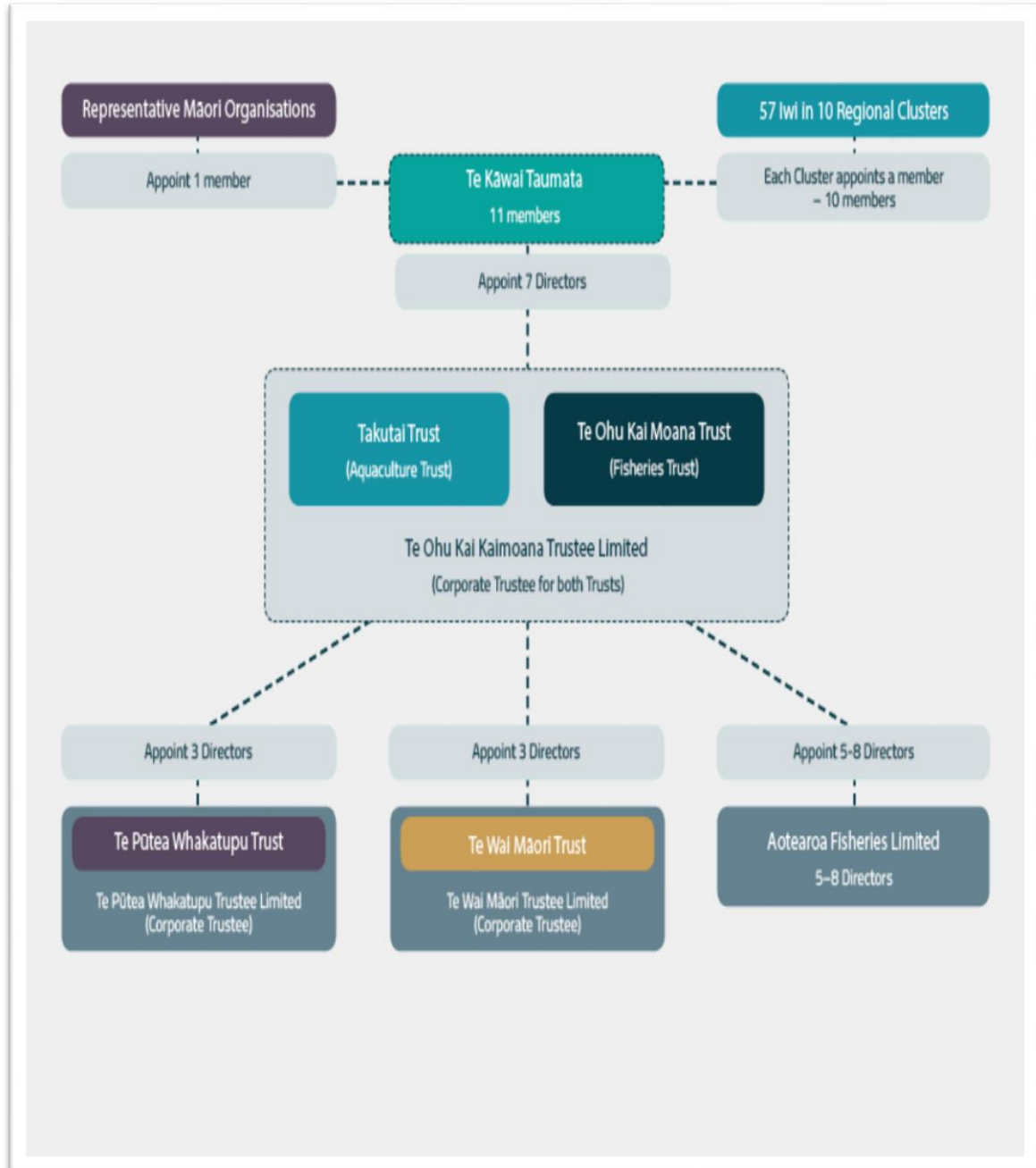
²²² This was all given formal effect by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, which separates commercial from customary fishing rights.

²²³ Māori Fisheries Act 2004.

²²⁴ Iwi is defined as 'tribe, race, people' in Ryan, P M, *Dictionary of Modern Māori*, (Pearson, New Zealand, 1997) at 76.

²²⁵ Māori Fisheries Act 1989, s. 6, as amended by s. 15, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Section 6(e) gave to TOKM the additional function of considering 'how best to give effect to the resolutions in respect of TOKM's assets, as set out in Schedule 1A to this Act.' Schedule 1A sets out resolutions made by TOKM at its hui-a-tau on 25 July 1992 including a resolution 'that the hui endorse the decision made by TOKM to seek legislative authority to further secure TOKM's intention to allocate its assets to 'iwi.'

Fisheries Act 1989 and held by TOKM. On 6 January 1993, PRESA consisted of quota, shares in Moana Pacific Fisheries Ltd and cash with an estimated value, in April 2003, of approximately \$350 million.



TOKM Organisational Structures²²⁶

²²⁶ See Te Ohu Kaimoana Governance Structure online at: <https://teohu.maori.nz/governance-structure/> (Accessed November 2018).

POSA were those assets that resulted from the Deed of Settlement signed in September 1992 that finally settled the Māori commercial fisheries claim. POSA consisted of quota, shares in a number of fisheries companies, including a 50% shareholding in Sealord Group Ltd, Prepared Foods Ltd, Chatham Processing Ltd and Pacific Marine Farms, and cash. Importantly, POSA also included a 20% share of quota for any new species introduced into the QMS. TOKM had at its disposal in 2005 a very substantial amount of fisheries cash, shares and quota assets totalling approximately \$700 million available for distribution to 'Māori' and was also responsible for devising a way of fairly distributing the benefits of the settlement to all 'Māori.'

Subsequently, an allocation model was developed and codified in the Māori Fisheries Act 2004 to enable TOKM to transfer fisheries assets to iwi Māori. The right of ownership of the fishery resource by Māori was included in legislation. These assets were not insignificant. An understanding of these assets is important particularly as the economic benefit is a clear enabler, however the corresponding challenge is whether this corporate economic benefit objective takes priority over the cultural, environmental and social tenets that collectively ensure its longevity for future generations and which comply with mātauranga and tikanga Māori. Equally as important as the economic benefit garnered from the settlement is the process for *how* these assets themselves were distributed to Māori. The process provided for some enablers of mātauranga and tikanga Māori, but also represented numerous limitations.

Today, Māori own approximately 27% of all quota by volume with an ITQ estimated value of approximately \$1 billion.²²⁷ Although financial returns from ownership have fallen as a percentage of quota value since 2004, reflecting generally falling interest rates in New Zealand over that period, the Māori fishing asset returns approximately \$60m annually.²²⁸

Fisheries Allocation, Tribal Identity and Tikanga Māori

To illustrate the challenges of incorporating mātauranga and tikanga Māori within mainstream law through the vexed challenge of deciding Māori representation, specifically who is the Treaty partner in a Māori fisheries context as well as some of the Māori corporate challenges in the marine estate, the next section will focus on the definition of 'iwi' in the fisheries settlement context. Although dated, the legal and cultural challenges two decades ago are still relevant and there is much to learn from these events. For example, a Te Tau Ihu informant recently commented on the litigious propensity of Treaty settlement processes:

This is a manipulation by the Government to put us against each other, they drafted the [Fisheries?] Act, they made the decision to let everybody in and during negotiations; they said 'You go off and fight about it, then come back and let us know.' So they had used the divide and conquer tool on us and are still doing it to us. We need to be awake so that we don't turn on each other, and so that we turn on the system and change it so that it doesn't have us fighting against each other.²²⁹

The above observation has some resonance with the fisheries settlement decision on iwi identity and representation as noted below.

²²⁷ Te Ohu Kaimoana 'Building on the Fisheries Settlement' < https://teohu.maori.nz/wp-content/uploads/2018/06/Building_on_the_Settlement_TOKM.pdf (Accessed September 2018).

²²⁸ Ibid.

²²⁹ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

Fisheries settlement allocation was a difficult legal and cultural challenge given that it was the very core of what the Sealords Settlement was purportedly about and which Māori groups the settlement supposedly represented which was in effect a protracted dispute among Māori over mātauranga and tikanga Māori equitable distribution and tribal identity. As Lord Goff noted in *Treaty Tribes Coalition v Urban Māori Authorities*²³⁰ Māori found the task of dividing the fisheries resource to be ‘an extremely challenging process.’²³¹

Much was left ambiguous in the Sealords deed, which was drawn up with ‘Māori,’ without further explanation, and which left to one side the question whether ‘Māori’ was supposed to be represented by some kind of federation of autonomous ‘iwi’ or whether it simply meant a sector of the general population of the country differentiated by an ethnic criterion. Was the settlement for the benefit of everyone who happened to be ‘Māori,’ or was it intended as a restoration of property rights to specific groups based on territory, historic involvement in marine fishing or some other criterion of specific, tribal connection to the resource? TOKM argued that Māori living in urban areas must belong to some ‘iwi’ (‘tribes’) if they can be meaningfully said to be ‘Māori’ at all, and urban Māori would benefit from a distribution of assets to ‘iwi.’ The initial distribution, so the argument went, would be to ‘iwi’ who can then apportion interests to the members of the iwi wherever they happen to live. However, separate Urban Māori Authorities (UMAs),²³² claiming to represent Māori living in urban areas,²³³ were no longer prepared to accept that mātauranga and tikanga ‘tribal’ approaches were sufficient to accommodate all Māori interests and development strategies and so they challenged TOKM and the ‘traditional tribes’ by taking a case to the High Court in conjunction with Te Rūnanga o Muriwhenua.

In the fisheries litigation that ensued, the four urban Māori authorities and Te Rūnanga o Muriwhenua were supported by Te Waka Hi Ika o Te Arawa, an incorporated society representing Te Arawa fishers and the Te Arawa Māori Trust Board.²³⁴ TOKM on the other hand was supported by the Treaty Tribes Coalition (which includes Ngāi Tahu and Ngāti Kahungunu), Tainui Waka Fisheries, Te Rūnanga o Ngāti Porou and the Te Iwi Māori Trust Board. Those favouring a distribution on an iwi/tribal basis were themselves divided as to how this should be done. In brief, the issues at stake were particularly difficult and raised quite fundamental questions about the purpose of the Māori Fisheries Act 1989 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and indeed the contemporary nature of mātauranga and tikanga Māori in contemporary Māori society.

The litigation focused on the distribution of the PRESA. In *Te Rūnanga, o Muriwhenua v Te Rūnanganui o Te Upoko o Te Ika Association Inc.*²³⁵ Anderson J decided that a preliminary question in judicial review proceedings brought by the Area One Consortium and the four urban

²³⁰ *Treaty Tribes Coalition v Urban Māori Authorities* [1997] 1 NZLR 513, 517 (PC).

²³¹ *Idem*.

²³² There are two Auckland Urban Māori authorities (UMAs), Manukau Urban Authority Inc (MUMA) and Te Whānau o Waipareira Trust (Waipareira), one from Wellington, Te Rūnanganui o Te Upoko o Te Ika Association, and one from Christchurch, Te Rūnanga o Nga Mata Waka Inc.

²³³ *Ibid*, 517 per Lord Goff. Interestingly, some ‘urban’ Māori simply happen to belong to iwi whose traditional territory were encroached on by urbanisation and who now fall within urban areas such as Ngāti Whātua of the Tāmaki isthmus (Auckland), Ngāti Toa based at Porirua and Ngāi Tahu in Christchurch and Dunedin. Ngāti Toa, and the other tribes, certainly view themselves as traditional ‘iwi’ rather than as ‘urban Māori.’ Urbanisation came to them not the other way round as is the case with many post-World War II urban Māori who moved to the cities.

²³⁴ The Te Arawa confederation, one of the largest groupings within Māori society, is made up of a number of descent groups mostly living inland around the Rotorua lakes area, but also holding a small strip of coastal territory around Maketu. Any allocation of assets based on coastal territory therefore disadvantaged Te Arawa.

²³⁵ [1996] 3 NZLR 10, 16.

Māori authorities should be set down for hearing before the substantive case began.²³⁶ The question was:

Is [TOKM], in the exercise of its power to allocate pre-settlement assets, required to allocate those pre-settlement assets to iwi?²³⁷

The Court of Appeal allowed the appeal, finding that ‘no useful purpose’ could be served by the determination of this preliminary point. In coming to that view, the Court of Appeal considered at some length the meaning of the term ‘iwi.’²³⁸ Controversially, the Court held that ‘iwi’ meant, simply, ‘people of the tribe,’ and accordingly TOKM had to make separate provision for urban Māori.²³⁹ In determining the meaning of ‘iwi’ the Court considered six sources:

1. the Māori text of the Treaty of Waitangi,
2. the Waitangi Tribunal’s, *Fisheries Settlement Report*;²⁴⁰
3. Williams’ *Māori Dictionary* (the most authoritative dictionary of the Māori language);²⁴¹
4. the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992,
5. the 1992 Sealords Deed of Settlement itself,²⁴² and
6. the submissions and memoranda of counsel.²⁴³

The Court of Appeal relied, at least in part, on the Waitangi Tribunal, which noted that the ‘iwi’ (‘tribe’)²⁴⁴ was not the main structural unit of Māori society but rather the hapū (sub-tribe or clan). Nevertheless, the tribunal added that some matters of particular importance had to be decided at the iwi level. With European settlement, ‘iwi structures became more necessary, significant and permanent’ and ‘the current wisdom appears to be that matters of common policy affecting the people generally, should be determined or ratified at an iwi or iwi-whānui plane.’²⁴⁵

The Court of Appeal decision, however, was appealed to London by some of the parties. The Privy Council’s decision, released on 16 January 1997, was reported as *Treaty Tribes Coalition v Urban Māori Authorities*.²⁴⁶ The appeal was allowed in part and the preliminary question was

²³⁶ This case is procedurally complex. The Area One Consortium and four Urban Māori Authorities against the Treaty of Waitangi Fisheries Commission and the Crown, alleging bias and breach of statutory duty by TOKM, filed judicial review proceedings. The Treaty Tribes Coalition, Te Rūnanga o Ngāti Porou, and Te Waka Hi Ika o Te Arawa also brought proceedings. Then on 30 June 1995 Anderson J ordered the preliminary question be decided before trial. It was this order that was appealed by the Area One Consortium (one of the plaintiff groups) to the Court of Appeal. There were also separate proceedings before Ellis J following on from claims in the Waitangi Tribunal lodged by the Area One Consortium and the Urban Māori Authorities. The Tribunal’s decision to proceed with inquiring into these claims led to judicial review proceedings against the Tribunal being filed in the High Court by the Treaty of Waitangi Fisheries Commission and the Treaty Tribes Coalition. The plaintiffs argued that the Tribunal could not hear the claim because of s 6(7), Treaty of Waitangi Act 1975, inserted by the Treaty of Waitangi (Fisheries Claims Settlement) Act 1992. Ellis J held that s 6(7) did not prevent the Tribunal from hearing the claim; but on appeal the Court of Appeal held that the section was effective to oust the Tribunal from inquiring into the issue (see *Te Rūnanga o Muriwhenua v Te Rūnanganui o Te Upoko o Te Ika* [1996] 3 NZLR 10, 16). This point was not appealed to the Privy Council.

²³⁷ *Idem*.

²³⁸ *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika* [1996] 3 NZLR 10.

²³⁹ *Ibid*, at 19-20.

²⁴⁰ Waitangi Tribunal, *Fisheries Settlement Report*, (Department of Justice, Wellington, 1992).

²⁴¹ Williams, H.W. *Dictionary of the Māori Language* (GP Publications, Wellington, 1992).

²⁴² Her Majesty the Queen and Māori, *Māori Commercial Fisheries Deed of Settlement* (1992).

²⁴³ *Ibid*, at 17-19.

²⁴⁴ Above, n. 240, (Waitangi Tribunal, *Fisheries Settlement*) at 12-14.

²⁴⁵ *Idem*.

²⁴⁶ [1997] 1 NZLR 513.

remitted to the High Court and reformulated to the High Court in *Te Waka Hi o Te Arawa v Treaty of Waitangi Fisheries*.²⁴⁷ The precise question before the Court involved the interpretation of s. 6(e), Māori Fisheries Act 1989, which gave to TOKM the additional responsibility of considering 'how best to give effect' to certain resolutions to allocate its assets to 'iwi.'²⁴⁸ The Court was directed to determine whether the pre-settlement assets should be distributed to 'iwi,' and, if so, whether 'iwi' meant 'only traditional Māori tribes.' Patterson J carefully considered the context of both the legislation and the Hui-a-Tau (annual general meeting) itself and concluded that TOKM was required by law to allocate its assets to 'iwi.' The second problem was the meaning of 'iwi.' Patterson J saw the issue as essentially one of statutory interpretation (rather than as the incorporation of Māori customary law).

A complication is that, for present purposes, the word is a Māori word used in an English statutory context.²⁴⁹

In interpreting the provision, Patterson J followed Lord Wilberforce's approach to interpretation of foreign words in statutes in *Fothergill v Monarch Airlines Ltd*.²⁵⁰

I am not willing to lay down any precise rule on this subject. The process of ascertaining the meaning must vary according to the subject matter. If a Judge has some knowledge of the relevant language, there is no reason why he should not use it... There is no reason why he should not consult a dictionary if the word is such that a dictionary can reveal its significance; often of course it may substitute one doubt for another.²⁵¹

The key point is that interpreting foreign words in English or New Zealand statutes is a somewhat more flexible process than interpreting statutorily incorporated foreign law, although the distinction might often be difficult to draw. Is 'iwi' merely a Māori word or an incorporation of mātauranga and tikanga Māori law? The case was argued before Patterson J who treated it as the former, and took into account dictionary definitions, the views of the Waitangi Tribunal as an expert body, and the corpus of evidence before the court. The decision was released on 4 August 1998²⁵² and Patterson J found that the basic unit of traditional Māori social structure was not the iwi (tribe) at all, but the hapū (sub-tribe, clan).

Resource management and welfare functions were typically carried out at whānau or hapū level and not iwi level. Often an iwi had no rigid structure and hapū entered and left collectives as needs dictated.²⁵³

²⁴⁷ *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (4 August 1998)(Unreported, High Court, Auckland Registry, CP 395/93 (Wgtn) Anderson J. (Hereinafter *Te Waka Hi Ika 1*).

²⁴⁸ Resolutions at the Hui-a-Tau of 25 July 1992 incorporated as a schedule to the 1992 Act. Resolution 1 was that the Hui-a-Tau endorse TOKM's decision to seek legislative authority in order allocate it assets to 'iwi.'

²⁴⁹ *Te Waka Hi Ika 1*, above, n 247 at 72. Proof of a point of Māori customary law, whether incorporated by statute, as an aspect of the doctrine of aboriginal title (as in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680) or simply on the basis that Māori customary law is part of the common law of New Zealand (as in *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Heneiti Rirerire Arani v Public Trustee* (1919) [1840-1932] NZPCC 1; and see also Chilwell J's dicta in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 215 (HC)) is a different process from interpreting Māori words in a statute. Proof of customary law requires expert evidence from those qualified in the customary system, as in *Loasby*, which followed standard English and British colonial practice as to proof of customary law. However, the distinction between a statutory incorporation of a Māori word and of a rule of Māori customary law is very fine - the example of 'iwi' being a case in point.

²⁵⁰ *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 273.

²⁵¹ *Idem*.

²⁵² *Te Waka Hi Ika 1*, above n 247.

²⁵³ *Ibid*, at 28.

Fishing rights were held by hapū, not iwi, and, accordingly, 'it is, in the main, rights which were vested in hapū which were infringed by the QMS and which the Crown has now abrogated and taken away.'²⁵⁴ More recently, and partly in consequence of Government policies, said Patterson J, 'it is the iwi which has come into prominence.' This view was endorsed by the 3:2 majority decision of the Court of Appeal who reached the conclusion that urban Māori associations as iwi are too 'radical a departure from custom' given the following conclusion:

It is fundamental, in our view that the implementation of the [Fisheries] settlement accords with Māori traditional values, although it will necessarily utilise modern-day mechanisms ... The settlement was of the historical grievances of a tribal people. It ought to be implemented in a manner that is consistent with that fact. With all due respect to UMA, who are formed on the basis of kaupapa not whakapapa, they cannot fulfil such a role.²⁵⁵

At the same time, however, the Māori population has become largely urbanised, concentrated to a large extent in Auckland, and to a growing degree (it would seem) remote from iwi links.²⁵⁶ Patterson J concluded:

The above considerations lead to the conclusion that... 'iwi' means traditional Māori tribes in the sense that a tribe includes all persons who are entitled to be a member of it because of kin links and genealogy.²⁵⁷

The UMAs were not 'iwi,' although, of course, 'many, if not all, of their Māori members are entitled to share in the benefits of the settlement.'²⁵⁸ TOKM was not, therefore, required to make any separate provision for the UMAs. Immediately after the decision Māori Affairs Minister Tau Henare called on Māoridom to allow the fisheries settlement assets to proceed without further court action, but representatives of the UMAs appealed to the Privy Council.²⁵⁹

In the 'iwi' litigation, two questions had been referred to this Court. First, should PRESA be distributed to 'iwi'; and second, if yes, did 'iwi' mean 'traditional tribes' in the context of a scheme of allocation. In the 1996 Court of Appeal judgment, 'iwi' was taken to mean 'people' rather than 'tribe.' But the Privy Council was not satisfied that the Court had heard sufficient evidence on the matter and in upholding the appeal by TOKM and 'traditional tribes,' referred the case back to the High Court in New Zealand. Of the several interested parties, Te Whānau o Waipareira, argued that the term 'iwi' was not bound by rigid structural determinations and that over the generations, there were many instances where 'iwi' had formed around a cause (kaupapa), rather than an ancestor (whakapapa). Tribes, however, argued that 'iwi', at least in the Māori Fisheries Act 1989 meant a group of people who share a common descent and a more or less definable territory. Others claimed that because 'iwi' was never mentioned in the Treaty of Waitangi, the more correct term was 'hapū' not 'iwi.' 'Iwi' was a recent construction, which did not and should not replace the rights of hapū.

²⁵⁴ Ibid, at 26.

²⁵⁵ *Te Waka Hi o Te Arawa v Treaty of Waitangi Fisheries Commission* (4 August 1998)(Unreported, High Court, Auckland Registry, CP 395/93 (Wgtn) at 54 per Patterson J. (Hereinafter *Te Waka Hi Ika 2*).

²⁵⁶ Patterson J referred to the 1996 census, which showed a total of 597,414 Māori, 70% of whom lived outside tribal territories (rohe); 112,566 people identifying as Māori indicated that they did not know which iwi they belonged to and another 40,917 did not specify their iwi. Idem.

²⁵⁷ *Te Waka Hi o Te Arawa 2*, above, n 255 at 79.

²⁵⁸ Ibid, at 81.

²⁵⁹ Let Fisheries assets flow, Henare urges Māoridom,' in *The Dominion*, (Wellington, August 5, 1998).

A further protracted legal debate ensued about mātauranga and tikanga Māori regarding Māori tribal identity that pitted Māori kaumātua (elders) and pūkenga (experts) against each other. Professor Hirini Mead of Ngāti Awa for example was asked who the traditional tribes in New Zealand were:

The word 'tribe' is a colonial word ... one coined by the colonisers when they first came to New Zealand and applied it to Māori. ... I'm not at all happy with the fact we are concentrating on the English words when we are here to consider the Māori words. It seems 'iwi' is the word we are talking about here. ... 'Tribe' or 'tribes' is not a word or words that Māori like very much. It has a connotation ... although as an anthropologist, it is a fairly neutral word but in some circles is not well received.²⁶⁰

Thompson Winitana from Tuhoe also made an important point about the use and abuse of Māori words (although referring to rohe (territory) in this instance) in contemporary politics:

As a result of the actions of the Māori Land Court, our people have been forced into the situation of defining [rohe] boundaries according to surveys. ... rohe is something that has been imposed by the Courts. ... The Māori language has been forced to accommodate the English language instead of being interpreted in its own right, the translation then accommodates the English definition of what a boundary is.²⁶¹

The use of iwi in the sense of 'bones' has an important imagery in terms of Māori social and political organisation. In non-Māori terms, kinship relationships are often expressed by the ties of blood but the equivalent in Māori is 'bones.' It is said that 'they are my bones.'²⁶² Waerete Norman of Muriwhenua provided the imagery of a body and the place of iwi within that mātauranga and tikanga Māori worldview:

The kupu (word) 'iwi' itself however, is an ancient one and is derived from koiwi (the skeletal framework or bones), hapū is the state of being pregnant, whānau relates to giving birth, and tangata whenua are individuals collectively named. The metaphor is one of a single body, linked by bones and containing smaller groupings, which through the birthing process produces related individuals inter-linked through common ancestry or whānaungatanga.²⁶³

Andrew Sharp also commented on this imagery:

The imagery of kin connection among persons and between persons and things was presented as a highly wrought imagery of the body, especially the body giving birth: not

²⁶⁰ Mead, H in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 407-8.

²⁶¹ Thompson Winitana, in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 254.

²⁶² Affidavit of Professor Wharehuia Milroy and Professor Timoti Karetu at 4, in *Te Rūnanga o Te Upoko o te Ika Association Inc., v the Treaty of Waitangi Fisheries Commission* (1998), C.P No. 122/95 (H.Ct of New Zealand, Auckland Registry). Judgment on that case *per* Patterson J., reported [2000] 1 N.Z.L.R at 289; and affidavit of Professor Timoti Karetu at 4.

²⁶³ Affidavit of Waerete Violet Beatrice Norman in Support of Muriwhenua, in *Te Rūnanga o Muriwhenua v Treaty of Waitangi Fisheries Commission* (CP 395/93 (Wgtn) (Rangitaurira & Co Solicitors, Rotorua, 12 February 1998) at 16.

only does 'iwi' denote 'bone',²⁶⁴ but 'hapū' is pregnant' or 'conceived in the womb',²⁶⁵ and 'whānau' is 'to be born' or 'to be in childbed.' The prefixes for names for particular iwi and hapū mean 'issue from the copulation of,' as in *Ngāti* (e.g. Whatua), *Ngāi te* (eg Rangi), *te Aitanga*, and *Te Ati*.²⁶⁶ 'Whenua,' the land, also means the placenta or afterbirth. 'Whare whakairo,' the carved meetinghouses to be found on the more elaborately realized marae, are redolent with the imagery of the body of the tribe.²⁶⁷

Professor Hirini Moko Mead discussed the extensive mātauranga and tikanga Māori rights and responsibilities an individual of this body acquires with whānau, hapū and iwi identity:

The act of whakawhānau (giving birth) produces a newborn child, a whenua (placenta) and eventually a pito (umbilical cord). The whenua and the pito are buried or placed within the land of the whānau and that establishes a spiritual link between the land and the child. Once born the child inherits a number of rights called a birthright. The birthright includes:

- the right to be Māori and the attributes that come with it including mauri, wairua, mana, tapu, whenua and whānaungatanga;
- the right to an identity and whakapapa as a member of the whānau, the hapū, the iwi and the waka;
- the right to share in the tribal estate, including the rights to succeed to the interests of the parents;
- the right to use the marae;
- the right to be buried in the urupa;
- the right to be listed on a hapū and iwi beneficiary roll; and
- the right to share in the benefits of any settlement to the hapū or iwi.

When the child matures, the birthright can be exercised. These rights are automatic and have become the foundation of rights in the hapū and iwi.²⁶⁸

Following the Privy Council's direction, there was a considerable volume of evidence on the record on the meaning of 'iwi' according to mātauranga and tikanga Māori customary law – 74 affidavits from 64 deponents were filed, 44 of whom were cross-examined. Each side produced affidavits of 'experts' who addressed the meaning of 'iwi' in terms of defining a Māori word in a non-Māori context - what is an 'iwi' in a fisheries settlement context? The first list of expert evidence below was by those pūkenga experts who believe that 'iwi' meant 'traditional tribe.' The second list maintain that 'iwi' meant 'people' and the small third list believe 'iwi' meant both 'traditional tribe' and 'people' depending on context.

²⁶⁴ Affidavit of Tamati Reedy, *ibid*, at 5 and affidavit of Professor Hirini Moko Mead, *ibid*, at 15.

²⁶⁵ Above, n. 260, (Mead) at 10.

²⁶⁶ Affidavit of Professor Tamati Reedy, in *Te Rūnanga o Muriwhenua v Treaty of Waitangi Fisheries Commission* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 6-7, 18-20.

²⁶⁷ Sharp, A, Blood, custom and consent: Three kinds of Māori groups and the challenges they present to governments' in *University of Toronto Law Journal* (Vol. LII, No. 1, Winter 2002) at 20-1. See also Sharp, *A Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand Since the 1970s* (Oxford University Press, Auckland, 1990) at 52-5.

²⁶⁸ Affidavit of Professor Hirini Moko Mead, in *Te Runanga o Muriwhenua v Treaty of Waitangi Fisheries Commission* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 7-8.

‘Iwi’ – ‘Traditional Tribe’

A number of prominent and perhaps conservative kaumātua provided their expert opinion on ‘iwi’ being a ‘traditional tribe’ and excluding, implicitly and explicitly, UMA’s under the ambit of ‘iwi.’ Sir Robert Mahuta of Waikato, for example, stated:

The meaning of iwi as I understand it is that it is a collection of sub-tribes who trace their descent to a common ancestor. Kinship links are an integral part of iwi organisation. In my view, without kinship links, no group can purport to call themselves an iwi. Some urban Māori groups have attempted to model themselves as iwi (such as Ngāti Poneke), but they lack long-term enduring ties associated with whānau, hapū and iwi kinship links. These links are the glue that keep a tribe together and are fundamental to the concept of iwi.²⁶⁹

Professor Wharehuia Milroy of Ngāi Tuhoe also noted:

The original meaning of the word iwi is tribe.²⁷⁰ ... the word iwi has been translated as people, tribe and bones. The words before me just refer to people and tribe²⁷¹ ... I agree there are many usages of this word iwi but on its own there is no other definition beyond iwi meaning descended from the eponymous ancestor.²⁷² ... I have only one understanding that the word iwi is a tribe.²⁷³ ... If there is no contextual reference ... there is only one meaning that can be derived from that content on its own and that is tribe.²⁷⁴

Professor Tamati Reedy of Ngāti Porou held:

I have spent a great deal of time ... explaining the meaning of the word iwi which I’ve come down to the final conclusion that it is the descent group from an eponymous ancestor we are talking about, the second part is explaining the context in which the word iwi stands in that phrase on behalf of iwi.²⁷⁵

In his affidavit, Professor Reedy concluded that ‘the core meanings of iwi are solely bones or traditional tribes and historically this was the usual context of the term iwi’²⁷⁶ Professor Hirini Moko Mead of Ngāti Awa referring specifically to urban Māori commented:

They are not iwi, they are not whakapapa based ... They have the qualities of metaphorical hapū and iwi but they are not an iwi.²⁷⁷ ... we are tribalising them by using the term and by tribalising them we are also inferring the entire structure of whānau, hapū and iwi. By doing so Māori people are very clear as to the distinction between those groups tribalised by the extension of the word iwi and those genuinely iwi.²⁷⁸

²⁶⁹ Affidavit of Sir Robert Mahuta in support of Tainui Waka Fisheries, in *Te Runanga o Muriwhenua v Treaty of Waitangi Fisheries Commission*, M1514/94 (Rudd Watt & Stone, Auckland, 24 February 1998) at 18.

²⁷⁰ Wharehuia Milroy, above, n. 262, at 325.

²⁷¹ Ibid, at 326.

²⁷² Ibid, at 332.

²⁷³ Idem.

²⁷⁴ Ibid, at 334.

²⁷⁵ Tamati Reedy, above, 266, at 369.

²⁷⁶ Ibid, at para 9.

²⁷⁷ Hirini Mead, above, n 268, at 405.

²⁷⁸ Ibid, at 406.

Sir Hugh Kawharu of Ngāti Whātua referring to UMAs added:

UMAs lack the wairua and the checks and balances of the kinship system – mana whenua.²⁷⁹ ... There was no conception of ‘urban’ in classical Māori thinking so ... to say that iwi applied to urban combinations in a classical use of iwi and put rather simply does not make sense.²⁸⁰

Perhaps the strongest view of Māori leaders that ‘iwi’ excludes urban Māori at the time was from the late Apirana Mahuika of Ngāti Porou who, commenting on Paul McHugh, boldly asserted:

[McHugh says] that cultural identity should be on ethnic non-blood lines rather than on tribal blood lines. This approach would be suicidal for iwi and culture, because whakapapa is the heart and core of all Māori institutions, from Creation to what is now iwi. Whakapapa is the determinant of all mana rights to land and marae, to membership of a whānau, hapū, and, collectively the iwi ... whakapapa determines kinship roles and responsibilities to other kin, as well as one’s place and status within society. To deny whakapapa therefore as the key to both culture and iwi is a recipe for disaster, conflict and disharmony.²⁸¹

Hence, the opinion of a number of very prominent Māori pūkenga (knowledgeable experts) that the Māori word ‘iwi’ in the fisheries context means ‘traditional tribes’ not urban Māori, pan-Māori or other Māori authorities.

‘Iwi’ – ‘People’

On the other hand, a number of other kaumātua and pūkenga maintained that ‘iwi’ means ‘people’ not just ‘traditional tribes.’ Manuka Henare of Muriwhenua, for example, described iwi as:

A term which includes a larger grouping of hapū or what is commonly known as a ‘tribe.’ Iwi were often alliances of hapū who from time to time collected together as a mutually interdependent political or military unit. However, the term also means people. ... the term iwi as the people was also appropriate for describing non-hapū or more correctly, pan-hapū collectives which were present in the 19th Century. ... The existence of pan-tribal unity and Māori solidarity was recognition that with the dynamism of Māori society new institutions and new structures emerged which enhanced and consolidated traditional Māori social groups.²⁸²

Rima Edwards of Muriwhenua defined iwi:

In simple terms an Iwi is, he huihuinga tangata, a collective of people. An iwi is in the individual in that, without individuals there can be no iwi, without individuals there can

²⁷⁹ Kawharu, I. H in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 542.

²⁸⁰ *Ibid*, at 545.

²⁸¹ Mahuika, A, ‘Whakapapa is the Heart’ in Coates, K & McHugh, P, *Living Relationships: the Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 214 at 219.

²⁸² First Affidavit of Manuka Henare, in *Te Runanganui o Te Upoko o Te Ika Association Inc v Treaty of Waitangi Fisheries Commission* (Russell McVeagh McKenzie Bartlett & Co, Auckland, 29 January 1998) at 3-4.

be no hapū and without individuals there can be no whānau. How these individuals decide to organise themselves is what matters most. ... The Māori race is an iwi. ... Different collectives of people have become known as iwi. These include Ngapuhi, Waikato, Ngatiporou, Ngāitahu, Whakatohea [sic] ... and so on. I estimate that there are about 60 such groupings in this country. The Commission's approach of treating these as the fixed and only form of iwi has given this form of iwi a huge financial boost since the Sealords agreement was signed ... Iwi has other meanings and does not just mean the above. I do not disagree with any other point of view of what an iwi is because it can mean different things to different people in different situations. However I can say that in my opinion the word 'iwi' in Schedule 1A of the Māori Fisheries Act 1989 means the Māori race as a whole both as individuals and as a collective or Nation.²⁸³

John Winitana of Te Rūnanga o Te Upoko o Te Ika Association Inc., an UMA, stated:

... traditionally iwi meant just 'the people.' It was regularly used as 'te iwi Māori me te iwi Pakeha,' the Māori and the Pākehā people. 'Iwi' could be used for the people of a hapū, the people of a district or the people of a country. It could be used for rich people, the poor people, the people of Auckland or whatever. When we talked of tribe we spoke of hapū.²⁸⁴

June Jackson, when referring to the Manukau Urban Māori Authority (MUMA) another UMA, noted:

Our organisation is a group of people who came together for a common purpose. So in that definition I see us as an iwi.²⁸⁵

Sir John Turei of Ngāi Tuhoe recorded his clear understanding of 'iwi':

Iwi appears to be a pre-1840 concept ... and an alliance of hapū but... its people no two ways about that. In today's context it's quite commonly used to describe a gathering of people.²⁸⁶ ... Iwi means tribe but other things as well. Any group with a common purpose is an iwi.²⁸⁷

The Māori scholar Dr Ranginui Walker of Whakatohea added his understanding of 'iwi':

If it stood on its own, I would take iwi to mean people. ... I'm not a tribal person in one sense, more of a pan-tribal person though I can trace my roots to a tribe. When I was growing up the only category, I knew were hapū categories in our area or district. ... I only

²⁸³ Affidavit of Rima Edwards in Support of Muriwhenua, in *Te Runanga o Muriwhenua v Treaty of Waitangi Fisheries Commission* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 4-5.

²⁸⁴ Affidavit of John Winitana, in *Te Runanga o Muriwhenua v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 10.

²⁸⁵ Jackson, J in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 115.

²⁸⁶ Sir John Turei, in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) lines 10-12, 30.

²⁸⁷ *Ibid*, at 8, lines 12-3.

knew of the hapū names. It wasn't until later life as an adult that I came to know the category Whakatohea as an iwi.²⁸⁸

Professor Mason Durie was asked what is the appropriate definition of 'traditional tribes' to which he answered:

I take a lot of direction from the wording of the Treaty of Waitangi which when addressing the question of the ownership of resources, refers to hapū not iwi. ... Since 1990 ... the word tribe has been associated with the word iwi.²⁸⁹

Professor Durie then went on to give what appeared to be his balanced opinion on the best way to define iwi from a more utilitarian view:

... in a way which led on to benefits and I think the broadest definition is most useful. The broadest definition would include tribes, aggregation of hapū, hapū and other groupings that will be able deliver benefits to Māori people.²⁹⁰

Sir Graham Latimer also of Muriwhenua was asked whether 'iwi' meant 'traditional tribes' to which he responded:

It depends on where you are. ... whatever they are they are people.²⁹¹ ... that is my concern ... trying to use the word iwi to take over the position of the tribes and I won't agree to that.²⁹²

'Iwi' – 'Traditional Tribe' and 'People'

A number of experts also concluded that 'iwi' means both 'traditional tribe' and 'people' as well as other meanings depending on context. Dr Ngapare Hopa of Ngāti Wairere defined 'iwi' in the context of Waikato:

The Waikato tribes are part of the confederation of tribes descended from the voyagers of the Tainui canoe which made its landfall at Maketu on the Kawhia harbour. Since that day descendants have spread throughout the Waikato area and beyond, firstly forming whaanau, then hapuu, and finally iwi, who form the Tainui confederation as we know it today. Beside Waikato, the major tribes of Tainui consist of Maniapoto, Raukawa, Ngaati Hauaa and Hauraki. Each tribe traces to an eponymous ancestor who, in turn, can be traced back to Hoturoa or one of the other voyagers on the Tainui. There are many forces of a spiritual, cultural and organisational nature which bind Tainui into the most cohesive

²⁸⁸ Walker, R in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 101-02.

²⁸⁹ Durie, M in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 204.

²⁹⁰ Ibid, at 205.

²⁹¹ Graham Latimer, in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 196.

²⁹² Idem, at 198.

tribe within Māoridom. Apart from a common ancestry, there are also linkages of the Waikato River, Kiingitanga, the land wars and raupatu.²⁹³

Dr Hopa subsequently asserted:

I've come to the conclusion that iwi is not just limited to groups who can claim their whakapapa, that historically and continuing it has been used loosely to refer to people of a place, of another culture, and so on. ... The definition and meaning of iwi as defined according to whakapapa is valid but not the only and sole basis or criteria. ... iwi can mean different things.²⁹⁴

It is appropriate to close this part of the discussion with the opinion of Dr Joan Metge, anthropologist and adopted traditionally into Te Rarawa of the Far North, who concluded:

[Iwi is] a high level descent based social political grouping in the Māori social order identified more particularly in the past by the English word 'tribe.'²⁹⁵

When asked whether iwi meaning people is the more traditional use of the word Metge replied: 'The evidence and logicality suggests that but I don't feel there is enough either way to make a decision.'²⁹⁶ Hence the diversity of expert opinion on the mātauranga and tikanga of Māori tribal identity and what the Māori word 'iwi' means which appeared to leave the Court none the wiser.

Consequently, this decision was appealed to the Judicial Committee of the Privy Council in *Manukau Urban Māori Authority v. Treaty of Waitangi Fisheries Commission*,²⁹⁷ which raised the question on TOKM's intention to allocate its assets to 'iwi' or 'traditional tribes.' The UMAs claimed that a distribution only to iwi could not give effect to the overriding purpose of the settlement, which was that it should be for the benefit of all Māori. It would exclude the many Māori who were not in touch with their iwi, including a substantial number who could not identify the iwi to which they belonged.²⁹⁸ TOKM's response was that it had no statutory power to distribute any of its assets except that conferred by s. 9(2)(I), Māori Fisheries 1989 Act, to iwi and no one else. TOKM accepted that the settlement had to be 'ultimately for the benefit of all Māori' but said there was no reason why it should not be able to devise a scheme for distribution to iwi, which satisfied this requirement.

Predictably, the Privy Council held that TOKM, as a statutory body, has no power to distribute its assets except in accordance with the terms of the Act. Section 19(2), Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 made it clear that TOKM's only power to dispose of quota or its shares in its company Aotearoa Fisheries Ltd is that conferred by s. 9(2)(I) as amended. That paragraph provided only for a distribution under a scheme, which gives effect to the resolutions of the hui. Those resolutions plainly provide for distribution to 'iwi.' The concurrent findings of Paterson J and the Court of Appeal, which were scarcely challenged in argument, were that in using the term 'iwi,' the resolutions intended to refer to 'traditional tribes.' As

²⁹³ Affidavit of Robert Mahuta at 18 in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 18.

²⁹⁴ Hopa, N in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) 40-41.

²⁹⁵ Ibid, at 337.

²⁹⁶ Ibid, at 339.

²⁹⁷ *Manukau Urban Māori Authority and Others v. Treaty of Waitangi Fisheries Commission and Others and Reuben Brian Perenara Treaty of Waitangi Fisheries Commission and Others* (Privy Council Appeal No. 68 of 2000 Delivered the 2nd July 2001).

²⁹⁸ For example, Urban, Cosmopolitan, and trans-Tasman Māori.

Thomas J said in his judgment ‘there is not the slightest doubt that those representatives of ‘iwi’ gathered at the hui-a-tau (annual general meeting) on 25 July 1992 intended the pre-settlement assets to be distributed to ‘iwi’ and that they meant iwi in the sense of ‘traditional tribes.’

The Lordships concluded that the Parliamentary sanction given to the resolutions of the hui-a-tau (AGM) for the distribution of PRESA formed part of a political settlement, not only between the Crown and Māori but also to some extent between Māori and Māori. Of course, it was assumed consistent with the overall objective of a settlement for the benefit of the Māori people as a whole. And it was possible that TOKM or the Minister may eventually reach the conclusion that consistency is impossible and that the settlement had to be revised. Alternatively, a court may decide that no other conclusion is rationally possible. However, their Lordships did not think it right for the courts to revise the terms of the settlement. As the Waitangi Tribunal remarked ‘treaty matters are more for statesmen than lawyers’²⁹⁹ and the appeal was dismissed.

The Māori fishing settlement then was precipitated on the identification of who the customary owners of the fisheries rights were for contemporary development, and in a wider context, general aboriginal and Treaty rights. TOKM was of the view that the Fisheries resource was vested in Māori ‘iwi’ (tribes)³⁰⁰ which they thought to number between 58-60 in New Zealand.³⁰¹ At its 1992 Hui-a-Tau (AGM), TOKM also captured the necessary mātauranga and tikanga Māori attributes of an ‘iwi’ and proposed that it is ‘a group of related Māori’ having the following essential (shared) characteristics:

1. shared descent from Tūpuna (ancestors);
2. hapū (sub-tribes);
3. marae (meeting houses);
4. belonging historically to a Takiwa (territory);
5. an existence traditionally acknowledged by other ‘iwi.’

These criteria for recognising official ‘iwi’ appears to be exactly the same as that definition offered in the now repealed Rūnanga Iwi Act 1990. Dame Joan Metge criticised these characteristics of ‘iwi’ from her submission made in 1990 on the Rūnanga Iwi Bill (which issues are still relevant) when she asserted:

I object to the embodiment of this list of the ‘essential characteristics of iwi’ ... not because I disagree with its content, but on the grounds, firstly, that the right to decide which groups are iwi and which are not and to define the criteria to be used in the process is the prerogative of te iwi Māori (that is, nga iwi collectively), not something to be imposed by the law; and secondly, because it would freeze the definition of the iwi in time, precluding recognition of future developments.³⁰²

Metge recommended that these ‘iwi’ characteristics be regarded as a set of guidelines instead of a legal prescription:

The list of iwi characteristics ... [are] overall sound and helpful. As it stands it reflects the static view of the iwi I have just criticized, but this could be easily remedied by minor amendments.³⁰³

²⁹⁹ Waitangi Tribunal *Fisheries Settlement Report 1992* (GP Publications, Wellington, 1992) at 21.

³⁰⁰ Some would define ‘iwi’ as ‘nation’ similar to the First ‘Nations’ context.

³⁰¹ Māori Fisheries Act 2004, Schedule 3 and 3A lists the 58 ‘official’ iwi recognised for fisheries.

³⁰² Metge, J, Submission on the Rūnanga Iwi Bill, (Wellington, 14 February 1990) at 7.

³⁰³ Idem.

Commenting on TOKM's criteria for 'iwi' Waerete Norman noted:

There needs to be established which or what groups are actually operating on the ground and to further devise a realistic and practical approach of asset delivery to all its beneficiaries. Other questions posed are will 'essential criteria' proposal and its interwoven strands achieve this? Will all Māori entitled to their fair share of asset distribution by way of fishing Quota share in the catch, or will it be reduced to a mere scale of the tail, before the fish is beached even?³⁰⁴

Waerete Norman continued further:

The TOKM definition [of iwi] it seems that it has not allowed for the dynamism, adaptation, and adjustment that Māori people have undergone since the advent of colonisation. In setting its 'essential criteria' it too has assumed that native social groupings such as that of 'iwi' have remained static and unchanging over time and continue to do so despite modernisation and successive government policies of assimilation, absorption and integration which have impacted on Māori.³⁰⁵

Dr Ngapare Hopa also criticised the criteria:

[It] ignores the dynamic and core fluidity of political alliances, but it also does not take into account the genius of our people to be flexible, to form alliances and new groupings [for] different responses, or changes in circumstances, economic or otherwise. I'm not saying that iwi as defined by whakapapa and one's membership of it is fine but not their only grouping. It is not the only grouping of lineages of whakapapa, for example, that is a vehicle for addressing our peoples' needs.³⁰⁶

Subsequently, the matter of defining an iwi and more importantly, who are the official iwi in the Māori commercial fisheries context, was settled by legislation in the Māori Fisheries Act 2004, Schedule 3: 'Iwi (listed by groups of Iwi) and notional Iwi populations.' The Māori Fisheries Act 2004 then recognised and codified 58-60 'official' iwi tribes.

³⁰⁴ Affidavit of Waerete Violet Beatrice Norman in Support of Muriwhenua, in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 12.

³⁰⁵ *Ibid*, at 12.

³⁰⁶ Hopa, N in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 41.

Māori Fisheries Act 2004, Schedule 3: Iwi (listed by groups of iwi) and notional iwi populations

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Name of iwi and group	Notional population	Percentage of total iwi notional population	Number of members required on register of iwi members to meet requirements of section 14(d)
A TAITOKERAU			
Ngāti Whatua	13 113	1.931	3 000
Te Rarawa	11 998	1.767	2 800
Te Aupouri	8 168	1.203	2 100
Ngāti Kahu	7 244	1.067	1 900
Ngāti Kuri	4 841	0.713	1 400
Ngāti Wai	4 115	0.606	1 300
Ngapuhi/Ngāti Kahu ki Whaingaroa	2 040	0.300	800
Ngāi Takoto	509	0.075	200
	52 028	7.662	
B NGAPUHI			
Ngapuhi	107 242	15.791	21 400
	107 242	15.791	
C TAINUI			
Waikato	46 526	6.851	9 300
Ngāti Maniapoto	30 857	4.543	6 100
Iwi of Hauraki ⁽¹⁾	13 622	2.006	3 100
Ngāti Raukawa (ki Waikato)	9 051	1.333	2 300
	100 056	14.733	
D TE ARAWA WAKA			
Te Arawa ⁽²⁾	40 533	5.968	8 100
Ngāti Tuwharetoa	34 226	5.040	6 800
	74 759	11.008	
E MATAATUA			
Tuhoe	29 726	4.377	5 900
Ngāti Awa	13 252	1.951	3 000
Ngāiterangi	10 451	1.539	2 500
Whakatohea	10 107	1.488	2 500
Ngāti Ranginui	6 631	0.976	1 700
Ngāi Tai	2 266	0.334	900

Name of iwi and group	Notional population	Percentage of total iwi population	Number of members required on register of iwi to meet requirements of section 14(d)
Ngāti Manawa	1 567	0.231	600
Ngāti Pukenga	1 243	0.183	500
Ngāti Whare	701	0.103	300
	75 944	11.182	
F POROURANGI			
Ngāti Porou	63 613	9.367	12 700
Te Whānau a Apanui	10 113	1.489	2 500
	73 726	10.856	
G TAKITIMU			
Ngāti Kahungunu	53 478	7.874	10 600
Te Aitanga a Mahaki	4 501	0.663	1 400
Rongowhakaata	3 728	0.549	1 300
Ngāi Tamanuhiri	1 207	0.178	500
	62 914	9.264	
H HAUAURU			
Te Atiawa (Taranaki)	14 147	2.083	3 200
Te Atihaunui a Paparangi	9 780	1.440	2 400
Taranaki	6 001	0.884	1 600
Ngāti Ruanui	5 675	0.836	1 500
Rangitane (North Island)	3 321	0.489	1 200
Nga Rauru	3 285	0.484	1 200
Nga Ruahine	3 276	0.482	1 200
Ngāti Apa (North Island)	2 461	0.362	900
Muaupoko	1 901	0.280	800
Ngāti Mutunga (Taranaki)	1 652	0.243	700
Ngāti Tama (Taranaki)	1 201	0.177	500
Ngāti Hauti	1 039	0.153	400
Ngāti Maru (Taranaki)	907	0.134	400
	54 646	8.047	

Name of iwi and group	Notional population	Percentage of total notional population	Number of members required on register of iwi to meet requirements of section 14(d)
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I TE MOANA O RAUKAWA

Ngāti Raukawa (ki te 19 698 Tonga)		2.900	3 900
Ngāti Toa Rangatira	5 202	0.766	1 500
Te Atiawa (Wellington)	1 761	0.259	760
Te Atiawa (Te Ihu)	1 965	0.289	800
Ngāti Kuaia	1 266	0.186	500
Rangitane (Te Ihu)	1 258	0.185	500
Ngāti Koata	885	0.130	400
Ngāti Rarua	805	0.119	400
Ngāti Apa ki Waipounamu	te 649	0.096	300
Ngāti Tama (Te Ihu)	Tau 628	0.092	300
Atiawa Whakarongotai	ki 493	0.073	200
	34 610	5.095	

J WAIPOUNAMU/REKOHU

Ngāi Tahu	41 496	6.110	8 200
Ngāti Mutunga (Chathams)	1 132	0.167	500
Moriori	601	0.088	300
	43 229	6.365	

Total notional iwi population 679 154

Notes—Iwi of Hauraki and Te Arawa

(1)

The iwi of Hauraki, whose notional population is set out in column 2 of this schedule, must be treated as one iwi for the purposes of Part 3.

The iwi of Hauraki are:

Ngāti Hako

Ngāti Hei

Ngāti Maru

Ngāti Paoa
Patukirikiri
Ngāti Porou ki Harataunga, ki Mataroa
Ngāti Pukenga ki Waiau
Ngāti Rahiri Tumutumu
Ngāi Tai
Ngāti Tamatera
Ngāti Tara Tokanui
Ngāti Whānaunga.

(2)

The iwi of Te Arawa, whose notional population is set out in column 2 of this schedule, must be treated as one iwi for the purposes of Part 3.

The iwi of Te Arawa are:

Ngāti Makino
Ngāti Pīkiao
Ngāti Rangiteaorere
Ngāti Rangitīhi
Ngāti Rangiwewehi
Ngāti Tahu/Ngāti Whāoa
Tapuika
Tarawhai
Tuhourangi
Te Ure o Uenuku-Kopako/Ngāti Whakaue
Waitaha.

In a similar manner, TOKM needed to clarify the organisations that represent each iwi. TOKM's proposal for Māori governance entities³⁰⁷ was that it would not allocate commercial fisheries assets until Iwi:

- have a constitution that meets the standards set out in the Māori Fisheries Act 2004 and received the approval of TOKM;
- have met all the structural requirements as set out in the Māori Fisheries Act 2004 and received approval of TOKM;
- have a register of members that is equal to, or exceeds the number of members required of that respective Iwi as set in the Māori Fisheries Act 2004 and received approval of TOKM; and
- have obtained coastline agreements and where appropriate harbour and freshwater agreements with all affected Iwi which have been approved by TOKM in accordance with the Māori Fisheries Act 2004.³⁰⁸

The organisations that represent iwi were also prescribed and codified in the Māori Fisheries Act 2004.

³⁰⁷ As reflected in Te Ohu Kai Moana, above 218 and the Māori Fisheries Act 2004.

³⁰⁸ Ibid, at 115.

Māori Fisheries Act 2004, Schedule 4 Organisations that are recognised iwi organisations (as at the commencement of this Act)

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Name of iwi and group	Organisation
A TAITOKERAU	
Ngāti Whatua	Te Rūnanga o Ngāti Whatua
Te Rarawa	Te Rūnanga o Te Rarawa
Ngāti Kahu	Te Rūnanga-a-iwi o Ngāti Kahu
Ngāti Kuri	Ngātikuri Trust Board Incorporated
Ngāti Wai	Ngāti Wai Trust Board
Ngapuhi/Ngāti Kahu ki Whaingaroa	Te Rūnanga o Whaingaroa
Ngāi Takoto	RONAN Trust
B NGAPUHI	
Ngapuhi	Te Rūnanga a Iwi o Ngapuhi
C TAINUI	
Waikato	Waikato Raupatu Lands Trust
Ngāti Maniapoto	Maniapoto Māori Trust Board
Iwi of Hauraki	Hauraki Māori Trust Board
Ngāti Raukawa (ki Waikato)	Raukawa Trust Board
D TE ARAWA WAKA	
Te Arawa (ten iwi)	Te Kotahitanga o Te Arawa Waka Fisheries Trust Board
Ngāti Tuwharetoa	Ngāti Tuwharetoa Marine Fisheries Committee
E MATAATUA	
Tuhoe	Tuhoe-Waikaremoana Māori Trust Board
Ngāti Awa	Te Rūnanga o Ngāti Awa
Ngāiterangi	Ngāiterangi Iwi Society Incorporated
Whakatohea	Whakatohea Māori Trust Board
Ngāti Ranginui	Ngāti Ranginui Iwi Society Incorporated
Ngāi Tai	Ngāitai Iwi Authority
Ngāti Manawa	Te Rūnanga o Ngāti Manawa
Ngāti Pukenga	Ngāti Pukenga Iwi ki Tauranga Society Incorporated

Name of iwi and group

Ngāti Whare

Organisation

Te Rūnanga o Ngāti Whare Iwi Trust

F POROURANGI

Ngāti Porou

Te Rūnanga o Ngāti Porou

Te Whānau a Apanui

Te Rūnanga o Te Whānau

G TAKITIMU

Ngāti Kahungunu

Ngāti Kahungunu Iwi Incorporated

Te Aitanga a Mahaki

Te Aitanga a Mahaki Trust

Rongowhakaata

Rongowhakaata Charitable Trust

Ngāi Tamanuhiri

Ngāi Tamanuhiri Whanui Charitable Trust

H HAUAURU

Te Atiawa (Taranaki)

Te Atiawa Iwi Authority Incorporated

Te Atihaunui a Paparangi

Whanganui River Māori Trust Board

Taranaki

Te Rūnanga o Taranaki Iwi Incorporated

Ngāti Ruanui

Te Rūnanga o Ngāti Ruanui Trust

Rangitane (North Island)

Te Rūnanganui o Rangitane Incorporated

Nga Rauru

Nga Rauru Iwi Authority Society Incorporated

Nga Ruahine

Nga Ruahine Iwi Authority

Ngāti Apa (North Island)

Te Rūnanga o Ngāti Apa Society Incorporated

Muaupoko

Muaupoko Tribal Authority Incorporated

Ngāti Mutunga (Taranaki)

Ngāti Mutunga Iwi Authority Incorporated

Ngāti Tama (Taranaki)

Te Rūnanga o Ngāti Tama

Ngāti Hauiti

Te Rūnanga o Ngāti Hauiti

Ngāti Maru (Taranaki)

Ngāti Maru Pukehou Trust

I TE MOANA O RAUKAWA

Ngāti Raukawa (ki te Tonga)

Te Rūnanga o Raukawa Incorporated

Ngāti Toa Rangatira

Te Rūnanga o Toa Rangatira Incorporated

Te Atiawa (Te Tau Ihu)

Te Atiawa Manawhenua ki te Tau Ihu Trust

Ngāti Kuia

Te Rūnanga o Ngāti Kuia Charitable Trust

Rangitane (Te Tau Ihu)

Te Rūnanga a Rangitane o Wairau Incorporated

Name of iwi and group	Organisation
Ngāti Koata	Ngāti Koata No Rangitoto ki te Tonga Trust
Ngāti Rarua	Ngāti Rarua Iwi Trust
Ngāti Apa ki te Waipounamu	Ngāti Apa ki te Ra To Incorporated
Ngāti Tama (Te Tau Ihu)	Ngāti Tama Manawhenua ki te Tau Ihu Trust
Atiawa ki Whakarongotai	Te Rūnanga o Ati Awa ki Whakarongotai Incorporated

J WAIPOUNAMU/REKOHU

Ngāi Tahu	Te Rūnanga o Ngāi Tahu
Moriori	Hokotehi Moriori Trust

Referring to the Māori Commercial Fisheries settlement, the iwi and representation debate, and contemporary Treaty settlements, a Tau Ihu informant recently observed:

Legislating was probably the worst thing they could have done because one size doesn't fit all. The whole negotiations settlement process is not working because the Crown wants to deal with one entity when Māori are actually hapū based.³⁰⁹

The above analyses of Māori fisheries and the key mātauranga and tikanga Māori principles around iwi identity and organisational representation highlighted some of the complex challenges at the interface of mātauranga and tikanga Māori and mainstream law especially on who decides and how they decide such fundamental cultural questions.

As noted earlier, although these highly contentious, litigious and divisive policies were made two decades ago, similar legal and cultural challenges are relevant when working with some Councils as another Te Tau Ihu informant observed:

Councils are problematic because one Council has adopted a particular process if they have an obligation to consult with iwi (as in the past we have provided cultural impact reports) outlining our cultural sites of significance and the potential impacts. So what one Council has done is set up a process where they invite Iwi to bid for the right to provide these reports. The result is Iwi bidding against each other - so having a race to the bottom of the barrel, and the one that comes up with the cheapest rate will be able to then have the right to provide a report on behalf of all the rest of us. So, it's an attempt to reduce the Treaty obligations contained in the Local Government Act and in the Treaty itself. To accrue tendering processes as if it was a contract for business. It is not a contract, this is not a commercial relationship, it's an international legal relationship and it's contained in the Local Government Act and in the RMA. How could they think that a tendering process is actually cutting out some of the iwi in their ability to provide reports [which] is bizarre?³¹⁰

³⁰⁹ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

³¹⁰ Ibid.

A further thought-provoking comment on codifying mātauranga and tikanga Māori in Treaty settlement legislation such as iwi identity and organisational representation in the Māori Fisheries Act 2004, was asserted by Williams J who, speaking extra-judicially, concluded: ‘The nature of tikanga is such that to codify it is to kill it!’³¹¹

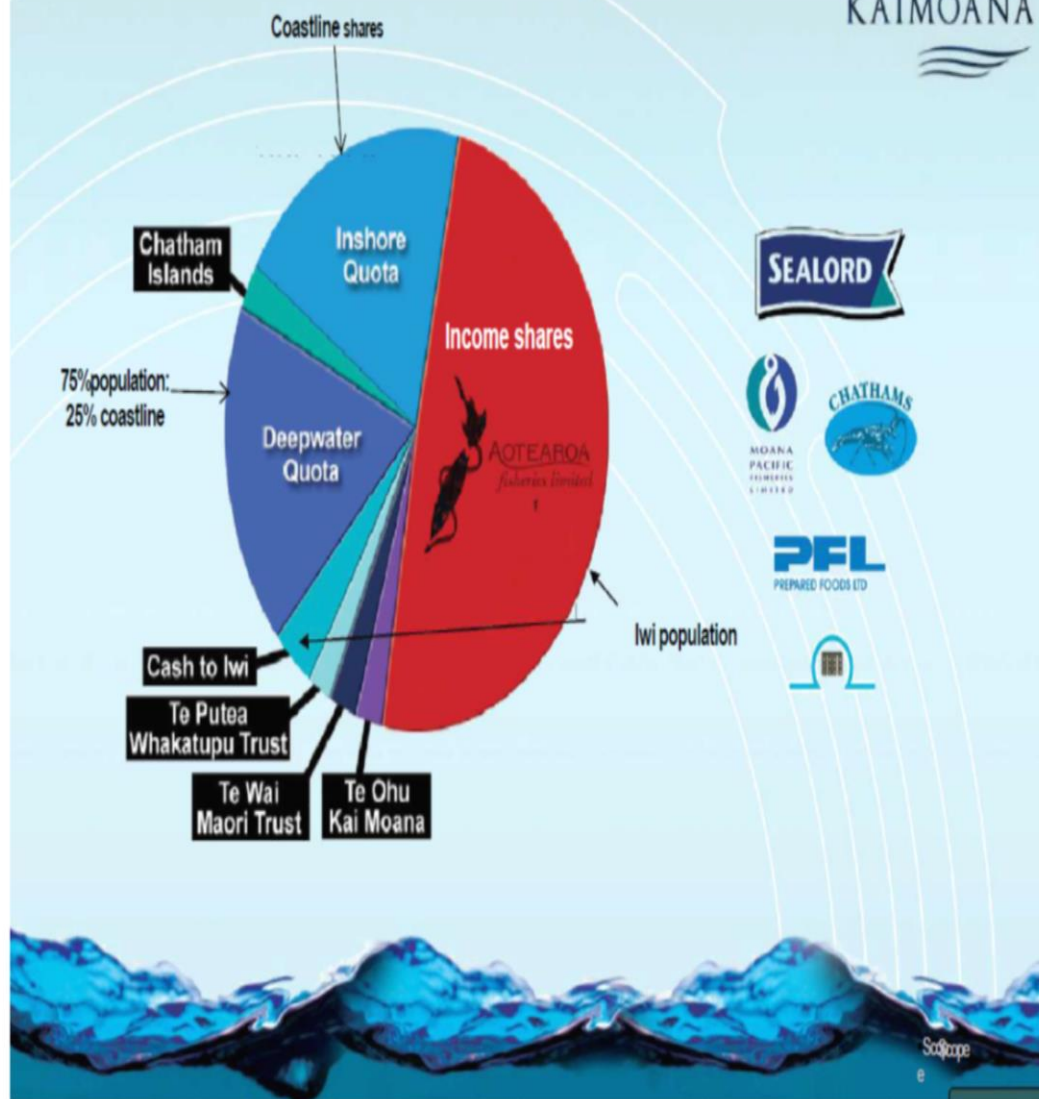
The following four maps on TOKM allocation models, traditional tribal boundaries, traditional coastline entitlements, and fisheries management areas were also apparently decided based on tribal mātauranga and tikanga and were the fruits of official iwi codified legal recognition and partnership in the Māori Fisheries Act 2004 but were also highly contentious (and continue to be contentious) exercises.

³¹¹ Williams, J, ‘The Māori Land Court: A Separate Legal System?’ (New Zealand Centre for Public Law, Wellington, 2001) at 4.

The Allocation model - What and How ?

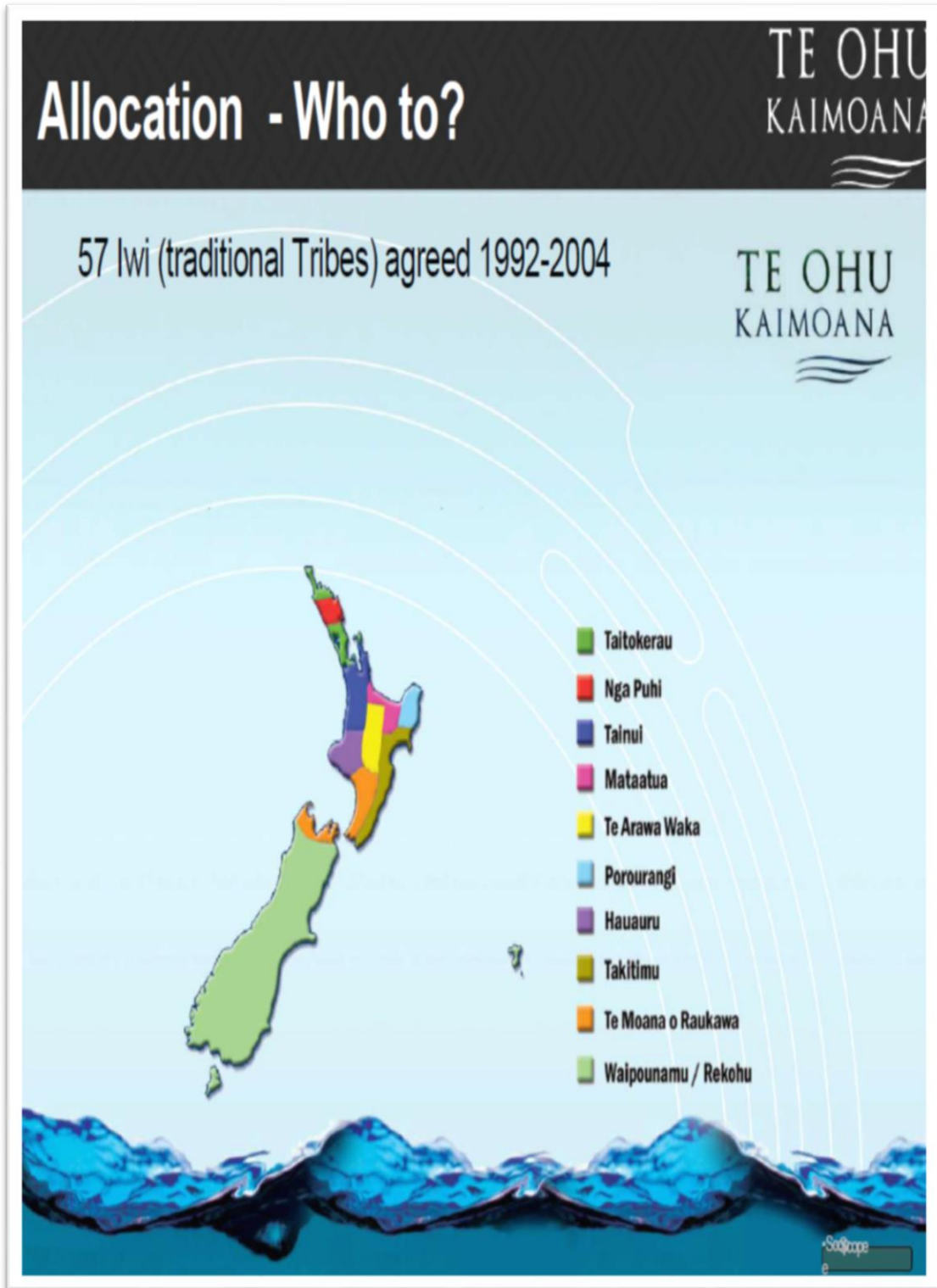
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TOKM Allocation Models based on Tikanga Māori³¹²

³¹² Te Ohu Kaimoana, 'Māori Customary Fishing Rights in the Modern New Zealand Context,' (Unpublished Presentation, Torres Strait, Australia, 8 April 2014) at 10.

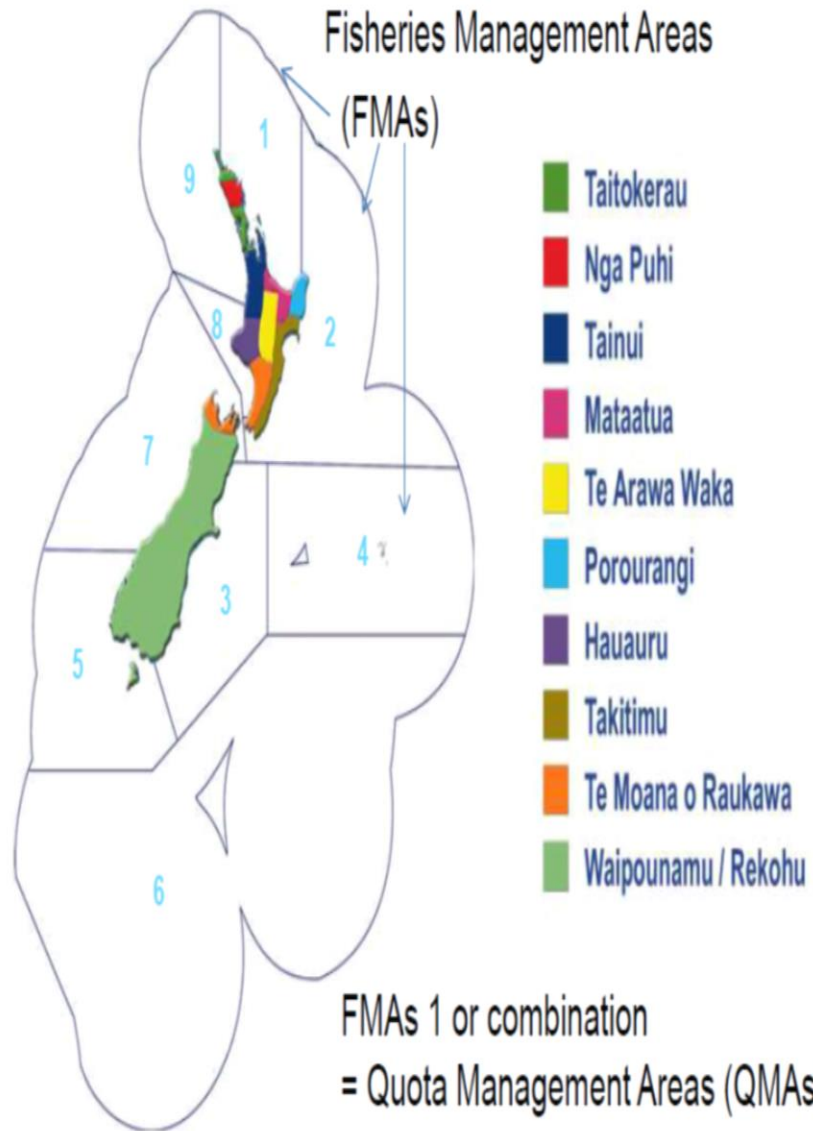


Official Tribes and General Boundaries³¹³

³¹³ Ibid.

www.sustainableseaschallenge.co.nz

Allocation of Settlement quota to 57 iwi based on the QMS and quota classification



Ka hua ki tai - Ka ora ki uta
a bountiful sea will sustain us

Fisheries Management Areas (FMAs) based on Tikanga Māori³¹⁵

³¹⁵ Ibid, at 11.

A Te Tau Ihu informant recently provided an interesting insight into traditional tribal coastline boundaries from the Māori Commercial Fisheries Settlement:

The other thing is that the [Fisheries] settlement means that we have a coastline measurement being an important aspect of whatever you share from the settlement even though we have neighbours who have issues just where each boundary starts. That's what you have to be able to defend and to get your tribal perspective on all of that.³¹⁶

Another Te Tau Ihu informant briefly referred further to some of the tensions that emerge from deciding coastline boundaries according to tikanga Māori and the challenges of Crown policy:

It's not necessarily iwi's fault, it's the system that's put us here so we have to. An example is that when we came here we displaced some iwi. We conquered them and we took their land and occupied it to this day. What has happened within the settlement process is that the Crown has said: 'Well all of you have an interest in this particular coastal area.' And what that does is impact on your mana whenua.³¹⁷

A different Te Tau Ihu informant provided another perspective on coastal boundary challenges:

There needs to be the opportunity to manage the coastal boundary conflicts with proper resourcing because if you don't get that right, the other bits won't work. Places like Ngāi Tahu are different because they are pretty well defined. Many other areas are a bit similar but it's not been equitable in terms of the overall settlement for people.³¹⁸

The next section will discuss similar challenges with Māori in the aquaculture industry.

G. Tikanga Māori and Aquaculture

Along a similar development as the Māori commercial fisheries settlement in 1992 and the Māori Fisheries Act 2004, the Māori Commercial Aquaculture Claims Settlement Act 2004 (MCACS Act) was the Crown's response to Māori Treaty claims to aquaculture.³¹⁹ The Aquaculture Settlement mirrors the commercial aspects of the Māori Fisheries Settlement. The MCACS Act provided for the full and final settlement of Māori commercial aquaculture interests. Under the new aquaculture legislation, mandated iwi organizations (MIO's) with accompanying Asset Holding Companies were entitled to receive 20% of all aquaculture space newly created after 1 January 2005, and the equivalent of 20% of existing aquaculture space.

The MCACS Act also established the Māori Commercial Aquaculture Settlement Trust – referred to as the 'Takutai Trust' - which is a subsidiary of TOKM. The Takutai Trust was established to assist Māori with the aquaculture settlement and to administer the MCACS Act. In 2010, the Takutai Trust even assisted Te Tau Ihu Iwi, Hauraki and Ngāi Tahu in successfully completing

³¹⁶ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

³¹⁷ Ibid.

³¹⁸ Ibid.

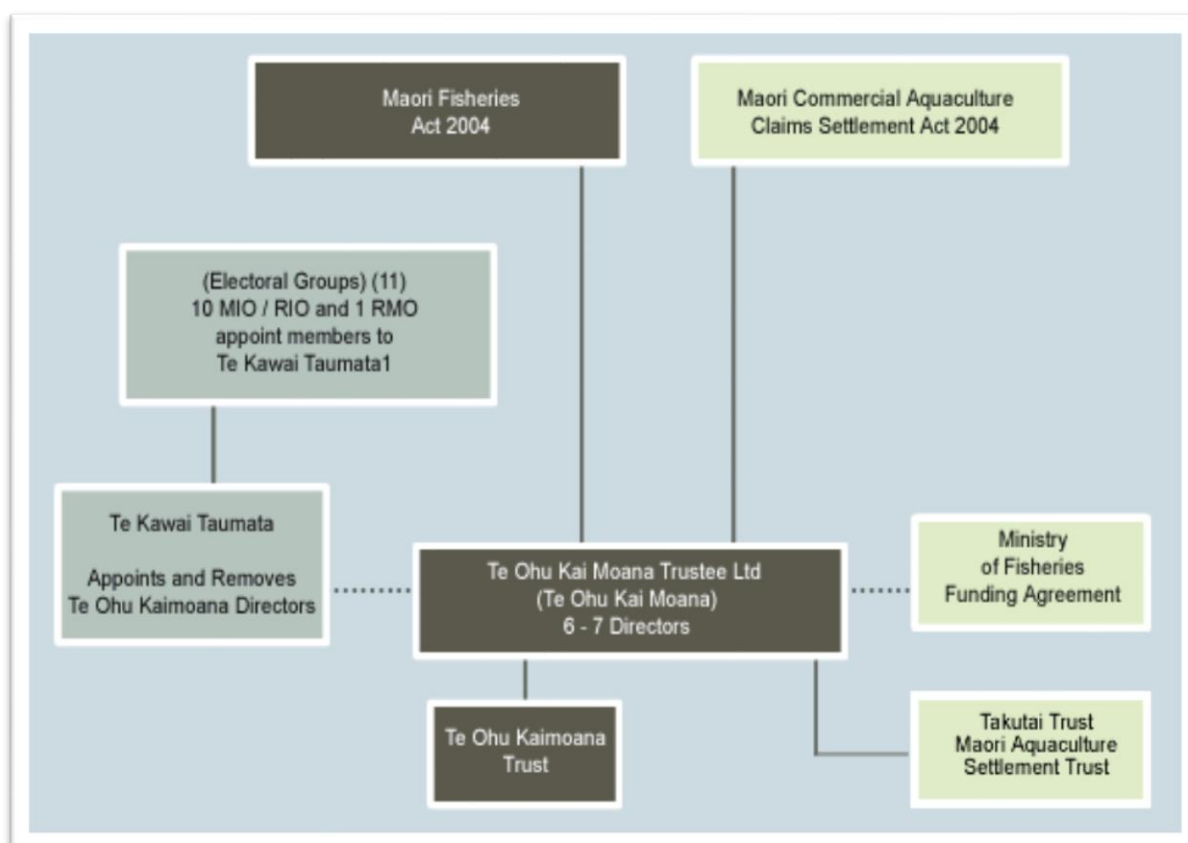
³¹⁹ Refer to Jones, M, 'Aquaculture Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).

their pre-commencement space settlements with the Crown, which resulted in a \$97 million Deed of Settlement.

The Takutai Trust, moreover, works to protect the aquaculture interests of Māori and is responsible for receiving aquaculture settlement assets from the Crown or Regional Councils, and allocating the settlements to Iwi Aquaculture Organizations (IAOs). The specific duties of the Takutai Trust include -

1. Allocating and transferring settlement assets;
2. Holding and administering settlement assets pending their allocation and transfer;
3. Determining allocation entitlements;
4. Maintaining an iwi aquaculture register and providing access to the register;
5. Facilitating steps by iwi organizations to be recognized as iwi aquaculture organizations;
6. Facilitating steps by iwi aquaculture organizations to reach agreement;
7. Notifying coastal endpoints in the Gazette

The following diagram shows the governance entities and relationships of the Takutai Trust and TOKM in relation to the Māori Fisheries Act 2004 and the Māori Commercial Aquaculture Claims Settlement Act 2004.



TOKM Organisational Structures & the Takutai Trust Māori Aquaculture Settlement Trust³²⁰

³²⁰ Takutai Trust, the Māori Agricultural Settlement Trust online at: <http://www.takutai.Māori.nz/about/takutai.htm> (Accessed November 2018).

As a result of the 2004 Māori aquaculture settlement then, Māori are well placed to be involved as Treaty partners, to prosper, and to integrate mātauranga and tikanga Māori in the aquaculture industry in an EBM context.

Like the 1992 Commercial Fisheries Settlement, the success of the 2004 Māori Aquaculture Settlement is, inter alia, dependent upon iwi having strong leadership, maintaining mātauranga and tikanga Māori, and instituting good governance structures and practices as one Te Tau Ihu informant commented:

It's important that we have the best representatives and advisers advocating for us. You only need to look historically at the best enablers that Māori have had such as Tipene O'Regan, Sir Graham Latimer, Dame Whina Cooper and Matiu Rata. ... These leaders changed the face of our country and without them, we probably wouldn't be where we are today. I think the primary focus of our people getting involved in the management of the [fisheries] quota is to take it away from the traditional piece and an assumption that when it comes to the management and governance of our marine economic resource, you don't necessarily have the cultural people involved in that. See, I believe that's a continuum which is social, economic and cultural. It's not a hierarchal thing, it's a flat line and if you understand that, then you start getting your structures and organizations right.³²¹

Aquaculture New Zealand even recently reported that 'aquaculture has become the world fastest growing primary industry and the demand for aquaculture products is expected to increase significantly as the world's population grows and wild-catch levels remain relatively static.'³²² Statistics report that aquaculture produces approximately 47% of seafood consumed by humans globally and that production levels have grown at a rate of approximately 6.3% per annum for the past decade.

In 2014, the Ministry for Primary Industries (MPI) reported that the vast majority of New Zealanders felt positive about aquaculture, and that they supported the sustainable growth of the industry. However, it was not only due to the industry's ability generate \$500 million revenue of which \$338.1 million went towards export earnings. The public support seemed to derive from a much more holistic view of the industry, given it provides regional employment within communities and much support to other industries. The MPI report added that aquaculture is a sustainable solution to feeding the world as the industry estimated aquaculture to be one of the world's most efficient forms of food production and will soon be producing more seafood than wild fisheries.³²³

However, as noted earlier, the four TOKM maps above on TOKM allocation models, traditional tribal boundaries, traditional coastline entitlements, and fisheries management areas that were apparently decided based on mātauranga and tikanga Māori also apply for the Māori Commercial Aquaculture Claims Settlement Act 2004. Hence, each of these areas highlight the importance and relevance of mātauranga and tikanga Māori as well as the Treaty of Waitangi partnership in the aquaculture space, which can also operate in an EBM context.

In addition, the corporate focus of Māori fisheries organisations – iwi MIOs and iwi IAOs – although commendable may be a challenge to implementing EBM over the marine estate in the

³²¹ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

³²² Aquaculture New Zealand, 'Research Shows Strong Support,' (Aquaculture New Zealand, 1 August 2018) online at <https://www.aquaculture.org.nz/2014/08/20/research-shows-strong-support/> (Accessed November 2018).

³²³ Idem.

future given the tendency to prioritise corporate economic objectives over environmental, cultural and social ones. But as noted above, for the aquaculture settlement to succeed, it is dependent upon iwi having strong leadership, and maintaining mātauranga and tikanga Māori while also instituting good Māori governance. Unfortunately, the past commercial fisheries challenges over tribal identity and representation, coastal boundaries and leadership are and will continue into the future hence a policy of caution is recommended going forward - kia tūpato – much care is required!

The next section will briefly discuss similar themes regarding Māori customary fishing provisions and mātauranga and tikanga Māori.

H. Tikanga Māori and Customary Fisheries

As noted above, both Māori commercial and customary fishing rights are included in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. While the Māori commercial fisheries interests of iwi span an entire Quota Management Area, the customary non-commercial interests of iwi and hapū are generally more locally based. There is scope for co-management fisheries agreements including the customary fisheries regulations, which significantly allow for iwi to establish bylaws in relation to the taking of kaimoana (seafood) that may also be reflective of aspects of ecosystem-based management.

There are a number of empowering statutes and two sets of regulations in place for Māori customary fisheries - one for the North Island and one for the South Island, although they are similar in most respects. Customary non-commercial Māori fisheries interests are provided for, inter alia, through the Fisheries (Amateur Fishing) Regulations 2013, the Fisheries (Kaimoana Customary) Fishing Regulations 1998, the Fisheries (South Island Customary Fishing) Regulations 1999, s. 16, Fisheries Act 1983 and ss. 186, 186A and B, Fisheries Act 1996 which are quite enabling laws for recognising mātauranga and tikanga Māori practices. For example, the Preamble of the Fisheries (Kaimoana Customary Fishing) Regulations 1998 state:

Under the deed of settlement the Crown agreed, among other things, to introduce legislation empowering the making of regulations recognising and providing for customary food gathering and the special relationship between the tangata whenua and places of importance for customary food gathering (including tauranga ika and mahinga mātaimai), to the extent that such food gathering is not commercial in any way nor involves commercial gain or trade: in accordance with the Crown's obligations under the deed to introduce the legislation, the Treaty of Waitangi (Fisheries Claims) Settlement Bill was introduced into Parliament, enacted, and came into force on 23 December 1992.³²⁴

Customary practices are further provided for in ss. 174-186B, Fisheries Act 1996. The objective of this Part of the Act is noted in s. 174:

The object of sections 175 to 185 is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapū either—

(a) as a source of food; or

³²⁴ Fisheries (Kaimoana Customary Fishing) Regulations 1998, Preamble C and D.

(b) for spiritual or cultural reasons,—

better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi.³²⁵

Section 10, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 also provides for customary rights:

10 Effect of Settlement on non-commercial Māori fishing rights and interests

It is hereby declared that claims by Māori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983—

(a) shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown; and in pursuance thereto

(b) the Minister, acting in accordance with the principles of the Treaty of Waitangi, shall—

(i) consult with tangata whenua about; and

(ii) develop policies to help recognise—

use and management practices of Māori in the exercise of non-commercial fishing rights; and

(c) the Minister shall recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 to recognise and provide for customary food gathering by Māori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mātaītai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade; but

(d) the rights or interests of Māori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly—

(i) are not enforceable in civil proceedings; and

(ii) shall not provide a defence to any criminal, regulatory, or other proceeding,—

except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983.³²⁶

³²⁵ Fisheries Act 1996, s. 174.

³²⁶ Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s. 10.

Furthermore, s.186A, Fisheries Act 1999 offers much more scope for recognising mātauranga and tikanga Māori in customary fisheries.³²⁷

In the administration of these regulations, the Minister must also provide necessary capacity support to ensure the regulations are effectively carried out as stated in s. 38, Fisheries (Kaimoana Fishing) Regulations 1998 and s. 35, Fisheries (South Island Customary Fishing) Regulations 1999:

The Minister must provide to any Tangata Tiaki/Kaitiaki such information and assistance as may be necessary for the proper administration of these regulations and do so in accordance with section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.³²⁸

Furthermore, Iwi planning documents are referred to in s. 16 of both regulations which state:

16 Iwi planning document

(1) Any Tangata Kaitiaki/Tiaki may prepare a management plan or strategy for the area/rohe moana for which that Tangata Kaitiaki/Tiaki has authority.

(2) When a plan is prepared by a Tangata Kaitiaki/Tiaki and that plan is agreed to be authorised by the tangata whenua of the area/rohe moana for which the Tangata Kaitiaki/Tiaki was appointed, the plan—

(a) may be treated as a planning document recognised by an iwi authority for the purposes of the Resource Management Act 1991, if it meets the requirements of that Act:

(b) must be taken into account by the Minister for the purposes of section 10(b) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

The regulations then provide for the sustainability provisions as agreed between the kaitiaki and the Ministry. These enabling legal provisions then provide access to seafood for customary non-commercial purposes and for iwi and hapū to exercise management rights over customary fishing areas and fisheries resources according to local mātauranga and tikanga Māori.

Under the Fisheries (Kaimoana Customary Fishing) Regulations, tangata whenua can appoint kaitiaki to authorise customary non-commercial fishing within a defined 'rohe moana.' Under these regulations, 'tangata whenua' in relation to a particular area means the whānau, hapū or iwi being Māori that hold mana whenua, mana moana over that area.

A Te Tau Ihu informant provided an important insight into whānau and hapū mana whenua operating locally with customary fisheries:

I think the knowledge is also about the traditional activities and people should still have the right to be able to do things for their family, hapū and community. Management of

³²⁷ Refer to Appendix 3.

³²⁸ Fisheries (Kaimoana Customary Fishing) Regulations 1998, s. 33; Fisheries (South Island Customary Fishing) Regulations 1999, s 38.

that should actually go down to that level because people on the ground actually don't get a share of the resource.³²⁹

The contemporary relevance of mātauranga and tikanga Māori is further illustrated in the process of defining a rohe moana and appointing kaitiaki for customary fisheries, which commences with acknowledging local mātauranga and tikanga proprietary interests and leadership qualities and then includes a public notification and objection process. Following the resolution of any disputes, the Minister of Fisheries confirms rohe moana boundaries and kaitiaki appointments so that kaitiaki can authorise customary fishing within these boundaries. As noted above, kaitiaki are empowered by the customary regulations to issue customary fishing authorisations only within their defined rohe moana. These areas are usually subareas or quota management areas but the designation of a rohe moana does not prevent commercial or recreational fishing in that area.

Taiāpure, Mātaitai and Non-Commercial Fishing Reserves

As part of non-commercial customary fishing interests, tangata whenua may establish taiāpure, mahinga mataitai reserves and other non-commercial fishing reserves - areas where tangata whenua manage all non-commercial fishing by making bylaws - following consultation with the local community – i.e. people who own land in the proximity of the proposed mataitai reserve.³³⁰

The Fisheries Act 1996 and associated regulations regarding customary fishing rights provide for the means to sustainably manage traditional customary fishing grounds and to implement EBM.

The Ministry of Primary Industries set out the four types of customary management models:

- taiāpure – local fisheries of special significance, that may have additional fishing rules,
- mātaitai reserves – areas closed to commercial fishing, that may have bylaws affecting recreational and customary fishing,
- temporary closures – issued under sections 186A or 186B of the Fisheries Act 1996, and
- customary bylaw areas – currently only in the Waikato-Tainui area.³³¹

Section 186, Fisheries Act 1996 recognises the first three customary management models (refer to Appendix 3).

³²⁹ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

³³⁰ There are two sets of regulations in place, one for the North Island and one for the South Island, although they are similar in most respects. The regulations in the North Island are called the Kaimoana Customary Fishing Regulations 1998, Reg 61 and cover non-commercial customary fishing, which means fishing to provide food for hui (meetings) and tangi (funerals), and which does not involve the exchange of money or other form of payment. See also the Taiāpure provisions that are contained within the Fisheries Act 1996, ss. 174-185.

³³¹ Ministry for Primary Industries, 'Customary fisheries management areas,' (14 October 2018) Fisheries New Zealand <https://www.fisheries.govt.nz/law-and-policy/Māori-customary-fishing/managing-customary-fisheries/customary-fisheries-management-areas> (Accessed September 2018).

Taiāpure

The Māori Fisheries Act 1989 established the taiāpure-local fisheries model in order 'to make better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II, Treaty of Waitangi.'³³² Defined as a coastal fishing area, limited to littoral or estuarine waters, which is of special significance to the local iwi either for fishing or for cultural or spiritual reasons, the purpose of the taiāpure is to give local Māori a greater say in the management and conservation of the area, not to establish a special fishing regime for iwi.³³³ A primary objective of taiāpure is to ensure access to abundant and safe kai moana but often more general objectives include to protect the mauri and wairua along the way.³³⁴

Taiāpure (local fisheries) are 'estuarine or coastal areas that are significant for food, spiritual, or cultural reasons that allow all types of fishing and are managed by local communities.'³³⁵ Taiāpure are often managed in collaboration with local fishing stakeholders (recreational and commercial fishers). Commercial fishing continues but may be subject to taiāpure rules. Taiāpure can only be applied to marine and estuarine environments.³³⁶

The Fisheries Act 1996 prescribes in ss. 174 and 175 that the Governor-General may declare, subject to s 176, 'any area of New Zealand fisheries waters (estuarine or littoral coastal) to be a taiāpure-local fishery.'³³⁷ Section 174, Fisheries Act 1996 states:

Taiāpure-local fisheries and customary fishing

174 Object

The object of sections 175-185 is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapū either—

- (a) as a source of food; or
- (b) for spiritual or cultural reasons,—

better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi.

Moreover, s 176 sets out the requirements for consideration prior to recommending a taiāpure-local fishery:³³⁸

176 Provisions relating to order under section 175

(1) An order under section 175 may be made only on a recommendation made by the Minister in accordance with sections 177 to 185.

(2) The Minister shall not recommend the making of an order under section 175 unless the Minister is satisfied both—

- (a) that the order will further the object set out in section 174; and

³³² Section 54A, Fisheries Act 1983, as inserted by s. 74, Māori Fisheries Act 1989.

³³³ Above, 210 (Munro).

³³⁴ *Idem*.

³³⁵ Ministry for Primary Industries, 'Managing customary fisheries,' (2018) Fisheries New Zealand <<https://www.fisheries.govt.nz/law-and-policy/Māori-customary-fishing/managing-customary-fisheries/#mataitai-reserves> (Accessed September 2018).

³³⁶ Te Tiaki Mahinga Kai, 'What are AMTs?' (2018), Te Tiaki Mahinga Kai, <<http://www.mahingakai.org.nz/resources/what-are-amts/> (Accessed September 2018).

³³⁷ Fisheries Act 1996, s.175.

³³⁸ *Ibid*, s. 176.

(b) that the making of the order is appropriate having regard to—

(i) the size of the area of New Zealand fisheries waters that would be declared by the order to be a taiāpure-local fishery; and

(ii) the impact of the order on the general welfare of the community in the vicinity of the area that would be declared by the order to be a taiāpure-local fishery; and

(iii) the impact of the order on those persons having a special interest in the area that would be declared by the order to be a taiāpure-local fishery; and

(iv) the impact of the order on fisheries management.

The management of the local taiāpure fishery will be through a committee appointed by the Minister (in consultation with the Minister of Māori Affairs) which may be an existing ‘body corporate’ from the local Māori community.³³⁹ The committee will hold office at the ‘pleasure of the Minister.’³⁴⁰ The power to make regulations is also covered in s. 185, Fisheries Act 1996:³⁴¹

A taiāpure-local fishery proposal must explain how the area is important to local Māori, why the taiāpure-local fishery is needed, what types of controls are proposed to achieve the objectives of the taiāpure-local fishery, and the likely effect on other users of the area.

The Fisheries Act 1996 does not specify any minimum or maximum size for the area within a proposed taiāpure-local fishery. However, legislative criteria restrict the area in which proposed taiāpure-local fishery can apply. It is possible that the boundaries of a proposed taiāpure-local fishery could be amended in response to the effect it would have on the general welfare of the local community and those who have a special interest in the area.

Once a taiāpure-local fishery proposal has been approved, the Minister appoints a management committee from those nominated by the local Māori community. The committee has the right to recommend the making of regulations to the Minister for the management and conservation of the taiāpure-local fishery. Fishing activities within the taiāpure-local fishery continue unchanged until the committee recommends the making of a regulation, and the Minister approves it. Until such time, all fishers must comply with existing regulations.

There are at least nine taiāpure-local fisheries that range in size from 3 to 137 km², totalling over 328 km². Since the late 1990s, Māori interest in establishing taiāpure-local fisheries has diminished due, in part, to the duration of time required for the legislative process when compared to that required for establishing mātaihai reserves.

Mātaihai Reserves

Mātaihai reserves are established to ‘recognise and provide for traditional fishing through local management. Mātaihai allow customary and recreational fishing but usually do not allow for

³³⁹ Fisheries Act 1996, s. 184(1)-(3).

³⁴⁰ *Ibid*, s. 184(4).

³⁴¹ *Ibid*, s. 185.

commercial fishing.³⁴² Mātaitai may be established in lakes, rivers, estuaries and coastal areas. Bess and Rallapudi referred to the background and application of Mātaitai reserves:

The 1992 Fisheries Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Act 1992, which legislated the Deed of Settlement, provided for the full and final settlement of Māori fishing claims and confirmed that Māori customary fishing rights had not been extinguished and continued to give rise to obligations on the Crown. These obligations led to enactment of the Fisheries (Kaimoana Customary Fishing) Regulations 1998, which apply to North Island waters and the waters around the Chatham Islands, and the Fisheries (South Island Customary Fishing) Regulations 1999, collectively referred to as the customary regulations. Customary food gathering areas established under these regulations are referred to as mātaitai reserves.³⁴³

The Tāngata Kaitiaki/Tiaki (local guardians), or those who nominated them, can apply to the Minister to establish a mātaitai reserve within their rohe moana. Upon being satisfied that the proposal has met all the regulatory criteria, the Minister must declare the proposed area to be a mātaitai reserve. In terms of the criteria outlined in the customary regulations, the proposed mātaitai reserve must not:

- unreasonably affect the ability of the local community to take fish, aquatic life or seaweed for non-commercial purposes; and
- prevent persons with a commercial interest in a species taking their ITQ or ACE within the remainder of the QMA for that species.

The Minister will appoint Tāngata Kaitiaki/Tiaki whose purpose is to manage fisheries resources for customary purposes by issuing customary fishing authorisations and have rights to establish bylaws to exercise kaitiakitanga within their rohe moana (territorial waters)³⁴⁴ These guardians are usually tangata whenua. Mātaitai can be constituted and run entirely by tangata whenua, although in practice, other interest groups often co-manage these areas. The Minister retains limited discretion on approving bylaws for sustainability. Bylaws only apply to customary and recreational fishing, given that commercial fishing is typically banned within the mātaitai reserve itself.³⁴⁵

The customary regulations do not specify any minimum or maximum size of a mātaitai reserve. The regulatory criteria provide broad guidance on the area in which the proposed mātaitai reserve can be established and the regulatory criteria could result in changes being made to a proposed mātaitai reserve boundaries to mitigate the effects it has on either commercial or recreational fishing activities.

Once a mātaitai reserve is established however, commercial fishing is excluded from the reserve. Nevertheless, Tangata Kaitiaki/Tiaki have the power to recommend to the Minister new regulations to reinstate the commercial catch of specific species by quantity or time period. Recreational fishing continues to occur within a mātaitai reserve under existing regulations until such time as the Minister approves any bylaws recommended by the Tangata Kaitiaki/Tiaki for the management of the mātaitai reserve. In practice, over 40 mātaitai reserves have been

³⁴² Ministry for Primary Industries, 'Customary fisheries management areas,' (14 October 2018) Fisheries New Zealand <<https://www.fisheries.govt.nz/law-and-policy/Māori-customary-fishing/managing-customary-fisheries/customary-fisheries-management-areas/>> (Accessed October 2018).

³⁴³ Above n. 209 (Bess and Rallapudi), at 722–723.

³⁴⁴ Ministry of Fisheries, *Mātaitai Reserve* (2009).

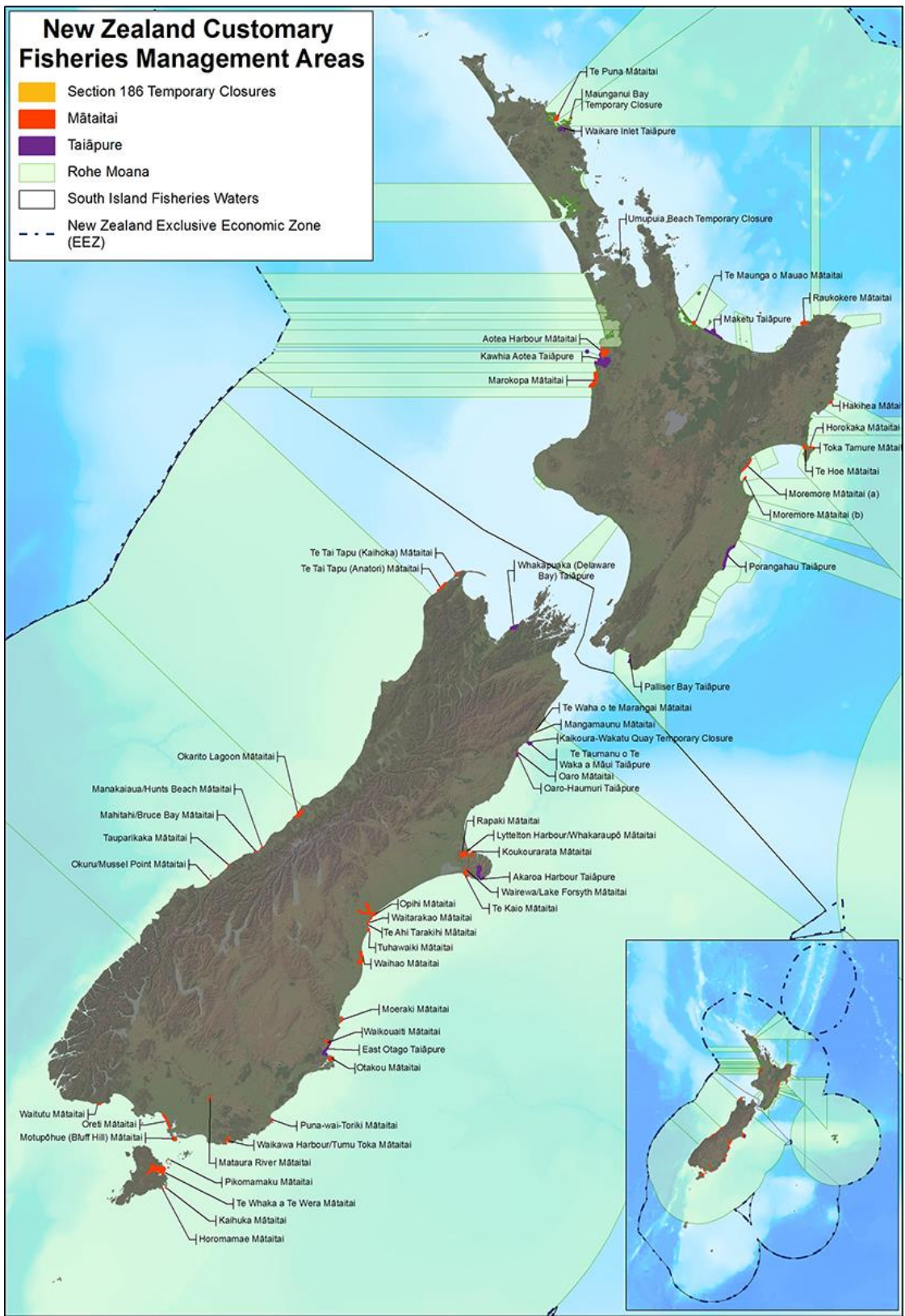
³⁴⁵ Above, n.336 (Te Tiaki Mahinga Kai).

established and more proposals are being considered. The current list of mātaihai reserves according to MPI are listed below:

Established Mātaihai Reserves:

1. Rapaki Bay (Lyttelton Harbour), est. 1998. 0.3 km².
2. Koukourarata (Banks Peninsula), est. 2000. 8 km².
3. Te Whaka ā te Wera (Rakiura – Stewart Island), est. 2004. 79 km².
4. Moremore (Hawkes Bay), est. 2005. 22.5 km².
5. Mataura River (Southland), est. 2005. 10 km of the river.
6. Raukokore (East Cape), est. 2005. 19 km².
7. Motupohue Mātaihai (Southland) est. 2014. 7.3 km²
8. Mataura Mātaihai (Southland) 0.8 km² (Freshwater)
9. Opihi Mātaihai (South Canterbury) 23.0 km² (Marine/Freshwater)
10. Waitarakao Mātaihai 0.9 km² (Marine/Freshwater)
11. Moremore Mātaihai (a) (Hawkes Bay) est. 2005 11.2 km²
12. Moremore Mātaihai (b) (Hawkes Bay) est. 2005 4.6 km²
13. Raukokere Mātaihai 26.5 km²
14. Puna-wai-Toriki Mātaihai 2.4 km²
15. Aotea Harbour Mātaihai (Waikato) est. 2008. 40.1 km²
16. Marokopa Mātaihai (Waikato) est. 2011. 67.9 km²
17. Hakihea Mātaihai (Gisborne) est. 2011. 4.1 km²
18. Moeraki Mātaihai (North Otago) est. 2010. 2.9 km²
19. Waikawa Tumu Toka Mātaihai (Southland/Catlins) 7.1 km² (Marine/Freshwater)
20. Oreti Mātaihai (Southland) 16.4 km²
21. Horomamae Mātaihai 0.2 km²
22. Te Tai Tapu (Anatori) Mātaihai (West Coast, South Island) 14.6 km²
23. Te Tai Tapu (Kaihoka) Mātaihai (West Coast, South Island) 5.1 km²
24. Wairewa Mātaihai 5.7 km² (Marine/Freshwater)
25. Te Kaio Mātaihai 12.2 km²
26. Pikomamaku Mātaihai (Foveaux Strait). 0.05 km²
27. Te Maunga o Mauao Mātaihai 6.9 km²
28. Kaihuka Mātaihai 0.1 km²
29. Mahitahi Mātaihai 1.1 km²
30. Tauperikaka Mātaihai 0.6 km²
31. Okuru Mātaihai (West Coast, South Island) 0.2 km²
32. Manakaiaua Mātaihai 0.7 km²
33. Horokaka Mātaihai 4.1 km² (Mahia Peninsula) est. 2012. 2.9 km²
34. Te Hoe Mātaihai 14.5 km² (Mahia Peninsula) est. 2012. 2.9 km²
35. Toka Tamure Mātaihai (Mahia Peninsula) est. 2012. 2.9 km²
36. Waihao Wainono Mātaihai 4.7 km² (Marine/Freshwater)
37. Okarito Mātaihai 19.5 km² (West Coast, South Island) (Marine/Freshwater)
38. Te Puna Mātaihai (Bay of Islands) est. 2013. 21.9 km²
39. Waitutu Mātaihai (Fiordland) est. 2015 2.1 km²
40. Te Waha o te Marangai Mātaihai 0.02 km²
41. Mangamaunu Mātaihai 0.02 km²
42. Oaro Mātaihai 0.2 km².³⁴⁶

³⁴⁶ Ibid.



Māori Customary Fisheries Management Areas³⁴⁷

³⁴⁷ Online at <https://www.mpi.govt.nz/law-and-policy/legal-overviews/fisheries/fishery-maps/> (Accessed November 2018).

Temporary Closures

Temporary closures are a third option for tangata whenua to acknowledge mātauranga and tikanga over customary fisheries. Section 186B, Fisheries Act 1996 allows the Ministry of Fisheries to temporarily close a fishery, or restrict a method of fishing in lakes, rivers, estuaries, and the sea. These closures and restrictions are similar to traditional rāhui - the traditional tikanga Māori approach to sustain a fishery. The purpose of the closure or restriction is to improve the size and/or availability of fish stocks that have been depleted, or to recognize and provide for the tikanga use and management practices of tāngata whenua.

However, anybody can suggest to the Ministry of Fisheries that a temporary closure should be put in place, but the Ministry must allow participation of tāngata whenua when assessing a proposal.

Temporary closures or method restrictions can be applied for a period of two years or less. If the objectives have not been achieved over such a period, tāngata whenua can apply for an extension of the temporary closure. However, it is unlikely that several successive rotations will be implemented; instead, a move to establish a mātaimai is probably needed in such a situation.

Temporary closures or method restrictions apply to everyone: commercial, recreational and customary fishers.³⁴⁸ Reserves can only be applied for over traditional fishing grounds and must be areas of special significance to the tangata whenua. Tangata whenua may also establish bylaws for the reserves, which may restrict or prohibit the taking of a particular species within a mātaimai reserve.

Another relevant section for establishing taiāpure, mātaimai and temporary closures or method restrictions is s. 66, RMA which states:

66 Matters to be considered by regional council (plans)

- (1) A regional council must prepare and change any regional plan in accordance with—
- (a) its functions under section 30; and
 - (b) the provisions of Part 2; and
 - (c) a direction given under section 25A(1); and
 - (d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
 - (e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
 - (ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and
 - (f) any regulations.
- (2) In addition to the requirements of section 67(3) and (4), when preparing or changing any regional plan, the regional council shall have regard to—

³⁴⁸ Above, n. 336, (Te Tiaki Mahinga Kai).

- (a) any proposed regional policy statement in respect of the region; and
- (b) the Crown's interests in the coastal marine area; and
- (c) any—
 - (i) management plans and strategies prepared under other Acts; and ...
 - (iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiāpure, mahinga mātaītai, or other non-commercial Māori customary fishing).

Given that the process of establishing a taiāpure, mataītai and temporary closure can involve a recommendation from the local Māori community, they are established to acknowledge the Treaty of Waitangi partnership over customary fisheries and mātauranga and tikanga Māori, and the powers of Tāngata Kaitiaki/Tiaki are extensive,³⁴⁹ there is scope to integrate mātauranga and tikanga Māori in a more meaningful way perhaps even in an EBM context if Māori so choose.

The Māori community have no power itself to establish a taiāpure, however, and the Minister is not bound to accept their recommendation. Still, the ability for the local Māori community to recommend the establishment of a taiāpure and mātaītai, is another enabler of mātauranga and tikanga Māori over the marine and coastal estate but it comes with a key challenge - the recommendation may not be implemented, despite the concept of a taiāpure and mātaītai themselves being grounded in mātauranga Māori philosophy and tikanga Māori legitimacy.

In addition, the process of establishing reserves and the bylaws themselves are heavily scrutinised by the Minister of Fisheries, which again undermines tribal rangatiratanga as envisaged in the original Treaty of Waitangi partnership but these provisions do provide much scope for integration in an EBM context in the right climate.

There are a number of additional practical Māori cultural and community challenges however, with exercising customary rights over taiāpure, mataītai and temporary closures – the perpetuation and transmission of mātauranga and tikanga Māori knowledge, practices and institutions is one key challenge. Capacity and rangatahi investing in the local area are other challenges which one Te Tau Ihu informant lamented:

Our Iwi has a similar problem to most Iwi where a lot of kaumātua are passing away and we are losing the traditional knowledge that has not transferred to the next generation. So we recognise that we needed to preserve that as quickly as we could. Another challenge our Iwi has is that we are becoming isolated as most of our younger generation move away in search of work so those left behind are few. So that knowledge of practicing kaitiakitanga or harvesting that kaimoana slowly disappears because you only have a handful left.

Another Te Tau Ihu kaumātua discussed the importance of preserving mātauranga and tikanga Māori for exercising customary cultural rights and responsibilities:

³⁴⁹ Sections 54A and 54K(6), Fisheries Act 1983.

A key focus for our Iwi is succession planning and ensuring the transference of mātauranga and tikanga to the next generation. However, its success is dependent on two things.

1. Financial Capacity - In our experience it's been 50/50 because half the time we'll be successful in securing funding, and half the time we're not which ultimately impacts on whether we hold our wānanga that year.
2. Human Capacity - We have only had a few that have been able to run our wānanga, and it is a strain on them. It's the same ones running it, and usually the same ones that are attending.³⁵⁰

Another Te Tau Ihu kaumātua referred to community reluctance to share mātauranga and tikanga Māori outside of the whanau and hapū with non-Māori (and some Māori too):

Some of our whanau who have the knowledge are very reluctant to share that with non-Māori for fear of exploitation and misappropriation. Also, with non-Māori taking the stance of 'we've already got your knowledge so we don't need to engage you anymore.' So our people are weary of bringing in or working alongside outside organisations as they are a little bit suspicious.³⁵¹

Another Te Tau Ihu informant lamented the loss of some tikanga customary fishing practices already:

I was brought up in a place where if you went down and got kai moana in sugar bags you brought it back and share it with families that couldn't get down to the beach. We don't do that anymore. So those are practices from the past and at the end of the day, it's all about whanau and families. I mean if there are people who have nothing, then you try and give them something, whether it's off the sea or the land, or other forms. We are losing out on that togetherness practice [manaakitanga (hospitality) and mahi tahi (unity)].³⁵²

Mātauranga and tikanga Māori are very relevant today over both commercial and customary fisheries notwithstanding the above kaumātua lament.

The next section will discuss the Marine Coastal Area (Takutai Moana) Act 2011 within a mātauranga and tikanga Māori context and the similar potential for integration in an EBM context.

³⁵⁰ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

³⁵¹ Ibid.

³⁵² Ibid.

I. Tikanga Māori and the Marine and Coastal Area (Takutai Moana) Act 2011

The Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) was enacted to repeal the controversial Foreshore and Seabed Act 2004³⁵³ that severely limited Māori property rights in the marine foreshore and seabed areas based on pre-existing historic aboriginal rights. Although not many MACA claims have been processed to date, the Office of Treaty Settlements (OTS), on behalf of the Government, received over 380 applications up to the statutory cut-off date of 3 April 2017.

It is anticipated the MACA will provide greater impetus for incorporating mātauranga and tikanga Māori within an EBM context once ownership and jurisdiction are returned to Māori and they can be more involved as Treaty partners on their own terms. Under MACA, hundreds of iwi, hapū and whānau are currently negotiating with the Crown over ownership rights and customary interests over the marine and coastal estate. To date, few claims have neither been completely settled nor have MACA provisions been fully implemented.

Three redress options are available under MACA –

1. Customary marine title (CMT),
2. Wāhi tapu protection (WTP) and
3. Protected customary rights (PCR):

Customary Marine Title (CMT) refers to customary interests based on aboriginal title established by a Māori applicant group in a specified location of the common marine and coastal area pursuant to MACA. Customary marine title is potentially a very strong legal imperative for Māori as a Treaty partner that will grant to them the right to check and even deny resource consents, marine reserves, conservation areas and DOC concessions with some exceptions. CMT will moreover guarantee to Māori ownership of minerals within the specified area excluding precious minerals under the Crown Minerals Act 1991 – gold, silver, petroleum and uranium. CMT will also guarantee to Māori interim custody of newly discovered taonga tuturu which is defined in s. 2, Protected Objects Act 1975 as an object that relates to Māori culture, history or society and was or appears to have been manufactured or modified in New Zealand by Māori, or brought into New Zealand by Māori or used by Māori; and is more than 50 years old.³⁵⁴

Furthermore, CMT will provide a right to consultation on some Government and Council decisions. CMT then is potentially a very strong enabling provision for incorporating mātauranga and tikanga Māori and for empowering the Treaty partnership as long as the Māori applicant group can pass the stringent statutory tests in s. 58, MACA:

s. 58 Customary marine title

- (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group –
- (a) holds the specified area in accordance with tikanga; and
 - (b) has, in relation to the specified area –
 - (i) exclusively used and occupied it from 1840 to the present day without any substantial interruption; or

³⁵³ Marine and Coastal Area (Takutai Moana) Act 2011, s. 5. See also the controversial Court of Appeal decision that sparked the foreshore and seabed debacle *Attorney-General v Ngāti Apa*, [2003] 3 NZLR 577. Refer also to Jones, M, 'The Status and Limits of the Marine and Coastal Area (Takutai Moana) Act 2011 Report and Database Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).

³⁵⁴ Section 2, Protected Objects Act 1975.

- (ii) received it, any time after 1840, through a customary transfer in accordance with subsection (3)
- (2) For the purpose of subsection (1)(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between—
 - (a) the commencement of this Act; and
 - (b) the effective date.
- 3) For the purposes of subsection (1)(b)(ii), a transfer is a customary transfer if—
 - (a) a customary interest in a specified area of the common marine and coastal area was transferred— and
 - (b) the transfer was in accordance with tikanga; and
 - (c) the group or members of the group making the transfer—
 - (i) held the specified area in accordance with tikanga; and some members of a group who were not part of the applicant group;
 - (ii) held the specified area in accordance with tikanga; and
 - (iii) exclusively used and occupied the specified area from the time of the (ii) had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and
 - (d) the group or some members of the group to whom the transfer was made have—
 - (i) between or among members of the applicant group; or
 - (ii) to the applicant group or some of its members from a group or transfer to the present day without substantial interruption.
- (4) Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law.

Wāhi Tapu Protection (WTP) will provide local Māori groups the opportunity to issue legally binding restrictions on public access to specific sacred areas within the CMT area which is a strong enabling provision for integrating mātauranga and tikanga Māori, for empowering the Treaty partnership, and even for implementing EBM in some respects as s. 78 MACA asserts:

s. 78 Protection of wāhi tapu and wāhi tapu areas

- (1) A customary marine title group may seek to include recognition of a wāhi tapu or a wāhi tapu area –
 - (a) in a customary marine title order, or
 - (b) in an agreement.
- (2) A wāhi tapu protection right may be recognised if there is evidence to establish –
 - (a) the connection of the group with the wāhi tapu or wāhi tapu area in accordance with tikanga; and
 - (b) that the group requires the proposed prohibitions on access to protect the wāhi tapu or wāhi tapu area.

Compliance with a wāhi tapu order is also provided for in s. 81, MACA:

81 Compliance

(1) A local authority that has statutory functions in the location of a wāhi tapu or wāhi tapu area that is subject to a wāhi tapu protection right must, in consultation with the relevant customary marine title group, take any appropriate action that is reasonably necessary to encourage public compliance with any wāhi tapu conditions.

(2) Every person commits an offence who intentionally fails to comply with a prohibition or restriction notified for that wāhi tapu or wāhi tapu area, and is liable on conviction to a fine not exceeding \$5,000.

(3) Despite subsection (2), the offence provisions of the Heritage New Zealand Pouhere Taonga Act 2014 apply if a wāhi tapu or wāhi tapu area subject to a wāhi tapu protection right is protected by a heritage covenant under section 39 of that Act.

(4) To avoid doubt, it is not an offence for a person to do anything that is inconsistent with the prohibition or restriction included in the wāhi tapu conditions if—

- (a) the person is carrying out an emergency activity (within the meaning of section 63); or
- (b) the person has an exemption notified under section 79(1)(c).

Protected Customary Rights (PCRs) refer to any activity, use or practice established by a Māori applicant group. PCRs are recognised by a protected customary rights order or an agreement. A protected customary rights order means an order of the Court granted in recognition of the protected customary rights of a group under s. 113, MACA. PCRs do not require consent, charges or royalties and Councils cannot grant a resource consent that adversely affects PCRs.

PCRs are established in accordance with s. 5, MACA:

s. 51 Meaning of protected customary rights

(1) A protected customary right is a right that –

- (a) has been exercised since 1840 and
- (b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
- (c) is not extinguished as a matter of law.

(2) A **protected customary right** does not include an activity—

- (a) that is regulated under the Fisheries Act 1996; or
- (b) that is a commercial aquaculture activity (within the meaning of section 4 of the Māori Commercial Aquaculture Claims Settlement Act 2004); or
- (c) that involves the exercise of—
 - (i) any commercial Māori fishing right or interest, being a right or interest declared by section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to be settled; or
 - (ii) any non-commercial Māori fishing right or interest, being a right or interest subject to the declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; or
- (d) that relates to—
 - (i) wildlife within the meaning of the Wildlife Act 1953, or any animals specified in Schedule 6 of that Act:

- (ii) marine mammals within the meaning of the Marine Mammals Protection Act 1978; or
- (e) that is based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource (within the meaning of section 2(1) of the Resource Management Act 1991).

If Māori iwi, hapū and whānau receive the relevant redress under MACA whether it be CMT, WTP and/or PCR, these provisions are theoretically very enabling in terms of recognising mātauranga and tikanga Māori and for empowering the Treaty partnership even within an EBM context.

The challenges with MACA however are the fact that the 380 claims were applied for in April 2017 and are still being processed so time and resources appear to be challenges. Further, the fact the Central Government - through the Office of Treaty Settlements (OTS) - and Regional and Local Governments appear to still be developing policy and capacity to deal with the MACA claims, hence it is still too early to assess how effective or not MACA is for Māori.

The first case where the High Court applied the tests for CMT under MACA however, was *Re Tipene*.³⁵⁵ The case concerned a 200m radius area between two islands off the southwest coast of Rakiura - Stewart Island. The High Court found that CMT exists under s. 58, MACA over the claimed area, and the applicant had authority to bring the application on behalf of the applicant group but the holder of the CMT order will be determined at a later date. Given that this case involved a small area of a remote island at the bottom of the South Island, it would have had fewer stakeholders to compete with the MACA application hence it is suspected the straightforwardness with which the application was processed but even then, the High Court decision to determine the CMT holder was reserved.

One of the other MACA claims that has been processed is Ngāti Pahauwera in the Mohaka, Northern Hawkes Bay area. Ngāti Pahauwera applied for MACA claims on the northern banks for the Poututu Stream and on the southern end of the Esk River. To this end, Ngāti Pahauwera applied for CMT over the whole application area (refer to the overleaf map).³⁵⁶ Ngāti Pahauwera moreover, applied for WTP over certain areas including to impose a temporary rāhui after a drowning or in a location where a death, a body or koiwi (human bones) are located, and for other prohibitions on polluting, littering, gutting of fish on the beach or in the water, and for overexploiting or wasting of resources, as well as a prohibition on polluting the river mouth.

Furthermore, Ngāti Pahauwera applied for PCRs over the whole area to take, utilise, gather, manage and preserve all of the natural and physical resources including sand, gravel, pumice, driftwood, kokowai (decorative ochre), wai tapu (sacred water), īnanga (small whitebait), kokopu (large whitebait, native trout) and tauranga waka (waka launching areas).³⁵⁷

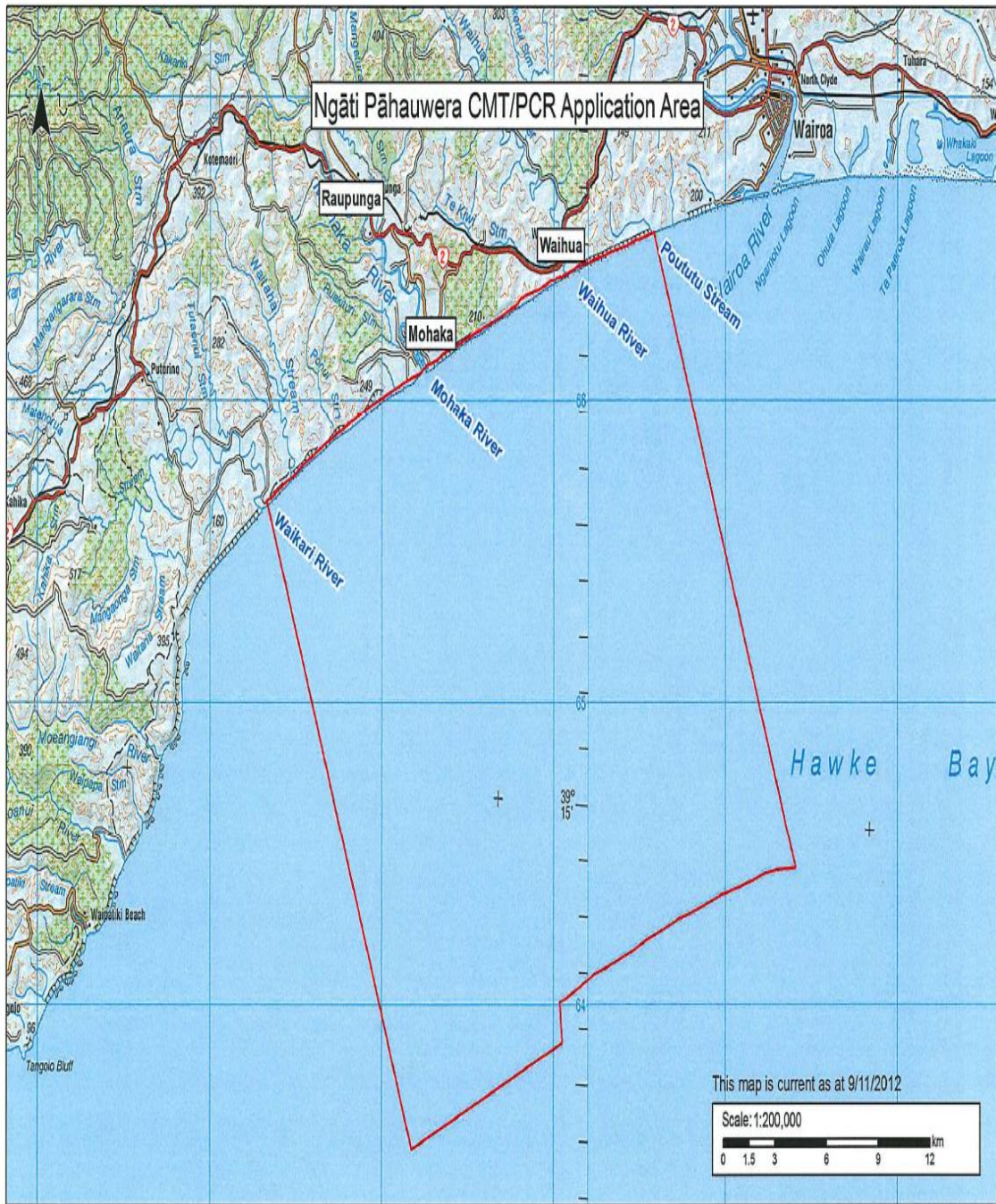
Ngāti Pahauwera commenced its MACA application in 2012 but they also applied earlier in the Māori Land Court and under the former Foreshore and Seabed Act 2004. Unfortunately, the result of negotiating directly with the Crown under MACA for Ngāti Pahauwera resulted in their being awarded less than 1% of the CMT they applied for. Furthermore, the Crown did not recognise any of the wāhi tapu or PCRs Ngāti Pahauwera applied for which are the redress

³⁵⁵ *Re Tipene*, [2016] NZHC 3199.

³⁵⁶ Ngāti Pahauwera Development Trust, 'Takutai Moana Ratification Booklet for Members of Ngāti Pahauwera,' (Unpublished Ngāti Pahauwera Report, May-July 2017).

³⁵⁷ Idem.

instruments that could restore the Treaty partnership for Ngāti Pahauwera to enable them to apply mātauranga and tikanga Māori in an EMB context.³⁵⁸



Mapping by Geospatial Solutions Ltd. October 2012 MCJ 2012-453

Ngāti Pahauwera MACA Claims, Northern Hawke Bay Map 2016³⁵⁹

³⁵⁸ Idem.

³⁵⁹ Idem.

Ngāti Pahauwera vehemently disagreed with the Minister’s views of their MACA application, the Crown’s assessment of the Ngāti Pahauwera evidence to prove their CMT, WTP and PCRs, as well as the Minister’s general interpretation of MACA. Ngāti Pahauwera subsequently appealed to the High Court for further deliberation, which, at the time, is still being processed.³⁶⁰ What the situation indicates on the MACA however is possibly a lack of ‘utmost good faith’ negotiations, the Crown’s very conservative interpretations of the MACA, the challenge of passing the stringent MACA statutory tests in s. 58 for example, a general reluctance to sufficiently recognise pre-existing Māori property rights in the coastal marine area based on aboriginal title, and the enormous power imbalance between the Treaty partners.

One of the Te Tau Ihu informants commented on the MACA as follows:

The Marine and Coastal Area Act is cruel. Is it empowering? Not at all. It will increase grievances and serve only to fatten the wallets of lawyers. I think the legal profession needs to look at itself because I think they should be giving good advice to people on their chances of success. The Crown has put out its criteria. It is simple and says if you cannot meet those things, you will not be successful, then why. I think 98% of those ones with claims cannot succeed.³⁶¹

Another Te Tau Ihu informant stated:

We are part of the leadership towards the foreshore and seabed so it's important for us. However, whilst we did lodge a MACA claim at the last minute during the stampede, we only did it to defend our territory from the next tribe really. There's not a hell of a lot in those MACA's. I don't hold much hope and the process and test were terrible and I'll be surprised if anybody really gets through that test.³⁶²

One other Te Tau Ihu informant commented further on MACA:

Our trust didn’t lodge a MACA claim because we did not have the capacity. Some of the elected leaders actually didn’t have the expertise or understand the system and the High Court action we were involved in took a lot of energy and focus away from the real business.³⁶³

The power imbalance actually undermines an authentic partnership, as well as limiting the opportunities to integrate mātauranga and tikanga Māori in an EBM context over the marine estate, which is deeply concerning for Māori as one Te Tau Ihu informant concluded: ‘Most of the provisions under the MACA and RMA are not empowering to Māori.’³⁶⁴

³⁶⁰ *The Marine and Coastal Area (Takutai Moana) Act 2011 v Ngāti Pahauwera Development Trust*, (CIV 2011 485 821, Unreported, High Court Decision, Wellington, 15 March 2017).

³⁶¹ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid.

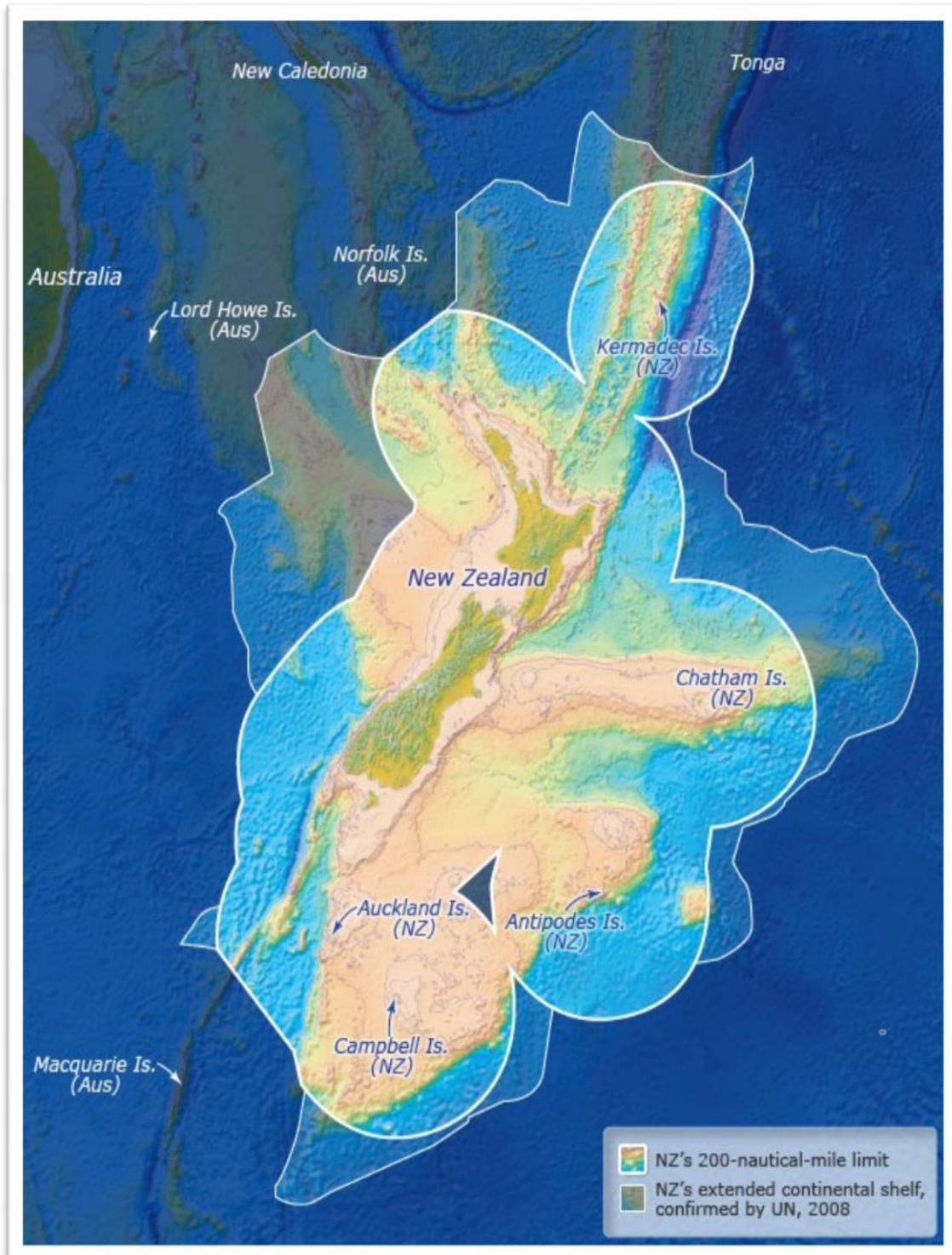
The next section will explore similar themes in New Zealand’s exclusive economic zone and continental shelf areas.

J. Tikanga Māori and the Exclusive Economic Zone and Continental Shelf Act 2012

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act) established an effects-based regime for the regulation of activities and development in the exclusive economic zone (EEZ) and continental shelf of New Zealand.³⁶⁵ Under the United Nations Convention on the Law of the Sea 1982 (UNCLOS), New Zealand has economic rights to water-column resources including the deep sea fisheries, seafloor and sub-seafloor resources such as oil, gas and metallic minerals.

The aim of the EEZ Act is to promote the sustainable management of natural resources in the EEZ and continental shelf. The EEZ Act also seeks to protect the EEZ and continental shelf from pollution by regulating discharges and dumping. The EEZ is defined in the EEZ Act as the marine space from 12 to 200 nautical miles from the coast of New Zealand. The continental shelf is included within the EEZ as the area that extends beyond 12 nautical miles from the coast to the outer edge of the continental margin.

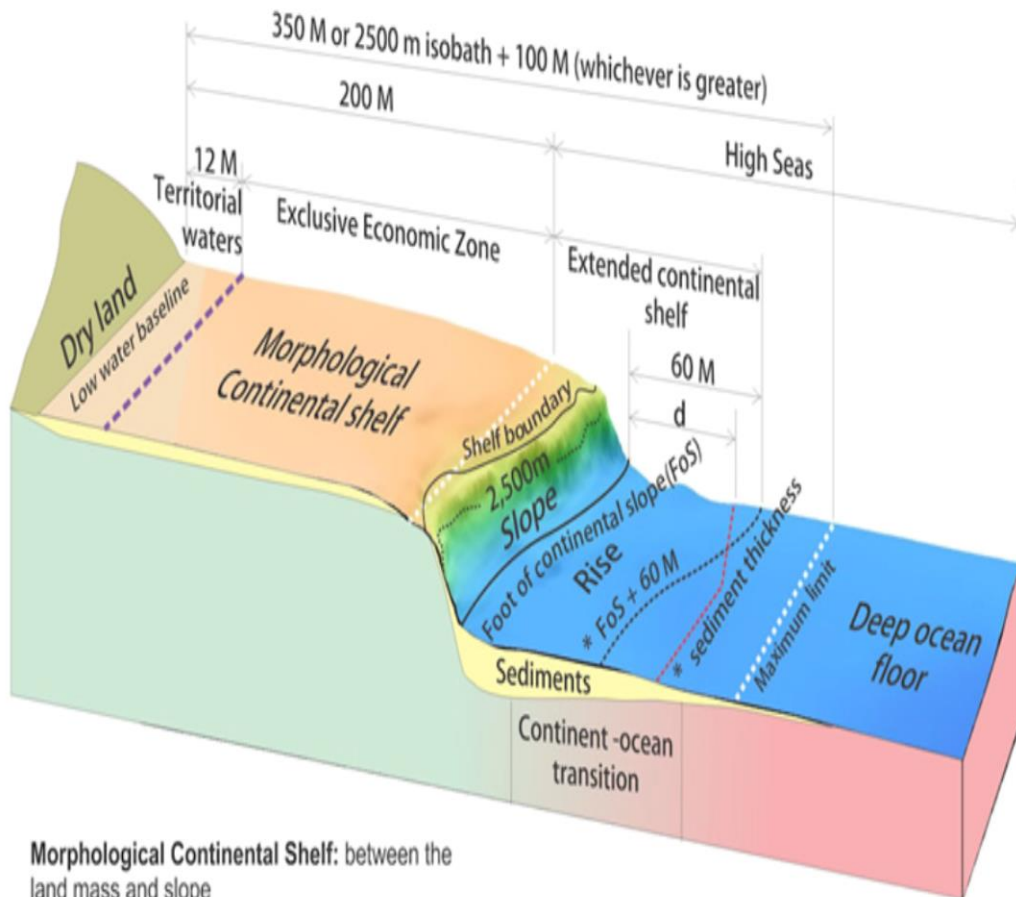
³⁶⁵ ‘The Statutory Framework for Management of the Exclusive Economic Zone and Continental Shelf - Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012,’ in *Environmental and Resource Management Law Online* (Lexis Nexis, September, 2017). Refer also to Iorns, C and Morar, R, ‘The Operation of Tikanga Māori within the EEZ and Continental Shelf Act Draft,’ (Unpublished Draft MIGC Report for the University of Waikato, University of Victoria, November 2018).



New Zealand's Exclusive Economic Zone (EEZ), fourth largest EEZ in the World.³⁶⁶

³⁶⁶ New Zealand Multilateral Organisations, from Te Ara the Encyclopedia of New Zealand online at: <https://teara.govt.nz/en/map/33830/exclusive-economic-zones> (Accessed November 2018).

Marine Territory



Morphological Continental Shelf: between the land mass and slope

Legal Continental Shelf: The EEZ and the extended continental shelf confirmed by the UNCLOS and includes the morphological shelf, slope and rise

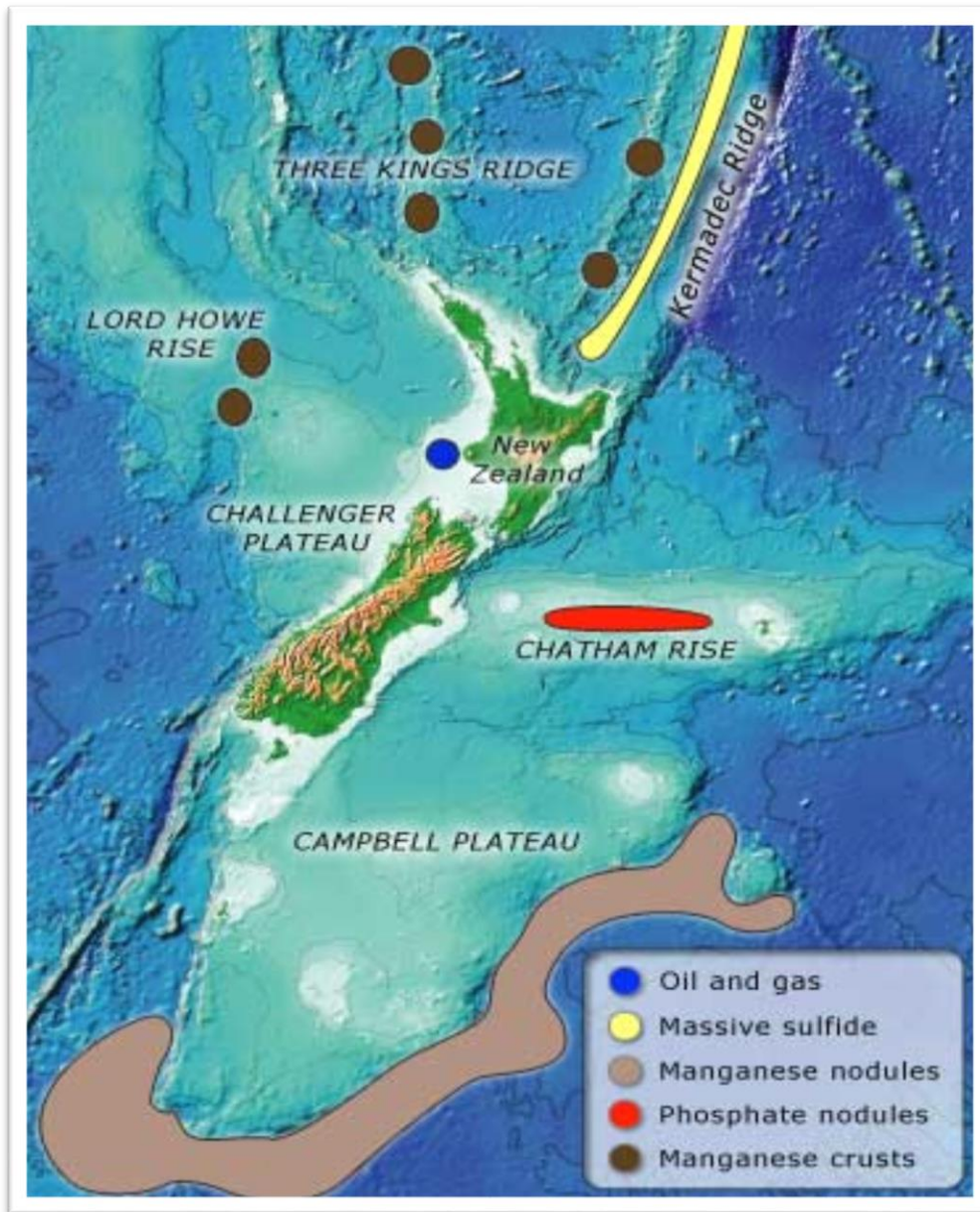
d = distance from 1% sediment thickness to foot of continental slope

* = extended continental shelf (whichever is greater)

Continental Shelf Cross Section³⁶⁷

³⁶⁷ New Zealand's Continental Shelf, GNS Science website: <https://www.gns.cri.nz/Home/Learning/Science-Topics/Ocean-Floor/Undersea-New-Zealand/NZ-s-Continental-Shelf> (Accessed November 2018).

The EEZ regulates activities that relate to the disturbance and exploitation of the seabed including petroleum and mineral exploration for economic development.³⁶⁸ Within the EEZ framework, there are permitted activities that can proceed subject to relevant conditions. There are also activities that are prohibited under the EEZ Act where no consent can be granted such as dumping certain types of waste and preventing certain organisms from entering New Zealand.



Mineral resources in New Zealand waters³⁶⁹

³⁶⁸ See Environment Guide website for a summary of the EEZ Act and the area subject to this legislation: (<http://www.environmentguide.org.nz/eez> (Accessed November 2018)).

³⁶⁹ Law of the Sea, Mineral resources in New Zealand waters from Te Ara the Encyclopaedia of New Zealand online at: <https://teara.govt.nz/en/map/6971/mineral-resources-in-new-zealand-waters> (Accessed November 2018).

The marine consent process is the decision-making platform for those discretionary activities under the EEZ Act, which is administered by the Environmental Protection Authority (EPA). The EPA is a Crown agent established by the Environmental Protection Authority Act 2011 (EPA Act) which was introduced to replace its predecessor, the Environmental Risk Management Authority (ERMA).³⁷⁰ The EPA Act provides a legislative framework for the incorporation of the principles of the Treaty of Waitangi into EPA decision-making processes.³⁷¹ However, there is no general approach taken by the EPA as to the extent of which the principles are accounted for in each decision-making process.

In July 2017 for example, there were six notified applications for marine consent heard under the EEZ Act.³⁷² Of the six notified applications, three were for seabed mining and the others were for continued drilling activities with associated structural and discharge effects but they were all declined.³⁷³ The most recent decision by the EPA to grant consent for the South Taranaki seabed mining application was quashed by the High Court appeal in *The Taranaki-Whanganui Conservation Board v The Environmental Protection Authority*.³⁷⁴

Treaty Provisions in the EEZ Act

A limitation for Māori of the EEZ Act is that it does not include a broad provision requiring decision makers to give effect to or even to have regard to the principles of the Treaty of Waitangi. Although the following statutory sections are dense, they are important for understanding the limitations of the EEZ Act and the EPA on recognising mātauranga and tikanga Māori as well as having regard for the principles of the Treaty of Waitangi hence the inclusion of the sections here.

Section 12, EEZ Act is an enabling section that provides decision makers with specific mandatory requirements they must comply with in order to give effect to the principles of the Treaty³⁷⁵ and any applicant who lodges a marine consent application must have regard to the principles. Section 12 states:

Treaty of Waitangi

In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—

(a) section 18 (which relates to the function of the Māori Advisory Committee) provides for the Māori Advisory Committee to advise marine consent authorities so that decisions made under this Act may be informed by a Māori perspective; and

³⁷⁰ 'How the Environmental Protection Authority incorporates the principles of the Treaty of Waitangi into its regulatory practice,' in *Report for the New Zealand Productivity Commission* (February 2014) at 3.

³⁷¹ Environmental Protection Authority Act 2011, ss. 4(a) and 4(b).

³⁷² Above, n. 365.

³⁷³ The unsuccessful applications were made by Chatham Rock Phosphate Ltd, OMV New Zealand Ltd and Shell Todd Oil Services Ltd. Trans-Tasman Resources Ltd were unsuccessful in their 2014 application which was subsequently overturned by the EPA decision-making committee following a second application in 2016. The decision was appealed to the High Court by several groups opposed to seabed mining in South Taranaki and was successful in *The Taranaki-Whanganui Conservation Board, and other Appellants v The Environmental Protection Authority* [2018] NZHC 2217.

³⁷⁴ [2018] NZHC 2217. The decision was quashed on adaptive management grounds while the grounds addressing Māori interests advanced by the appellants were rejected by the Court.

³⁷⁵ The approach is in line with the general approach of Parliament to not have broad Treaty clauses but to enact specific duties.

- (b) section 32 requires the Minister to establish and use a process that gives iwi adequate time and opportunity to comment on the subject matter of proposed regulations; and
- (c) sections 33 and 59, respectively, require the Minister and a marine consent authority to take into account the effects of activities on existing interests; and
- (d) section 46 requires the Environmental Protection Authority to notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them.

In decisions to approve or decline an application, decision making committees must assess whether the applicant has met and discharged the above s. 12 obligations. The requirement however is not to assess whether the applicant has had sufficient regard to the principles of the Treaty in general but has paid sufficient regard to the particular requirements adopted by Parliament in s. 12 in order to uphold the principles of the Treaty.

In addition, s. 32, EEZ Act requires the Minister to establish and use a process that gives iwi ‘adequate time and opportunity’ to comment on the subject matter of the proposed regulations which appears to be an enabling provision for Māori. Section 46, EEZ Act similarly requires the EPA to notify iwi authorities and other groups with an existing interest of consent applications that may affect them. Such legislative provisions however leave open to interpretation what constitutes ‘giving iwi adequate time and opportunity to comment’ to the decision making committee. Such provisions give the Minister discretionary power to determine the consultation period. The circumstances in which a Minister has provided adequate time and opportunity will differ depending on the scale of the operation proposed by the application. The EPA has a statutory timeframe for processing activities under ss. 20 A – D and 20G, EEZ Act. From the date of public notification, iwi are given 30 working days to make a written submission on the application and 20 working days between the hearing notification and the hearing itself,³⁷⁶ which timeframes can be a challenge for Māori organisations with limited staff capacity and resources.

The EPA has also provided guidelines for exercising this discretion when determining the adequacy of the consultation period.³⁷⁷ The purpose of the guidelines is for applicants to check whether the proposed application has any impacts on Māori to determine the correct level of engagement. Māori organisations who have a Treaty interest affected by a proposed application require a medium-high level of engagement, which is described in the EPA guidelines as:

- 1) Request feedback via emails;
- 2) Post application information on the EPA website;
- 3) Face-to-face meetings with iwi organisations;
- 4) Māori Reference Group; and
- 5) Presentation at TH national hui.³⁷⁸

Section 59(2), EEZ Act is the substantive provision that details the mandatory considerations the decision-making committee must take into account when considering an application. Section 59(1) and (2) state:

³⁷⁶ See the EPA website for notification process guidelines for ss. 20 A-D and 20G online at: <https://www.epa.govt.nz/assets/Uploads/Images/Content-page-images/Marine-Activities-EEZ/Notified-EEZ-Process-Diagram.jpg> (Accessed November 2018).

³⁷⁷ See also the EPA website on *Māori Engagement Guidelines for Hazardous Substances for Notified Applicants* (2015). Online at: <https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf> (Accessed November 2018).

³⁷⁸ Idem.

Marine consent authority's consideration of application

- (1) This section and sections 60 and 61 apply when a marine authority is considering an application for a marine consent and submissions on the application.
- (2) If the application relates to a section 20 activity... a marine consent authority must take into account -
- (a) any effects on the environment or existing interests of allowing the activity, including—
 - (i) cumulative effects; and
 - (ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and
 - (b) the effects on the environment or existing interests of other activities undertaken in the area covered by the application or in its vicinity, including—
 - (i) the effects of activities that are not regulated under this Act; and
 - (ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and
 - (c) the effects on human health that may arise from effects on the environment; and
 - (d) the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes; and
 - (e) the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species; and
 - (f) the economic benefit to New Zealand of allowing the application; and
 - (g) the efficient use and development of natural resources; and
 - (h) the nature and effect of other marine management regimes; and
 - (i) best practice in relation to an industry or activity; and
 - (j) the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity; and
 - (k) relevant regulations (other than EEZ policy statements); and
 - (l) any other applicable law (other than EEZ policy statements); and
 - (m) any other matter the marine consent authority considers relevant and reasonably necessary to determine the application.

Under s 59(2)(a) then, the decision-making committee must take into account any effects on 'existing interests.' An 'existing interest' is defined in s.4, EEZ Act interpretation section which includes:

- (a) any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing;
- (b) any activity that may be undertaken under the authority of an existing marine consent granted under section 62;
- (c) any activity that may be undertaken under the authority of an existing resource consent granted under the Resource Management Act 1991;
- (d) the settlement of a historical claim under the Treaty of Waitangi Act 1975;
- (e) the settlement of a contemporary claim under the Treaty of Waitangi as provided for in an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992;
- (f) a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011.³⁷⁹

³⁷⁹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s. 4.

The definition of ‘existing interests’ is not limited to merely physical and tangible interests but extends to possessions that have spiritual or intrinsic value beyond physical attributes.³⁸⁰ Metaphysical interests emphasise the role that Māori have as kaitiaki of coastal marine areas that have traditionally been governed by local tikanga.³⁸¹ The principle of active protection furthermore requires the Crown to actively protect Māori rights and interests, particularly those protected under the Treaty³⁸² which interests the courts have found may not be satisfied by consultation alone.³⁸³ In contrast, although customary rights are recognised in the common law, the EEZ statutory regime does not recognise such rights unless prescribed by Parliament.

Section 59(2)(m), EEZ Act above is a catchall provision that provides for the decision-making committee to take into account ‘any other matter the marine consent authority considers relevant and reasonably necessary to determine the application.’ In 2017, the decision-making committee heard the Trans-Tasman Resources Ltd application for seabed mining and held that Parliament intended for the Treaty principles to be considered under the prescriptions expressed under s. 12, EEZ Act. Hence, the scope of s 59(m), EEZ Act was described as being limited to those considerations that are not accounted for by the EEZ Act. The Treaty of Waitangi principles according to this decision-making committee can only be given effect by compliance with the prescriptions under s. 12, EEZ Act and cannot be bolstered by s. 59(m), EEZ Act.³⁸⁴

The inability of the EEZ Act to give full regard to the Treaty principles then is a significant limitation on exercising tikanga and mātauranga Māori because the decision-making committee appears to be unable to protect Māori interests that do not fall within s 12, EEZ Act.

Another procedural aspect relevant to the substantive consideration of Māori interests is the ability under s 56(1)(b), EEZ Act for a decision-making committee to ‘seek advice from the ‘Māori Advisory Committee’ established under the EPA Act ‘on any matter related to’ an application for a consent under the EEZ Act.

Environmental Protection Authority

As noted briefly above, the Environmental Protection Authority (EPA) is the Government agency responsible for administering the EEZ Act. Any assessment of the protection of Māori interests under the EEZ Act must also consider the role of Māori within the EPA and its decision-making processes.

There is no other overarching requirement for the EPA to take into account the principles of the Treaty of Waitangi in its decision-making but s. 4, EPA Act requires the EPA to comply with

³⁸⁰ ‘Māori and Environmental Law - Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012’ in *Environmental and Resource Management Law Online* (Lexis Nexis, September 2017).

³⁸¹ See the Environment Guide website on *Māori and the EEZ Act online at: <http://www.environmentguide.org.nz/eez/Māori-and-the-eez-act>* (Accessed November 2018).

³⁸² Above, n. 121, (Glover and Te Puni Kokiri), *The Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*, (2002) at 93.

³⁸³ *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

³⁸⁴ While the decision of this committee was quashed by the High Court in *The Taranaki-Whanganui Conservation Board v The Environmental Protection Authority* [2018] NZHC 2217, this finding in relation to the scope of s 59(m), EEZ Act was not held to be in error.

whatever Treaty requirements there are in the statute that it is administering when exercising powers or functions under that Act.³⁸⁵ Section 4, EPA Act states:

Treaty of Waitangi (Te Tiriti o Waitangi)

In order to recognise and respect the Crown's responsibility to take account of the Treaty of Waitangi –

- (a) Section 8 establishes the Māori Advisory Committee to advise the Environmental Protection Authority on policy, process, and decisions of the EPA under an environmental Act; and
- (b) The EPA and any person acting on behalf of the EPA must comply with the requirements of an environmental Act in relation to the Treaty, when exercising powers or functions under that Act.

The Māori Advisory Committee mentioned above in s. 4(a) arose out of criticism of its predecessor – the Environmental Risk Management Authority - for its approach to incorporating Māori perspectives in its decision-making procedures where isolated Māori individuals were expected to respond on behalf of one or more iwi or sometimes on a national level.³⁸⁶

The Māori Advisory Committee is officially named Ngā Kaihautū Tikanga Taiao (Ngā Kaihautū) whose primary roles are:³⁸⁷

- to provide advice and assistance to the EPA on matters relating to policy, process, and decisions of the EPA under the Acts it administers, including the EEZ Act; and
- to provide advice to a marine consent authority when the committee's advice is sought under s. 56(1)(b), EEZ Act.

Importantly, all of its members are Māori,³⁸⁸ and the 'advice and assistance' Ngā Kaihautū provides 'must be given from the Māori perspective,'³⁸⁹ which are enabling provisions for Māori.

However, while Ngā Kaihautū offers a Māori perspective, they do not represent the views of all Māori groups affected by specific activities, so Ngā Kaihautū needs to operate with caution.³⁹⁰ Still, Ngā Kaihautū has effectively become kaitiaki of the decision-making processes under the statutes the EPA administers thus ensuring that Māori have an adequate opportunity to participate in the decision-making processes for all EPA regulatory practices. Ngā Kaihautū for example, advises the relevant decision-making committee on the context in which Māori submissions to that committee are to be interpreted and understood. Ngā Kaihautū may also provide a separate report to a decision-making committee such as a cultural assessment of a proposed activity. Ngā Kaihautū is critical in this respect to ensuring robust decision-making

³⁸⁵ Environmental Protection Authority Act 2011, s. 4(b). The EPA operates under its own legislation – the Environmental Protection Authority Act 2011 (EPA Act) - and has its own structures and guidelines for implementing the principles of the Treaty of Waitangi within its operations and regulatory practices. The EPA also has responsibilities for other legislation such as the Hazardous Substances and New Organisms Act 1986 in addition to the EEZ Act.

³⁸⁶ Above, n. 370, (EPA) at 6.

³⁸⁷ Environmental Protection Authority Act 2011, s. 19(1).

³⁸⁸ See <https://www.epa.govt.nz/about-us/our-people/nga-kaihautu-tikanga-taiao/> (Accessed November 2018).

³⁸⁹ Ibid, s. 19(2).

³⁹⁰ Above, n. 370 (EPA) at 32.

processes are followed by holding decision-making committees accountable to minimum standards of consultation with affected Māori communities. One risk of the extensive role of Ngā Kaihautū as noted above however is that it could be treated as *the* Treaty partner by the EPA instead of the actual Māori community affected by the activities.³⁹¹

The EPA and EEZ regimes then complement each other and both are important in the decision-making processes. Unfortunately, however, no matter what the strength of Ngā Kaihautū, the EPA's approach to decision-making under the EPA Act must fit within the parameters of the EEZ Act. EEZ applicants are required to consider specific Treaty obligations pursuant to s. 12, EEZ Act and to follow the prescribed procedure for meaningful consultation with affected Māori. Ironically, those procedural and substantive requirements in the EEZ framework can limit the EPA's power to give full effect to the principles of the Treaty during the decision-making processes. For example, even if adherence to the Treaty principles might suggest that an applicant needs to do more than it has, if the applicant has fulfilled the s. 12, EEZ Act requirements to 'give effect to the principles', then no additional requirements can be imposed upon them.³⁹² The EPA then is not required to go beyond the minimum standard of Māori participation in the decision-making process provided for by the EEZ Act, in conjunction with its requirement to operate the Māori Advisory Committee. Such narrow prescriptive requirements in the EEZ Act and those used by the EPA can minimise the EPA's responsibilities to Māori communities affected by activities.

It is moreover, unclear how the EPA could better incorporate the principles of the Treaty of Waitangi into its decision-making processes. For example, there are some matters within the EPA's control such as the time limits prescribed for making a decision and in what manner submissions may be taken. There have however, been criticisms of these aspects in relation to decisions on applications made under the EEZ Act. For example, Māori have complained about the lack of appropriate participation in applications for approval of pesticides³⁹³ and for new organisms.³⁹⁴ Consultation on pesticide applications were neither appropriate nor timely,³⁹⁵ despite being clearly required of applicants,³⁹⁶ with a detailed framework being provided to assist applicants to do so.³⁹⁷ Iorns concluded in this respect:

Ngā Kaihautū has, in multiple reports regarding pesticide applications, noted with concern the lack of early engagement with Māori. The consequences of such a lack of meaningful early engagement is twofold: first, it prevents the applicant from fully engaging with the potential effects of the chemical ... on the *kaitiaki* relationship between

³⁹¹ Ibid, at 35.

³⁹² See for example, the deciding view on 'Social and Cultural Impacts: Tangata Whenua Matters' in Marine Consents and Marine Discharge Consents EEZ000011 online at: (<https://www.epa.govt.nz/public-consultations/decided/trans-tasman-resources-limited-2016/the-decision/>) (Accessed November 2018); and *The Taranaki-Whanganui Conservation Board, and other Appellants v The Environmental Protection Authority*, [2018] NZHC 2217.

³⁹³ For a discussion on the application and decision-making processes for pesticide approval, see Iorns, C, 'Permitting Poison: Pesticide Regulation in Aotearoa New Zealand,' in *EPLJ* (Vol. 35, 2018) 456, at 474.

³⁹⁴ For a discussion on the application and decision-making processes for new organisms, see, Oldham, O, 'If Māori speak in a forum that doesn't listen, have they been heard at all? A critical analysis of the incorporation of tikanga Māori in decisions on genetic modification,' (Unpublished LLB (Hons) Dissertation, Victoria University of Wellington, 2017).

³⁹⁵ See, Horn, C and Kilvington, M, *Māori and 1080* (2002) 5 online at: www.landcareresearch.co.nz (Accessed November 2018).

³⁹⁶ Refer to the EPA instructions to applicants online at: <https://www.epa.govt.nz/applications-and-permits/engaging-with-Māori> (Accessed November 2018).

³⁹⁷ EPA, *Māori Engagement Guideline for Hazardous Substances Notified Applications* (2015) online at: <https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf> (Accessed November 2018).

iwi and *taonga* species; and second, it hinders the comprehensive involvement of Māori in the application process.³⁹⁸

Iorns continued:

Ngā Kaihautū has raised concerns with the treatment of this issue by applicants in its response to several pesticide applications, linking failures in process to failure to consider the substantive issues. ... In 2017, the EPA expressed its commitment to ‘considering how to incorporate mātauranga Māori into [its] decision making.’ It is a welcome step, but illustrates how the process does not yet accommodate very well the consideration of the wider range of possible adverse effects of pesticide use.³⁹⁹

Another limitation has been that EPA consultation has frequently been framed as a means of ‘convincing’ Māori of the correctness of an outcome that the Crown, it appears, has already decided upon.⁴⁰⁰ Such a perspective was particularly evident in a 1998 Parliamentary Commissioner for the Environment Report⁴⁰¹ that argued for ‘well targeted and effectively delivered information’ to ‘counteract the suspicions and distrust some Māori [sic]... have to poisons and 1080 in particular.’⁴⁰² The report added that the ‘risk that if these consultation/information matters are not convincing, some tangata whenua will remain antagonistic to control operations.’⁴⁰³ Such a limiting approach to consultation is problematic given that a failure to adequately consult at the framing stage and subsequently in the decision-making processes constructs Māori as advisors to the Crown rather than as Treaty partners.⁴⁰⁴ The approach moreover, perceives consultation as ‘education’ rather than a ‘dialogue’ between the two parties where they can learn from each other which is another obvious limitation on incorporating mātauranga and tikanga Māori in an EBM context with the EPA over the EEZ which is contrary to the Treaty of Waitangi partnership.

There is evidence of a commitment within the EPA itself to move away from this limited power imbalance model of consultation.⁴⁰⁵ The EPA’s October 2017 briefing to Incoming Ministers repeatedly highlighted the EPA’s commitment to ‘considering how to incorporate mātauranga Māori into [its] decision making’ more generally.⁴⁰⁶ Nevertheless, for consultation with Māori to be effective, applicants under the relevant statute need to consider tikanga and mātauranga Māori as seriously as the EPA does. Hence, to implement EBM appropriately over the EEZ as

³⁹⁸ Above, n. 393, (Iorns).

³⁹⁹ *Idem*.

⁴⁰⁰ In contrast, see above, n. 395 (Horn and Kilvington).

⁴⁰¹ Parliamentary Commissioner for the Environment, *Possum-Management in New Zealand: Critical Issues in 1998* (Office of the Parliamentary Commissioner for the Environment, PCE Progress Report No 1, November 1998) at 7.

⁴⁰² *Ibid*.

⁴⁰³ *Ibid*.

⁴⁰⁴ Above, n. 394 (Oldham) at 14 and 26–27.

⁴⁰⁵ Environmental Protection Authority, *Māori Engagement Guideline For Hazardous Substances Notified Applications*, (2015) online at: <https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf> ((Accessed November 2018)).

⁴⁰⁶ The 2017 Briefing stated: ‘We are considering further incorporating mātauranga Māori into the EPA’s work. Mātauranga Māori may include the pursuit and application of knowledge and understanding of the environment, following a systematic approach based on evidence, incorporating culture, values and Māori perspectives. This knowledge is not universally pan-Māori, but is held by individual *iwi* and *hapū*, based on observation of the environment in their individual *rohe* (region). Our aspiration to use mātauranga Māori, to develop an appropriate framework, and to draw on a network of mātauranga experts, is important, as any significant change to environmental policy settings is likely to involve cultural, ethical, and scientific issues.’ Environmental Protection Agency, *Briefing to Incoming Ministers* (October 2017) at 6.

noted above, mātauranga and tikanga Māori are a fundamental pillar of EBM and how it applies in Aotearoa New Zealand

The next section will briefly analyse similar limitations with the application of tikanga and mātauranga Māori and of incorporating the Treaty of Waitangi principles in marine protected areas especially in the Kermadec Ocean Sanctuaries Bill 2016.

K. Tikanga Māori, Marine Protected Areas and the Kermadec Ocean Sanctuary Bill 2016

Marine Protected Areas (MPAs) are a relatively recent conservation development that has dominated the form of aquatic conservation initiatives.⁴⁰⁷ MPAs are another management tool to manage the marine environment. Marine reserves are the highest form of marine protection under the Marine Reserves Act 1971. The Department of Conservation (DOC) is responsible for the implementation, management and monitoring of New Zealand's 44 marine reserves.

Two other types of MPAs can be established outside of the Marine Reserves Act 1971. Although no set process is available to create these MPAs, there are two policies that provide guidance - the 2005 Marine Protection Areas Policy and Implementation Plan and the 2008 Marine Protection Areas Classification, Protection Standard and Implementation Guidelines.⁴⁰⁸

MPAs have moreover, been endorsed internationally for combatting marine exploitation and they have increased from 120 in 1970 to 10,280 in 2013.⁴⁰⁹ The global network of MPAs is currently comprised of over 10,000 areas, which equates to only 6% of the global ocean being protected.⁴¹⁰ MPAs may provide aquatic ecosystems with a complete reprieve from human interference. MPAs can also implement various degrees of restrictions on what may be taken from an area.⁴¹¹

In 1993, New Zealand ratified the Convention of Biological Diversity in recognition of the need to minimize the consequences of anthropogenic threats to the marine environment and set principles and targets for sustainable development and attempted to comply with Target 11 of the Aichi Biodiversity Targets.⁴¹²

By 2020 [...] 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas.

⁴⁰⁷ Pita, C and others 'An overview of commercial fishers' attitudes towards marine protected areas,' in *Hydrobiologia*, (Vol. 670, 2011) at 289. Refer also to Donnelly, E, 'The Protection of Māori Knowledge and Culture in the Proposed Kermadec Ocean Sanctuary Bill,' (Unpublished Draft Report for MIGC University of Waikato, Faculty of Law, University of Victoria, 2018).

⁴⁰⁸ Department of Conservation, 'Marine Protected Areas: Policy and Implementation Plan,' (2005) at 865-94 online at <http://doc.govt.nz/about-us/science-publications/conservation-publications/marine-and-coastal/marine-protected-areas/marine-protected-areas-policy-and-implementation-plan/> (Accessed November 2018).

⁴⁰⁹ Caveen, Alex Polunin, Nick and Gray, Tim, *The Controversy over Marine Protected Areas* (Springer, London, 2015) at 11.

⁴¹⁰ Marine Conservation Institute 'MPAtlas,' online at: www.mpatlas.org ((Accessed November 2018).

⁴¹¹ Upton, H and Buck, E, 'Marine Protected Areas: An Overview,' in Mayr, F, (ed) *Marine Protected Areas* (Nova Science Publishers, New York, 2010) at 3.

⁴¹² Convention on Biological Diversity, 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993), *Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, (Target 11).

While the target of 10% by 2020 has been heralded as being ‘politically ambitious,’ scientists have identified it as merely the starting point for effective ocean management.⁴¹³ Studies have concluded that although MPAs currently comprise 6% of the ocean, the active protection of anything less than 30% will be insufficient to protect biodiversity, ecosystems and to support the current socio-economic and commercial priorities of states.⁴¹⁴

⁴¹³ O’Leary, B and others, ‘Effective Coverage Targets for Ocean Protection,’ in *Conservation Letters* (Vol. 9, 2016) at 398.

⁴¹⁴ *Ibid*, at 398.



Marine Protected Areas Map⁴¹⁵

⁴¹⁵ Online at <https://teara.govt.nz/en/map/13882/marine-protected-areas-map> (Accessed November 2018).

In establishing MPAs, decision makers must balance a plethora of social, political, economic, cultural and ecological challenges.⁴¹⁶ The political dimension to the creation of MPAs however, has been identified as a major determinant to success or failure. Unsurprisingly, to generate support for an MPA throughout the spectrum of stakeholders, they must be created in a transparent, democratic manner that seeks to fulfil ecological, commercial fishery management and cultural outcomes.⁴¹⁷

In a bid to comply with international obligations, states propose MPAs and no-take zones as the only available conservation tools,⁴¹⁸ which approach can preclude consideration of alternative environmental management options and has the effect of isolating interested parties. Instead of considering options that may introduce more comprehensive marine resource management approaches, states are instigating strict no-take zones over small areas of their respective EEZ.⁴¹⁹

In supporting the introduction of MPAs as a conservation tool, the New Zealand Government published a consultation document in January 2016 that outlined a new approach to marine protection through legislation⁴²⁰ and endorsed co-management as a means of recognising Māori as a Treaty partner. Methods for strengthening iwi/Māori involvement were also discussed:

- Including a Treaty clause consistent with current statutory recognition of Treaty of Waitangi obligations;
- Providing meaningful iwi/ Māori involvement in all stages of MPA establishment to ensure that legislative reforms do not result in any inconsistencies with Treaty settlement legislation;
- Ensuring existing arrangements for non-commercial customary fishing are recognised and maintained, and that customary fishing activities are appropriately accommodated for in marine packages;
- Requiring that any MPA advisory committees include iwi/ Māori representation.⁴²¹

The document proposed that the Government should strive to implement governance structures for MPAs that recognise and provide for Māori as a Treaty partner.

MPAs have however, been used as a justification to allow unsustainable marine exploitation in zones surrounding MPAs for them to continue⁴²² and the establishment of the proposed Kermadec Ocean Sanctuary in 2016 may be an example of the New Zealand Government following such an approach.⁴²³

⁴¹⁶ Above, n. 411 (Upton and Buck) at 1.

⁴¹⁷ Above, n. 407 (Pita) at 289.

⁴¹⁸ Joachim, C, *Marine Protected Areas: A Multidisciplinary Approach* (Cambridge University Press, Cambridge, 2011) at 13.

⁴¹⁹ Fanny, D, 'The importance of marine spatial planning in advancing ecosystem-based sea use management,' *Marine Policy* (Vol. 32, 2008) 762 at 763.

⁴²⁰ Ministry for the Environment, *A New Marine Protected Areas Act: Consultation Document* (Ministry for the Environment, Wellington, 2016).

⁴²¹ *Ibid*, at 26.

⁴²² Agardy, T and others, 'Mind the gap: Addressing the shortcomings of marine protected areas through large scale marine spatial planning,' *Marine Policy*, (Vol. 35, 2011) at 226 at 228.

⁴²³ (15 September 2016) 717 NZPD 13783.

Kermadec Sanctuary Area

The Kermadec region is an area of particular cultural and historical importance to Māori.⁴²⁴ Nestled in the upper corner of New Zealand's EEZ, approximately 1,000 kilometres away, the Kermadec Ocean has been referred to as 'one of the most pristine and unique places on earth.'⁴²⁵ It is a meeting place of two tectonic plates - the Pacific and Australian. The subduction of the Pacific Plate simultaneously created the Southern Hemisphere's deepest ocean trench and the longest, most hydrothermally active chain of underwater volcanoes.⁴²⁶

Geographically, the points of reference for the Kermadec Ocean are the five visible tops of semi-submerged volcanoes that form part of the 2,800 kilometre trail.⁴²⁷ Raoul Island/Rangitāhua is the largest island and was used as a rest area for Māori migrating between the Cook Islands and Aotearoa.⁴²⁸ Rangitāhua is where the survivors of the shipwrecked waka Kurahaupo washed up and were picked up by the Aotea waka. The connections of Ngāti Kurī and Te Aupouri as kaitiaki (guardians) over the island has also been statutorily acknowledged in Schedule 4, Ngāti Kurī Claims Settlement Act 2015 and Schedule 4, Te Aupouri Claims Settlement Act 2015. Rangitāhua is a distinct ecoregion and has been crowned an Important Bird Area by BirdLife International as a breeding site for six million seabirds of 39 different breeds.⁴²⁹

⁴²⁴ Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at [8].

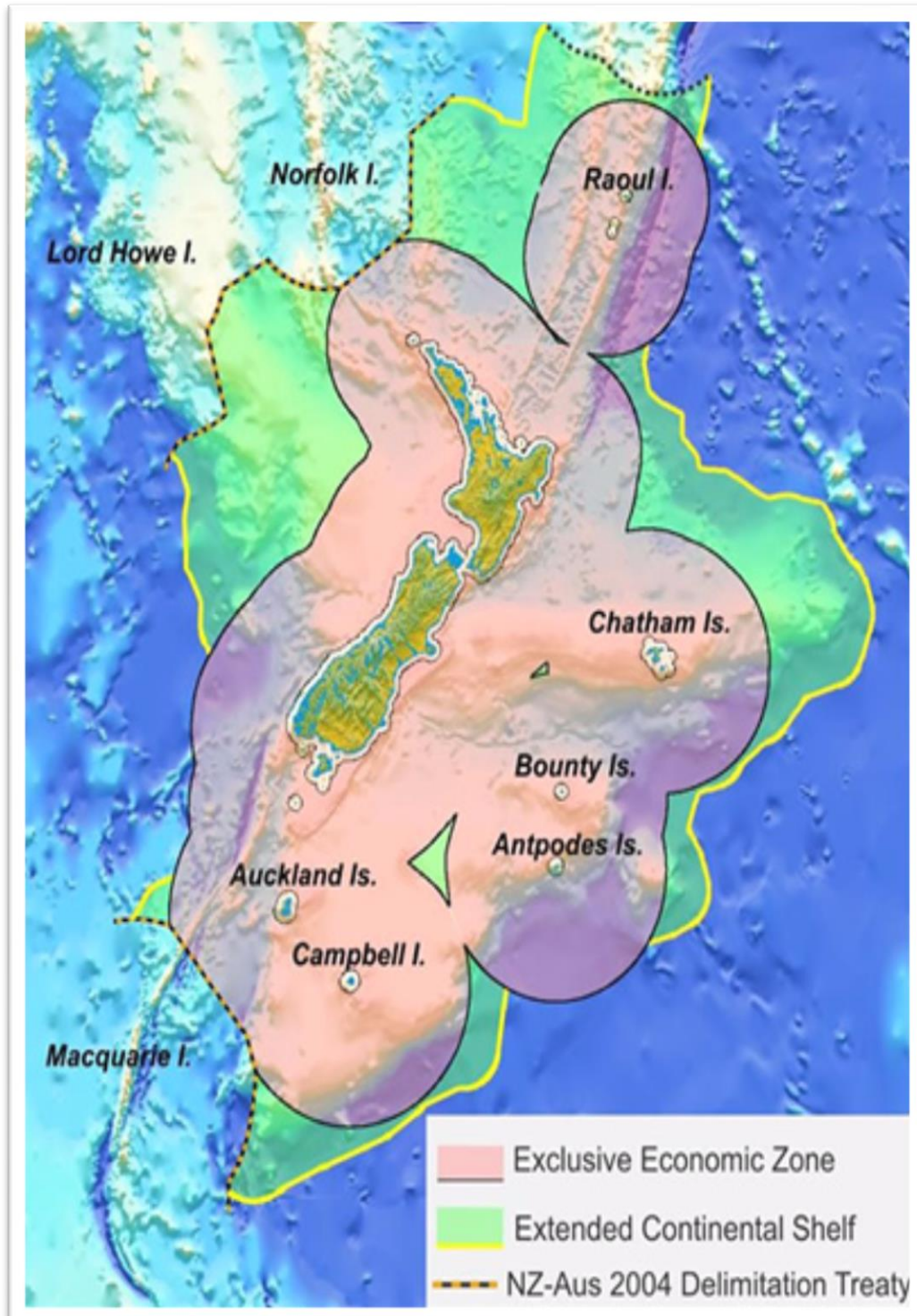
⁴²⁵ Ministry for the Environment 'About the Kermadec Ocean Sanctuary,' (2 August 2016) www.mfe.govt.nz (Accessed November 2018).

⁴²⁶ Priestly, R, 'Fire and water,' in *New Zealand Geographic*, (Vol. 119, 2013) (Online ed, 2013, Auckland).

⁴²⁷ Department of Conservation 'Kermadec Islands,' www.doc.govt.nz (Accessed November 2018).

⁴²⁸ Above n.24, (Te Aupouri Trust) at [7].

⁴²⁹ BirdLife International 'Important Bird Areas factsheet: Kermadec Islands,' (2012) BirdLife International www.birdlife.org (Accessed November 2018).



New Zealand EEZ and Extended Continental Shelf⁴³⁰

⁴³⁰ GNS Science website Online at: <https://www.gns.cri.nz/Home/Learning/Science-Topics/Ocean-Floor/Undersea-New-Zealand/NZ-s-Continental-Shelf> (Accessed November 2018).
www.sustainableseaschallenge.co.nz



Kermadec Islands Map⁴³¹

⁴³¹ Greenpeace New Zealand Map online at: <https://www.greenpeace.org/new-zealand/story/te-ohu-kaimoana-crying-crocodile-tears-over-kermadec-ocean-sanctuary/> (Accessed November 2018).

The isolation of the ocean around the Kermadec Islands has rendered it a ‘biodiversity hotspot’ and one of the few marine ecosystems spared from anthropogenic destruction.⁴³² The region harbours over 150 species of fish, three species of endangered sea turtles and is a common migration route for 35 species of whale and dolphins.⁴³³ The absence of commercial fisheries have left the complex marine food chains untouched.⁴³⁴ Apex predators such as Galapagos sharks and spotted black groper have ensured the archipelago is a bounty of fish species, sponges, bryozoans and corals.⁴³⁵

Since 1990, the territorial sea area surrounding the five Kermadec Islands – Raoul, Macauley, Cheeseman, Curtis and L’Esperance - out to 12 nautical miles were provided marine reserve status.⁴³⁶ In 2007, the area beyond the reserve out to 200 nautical miles was recognised as a benthic protection area (BPA). Some fishing activities have been restricted as a result including dredging and bottom trawling up to 50 metres from the seabed.⁴³⁷ However, given the ecological, cultural and historical status of the region, a campaign started to extend the legal protections around the ocean.

The Royal Forest and Bird Protection Society of New Zealand (Forest and Bird), World Wide Fund for Nature New Zealand (WWF), Pew Charitable Trusts and the Kermadec iwi authorities - Ngāti Kuri and Te Aupouri – aggregated to campaign for the protection of the region.⁴³⁸ Both the Labour Party and Greens supported the initiative.⁴³⁹ Public support through a WWF funded Colmar Brunton poll in April 2016 concluded that 89% of New Zealanders support the Sanctuary, including 86% of Māori respondents.⁴⁴⁰ Because of the hard work of non-governmental organizations and mana whenua, there was a sense of anticipation and expectation leading up to the Sanctuary’s proposal.

Kermadec Ocean Sanctuary Bill 2016

From the outset, the proposed Kermadec Ocean Sanctuary Bill (the KOS Bill) was problematic for Māori. Former National Party Prime Minister John Key announced the Government’s decision to recognise the region as a MPA at the United Nations General Assembly in New York on 29 September 2015⁴⁴¹ while campaign leaders, key stakeholders and iwi authorities neither were consulted nor were they informed well in advance.⁴⁴²

Following this announcement, the National Government acted with a sense of urgency to be recognised as a ‘world leader in the management and protection of our ocean environment’

⁴³² Hon Nick Smith MP, ‘Kermadec Ocean Sanctuary Bill introduced,’ (8 March 2016) Beehive <www.beehive.govt.nz (Accessed 2016).

⁴³³ Ministry for the Environment, *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (25 February 2016) at 2.

⁴³⁴ Clark, M and others, *Biodiversity of the Kermadec Islands and offshore waters of the Kermadec Ridge: Report of a coastal, marine mammal and deep-sea survey* (Ministry of Primary Industries, TAN1612, January 2017) at 7.

⁴³⁵ Above, n. 426, (Priestly).

⁴³⁶ Beehive ‘Q&A: Kermadec Ocean Sanctuary,’ online at: www.beehive.govt.nz (Accessed November 2018).

⁴³⁷ *Regulatory Impact Statement*, above n. 433, at 3.

⁴³⁸ Forest and Bird, WWF NZ and The Pew Charitable Trusts, ‘Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,’ (2016) at 2 and Ngāti Kuri Trust Board Inc. ‘Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,’ at [2]; Kermadec Ocean Sanctuary Bill (120—2) (Select Committee Report) at 10.

⁴³⁹ *Idem*.

⁴⁴⁰ *Ibid*, at 2.

⁴⁴¹ Key, J, PM announces Kermadec Ocean Sanctuary,’ (29 September 2015) Beehive online at: www.beehive.govt.nz (Accessed November 2018).

⁴⁴² Above, n. 424, (Te Aupouri Trust), at [14].

when they outlined to the UN General Assembly of their intention for the establishment of the Kermadec Ocean Sanctuary (KOS) by November 2016.⁴⁴³ To reach the November deadline, the KOS Bill was drafted independently of stakeholder and mana whenua participation.⁴⁴⁴

The Kermadec Ocean Sanctuary Bill was introduced to Parliament by Environment Minister Hon. Nick Smith on 8 March 2016, was well received within the House of Representatives and was applauded by the PEW Charitable Trust for setting the 'gold standard internationally' for MPAs.⁴⁴⁵ While several challenges with the KOS Bill were raised during its First Reading, it went unopposed to Select Committee.⁴⁴⁶

The KOS Bill sought to create 'one of the world's largest and most significant fully protected ocean areas.'⁴⁴⁷ At 620,000 square kilometres, the marine reserve will be one of the world's largest and most significant fully protected areas, 35 times larger than the combined area of New Zealand's existing 44 marine reserves and 15% of New Zealand's ocean environment. The reserve will be the first time an area of the New Zealand EEZ will be fully protected.⁴⁴⁸ Within the KOS, mining-related activities, fishing, dumping of any matter, damaging vibrations, seismic surveying and the disturbance of any material will be prohibited.⁴⁴⁹

Conservation Board

The Conservation Board plays an important role in the governance of the Kermadec Ocean Sanctuary Bill, as well as for recognising the Treaty partnership and mātauranga and tikanga Māori, and will be briefly discussed here. The Conservation Act 1987 states that the Act shall be interpreted and administered to give effect to the principles of the Treaty of Waitangi.⁴⁵⁰ Section 6L(1), Conservation Act 1987 established the Conservation Board⁴⁵¹ who is responsible for establishing a conservation management strategy for the KOS area and will constitute seven members appointed by the responsible Minister.⁴⁵² Two of the members are to be nominated from Ngāti Kurī and Te Aupouri, another appointed at the discretion of the Minister of Māori Development to represent 'iwi Māori who have cultural, historical, spiritual, and traditional associations with the Kermadec/Rangitāhua area.'⁴⁵³ The remaining four are appointed by the Minister of Conservation.⁴⁵⁴

The KOS Bill was criticised during the First Reading and the Select Committee period. Three key challenges regarding the Conservation Board and the general receptiveness of Māori and the wider public to the Bill were:

1. Māori rights to compensation,
2. Failure to consult Māori, and

⁴⁴³ Hon Nick Smith MP (15 March 2016) 712 NZPD 9662. See also Radio New Zealand 'Legal challenge to Kermadec Ocean Sanctuary,' (20 March 2016) online at: www.radionz.co.nz (Accessed November 2018).

⁴⁴⁴ New Zealand Fishing Industry Association, 'Supplementary Submission A to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016). at 6.

⁴⁴⁵ Above, n. 438, (Forest and Bird, WWF NZ and The Pew Charitable Trusts) at 2.

⁴⁴⁶ Hon Nick Smith MP, above, n.443, at 9662.

⁴⁴⁷ Ibid, at 9662.

⁴⁴⁸ Kermadec Ocean Sanctuary Bill, sch 2, pt 1.

⁴⁴⁹ Clause 9.

⁴⁵⁰ Section 4, Conservation Act 1987.

⁴⁵¹ Clause 23.

⁴⁵² Clause 24.

⁴⁵³ Clause 24(2).

⁴⁵⁴ Clause 24(1)(d).

3. Practical enforcement of the Bill

Compromising the Integrity of Treaty Settlements

The KOS Bill's treatment of fishing quota was problematic for Māori given the restrictions of the KOS abrogated two forms of rights guaranteed by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992⁴⁵⁵ - Māori commercial and customary fishing rights.

Currently, the Kermadec region is recognised as Fishery Management Area 10 (FMA10) and the fishing quota is shared between the Crown and Te Ohu Kaimoana (TOKM)⁴⁵⁶ – the post-settlement governance entity established by the 1992 Māori commercial fisheries settlement and guardian of Māori fishing rights as noted above. TOKM advocates on behalf of Māori fishing interests, allocates fishery assets, and monitors the performance of mandated iwi organisations (MIOs).⁴⁵⁷ The KOS Bill does not extinguish the quota held by TOKM, nor does it disestablish the area as Kermadec Fishery Management Area 10, but what the KOS Bill does do is it simply reduces the total allowable catch to zero⁴⁵⁸ while customary fishing rights remain unextinguished but unusable.⁴⁵⁹

⁴⁵⁵ Section 2.

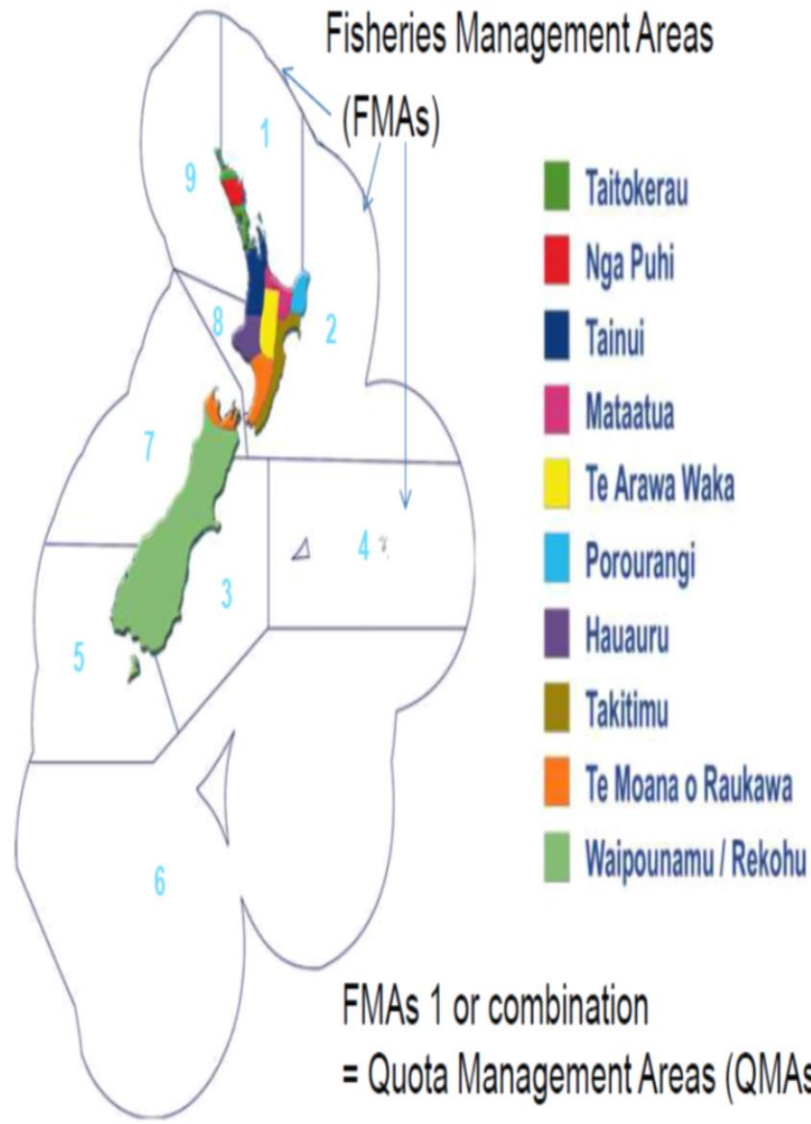
⁴⁵⁶ Above, n. 444, (Select Committee Report) at 7.

⁴⁵⁷ Māori Fisheries Act 2004, s. 32.

⁴⁵⁸ Kermadec Ocean Sanctuary Bill, cl 113AC.

⁴⁵⁹ Fisheries (Amateur Fishing) Regulations 1986, reg 27.

Allocation of Settlement quota to 57 iwi based on the QMS and quota classification



Ka hua ki tai - Ka ora ki uta
a bountiful sea will sustain us

Fisheries Management Areas (FMAs) based on Tikanga Māori⁴⁶⁰

⁴⁶⁰ Te Ohu Kaimoana, 'Māori Customary Fishing Rights in the Modern New Zealand Context,' (Unpublished Presentation, Torres Strait, Australia, 8 April 2014) at 11.

The KOS Bill further outlines that the Crown is indemnified against compensating for ‘any adverse effect on a right or interest.’⁴⁶¹ Less than 2% for each fish species is caught inside FMA10 given the area is viewed as economically unviable and future economic benefits are predicted to reflect the status quo.⁴⁶² The rationale for refusing to compensate quota holders is because the property rights are not currently used and do not need to be compensated.⁴⁶³ Various NGOs such as WWF, and Forest and Bird moreover, supported this approach because establishing the KOS is ‘a major step forward in biodiversity conservation while having no significant impact on existing industries.’⁴⁶⁴

However, the approach of the KOS is limiting for Māori particularly regarding the protection and integrity of Treaty settlements generally, as well as testing the Crown’s respect for Māori commercial fishing interests specifically that were deemed to be a ‘full and final’ settlement in 1992⁴⁶⁵ as one of the Te Tau Ihu informants opined:

Our legal rights are based around commercial access to quota so that gives us the legal right to be able to fish that quota or to sell that quota, or generate money out of that quota. That's a legal right we have.⁴⁶⁶

Refusing to compensate the proprietary rights held by TOKM contradicts the expectation in New Zealand society that property rights are sacrosanct and should only be removed if there is a ‘cogent policy justification’⁴⁶⁷ or for legitimate public works concerns. The Crown argued however, that it is not obliged to compensate Māori because establishing the KOS is a sustainability measure and perhaps for public interest.⁴⁶⁸ Beyond a general threat to the environment, there appears to be little evidence of the region facing unsustainable exploitation.⁴⁶⁹ Furthermore, neither Māori customary nor commercial fishing responsibilities are being exercised at an unsustainable rate given the geographical isolation creates a fortress for the region that largely prevents the rights and responsibilities from being engaged.⁴⁷⁰

The Crown’s approach to the KOS Bill however exhibits the unilateral abrogation of Māori Treaty rights and the potential for Western conservation values to be treated as paramount and capable of undermining tikanga Māori and the integrity of Treaty settlements. Indeed, Ngāi Tahu kaumātua Sir Tipene O’Regan stated that the KOS Bill in its current form has the potential to create a ‘dangerous’ precedent of overriding Treaty of Waitangi settlement rights.⁴⁷¹

⁴⁶¹ Kermadec Ocean Sanctuary Bill, cl 1(2).

⁴⁶² *Regulatory Impact Statement*, above, n. 433, at 7.

⁴⁶³ *Ibid*, at 8.

⁴⁶⁴ Above, n. 438, (Forest and Bird, WWF NZ and The Pew Charitable Trusts) at 2.

⁴⁶⁵ Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 9(b). Following the signing of the Fisheries Settlement, the Crown unilaterally extinguished any further commercial fishing interest for Māori. For further information, see Waitangi Tribunal, *The Fisheries Settlement Report* (Wai 307, 1992) at 9.

⁴⁶⁶ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

⁴⁶⁷ LAC Guidelines on Process and Content of Legislation (2016 edition) at 4 cited in Legislation Design and Advisory External Subcommittee ‘Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill’ (2016) at 2.

⁴⁶⁸ Fisheries Act 1996, s. 308.

⁴⁶⁹ *Regulatory Impact Statement*, above, n. 433, at 7.

⁴⁷⁰ New Zealand Fishing Industry Association, ‘Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,’ (2016) at 14.

⁴⁷¹ Price, R, ‘Kermadec Ocean Sanctuary: a ‘dangerous’ precedent for Māori rights?’ in *Stuff* (23 March 2016) <www.stuff.co.nz (Accessed March 2016).

Lack of Consultation

Consultation with Māori was another concern with the KOS Bill. A Te Tau Ihu informant, speaking generally on unilateral Treaty settlement changes and a lack of consultation, commented:

The Minister has now exercised discretionary powers to change the weighting of our fishing quota, so Iwi agreed on their weighting and the Minister has changed that with no consultation with Iwi, which is actually a breach of our agreement. If that is reviewed in Court, then if it is legal, the Courts must uphold the law.⁴⁷²

Moreover and specific to the region, Te Aupouri openly criticised the National Government for its failure to consult those statutorily recognised as having mana whenua over the region.⁴⁷³ Chairman Riki Witana was contacted hours before the announcement of the KOS and asserted that the Crown's failure to consult Māori was 'disappointing.'⁴⁷⁴ Hon Nick Smith maintained the view that as previous discussions had occurred between Te Aupouri, Ngāti Kurī and the Crown, they were sufficiently consulted on the Crown's intentions to establish a Sanctuary.⁴⁷⁵ The Crown alleged that given both iwi authorities had campaigned alongside NGOs, they had effectively registered support for the KOS,⁴⁷⁶ and therefore the involvement of the two iwi in the procedural creation of the Sanctuary was not strictly necessary given their earlier agreement with the substance of the KOS Bill.⁴⁷⁷

Labour Fisheries Spokesperson Riro Tirikatene on the other hand claimed that the Government had 'jumped the gun' by announcing the KOS without properly consulting Māori.⁴⁷⁸ Tirikatene stated that the Government 'made a big announcement to the world then thought about Māori interests only after the legislation was introduced.'⁴⁷⁹ In their submission to the Local Government and Environment Committee, Te Aupouri stated that informing the Chairperson of the Sanctuary proposal hours before its announcement was not recognising the position of Māori as an equitable Treaty partner.⁴⁸⁰ The Crown's 'consultation,' Te Aupouri added, was 'not consultation in any sense of the word - the decision had been made and we were simply being informed of that decision.'⁴⁸¹

The blatant disregard for Māori involvement in the KOS process indicates that the Crown did not consider the contribution of Māori to be as important which approach has the potential to establish a precarious precedent of failing to consult or facilitating minimal Māori participation in decisions of national significance. While Hon Nick Smith stated that iwi had a 'key influence over the bill establishing the sanctuary and will have an ongoing role in its management,' in reality, the KOS Bill fails to reflect this position.⁴⁸² A result of excluding Māori from the process of designing the KOS is that the product proposed by the Government fails to reflect the Treaty

⁴⁷² MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

⁴⁷³ Harris, C, 'Iwi calls Crown on consultation but backs Kermadecs marine sanctuary,' *Stuff* (27 March 2016) <www.stuff.co.nz (Accessed May 2016).

⁴⁷⁴ Above, n. 424, (Te Aupouri Trust) at 13.

⁴⁷⁵ Hon Nick Smith MP, 'Kermadec Ocean Sanctuary objections mistaken,' (11 April 2016) *Beehive* <www.beehive.govt.nz (Accessed May 2016).

⁴⁷⁶ *Ibid.*

⁴⁷⁷ Cabinet Economic Growth and Infrastructure Committee, 'Establishment of the Kermadec Ocean Sanctuary,' (10 September 2015) at 4.

⁴⁷⁸ Sachdeva, S, 'Hope grows for compromise on Māori fishing rights in Kermadec Ocean Sanctuary,' *Stuff* (23 September 2016) <www.stuff.co.nz (Accessed October 2016).

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Above, n. 424, (Te Aupouri Trust), at 14.

⁴⁸¹ *Ibid.*, at 1.

⁴⁸² Above, n. 443, (Smith).

partnership as well as the ethical best practice of acknowledging tikanga Māori or of substantively incorporating Māori worldviews.

Similar challenges occur for other Māori groups around the country including in Te Tau Ihu which one informant voiced:

There is also implications here of the ultimate Crown control, I mean – we might elect boards, we might elect people to represent us but at the end of the day, it's the Crown decision at the top that actually matters and if those people don't have the right strength and advocacy to be able to negotiate, then things don't happen right.⁴⁸³

Furthermore, iwi participation in the proposal for the KOS governance structure only occurred at the Select Committee stage. Submissions by Ngāti Kurī and Te Aupouri reflected the fears that as minorities in the Conservation Board structure, Māori views would be marginalised.⁴⁸⁴ Ngāti Kurī even suggested that given the Crown unilaterally decided the governance structure; the position of Chair should be granted to iwi.⁴⁸⁵ Ngāti Kurī viewed the measure as a substantive way of power sharing with iwi as a minority on the Board. Hon Nick Smith responded that the Chairperson for the Board *could* be an iwi representative but the prominent consideration was whether they possess the scientific and marine mammal expertise,⁴⁸⁶ which demonstrates the Crown's view that the scientific objectives of the KOS are more important than Māori cultural obligations. In addition, the power imbalance will restrict the ability of iwi to influence how DOC and the EPA chose to implement the Conservation Management Strategy.⁴⁸⁷

The prevailing science agenda was further demonstrated in the provisions for scientific marine research permitted in the KOS Bill. Research that does not contravene KOS restrictions is automatically permitted.⁴⁸⁸ The original KOS Bill was altered however, in accordance with Te Aupouri's submission that the original considerations for authorization did not have to consider Kermadec/Rangitāhua iwi authority views and Treaty partnership obligations, nor did it have to conform to the Conservation Management Strategy.⁴⁸⁹

The current form of the KOS Bill establishes that the Environmental Protection Agency is responsible for authorising applications for marine scientific research that may involve a prohibited activity within the area.⁴⁹⁰ Applications may only be refused if certain activities, that are not strictly necessary to contribute to the purpose, will occur during the research.⁴⁹¹ When granting an application, the EPA must consider the views of Kermadec iwi authorities, which the applicant obtains by consulting trustees of both Kermadec iwi authorities, Te Rūnanganui o Te Aupouri Trust (Te Aupouri) and Te Manawa o Ngāti Kurī Trust (Ngāti Kurī).⁴⁹² Iwi views however, are only considered to the extent that they are relevant to the application and have been provided in writing.⁴⁹³ The amendment inserted by the Local Government and Environment Committee considers iwi views but limits the effect on the final decision, keeping iwi

⁴⁸³ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

⁴⁸⁴ Above, n. 424 (Te Aupouri Trust) at 14.

⁴⁸⁵ Above, n. 438 (Ngāti Kurī Trust) at 9.2.

⁴⁸⁶ Hon Nick Smith cited in Price, R 'No co-management with Māori on Kermadec Ocean Sanctuary,' *Stuff* (8 March 2016) <www.stuff.co.nz (Accessed May 2016).

⁴⁸⁷ Above, n. 424, (Te Aupouri Trust) at 14.

⁴⁸⁸ Kermadec Ocean Sanctuary Bill, cl 13(3).

⁴⁸⁹ Above, n. 424, (Te Aupouri Trust) at 14.

⁴⁹⁰ Kermadec Ocean Sanctuary Bill, cl 13.

⁴⁹¹ Clause 19.

⁴⁹² Clause 10.

⁴⁹³ Clause 19(4)(c).

involvement to what has been criticized as 'simply a box ticking exercise' not consultation or Treaty partnership.⁴⁹⁴

Enforcement

The other challenge of the KOS Bill is whether it can actually be enforced in practice. The responsibilities for the enforcement of the KOS will remain the responsibility of the Department of Conservation (DOC). However, the Budget for 2017 does not reflect changes to funding that would enable DOC to extend current resources for managing the KOS.⁴⁹⁵ The Budget for 2017 allocates \$0.75 million towards marine protection and development for the entire country.⁴⁹⁶ Nor is there a clear devolution of funding to the Defence Force, particularly the Navy, to ensure more frequent patrolling of the area.⁴⁹⁷

Such challenges suggest that the Kermadec Ocean Sanctuary in its current form is an arguably unjustified measure for ironically, sustainable management and protection that at the same time unilaterally removes Māori Treaty property rights, undermines the integrity of Treaty settlements, fails to acknowledge tikanga Māori responsibilities and the Treaty partnership, and it may not even be effectively implemented due to it being unimplementable. ACT leader David Seymour succinctly outlined in 2016 that the 'only greater good in drawing lines on a map and saying 'Thou shalt not fish here' is good publicity for the Government.'⁴⁹⁸ While the possible lack of enforcement is no reason to declare the environmental initiative redundant, it does reflect the political nature of the creation of the KOS.

A Te Tau Ihu informant made an interesting suggestion to assist DOC with enforcement, albeit in another context:

If you look at the budget for the Department of Conservation, they don't have enough money to look after all of the DOC estate, so the question there is, given that they have an obligation to do nothing that is against the principles of the Treaty and look after it, so a question for the Government is: 'Why don't they give that back to Iwi so Iwi can look after it?'⁴⁹⁹

Recognition of the Treaty of Waitangi and Tikanga Māori?

The KOS Bill promotes Western conservation values⁵⁰⁰ but, like the EEZ, it does not include a Treaty clause recognising the obligations of the Crown to Māori. The KOS Bill does not recognise the mauri of the region nor does it provide for the practice of tikanga Māori in the creation of the Sanctuary.

The Department of Conservation and the EPA are the key organisations working together to govern the Sanctuary. The EPA will be responsible for ensuring compliance with international

⁴⁹⁴ Above, n. 424, (Te Aupouri Trust) at 20.

⁴⁹⁵ Department of Conservation, 'DOC's Budget 2017 Explained,' (25 May 2017) <www.doc.govt.nz (Accessed June 2017).

⁴⁹⁶ Ibid.

⁴⁹⁷ 'Ministry of Defence,' (25 May 2017) Budget 2017 <www.budget.govt.nz (Accessed July 2017).

⁴⁹⁸ Seymour cited in Sachdeva, S, 'Kermadec sanctuary legislation to be delayed after failed negotiations over Māori rights,' *Stuff* (14 September 2016) <www.stuff.co.nz (Accessed November 2016).

⁴⁹⁹ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

⁵⁰⁰ Kermadec Ocean Sanctuary Bill, cls 3, 12A-22D.

obligations and controlling scientific access while DOC will be responsible for the practical management of the Islands with support from the New Zealand Navy.⁵⁰¹

In administering its functions, DOC is obliged to discharge their duties in a manner that gives effect to the principles of the Treaty of Waitangi.⁵⁰² The 2011 WAI 262 Waitangi Tribunal ‘*Ko Aotearoa Tenei Report*’ however, criticised DOC for its failure to adequately discharge its obligations over the conservation estate in a manner that incorporates Māori as a Treaty partner.⁵⁰³ Over the last seven years since this Waitangi Tribunal Report was published, DOC, it appears, has not sought to incorporate any recommendations relating to incorporating iwi authorities or altered their policies in any way. It appears then that without a substantial change in approach by DOC, it is unlikely to administer its functions over the KOS in a way that enables and empowers iwi to either practice tikanga Māori or to employ mātauranga as the basis of environmental protection.

Direct incorporation of Tikanga Māori in the KOS Bill?

Creative and bold innovations in conservation governance have been undertaken in the last five years around the country which is coming from various angles and iwi are pushing to have their input respected. Government Departments are instigating policy changes, and Treaty settlements are reforming the way New Zealand recognises and governs the environment.⁵⁰⁴ Such approaches reflect the importance of reforming the previous mono-cultural, preservationist approach as well as intertwining New Zealand’s conservation law with tikanga Māori by engaging with iwi and hapū.

The Hon Nanaia Mahuta however, asserted during the KOS Bill’s First Reading that the behaviour of the National Government in the KOS proposal had been in ‘direct contrast to the approach’ proposed in the MPA discussion document.⁵⁰⁵ The KOS Bill, she added, was proposed without any consultation with iwi associated with the area or representatives for all Māori who hold an interest in the area derived through the Māori Fisheries Settlement 1992.

Indirect incorporation of tikanga through the governance structure?

Another poignant question of the KOS Bill is whether the Conservation Board reflects the core foundations of a successful Treaty partnership and accommodates the inclusion of mātauranga and tikanga Māori. It is important to consider the proposed governance structure and the exclusion of tikanga in the context of co-management developments, Treaty expectations and the *Protected Areas Act: Consultation Marine Document*.⁵⁰⁶

In summary: while the period of campaigning for more extensive protection of the Kermadec region lasted over eight years, with involvement from a range of invested parties, the KOS Bill demonstrates the unilateral nature of Government actions and inactions. And the failure to consult, or consider Māori interests both commercially and culturally, is reflected in the Conservation Board. The Conservation Board structure fails to recognise te tino rangatiratanga of Māori it appears, for three reasons:

⁵⁰¹ Above, n. 444, (Select Committee Report) at 2.

⁵⁰² Conservation Act, s 4.

⁵⁰³ Above, n. 164, (Wai 262) at 297-372.

⁵⁰⁴ Ibid, at 324.

⁵⁰⁵ Hon Nanaia Mahuta MP (15 March 2016) 711 NZPD 9662.

⁵⁰⁶ New Zealand Government, *A New Marine Protected Areas Act: Consultation Document*, (Ministry for the Environment, Wellington, 2016).

- 1) The Conservation Board ignores mātauranga and tikanga Māori,
- 2) Does not recognise the mauri of the area, and
- 3) Seeks to enforce a strict preservationist approach.

Mātauranga and Tikanga Māori Ignored

The Conservation Board acknowledges the position of Māori but it does not sufficiently acknowledge tikanga Māori, Māori cosmology or provide significant Treaty partnership options. The entrenched stance of the National Government on the no-take element of the Sanctuary reflects the American National Park model that excludes people from nature rather than accounting for the interdependent EBM relationship between humans and nature.

The Conservation Board is designed to fulfil the commendable purpose of the KOS Bill, which is to 'preserve the Kermadec/Rangitāhua Ocean Sanctuary in its natural state.'⁵⁰⁷ But this purpose the Conservation Board is trying to achieve appears to only recognise the Western approach to resource management rather than integrating mātauranga and tikanga Māori. A 21st century EBM approach for Aotearoa on the other hand, provides for a Treaty of Waitangi partnership and for the integration of mātauranga and tikanga Māori. Mainstream New Zealand has much to learn from both Western science and mātauranga and tikanga Māori given that EBM is adaptable, place and time specific and it recognises all ecological complexities and connectedness so it should be tailored to a 21st century Aotearoa New Zealand context.⁵⁰⁸ EBM is also flexible and adaptive, collaborative, co-designed and participatory in decision-making processes that involves all interested parties including Māori. EBM should be based on Western science and mātauranga and tikanga Māori and is informed by community values and priorities. The Conservation Board governance structure on the other hand does not recognise te tino rangatiratanga of Māori and seeks to enshrine the paternalistic, preservationist approach to resource management.⁵⁰⁹

Following the immediate announcement of the National Governments intention to establish the Sanctuary, Te Aupouri Trust Chairperson Rick Witana and Ngāti Kurī Trust Board Chairman Harry Burkhardt hoped a partnership would be formed with the Crown that would 'highlight Māori involvement in protecting and nurturing the environment,'⁵¹⁰ Witana added that 'it's not often that the role of kaitiaki can be readily identified by non-Māori - this is one of those occasions that the whole world gets to see the concept of kaitiakitanga.'⁵¹¹

Unfortunately, the role of Māori as kaitiaki was not emphasised in the KOS Bill. The commitment that the Kermadec iwi authority demonstrated towards the creation of the Sanctuary was not reflected in the drafting. Not only is there no Treaty clause, but there is no opportunity to explore the integration of tikanga Māori and Western science in the implementation of conservation measures. The introduction of the Kermadec Ocean Sanctuary Bill moreover, did not manifest any elements of co-management as expected in the current political climate and previous discussions, which is particularly disappointing given that initial discussions between

⁵⁰⁷ Kermadec Ocean Sanctuary Bill, cl 3.

⁵⁰⁸ Above, n. 93, Sustainable Seas EBM diagram.

⁵⁰⁹ Roberts, M and others, 'Kaitiakitanga: Māori perspectives on conservation,' in *Pacific Conservation Biology* (Vol. 2 1995) at 7.

⁵¹⁰ Cited in Price, above n. 471.

⁵¹¹ *Ibid.*

the Crown and iwi indicated that the form of governance of the area was anticipated to be co-management.⁵¹²

Fundamentally, this form of partnership is Crown-controlled, Crown dictated and Crown implemented. The Conservation Board is a pre-determined structure endorsed by the Crown in the Conservation Act 1987.⁵¹³ While the Conservation Act must be read to give effect to Treaty principles, the Board structure greatly limits the forum and methods of input to the classic bureaucracy-based approach to resource governance.

Māori Participation

The KOS Bill moreover, does not provide any mechanism for Māori to become involved in the administering of the governance plan. The responsibility will continue to fall exclusively to DOC, and to the New Zealand Navy in monitoring the Sanctuary.⁵¹⁴ Sharing, mutual responsibility and involvement of Māori begins with the membership on the Conservation Board. The Kermadec iwi authorities' intentions to have a 'role within governance to drive the Sanctuary' failed to arise in the manner that they had hoped for in the prior years of campaigning.⁵¹⁵ The Conservation Board retains the right of kāwanatanga for the Crown and it fails to give credence to te tino rangatiratanga of Māori. The Board then does not reflect a Treaty partnership that respects and strengthens the mutual identities of both Treaty partners.

Consultation

As noted above, developments since 1987 through resource management litigation and statutory recognition have established that it is 'recognised good practice to consult' tangata whenua who may be affected by a proposal.⁵¹⁶ The Crown's duty to consult, to act reasonably and in good faith, and to make informed decisions in the proposal of the KOS Bill and the Conservation Board, were acutely compromised by the absence of effective consultation between iwi and relevant stakeholders before the announcement of the KOS Bill. The Sanctuary had a significant impact on Māori customary and commercial fishing rights.

The failure to consult with Māori is further reflected in the Board structure. The Crown unilaterally proposed the Conservation Board and then decided, for Māori, the membership that they would be entitled to which is problematic given that co-management was initially discussed with Ngāti Kurī and Te Aupouri.⁵¹⁷ Hon Nick Smith recognised that the representation on the Board is not as extensive as iwi expected and that co-management was preferred. However, he reconciled his position by asserting 'like all discussions with Māoridom, there's give and take.'⁵¹⁸

Although a different context, a Te Tau Ihu informant commented on a similar situation with the RMA:

There is a growing trend that the Minister has power, so you have the Minister for the Environment, the Minister of Conservation and there is a growing trend that they are

⁵¹² Hon Ruth Dyson MP (15 March 2016) 711 NZPD 9662.

⁵¹³ Conservation Act, ss. 6L-6W.

⁵¹⁴ Above, n. 444, (Select Committee Report) at 2.

⁵¹⁵ Above, n. 471 (Price).

⁵¹⁶ *Paihia & District Citizens Association Inc v Northland Regional Council* (A71/95).

⁵¹⁷ Hon Ruth Dyson MP (15 March 2016) 711 NZPD 9663.

⁵¹⁸ Above, n. 471 (Price).

giving themselves powers, and if they get back into Government, they're anticipating amending the Act [RMA]. A concern that is raising its head now is the ability of the Minister to exercise discretionary powers to amend coastal plans in accordance with what he wants to be done, without the need for consultation so there's a disturbing trend that these overarching powers (which I think were originally intended to only be exercised for emergency or extraordinary cases such as the Kaikoura earthquake), are now being exercised in what we call an inappropriate use of his discretionary power.⁵¹⁹

Commercial Fishing Interests

The Conservation Board moreover, arose without any consultation with TOKM, the Māori commercial fisheries Treaty partner with considerable proprietary rights in the KOS area. The renegeing of commercial interests and the subsequent exclusion of representatives of these interests from the Conservation Board indicates the monocultural focus of the KOS Bill. Evaluations of the success of MPAs demonstrated that success often relies on engaging, accommodating and consulting key players who hold commercial and economic interests in the area.⁵²⁰ Commercial fishers are typically the most directly affected by the creation of MPAs and their behaviour can dictate or undermine the success of an MPA in achieving its conservation purpose.⁵²¹

Predictably, the structure of the Conservation Board does not accommodate the existence of these commercial fishing interests. The Minister of Conservation is responsible for appointing the remaining four members to the Board⁵²² which appointments are made with applicants who have the required skills, knowledge or experience to contribute to achieving the Sanctuary's purpose⁵²³ of preserving the current state of the Kermadec Ocean. Consequently, the interests of commercial stakeholders including those granted by the Māori Commercial Fisheries Settlement - over one-third of New Zealand's commercial fishing rights⁵²⁴ - are ignored. By prohibiting the exercise of Māori commercial fishing rights in the KOS, the Government appears to be excluding Māori participation from the region in every shape and form notwithstanding recognised proprietary interests through a Treaty settlement protected by legislation.

Te Ohu Kaimoana was established to advance iwi interests within the fishing industries⁵²⁵ as well as to protect and enhance the natural marine environment in a manner consistent with kaitiakitanga.⁵²⁶ Currently, the only way Māori can have any influence over the region or to practice tikanga Māori responsibilities is through TOKM.

TOKM made it clear that they do not oppose the creation of the KOS in the first instance. What they oppose is the current form the KOS will take.⁵²⁷ Prior to the KOS proposal, TOKM had not fished their quota in the region.⁵²⁸ The average annual catch in the region contributed to the fishing livelihoods of five commercial fishing companies but formed 0.004% of all fisheries and 0.011% of export value.⁵²⁹ The Regulatory Impact Statement justified the imposition of no-take

⁵¹⁹ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

⁵²⁰ Above, n. 411 (Upton and Buck) at 1.

⁵²¹ Above, n. 164 (Wai 262) at 302.

⁵²² Kermadec Ocean Sanctuary Bill, cl. 24(1)(d).

⁵²³ Clause 3.

⁵²⁴ Hon Ruth Dyson MP (15 March 2016) 711 NZPD 9663.

⁵²⁵ Māori Fisheries Act 2004, s. 32.

⁵²⁶ Te Ohu Kai Moana Trustee Limited, 'Submission on the Kermadec Ocean Sanctuary Bill,' (2016) at 7.

⁵²⁷ Ibid, at 4.

⁵²⁸ Above n. 433, (*Regulatory Impact Statement*) at 8.

⁵²⁹ Ibid, at 8.

restrictions because the current data demonstrated that the area was largely unused apparently due to commercial fisheries operations within the area being commercially unviable.

Iwi opposition to commercial fisheries in the Kermadec region was also widespread. Due to the tikanga practices of kaitiakitanga over the region, TOKM even voluntarily supported the imposition of restrictions on the types of fishing practices conducted within the region.⁵³⁰ The KOS Bill in its proposed form failed to recognise this Treaty partnership, as well as the application of mātauranga and tikanga Māori that was already exercised over the area.⁵³¹

The KOS Bill then fails to uphold the Treaty principles and to acknowledge mātauranga and tikanga Māori in a substantive way that appeared to be operating effectively ironically, anyway. The Government asserted its kawanatanga authority but at the expense of te tino rangatiratanga, mātauranga and tikanga Māori, which compromises were severely limiting for Māori and the establishment of the KOS and may be permanently undermined by this procedural oversight of the Executive.

Current position of the KOS Bill

Leading up to the 2017 election, the relationship between TOKM and the National Government reached an impasse. TOKM criticised the Government's demonisation of Māori interests and refusal to engage in negotiations,⁵³² which position appeared to be largely supported across the political spectrum. The Labour Party noted that their support was dependent on a resolution with TOKM.⁵³³ The Māori, ACT and NZ First Parties withdrew their support subject to the adequate compensation of property rights derived from the Māori Commercial Fisheries Settlement 1992.⁵³⁴ The former National Government's approach to establishing the KOS revoked Māori Treaty interests, and contradicted the Treaty principle of partnership and was framed as an unjustified and politically charged removal of rightfully recognised Māori Treaty rights and tikanga responsibilities under the guise of sustainability.⁵³⁵

Following the election of the new Labour Government in 2017, predictably the KOS Bill has been placed on hold before the Second Reading.⁵³⁶ The controversy surrounding the KOS Bill's abrogation on Māori Treaty rights guaranteed in the 1992 Māori Commercial Fisheries Settlement was unable to be resolved between the Crown and iwi representatives. Te Ohu Kaimoana even lodged proceedings against the Crown in the High Court for failure to consult or consider rights granted in a full and final settlement.⁵³⁷

⁵³⁰ Above n.526, (Te Ohu Kai Moana) at 7.

⁵³¹ Previous Māori Party Co-Leader Marama Fox cited in Marwick, F, 'Rahui a possible way out of Kermadec impasse,' (20 September 2016) Newstalk ZB <www.newstalkzb.co.nz (Accessed October 2016).

⁵³² Jamie Tuuta cited in, Sachdeva, S, 'Kermadec sanctuary legislation to be delayed after failed negotiations over Māori rights,' *Stuff* (14 September 2016) <www.stuff.co.nz (Accessed October 2016).

⁵³³ Andrew Little cited in Trevett, C and Jones, N, 'PM John Key: Kermadec sanctuary will be put on ice if no agreement with Māori Party,' *New Zealand Herald* (20 September 2016) <www.nzherald.co.nz (Accessed October 2016).

⁵³⁴ Forbes, M, 'Government to delay Kermadec Ocean Sanctuary Bill,' Radio New Zealand (14 September 2016) <www.radionz.co.nz (Accessed October 2016).

⁵³⁵ Above, n. 526, (Te Ohu Kai Moana) at 28.

⁵³⁶ Moir, J 'Winston Peters confident of Kermadec Marine Sanctuary deal by end of year,' Radio NZ (24 July 2018) <www.radionz.co.nz (Accessed August 2018).

⁵³⁷ Te Ohu Kaimoana issued proceedings seeking a declaration that the KOS Bill breaches the Crown's commitments to Māori established in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and under their obligations as a Treaty partner. Further information can be found in the New Zealand Fishing Industry Association, 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016) at 9 and

The National Government subsequently conceded that the process was mishandled and consultation should have occurred,⁵³⁸ which concession resulted in the former Environment Minister Nick Smith stepping down from negotiations with TOKM. The current Environment Minister Hon David Parker and Deputy Prime Minister Winston Peters are currently engaging in negotiations to reach a compromise on the structure and restrictions of the KOS.⁵³⁹ Peters is confident that by considering alternative options such as a mixed approach to environmental management, the deadlock can be resolved before the end of 2018.⁵⁴⁰

The next section will ironically focus on the importance of Treaty of Waitangi settlements to acknowledge the Treaty partnership and as a means of incorporating mātauranga and tikanga Māori into an EBM context over the marine estate.

L. Treaty of Waitangi Settlement Legislation

Treaty of Waitangi settlements rather than the RMA, the EEZ Act, MPAs like the proposed Kermadec Ocean Sanctuary and MACA applications, are proving to be the major catalyst for recognising and protecting Māori environmental interests in mātauranga, tikanga and taonga Māori in a more meaningful way. Treaty settlements are realising new partnerships, and Memoranda of Understandings and other formal and informal relationships that are proving effective. The Waitangi Tribunal has even characterised the RMA as being ‘fatally flawed’ due to its inability to require decision makers to act, paradoxically, in conformity with the Treaty of Waitangi.⁵⁴¹ Referring to the s.8 RMA provision to ‘take into account’ the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), the Waitangi Tribunal noted as early as 1993, two years after the RMA was enacted:

Implicit in the requirement to ‘take into account’ Treaty principles is the requirement that the decision-maker should weigh such principles along with other matters required to be considered, such as the efficient use and development of geothermal resources (to which ‘particular regard’ must be given under s. 7 [to kaitiakitanga]). The role and significance of Treaty principles in the decision-making process under the [RMA] Act is a comparatively modest one.⁵⁴²

The Waitangi Tribunal added:

It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect, the legislation is fatally flawed.⁵⁴³

‘Legal Challenge to Kermadec Ocean Sanctuary,’ Radio NZ (20 March 2016) <www.radionz.co.nz (Accessed May 2016).

⁵³⁸ John Key cited in Trevett and Jones, above, n. 533. ,

⁵³⁹ Above, n. 536, (Moir).

⁵⁴⁰ Ibid.

⁵⁴¹ See for example, Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993*, (Wai 304, Brookers Ltd, Wellington, 1993) at 145-146.

⁵⁴² Idem.

⁵⁴³ Idem.

As illustrated recently in the 2017 *Hokio Trusts v Manawatu-Wanganui Regional Council*⁵⁴⁴ decision, the High Court endorsed the Environment Court's decision regarding procedural obligations under s 8, RMA⁵⁴⁵ that it is 'not properly concerned with giving effect to the Treaty, but taking into account the principles of the Treaty.'⁵⁴⁶

Similar challenges of ignoring Treaty partnership obligations or failing to fully acknowledge mātauranga and tikanga Māori responsibilities are evident in the EEZ Act, with MPAs and the KOS Bill, and MACA. In this respect, the Waitangi Tribunal continued:

It is inconceivable that Māori would have signed the Treaty had they not been assured that the Crown would protect their rangatiratanga over their valued resources for as long as they wished. In return, they exchanged the power of governance. ... The Crown is under a clear duty under the Treaty to ensure that the claimants' taonga is protected. The partnership, which the Treaty embodies and represents, requires no less.⁵⁴⁷

The Waitangi Tribunal then recommended an amendment to the RMA:

The tribunal finds that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi. ... The tribunal recommends that an appropriate amendment be made to the Resource Management Act providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, *shall* act in a manner that is consistent with the principles of the Treaty of Waitangi⁵⁴⁸ [emphasis added].

As noted above, similar limitations are echoed in the MACA, the EEZ Act, with MPAs and the Kermadec Ocean Sanctuary Bill.

In contrast, Treaty settlement legislation can impose specific requirements on Local Government to work with or enable tribal and hapū entities in resource management recognising traditional, historic, cultural and spiritual associations of specific Māori entities to the environment, and potentially provide for the authentic exercise of rangatiratanga and kaitiakitanga within the respective tribal rohe (territory) as one Te Tau Ihu informant asserted:

If you look at Council, they have a number of staff available to work on district plans, environmental plans compared to Iwi who will only have one person. As long as our Iwi's interests are respected and listened to and then implemented, we'll be happy. If not, then something needs to change which is when you need a few strong willed people to challenge Council. In the past, they didn't listen to our interests but now they are getting better from what I can see. Our Iwi ensures that we regularly engage with Council and maintain a strong voice with them. Sometimes it has been good and other times not. However, once our settlement was finalised and with the changes of the

⁵⁴⁴ *Hokio Trusts v Manawatu-Wanganui Regional Council*, [2017] NZHC 1081

⁵⁴⁵ *Ibid*, at 63.

⁵⁴⁶ *Ibid*, at 75-76.

⁵⁴⁷ *Idem*.

⁵⁴⁸ *Idem*.

RMA, they realised they needed to work with us a lot more and take our views into account whereas before they didn't. Now they are aware of it, the writing is on the wall and they need to work with iwi or else.⁵⁴⁹

Another Te Tau Ihu informant commented in this respect:

Legally, we rely on the Treaty and RMA to enforce our legal rights. However, we don't have much resources to meet our needs. We use a representative from our trust to work with Local Council and science organisations to ensure our interests are protected in the marine coastal space. In the past, Māori didn't have a say and as Council's seemed to have it all, they did not take Māori seriously. Council are now getting better, as more power sharing is happening, Iwi are able to protect a lot more.⁵⁵⁰

One other Te Tau Ihu informant added:

Trying to manage the overall resources of New Zealand is not an easy task. Here we have multiple Councils and think about all the jobs and the people that they have to do them. Then they say that we (Iwi) can do all of that. Well it's a really big challenge, a very big challenge. Our main role is to build resources so we can try and improve lives of our people.⁵⁵¹

Hence, Treaty settlements currently offer more opportunities for acknowledging the Treaty partnership and for Māori to work within their own mātauranga and tikanga frameworks to exercise customary management mechanisms over the coastal marine estate more effectively including in an EBM context. Treaty of Waitangi settlements then are about settling past and contemporary grievances with the Crown and moving into a more transformative forward-looking space of engagement as Treaty partners with customary rights and responsibilities as kaitiaki.

⁵⁴⁹ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

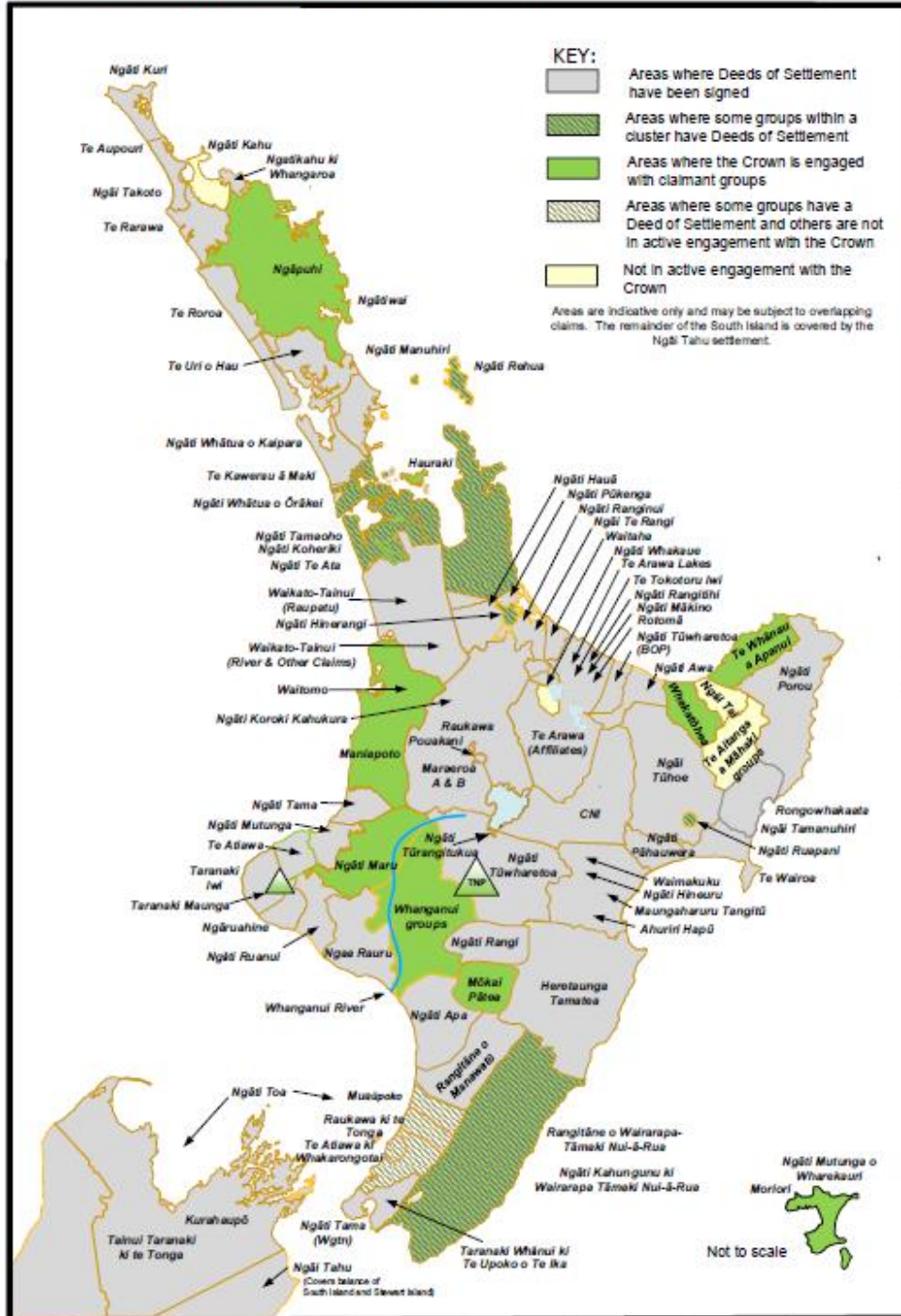
⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

Progress Map

The map below provides an overview of the areas where Treaty settlements have been completed and areas currently subject to negotiations or preparing for negotiations.

FIGURE 1: Completed Treaty Settlements and Current Negotiation



Completed Treaty Settlements & Current Negotiations September 2018 - OTS

As at November 2018, over 75 Treaty of Waitangi settlement agreements⁵⁵² have been negotiated and at least 50 of these Treaty settlements include some form of redress that includes a form of kaitiakitanga over the marine estate including statutory acknowledgements, deeds of agreement and co-management models.⁵⁵³ Statutory acknowledgements are recognised under the RMA in ss. 95B-95E, 149ZCF and Schedule 11, and require consent authorities to provide summaries of all resource consent applications that may affect iwi and hapū. Deeds of Recognition, on the other hand, oblige the Crown to consult with iwi and hapū and to have regard for local Māori views regarding specific sites of significance, which are both enabling legislative provisions of mātauranga and tikanga Māori.

The next section will focus specifically on some recent co-management models.

M. Co-Management Models – Waikato, Te Urewera and Whanganui

Co-management frameworks for environmental management represent a new era in Treaty of Waitangi settlements. Under such arrangements, responsibilities for duties, functions and powers under the RMA are vested, to varying degrees, in tribal entities.⁵⁵⁴ Such arrangements provide opportunities for Māori involvement in ecosystem-based management. For example, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 established the Waikato River Authority (WRA) - a statutory body that brings together tribal entities with authority over the Waikato River. The WRA is also the sole trustee of the Waikato River Trust whose role is to fund projects that meet the purpose of the WRA. The WRA consists of 10 board members who are appointed by the Waikato River iwi and Ministers of the Crown. The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 grants functions and powers to the WRA and provides for co-management by the Crown and iwi through the development, implementation and ongoing review of an integrated river management plan for the Waikato River and a Waikato-Tainui environmental plan which has the same legal weight as a Regional Policy Statement regulated by Regional Councils. Such a Māori-Crown co-management initiative, in alliance with the community, was unprecedented in New Zealand in the 20th and 21st centuries.

There is also provision for joint management agreements between Local Authorities and the WRT to work together to carry out certain duties, functions and powers under the RMA related to the Waikato River and its catchment which offers further possibilities for integrated ecosystem-based management approaches that share the responsibility, power and agency that are necessary for successful Māori involvement in resource management.

The Crown will however, neither acknowledge nor declare full ownership over natural resources by iwi and hapū but recent Treaty of Waitangi settlements have resulted in several natural areas

⁵⁵² Refer to the comprehensive MIGC report on Treaty of Waitangi settlement redress options by Takuiria, J, 'Treaty of Waitangi Settlement Redress Options Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018). Refer to also Appendix 4 for a table by Takuiria outlining over 50 Treaty settlement redress mechanisms over the coastal and marine estate.

⁵⁵³ Ibid.

⁵⁵⁴ Some other co-management agreement examples include Tūpuna Maunga o Tāmaki Makaurau Authority (over the Auckland City maunga - volcanoes), Te Waihora Co-Governance Agreement (Lake Elsmere, Christchurch), Ngā Poutirao o Mauao (Mt Maunganui, Tauranga), Maungatautari ecological island trust (the prominent maunga (mountain) outside of Cambridge, Waikato), Ngāti Whatua Orakei Reserves Board (Okahu Bay, Auckland), Parakai (Kaipātiki Recreation Reserve (Ngāti Whatua o Kaipara) and the Rotorua Te Arawa Lakes Strategy Group (under the Local Government Act 2002). See the Auditor General Report 'Principles for effectively co-governing natural resources,' online at: <https://www.oag.govt.nz/2016/co-governance/docs/co-governance-amended.pdf> (Accessed August 2018).

being designated as legal entities that effectively own themselves but, unlike the Waikato River, are governed and managed by a board comprised of Crown and iwi representatives.⁵⁵⁵ The Te Urewera Act 2014 acknowledges Ngāi Tūhoe as kaitiaki and tangata whenua of Te Urewera and removes the status of Te Urewera as a National Park vested in the Crown. Consequently, the land became a 'legal entity' with all the rights, powers, duties and liabilities of a legal person.⁵⁵⁶

In a similar manner, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 recognises the intrinsic mana of the environment itself and empowers iwi to share in management responsibilities through a trust, Te Pou Tupua, constituted equally of tribal and Governmental members to co-manage the Whanganui River. The Act provides the Whanganui River its own legal status – Te Awa Tupua – as a legal person recognising 'Te Awa Tupua' as an indivisible and living whole comprising the Whanganui River from the mountains to the sea and incorporating all of its physical and metaphysical elements⁵⁵⁷ which reflects the understanding of Whanganui iwi of the ecosystem as a whole and its connectedness and complexity.

The legal status of Te Awa Tupua must be recognised and provided for by persons exercising or performing a function, power or duty under an Act if the exercise or performance of that function, power or duty relates to the Whanganui River, or if an activity within the Whanganui River catchment affects the Whanganui River and if, and to the extent that, the Te Awa Tupua status or Tupua te kawa (customary practices) relates to that function, duty or power.⁵⁵⁸ These provisions appear to potentially be an integrated ecosystem-based management approach within a rohe and in a manner that is consistent with the mātauranga, tikanga and kawa of Whanganui iwi and hapū.

The Te Urewera Act 2014 and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 then recognise the mana of the natural resource itself and the rangatiratanga and mana of the local iwi and hapū through what appears to be an authentic Treaty of Waitangi partnership underpinned by mātauranga and tikanga. The provisions appear to reflect movement towards collaborative approaches to natural resource governance and management resulting in much anticipated positive changes to resource management in New Zealand including hopefully, ecosystem-based management. Consequently, it is hoped that cultural, social and environmental values and priorities will not be outweighed by entrenched neoliberalist economic values, and enduring and sustained reverence and respect for ecosystem-based management emerges that integrates mātauranga and tikanga Māori as originally envisaged in the Treaty of Waitangi.

The recognition of the independent autonomy of the Whanganui River roughly accords with the customary view that rivers possess their own mana (authority) and mauri (life force). Like the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the focus in the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 is on the future health and well-being of the river and its people. And measures are provided to facilitate tribal engagement in the RMA planning and consent making processes associated with the river.⁵⁵⁹ But by vesting the river with

⁵⁵⁵ In the case of Te Urewera, the ratio of board members will change from Tūhoe-Crown members of 4:4 to 6:3 after 3 years.

⁵⁵⁶ Urewera Act 2014, s. 11(1).

⁵⁵⁷ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Part 2(12). See also Iorns, C, 'Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand,' in *Hors serie Vertigo - la revue électronique en sciences de l'environnement* (Vol. 22, 2015) at 1-15 and Iorns, C, 'Access to Environmental Justice for Māori,' in *Yearbook of NZ Jurisprudence* (2017) at 141-181.

⁵⁵⁸ *Ibid*, Part 2(2, 13).

⁵⁵⁹ *Ibid*, ss. 8 and 63.

legal personality, the Government has effectively side-stepped the issue of ownership.⁵⁶⁰ The tribes thus cannot gain any benefit from use of the resource, which is a concern.

Moreover, while the Whanganui and Waikato River tribes have a greater say in RMA decisions, they cannot stop for example, the issuing of natural resource consents over the river to extract or divert water or build dams on them.⁵⁶¹ Such an outcome for the Whanganui is a far cry from the recommendation made by the Waitangi Tribunal that the river in its entirety be vested in the tribes which would mean that any resource consent application would require the tribe's approval.⁵⁶²

These recent Treaty of Waitangi co-management agreements then promote tribal engagement in RMA regulatory processes yet they remain directed at the right to culture as far as they are limited to effective participation and the overall objective of restoring and protecting the health and wellbeing of the rivers for future generations.⁵⁶³ Tribes are not granted the right to give their free, prior and informed consent in relation to the use of the rivers for hydroelectric projects for example.⁵⁶⁴ The Whanganui and Waikato River tribes cannot stop the issuing of natural resource consents over the river to extract, or divert water or build dams on them. Nor do they gain any benefit from use of the resource. And the issue of water ownership over rivers remains unresolved.

The Waitangi Tribunal has even been heavily critical of the use of Treaty settlements to stop gaps in the RMA in its 2011 *Ko Aotearoa Tenei Report* when it observed:

It is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed. It is equally disappointing that Māori are being made to expend the potential of their Treaty settlement packages or customary rights claims to achieve outcomes the Resource Management Law Reform project (now two decades ago) promised would be delivered anyway.⁵⁶⁵

As noted above, other co-management agreements include the Māori customary fisheries regulations, which significantly allow for iwi to establish bylaws in relation to the taking of kai moana (seafood) that may also be reflective of aspects of ecosystem-based management. Tangata whenua may establish mataitai reserves following consultation with the local community – i.e. people who own land in the proximity of the proposed mataitai reserve.⁵⁶⁶ Reserves can only be applied for over traditional fishing grounds and must be areas of special

⁵⁶⁰ See also the Tūhoe deal where the Crown rejected ownership of conservation land and offered instead to vest the park with legal personality to be co-chaired by Māori and the Crown in the Te Urewera Act 2014. See also the Marine Coastal Area (Takutai Moana) Act 2011, which simply declares that no one owns the foreshore and seabed.

⁵⁶¹ However, the consent of Te Pou Tupua may be required in relation to the use of the bed of the Whanganui River in Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s. 41.

⁵⁶² See Waitangi Tribunal, *The Whanganui River Report 1999*, (GP Publications, Wellington, 1999) at 343-348.

⁵⁶³ See Te Aho, L, 'The 'False Generosity' of Treaty Settlements – Innovation and Contortion,' in Erueti, A, *The UN Declaration on the Rights of Indigenous peoples: Implementation in Aotearoa*, (Victoria University Press, 2017). Te Aho also notes that the issue of ownership is expressly deferred by the Treaty settlement in Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss. 64 and 90.

⁵⁶⁴ The requirement in the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) in Articles 10, 19, that States obtain the 'free, prior and informed consent of Indigenous peoples before engaging in any activity that could significantly affect them' is pertinent here. Refer to Erueti, A, *The UN Declaration on the Rights of Indigenous peoples: Implementation in Aotearoa*, (Victoria University Press, 2017).

⁵⁶⁵ Above, n. 164, (*Ko Aotearoa Tēnei*) at 279.

⁵⁶⁶ Refer to the Kaimoana Customary Fishing Regulations 1998, Reg 61 and the Fisheries Act 1996, ss. 174-185.

significance to the tangata whenua. Tangata whenua may also establish bylaws for the reserves, which may restrict or prohibit the taking of a particular species within a mataitai reserve. However, as noted above, the process of establishing reserves and the bylaws themselves are heavily scrutinised by the Minister of Fisheries, which again undermines tribal rangatiratanga as envisaged in the original Treaty of Waitangi partnership.

The next section will explore some recent special legislative initiatives for actualising the Treaty partnership and for integrating mātauranga and tikanga Māori in an EBM context.

N. Special Legislation

Special legislation is a further innovative initiative that enables the development and implementation of integrated management that empowers tangata whenua rangatiratanga and kaitiakitanga and is simultaneously reflective of ecosystem-based management. Three such examples are the Hauraki Gulf Marine Park Act 2000, the Fiordland (Te Moana o Atawhenua) Marine Engagement Act 2005 and the Kaikoura (Te Tai o Marokura) Marine Management Act 2014.

Each example refers to special legislation that is place-specific and recognises and understands both the values of the associated ecosystem as a whole and the need to address cumulative and multiple stressors. The ecocentric acknowledgement of humans as ecosystem components with multiple values has resulted in the establishment of collaborative and participatory stakeholder working groups that recognise the Māori constitutional relationship based on the Treaty of Waitangi/Te Tiriti o Waitangi, mana whenua and mana moana at all levels and is mindful of the guiding concepts of whakapapa, kaitiakitanga, mauri, mātauranga-a-iwi and mātauranga-a-hapū. Long-term sustainability is moreover, a fundamental value with clear intent to maintain values and uses for future generations. The strategies and plans that have been enabled by these special statutes include clear goals and objectives based on knowledge – Māori and non-Māori – and are mindful of the need for adaptive management, appropriate monitoring and acknowledgement of uncertainty.

Sea Change – Tai Timu Tai Pari Initiative Hauraki

The Sea Change – Tai Timu Tai Pari initiative is an aspirational spatial plan under the Hauraki Gulf Marine Park Act 2000 that advocates ecosystem-based and Māori resource management and co-governance and is a result of a marine spatial planning exercise led by co-governance partnership between Hauraki tangata whenua and Local Government in collaboration with various agencies and stakeholders.⁵⁶⁷

The Tikapa Moana Hauraki Gulf is under significant pressure and its communities have seen a marked decline in the environmental quality, abundance of resources and general mauri of the area. The Sea Change – Tai Timu Tai Pari project was established in 2013 to reverse the decline and was led by a governance group representing a Treaty of Waitangi partnership between mana whenua and Local Government agencies having equal membership. A Stakeholder Working Group was also involved that comprised 14 members reflecting a diverse range of

⁵⁶⁷ See Forum Ag, 'Sea Change – Tai Timu Tai Pari: Hauraki Gulf Marine Spatial Plan,' online at: [2020PlanWR.pdf http://seachange.org.nz/Page_Files/1166/5086_SCTTP_Marine%20Spatial%20Plan_WR.pdf](http://seachange.org.nz/Page_Files/1166/5086_SCTTP_Marine%20Spatial%20Plan_WR.pdf) (Accessed August 2018). See also Harmsworth, G, 'The role of Māori values in Low-impact Urban Design and Development, (LIUDD), Discussion Paper, no date).

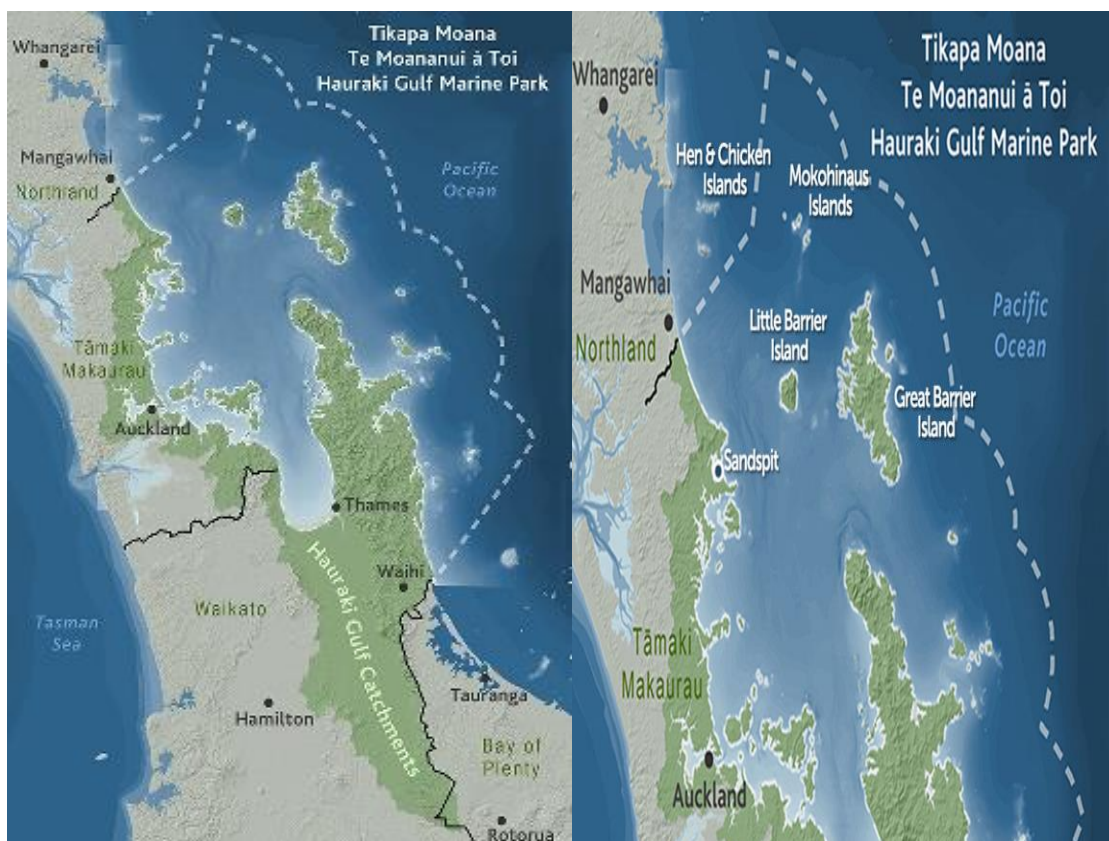
interests including mana whenua, environmental and conservation, commercial and recreational fishing, aquaculture, land use, farming and infrastructure.

The plan lays the foundation for an integrated approach to managing the Hauraki Gulf and aims to secure a healthy, productive and sustainable future for the Gulf through:

- 1) Improving the understanding of the pressures on the coastal and marine resources,
- 2) Identifying and proposing long-term solutions to improve overall health, mauri, quality and well-being,
- 3) Providing increased certainty for the economic, cultural and social goals of communities in and around the Gulf, and
- 4) Ensuring that the ecosystem functions that make those goals possible are sustained.⁵⁶⁸

The plan was co-designed resulting in four overarching concepts that appear to be innovative and disruptive of the status quo:

1. Kaitiakitanga – guardianship;
2. Mahinga Kai Pātaka Kai – replenishing the food basket;
3. Ki Uta Ki Tai – ridge to reef, mountain to sea; and
4. Kotahitanga – prosperous communities.



Sea Change Tai Timu Tai Pari Map⁵⁶⁹

⁵⁶⁸ Majurey, P and Beverley, P, *Tai Timu Tai Pari Sea Change Hauraki Gulf Marine Spatial Plan: An Introduction and Overview*, (Hauraki Gulf Forum, MPI, DOC, Waikato Regional Council and Auckland Council, May 2017) at 2.

⁵⁶⁹ See the Waikato Regional Council Sea Change – Tai Timu Tai Pari website online at: <https://www.waikatoregion.govt.nz/council/policy-and-plans/coastal-policy/sea-change/> (Accessed November 2018).

The plan reflects a strong sense of te ao Māori and advocates for strategies and initiatives that enable and empower mana whenua to lead tikanga-based resource management within a broader ecosystem-based management context. The plan then is a new departure from the current New Zealand resource management ad hoc, disparate and inadequate management approaches. Within an ecosystem-based management context, the innovative plan also appears to provide an opportunity to disrupt the status quo that simply is not working to improve sustainable and tangible environmental and cultural outcomes.

The Stakeholder Working Group allegedly worked in a highly collaborative manner, demonstrating significant levels of personal commitment, sacrifice, perseverance and vision to deliver the plan.⁵⁷⁰ The next step for the Hauraki Gulf Marine Spatial Plan is implementation, which as noted above can be challenging. Time will tell how effective this initiative is in terms of mobilising diverse stakeholder groups - Government, industry and communities - as well as mana whenua, all collaborating with a common interest in the health and well-being of the Hauraki Gulf. How the plan integrates mātauranga and tikanga Māori and reflects the Treaty partnership in an EBM context will also prove to be important elements for the success of the plan.

The next section will briefly explore the Great Bear Initiative in British Columbia, Canada, as a compelling tested model of EBM best practices over the marine and terrestrial estate that includes the British Columbia Provincial Government, multiple stakeholders, industry and Indigenous First Nations that may bear some resonance for Aotearoa New Zealand.

O. Canada Great Bear Initiative – EBM in Practice

The Great Bear Initiative (GBI) in British Columbia (BC), Canada, is regarded as being an EBM and co-governance case study that has successfully integrated the views and perspectives of First Nations as well as fulfilling the overall vision of sustainably protecting and enhancing the Great Bear ecosystem through aggregation.

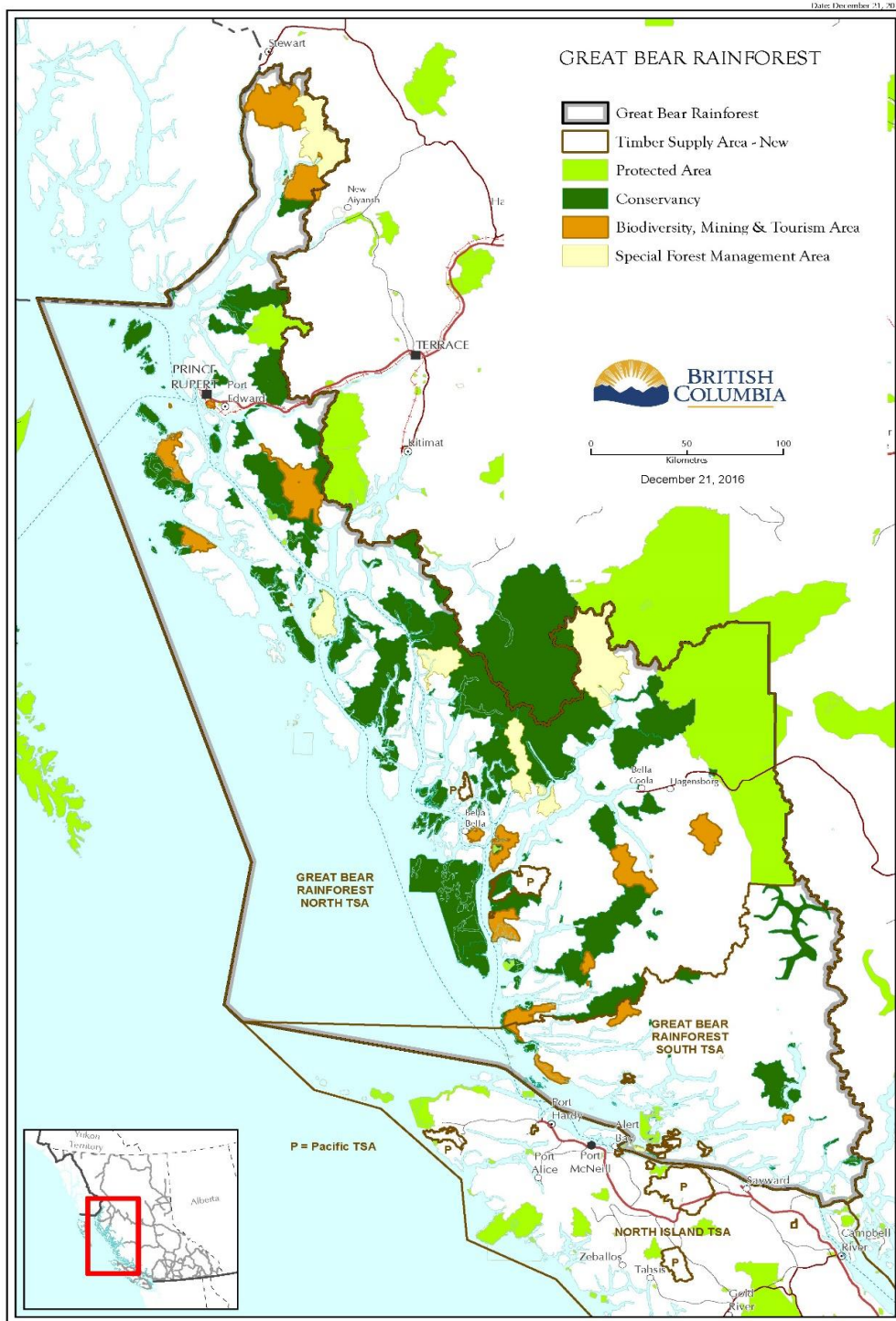
The GBI started officially in 2005 when leaders from BC, industry and other stakeholders as well as First Nations agreed to work together to form a collective presence in the Pacific North Coast to implement EBM over the Great Bear forest and marine estate. The GBI emerged initially from conflict between environmentalists, industry and First Nations. Joint protests of First Nations and environmentalists emerged against logging as well as environmental degradation. Consequently, First Nations, environmentalists, the Provincial Government and forestry industry aggregated together to work in a more sustainable way under EBM and First Nations traditional ecological knowledge – the First Nations equivalent to mātauranga and tikanga Māori. Similar principles have been applied in the Marine Plan Partnership (MaPP) utilising two key principles:

- 1) Ecosystem-based management; and
- 2) Government to Government relationships between First Nations and the BC Provincial Government.

The GBI covers 6.4 million hectares from Alaska to the Discovery Islands along with Haida Gwaii, which represents a quarter of the world's temperate rainforest. The GBI covers the territories of 26 First Nations while the MaPP includes the territories of 17 First Nations mostly the same as the GBI and each has their own diverse culture, language and tribal governance structure.

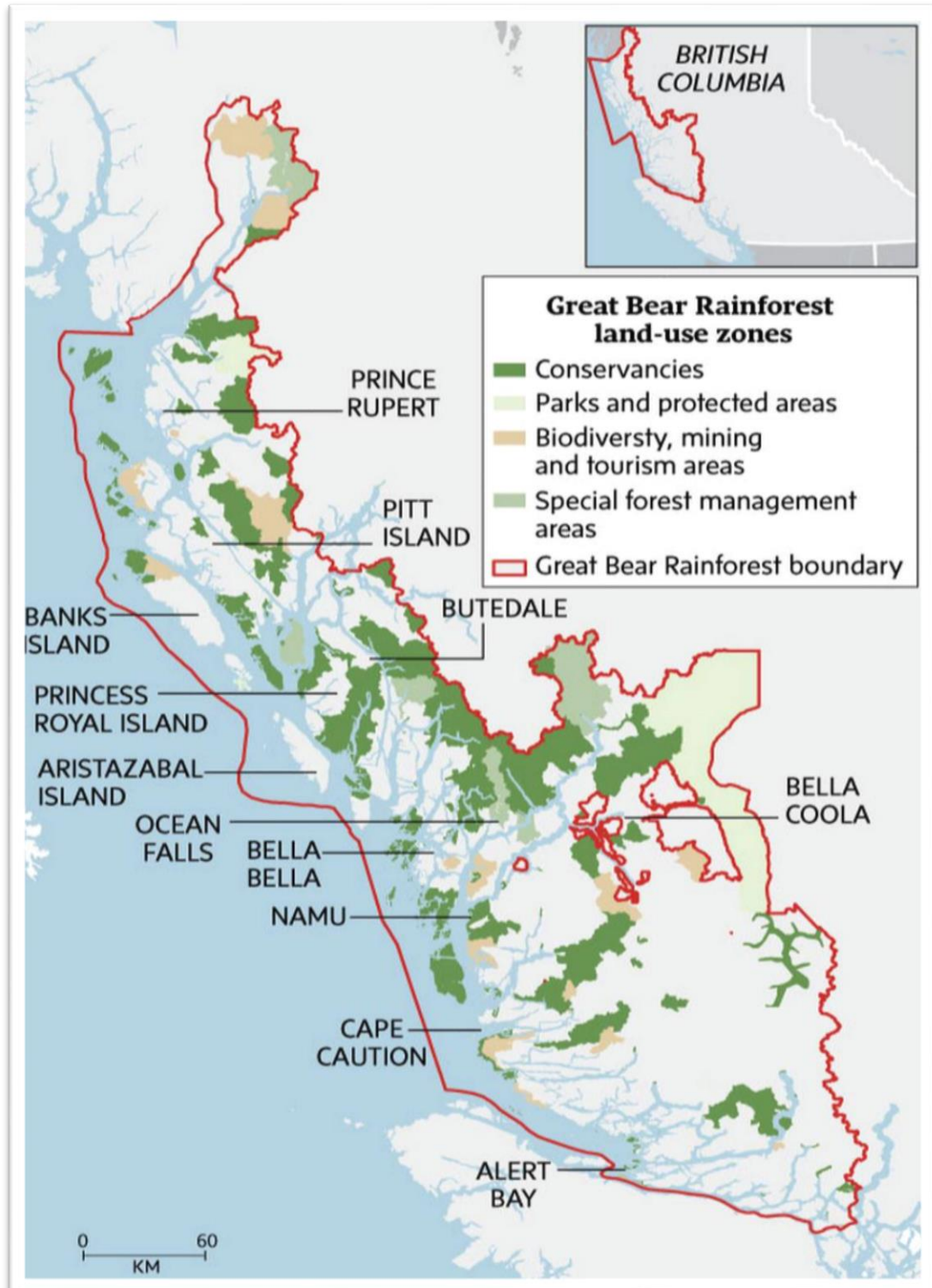
⁵⁷⁰ Above, n. 68, (Majurey and Beverley) at 1.

The democratic, demographic, geographic, historic and cultural differences are so diverse and complex over the GBI and MaPP areas that a traditional top down approach would have been fatal. EBM and Nation to Nation principles positioned First Nations in a collaborative rather than competitive position.



Great Bear Rainforest Area⁵⁷¹

571 Online at <https://www.sfmcanada.org/en/sustainable-forest-management/great-bear-rainforest> (Accessed November 2018).



Great Bear Initiative Land Use Zones⁵⁷²

⁵⁷² Online at <https://www.theglobeandmail.com/news/british-columbia/key-players-in-great-bear-rainforest-deal-find-common-ground/article28475126/> (Accessed November 2018).

EBM was initially developed in the GBI in the development of a series of land-use plans between First Nations and the British Columbia Provincial Government. The Coastal First Nations (CFN) worked together to reach innovative land use planning agreements with the Provincial Government that enabled the CFN communities to take an active role in developing a conservation-based economy.



GBI Coastal First Nations Communities⁵⁷³

In 2005, the CFNs extended the planning model to the marine and coastal areas through various marine planning processes with the BC Provincial Government and industry to plan for the best

⁵⁷³ Online at <https://coastfunds.ca/first-nations/coastal-first-nations-great-bear-rainforest-initiative/> (Accessed November 2018).

and most responsible use of the marine estate in an EBM context. The CFNs have identified enormous risks to the marine estate including:

- 1) Declining fish stocks and ocean biodiversity,
- 2) Climate change,
- 3) Potential oil and gas threats,
- 4) Overfishing impacts on traditional First Nations harvesting, and
- 5) Risks of oil spills and pollution from potential crude oil tanker traffic.⁵⁷⁴

In 2008, CFNs GBI signed an agreement with the Federal Government to work collaboratively on the development of a marine planning process for the Pacific North Coast Integrated Management Area. In 2010, the BC Provincial Government joined the agreement. In 2015, CFNs and BC Provincial Government signed marine plans through the MaPP to manage the competing demands for the use of the marine estate. CFN created local and regional marine use plans for the central and north coast, Haida Gwaii and north Vancouver Island regions.⁵⁷⁵ The MaPP collaborations cover approximately 102,000 km of coast. Each sub-region has a marine plan that aggregates into an overarching Regional Action Plan where collective actions are identified and implemented at the regional level.

In addition, MaPP provides zoning and direction on a wide variety of marine and ocean permitted activities including:

- 1) Log handling,
- 2) Tourism,
- 3) Alternative energy opportunities, and
- 4) Aquaculture.⁵⁷⁶

MaPP are informed by traditional ecological knowledge, and scientific and local knowledge. MaPP are also shaped by community values and interests, scientific information and input from coastal stakeholders and the public.⁵⁷⁷ MaPP are moreover, based on EBM that integrates human well-being, ecological integrity and First Nations governance. To this end, MaPP adapted its own definition of EBM:

Ecosystem-based management is an adaptive approach to managing human activities that seeks to ensure the co-existence of healthy, fully functioning ecosystems and human communities. The intent is to maintain those spatial and temporal characteristics of ecosystems such that component species and ecological processes can be sustained and human well-being supported and improved.⁵⁷⁸

The MaPP EBM framework is built on the principles of ecological integrity, human well-being, good governance and collaborative management, and as noted above, integrates science and First Nations traditional ecological knowledge to advance EBM. And EBM is advanced in the

⁵⁷⁴ See the Coastal First Nations Great Bear Initiative website <https://coastalfirstnations.ca/our-sea/marine-plan-partnership-for-the-north-pacific-coast-mapp/> (Accessed November 2018).

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

⁵⁷⁷ See the Marine Plan Partnership for the Pacific North Coast website <http://mappocean.org/about-mapp/sub-regions/> (Accessed November 2018).

⁵⁷⁸ MaPP, *Title*, (2016) available online at: <http://mappocean.org> (Accessed November 2018).

respective MaPP implementation areas and addresses a set of challenges identified by First Nations, the Provincial Government and stakeholders hence First Nations are partners not stakeholders acknowledging their constitutional relationship as First citizens and Treaty partners.

Furthermore, the MaPP governance model employs a co-governance nation to nation framework within the EBM context. Hence, the governance boards of the MaPP regions involve only the Provincial Government and First Nations leaders, while scientists, industry and community members are included in advisory committees, which provides stakeholders with a voice but it removes them from the actual decision-making function of governance.

Price, Roburn and MacKinnon provided an overview of the implementation of EBM in the Great Bear Rainforest although they do not focus on EBM over the coastal marine space. Nevertheless, they do provide a valuable insight into the representative management of resources within an EBM model.⁵⁷⁹ Price et al described the shift of power away from the Provincial Government into the hands of Indigenous peoples and stakeholders and the changing dynamics and interactions between stakeholders and various interest parties that have ensued as Price noted:

Environmental groups and forest companies have typically been locked in bitter conflict, the two coalitions agreed to work together to generate solutions.⁵⁸⁰

The power shifts have given way to a more integrative collaborative approach to management that has acted as a catalyst for cooperation and building consensus between multiple interest groups over a shared environment in an EBM context.

The importance of building capacity as well as the need to communicate messages to the wider public in a clear manner appear to be some of the key enablers for the GBI. Conservation efforts opened up new economic opportunities to local communities for example, yet stakeholders continued to see conservation methods as opposing economic benefits. Knowledge and education were critical to deal with the situation and had to be broad and clear.

The development of relationships between stakeholders and various interest groups with seemingly divergent objectives and values appeared to be another key factor in the success of the GBI.⁵⁸¹ The focus on relationships and co-governance arrangements provided a firm foundation for the particularities of an EBM approach rather than focusing on particularities themselves which perspective allowed for the management of the marine ecosystems to be intergenerational and more sustainable over time.

The Great Bear Initiative and the Marine Plan Partnership over the marine estate in BC, Canada certainly provides a compelling case for deeper exploration and analyses for Aotearoa New Zealand. We have covered the GBI briefly in this section but we need to explore the GBI much deeper in terms of building broad constructive relationships of trust between diverse communities, focusing on a common objective brought about by a crisis but also exploring new opportunities that emerge from crises that all can equitably benefit from and contribute to, what policies and structures are required to bring such diverse groups to aggregate time, resources

⁵⁷⁹ Price, K, Roburn, A and MacKinnon, A, 'Ecosystem-Based Management in the Great Bear Rainforest,' *For. Ecol. Man.* (Vol. 258, 2009) at 495.

⁵⁸⁰ *Idem.*

⁵⁸¹ Tiakiwai, S, Kilgour, J and Whetu, A, 'Indigenous Perspectives of Ecosystem-Based Management and Co-governance in the Pacific Northwest: Lessons for Aotearoa,' in *Alter Native*, (An International Journal of Indigenous Peoples, Vol. 13, No. (2), 2017) at 69-79.

and aspirations together, implementing EBM over the marine estate effectively for a particular context, actualising Treaty partnerships between Governments, industry and Indigenous people and effective co-governance models, and what appears to be the successful integration of First Nations traditional ecological knowledge - mātauranga and tikanga Māori in an Aotearoa New Zealand context - and science effectively over the marine estate. The MIGC researchers are continuing to work closely with the GBI leaders and will explore these and other relevant research questions in the future.

P Some Formative Conclusions

It is unlikely that Māori rangatira (chiefs) would have signed the Treaty of Waitangi in 1840 had they not been guaranteed that the Crown would protect their rangatiratanga (authority) over their valued taonga (natural resources) for as long as they wished, and that the taonga would continue to be available, accessible and affordable. In return, Māori shared governance authority, which was the reciprocal acknowledgment of the mana of both Treaty partners. The Crown is under a clear legal duty under the Treaty of Waitangi then to ensure that Māori claimants' mana over taonga are protected including over the marine and coastal estate. The exercise of mana for Māori communities on the other hand includes, inter alia, the mātauranga and tikanga Māori right and responsibility to secure the protection and perpetuation of natural resources for future generations.

Mātauranga and tikanga Māori philosophy, laws, institutions and methodologies over natural resource governance and management then were also guaranteed in the Treaty of Waitangi. Furthermore, mātauranga and tikanga Māori appear to be congruent with contemporary ecosystem-based management principles and best practices over natural resources and should be embraced in all EBM policy and laws in Aotearoa New Zealand. The emphasis in the RMA for Māori however, is on a right to culture model and not political authority or proprietary rights to exercise tikanga rights and responsibilities over natural resources as envisaged in the Treaty.

In addition, current New Zealand resource management policy and regulatory and legislative regimes recognise Māori rights, interests, values and concepts in the RMA and other statutes, but they are neither provided for fully nor are given substantive effect to in practice. Translating sections in a statute into practical and positive substantive outcomes for Māori resource governance and management do not necessarily follow each other. The practical implementation of the RMA statutory provisions has been a key challenge for Māori such as balancing the specific purpose and Māori provisions in ss. 5, 6, 7 and 8, RMA due to the elusive balancing acts tipping against Māori aspirations, rights and responsibilities.

The Waitangi Tribunal even acknowledged as early as 1993 that the role and significance of the Treaty of Waitangi principles in s.8, RMA 1991 were modest given that decision-makers are neither required nor are they obliged to act in conformity with, and to apply, relevant Treaty principles. The RMA devolves powers and rights on Local Authorities but it does not paradoxically, devolve Treaty of Waitangi responsibilities with this transfer which the Waitangi Tribunal acknowledged when it prophetically concluded at the time that the RMA is itself inconsistent with the principles of the Treaty.

The challenge of practical implementation of other specific RMA statutory provisions for Māori is also evident and needs to be addressed including, inter alia, ss. 33 (transfer of powers to iwi), 36B (joint management agreements), 66(2)(c)(ii) (reference to iwi planning documents), 171 (recommendations by territorial authorities to consider ss. 5-8) and 188 (potential iwi heritage

management authorities), and more recently, ss. 58M-58U (Mana Whakahono a Rohe) but it is still too early to assess these provisions that were enacted in 2017.

Māori commercial, customary fisheries and aquaculture legislation regulates Māori commercial, customary fishing and aquaculture responsibilities in New Zealand and appear to be enabling regimes for recognising mātauranga and tikanga Māori and Treaty partnerships. The challenges however, are the competitive corporate nature of Māori commercial fisheries that have pitted Māori against each other in vying for recognition as *the* Treaty partner based on mātauranga and tikanga Māori for group identity and representation, not to mention good Māori governance and kaitiakitanga over fisheries.

Furthermore, Māori communities have to incorporate into legal entities that represent group interests in both commercial fisheries and aquaculture which tend to favour (but not always!) corporate interests over environmental and cultural interests. Similar mātauranga and tikanga Māori legal challenges have emerged with ascertaining traditional tribal boundaries, coastal entitlements and fisheries management areas, and such vexatious areas and the fora for resolving such disputes in the High Court may not necessarily be conducive to tikanga Māori and EBM governance of the marine and coastal estate let alone the whenua (land).

The Fisheries Act 1996 and other Māori fisheries regulations do provide generously in some areas for Māori customary forms of environmental governance and management such as in taiāpure and mātaurai reserves. Taiāpure and mātaurai reserves have management committees who pass bylaws that provide scope for mātauranga and tikanga Māori governance and management, which is significant in terms of acknowledging the Treaty partnership. The process of establishing reserves and the bylaws themselves however, are heavily scrutinised and are even controlled in many respects by the Minister of Fisheries, which, again, undermines tribal rangatiratanga as envisaged in the Treaty.

The Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) similarly states that its purpose is, inter alia, to acknowledge the Treaty of Waitangi – Te Tiriti o Waitangi, and it provides for decision makers to ‘take into account’ the Treaty of Waitangi – Te Tiriti o Waitangi. MACA moreover, recognises and promotes the exercise of Māori customary interests in the common marine and coastal area by providing for customary marine title, wāhi tapu protection and protected customary rights, which are theoretically very enabling provisions in terms of recognising tikanga and mātauranga Māori and for empowering the Treaty partnership. Consequently, hundreds of Māori groups are currently negotiating with the Crown for recognition of customary interests over the marine estate based on aboriginal title which is itself determined by mātauranga and tikanga Māori.

The challenges of MACA in the first instance though are the slowness in processing claims as well as inadequate funding to process claims. In addition, what appears to have emerged from the few claims that have been processed to date are a lack of good faith negotiations and the enormous power imbalance between the Treaty partners, passing the nearly impossible MACA statutory tests, and the Crown’s very conservative interpretation of MACA generally, which challenges are deeply concerning for Māori.

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) similarly does not give full regard to the principles of the Treaty of Waitangi. The Courts have not been willing to require more than the stated legislative requirements under s. 12, EEZ Act to fulfil the principles of the Treaty. Although s. 59(m), EEZ Act provides the Courts with the broad

power to consider ‘any other matter,’ a recent High Court decision⁵⁸² affirmed that s. 59(m), EEZ Act was not intended to supplement existing legislative provisions provided to serve the same objective. Thus, if a decision-making committee is unwilling to go beyond s 12, EEZ Act matters, Māori who have interests outside the s. 12 matters will be adversely affected, which may limit the Environmental Protection Authority’s ability to incorporate the Treaty principles into its decision-making processes to the same extent it is enabled under other legislation such as the RMA.

Marine Protected Areas (MPAs), it appears, also naturally align with tikanga Māori practices such as rāhui, along with internationally recognised conservation approaches including EBM best practices of flexibility to achieve ecological, social, cultural and commercial objectives that determine successful environmental initiatives. The creation of MPAs in New Zealand requires, as a minimum, transparency and appropriate acknowledgement of mātauranga and tikanga Māori as well inclusion of Māori as a Treaty partner not a bystander or another stakeholder. The former National Government’s mistreatment of the Kermadec Ocean Sanctuary in 2016 however, illustrates the potential for ulterior political motives to undermine the Treaty partnership and tikanga responsibilities of Māori within the Kermadec Ocean Sanctuary.

A similar Government approach would also derail the implementation of EBM in Aotearoa New Zealand. While it is a mute truism that the marine estate deserves protection particularly in an EBM context, the unilateral enactment of the KOS Bill was the impetus for its failure. The KOS Bill does not enable the exercise of tikanga Māori either directly or through the proposed Kermadec governance structure which is not only disappointing and out of touch with other conservation initiatives such as co-management models, but it may also demonstrate a failure on the part of the Crown to act in good faith and to honour its Treaty partnership obligations.

For long-term sustainability in Aotearoa New Zealand, the Government must ensure that the processes for creating MPAs are inclusive and that they reflect the commitments that the Crown is obliged to honour from the Treaty partnership. The Kermadec Ocean Sanctuary Bill 2016 in seeking environmental sustainability sought to renege on these cultural obligations, which was its undoing. The Kermadec Ocean certainly deserves protection but not at the cost of Māori involvement and negotiated Treaty of Waitangi settlement proprietary, and cultural rights and responsibilities. Environmental protection and tikanga Māori are symbiotic, align with EBM best practices, and therefore should be recognised at all levels of decision-making over the marine estate in Local, Regional and National Government as well as with industry and other stakeholders.

Treaty of Waitangi settlements, rather than the RMA, MACA, EEZ Act, MPAs, and the Kermadec Ocean Sanctuary Bill, are proving to be the major catalysts for recognising and protecting mātauranga, tikanga and taonga Māori environmental interests. Treaty settlements are realising new partnerships between Māori organisations and the Crown including Local Authorities. The co-management agreements with the Waikato-Tainui, Te Urewera and Whanganui tribes are important recent examples. The efforts to introduce iwi participation arrangements (IPAs), Mana Whakahono a Rohe in the RMA, and special legislation initiatives such as the Sea Change – Tai Timu Tai Pari marine spatial plan also go some way towards promoting effective iwi participation in RMA processes and provide much scope for EBM collaboration.

But again, like the co-management agreements in Treaty settlements such as the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Te Urewera Act 2014 and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, the emphasis is on consultation and

⁵⁸² *The Taranaki-Whanganui Conservation Board and Others v The Environmental Protection Authority*, [2018] NZHC 2217.

effective participation in decision-making under the RMA – a right to culture model - not rangatiratanga and collaborative ecosystem-based management and governance over natural resources.

Māori environmental perspectives deserve to be fully tested and integrated, not treated as an add-on, afterthought, or a group of matters placed in opposition to (or as grudging concessions to) a dominant New Zealand mainstream Western paradigm. To treat them as a separate theme would deny their potential for synergies with other matters including implementing EBM over natural resources, and it partitions Māori challenges from their broader systemic context.

There is no legitimate reason under existing legislation such as the RMA, Conservation Act 1987, Māori Fisheries Act 2004, Māori Commercial Aquaculture Claims Settlement Act 2004, Marine and Coastal Area (Takutai Moana) Act 2011, Exclusive Economic Zone and Continental Shelf Act 2012, and Marine Protected Areas under the Marine Reserves Act 1971, why Central Government and Local Authorities cannot involve the tangata whenua in 21st century Aotearoa New Zealand as authentic Treaty of Waitangi partners in the sustainable ecosystem-based governance and management of natural resources, except perhaps a lack of political will, institutional inadequacies, organisational capacity and a lack of resources for both Local Authorities and Māori communities. Yet authentic bicultural partnerships in decision-making processes should be substantively and procedurally normative.

Given the increasing frequency of Treaty of Waitangi settlements, co-management and joint management agreements, iwi planning arrangements, the new Mana Whakahono a Rohe arrangements and other special legislative initiatives such as the Hauraki Sea Change Tai Timu Tai Pari marine spatial plan 2013, and the Auckland Unitary Plan 2017, a feasible option to empower the Treaty partnership, and as a show of utmost good faith, is to transfer official jurisdiction to iwi and hapū authorities, at least in part initially, and then more over time to allow Māori to effectively administer a particular area of the environment in the tribal rohe within an overarching EBM framework as one Te Tau Ihu informant suggested:

Kotahitanga [unity] is the way forward in my view. You cannot actually have that on a hierarchal structure, otherwise people see it as a domination factor and that's really what's happened around the country.⁵⁸³

Another Te Tau Ihu informant implicitly opined:

Starting from the top there is the international legal framework which is the Treaty, so the Treaty and the UNDRIP [2007 UN Declaration on the Rights of Indigenous Peoples] are at the top, and then we come down to the RMA, and also running alongside that the LGA [Local Government Act] and Conservation Act. We would like the Minister for MPI [Ministry for Primary Industries] to exercise his powers of discretion ... so that we can do whatever we want to do without having to jump through [too many] hoops.⁵⁸⁴

⁵⁸³ MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

⁵⁸⁴ Ibid.

Such radical options have been possible since the enactment of the RMA in 1991 under ss. 33, and 188, and more recently in ss. 36B⁵⁸⁵ and 58M-58U, RMA,⁵⁸⁶ as well as with Māori customary fishing responsibilities with taiāpure and mātaimai reserves for example.

Such radical international models also exist such as the Canadian Great Bear Initiative (GBI) and Marine Planning Partnership frameworks over the BC terrestrial and marine estate which are compelling case studies for effective co-governance and partnership collaboration models between diverse groups – Government, industry, community and Indigenous people - to manage the natural resources in an EBM context. The GBI is also important as a ‘radical’ mechanism for recognising and realising First Nations co-governance aspirations over traditional territories, for bridging and integrating traditional ecological knowledge and stewardship laws and institutions with western science and mainstream law when governing coastal resources, and for building genuine partnerships through power sharing, collective jurisdiction, resource sharing and capacity building at all levels in the policies, laws and institutions of the nation.

The contemporary Treaty of Waitangi relationship between the Crown and Māori ought to be characterised by the original principles of the Treaty of Waitangi of power sharing - which are incidentally similar to the GBI governance principles - as an attempt to achieve an authentic partnership between both groups in a modern, post-colonial constitutional climate that is conducive to EBM. Given that the current resource management status quo is ad hoc, disparate, inadequate and is literally destroying the environment and the ‘clean, green’ image of New Zealand - which has, incidentally, far reaching negative neoliberalist economic, as well as negative social, cultural and environmental ramifications - then as a country, we need to make some sweeping radical changes.

Environmental law in New Zealand was comprehensively reformed in the mid-1980s which reflected a major ideological shift in approach to New Zealand’s natural resources from one that was primarily exploitative to one more focused on environmental well-being. Perhaps the current climate is conducive to making another major ideological shift up that embraces mātauranga and tikanga Māori and enhances the Treaty partnership in more procedural and substantive ways within an EBM context over our natural resources including the marine and coastal estate.

To this end, given that the RMA is currently under review, perhaps another appropriate amendment is to ensure that Local Authorities and decision-makers act in a manner that is consistent with the principles of the Treaty. In 1993, two years after the enactment of the RMA, the Waitangi Tribunal even recommended an appropriate - yet radical for the time - amendment to the RMA. The Tribunal recommended that all persons exercising functions and powers under the RMA *shall* act in a manner that is consistent with the principles of the Treaty of Waitangi,⁵⁸⁷ which is a mandatory, not discretionary, provision that would certainly strengthen the Treaty partnership and, it is hoped, the well-being of the environment.

The adoption of authentic Māori rangatiratanga power-sharing arrangements based on the Treaty of Waitangi as well as international precedent such as the UNDRIP provisions and the compelling Great Bear Initiative, the effective implementation of statutory provisions already in the RMA, Conservation Act 1987, Māori Fisheries Act 2004, Māori Commercial Aquaculture Claims Settlement Act 2004, Marine and Coastal Area (Takutai Moana) Act 2011, Exclusive Economic Zone and Continental Shelf Act 2012, Marine Protected Areas, and other legislation and regulations such as effective taiāpure and mātaimai reserves, as well as initiatives such as the

⁵⁸⁵ As amended on 10 August by s. 18, Resource Management Amendment Act 2005.

⁵⁸⁶ As amended on 19 April 2017 by s. 51, Resource Legislation Amendment Act 2017.

⁵⁸⁷ Idem.

Auckland Unitary Plan 2017 and Hauraki Sea Change – Tai Timu Tai Pari marine spatial plan, are prudent options going forward.

Also as an expression of political will and utmost good faith, adopting and adapting ecosystem-based management integration, constructed on international best practices but fit for purpose for Aotearoa New Zealand that appropriately acknowledges the Treaty partnership and integrates mātauranga and tikanga Māori, it is asserted, are further radical but measured options to consider as possible ways forward for improving sustainable resource management in Aotearoa New Zealand that are suitable and sustainable for Māori, suitable and sustainable for the environment, and are therefore suitable and sustainable for the nation.

*Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tūpuna. - Beneath the herbs and plants are the writings of our ancestors.*⁵⁸⁸

⁵⁸⁸ Waitangi Tribunal, *Ko Aotearoa Tenei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Legislation Direct, Wellington, 2011) at 237. Available online at www.waitangitribunal.govt.nz (Accessed September 2018). The paragraph where the above *whakatauki* (proverb) appears elaborates further: 'The environment, therefore, cannot be viewed in isolation. There is an old saying: *Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tūpuna.*' (Beneath the herbs and plants are the writings of our ancestors). *Mātauranga Māori* [Māori traditional knowledge] is present in the environment: in the names imprinted on it; and in the ancestors and events those names invoke. The *mauri* [spirit or life-force] in land, water, and other resources, and the *whakapapa* [genealogy] of species, are the building blocks of an entire world view and of Māori identity itself. The protection of the environment, the exercise of *kaitiakitanga* [guardianship], and the preservation of *mātauranga* [knowledge] in relation to the environment then are all inseparable from the protection of Māori culture itself.

Q Glossary

<i>ahi kaa</i>	occupation
<i>aroaha</i>	charity, generosity
<i>aituā</i>	misfortune
<i>haka</i>	dance
<i>hapū</i>	descent group with local base on a marae, section of a tribe, sub-tribe, also to be pregnant
<i>hara</i>	committing a crime
<i>hau</i>	respect for the vital essence of a person, place or object
<i>hē</i>	committing a formal wrong, crime
<i>hui</i>	formal meeting, ceremonial gathering.
<i>iwi</i>	tribe or people, also bones
<i>kāinga</i>	home, village
<i>kai moana</i>	seafood, including shell fish, seaweed and fish
<i>kaitiakitanga</i>	stewardship and protection, often used in relation to natural resources.
<i>karakia</i>	prayer, incantations, prayer-chant, Church service
<i>karanga</i>	chant
<i>kaumātua</i>	respected elder, old man, can be both sexes
<i>kaupapa</i>	rule, basic idea, topic, plan, foundation
<i>kawa</i>	protocol of the marae, varies among the tribes, ceremonial, dedication.
<i>koha</i>	gift exchange
<i>koroua</i>	male elders
<i>kuia</i>	elderly woman
<i>mana</i>	ascribed and achieved authority, honor, status and prestige of an individual and group, spiritually endowed and maintained
<i>manaakitanga</i>	hospitality, enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honor requires
<i>mana tupuna</i>	ascribed authority inherited from ancestors, inherited rights and responsibilities
<i>Marae</i>	place of ceremonial greeting and gathering, meeting place, village courtyard, spiritual and symbolic centre of Māori community affairs
<i>Māori</i>	literally ordinary person, native or Indigenous to Aotearoa New Zealand
<i>Māoritanga</i>	Māori culture and identity
<i>mauri</i>	recognition of the life-force of persons and objects

<i>noa</i>	free from tapu or any other restriction; liberating a person or situation from tapu restrictions, usually through karakia and water
<i>Pākehā</i>	New Zealander of non-Māori descent, non-Māori, literally stranger, newcomer
<i>paki waitara</i>	stories
<i>pepeha</i>	tribal sayings, proverbs, tribal mottoes
<i>poroporoaki</i>	farewell
<i>powhiri</i>	to wave, welcoming ceremony
<i>rangatira</i>	chief, both male and female leaders
<i>rangatiratanga</i>	chieftainship, authority, kingdom, principality, appreciation of the attributes of leadership
<i>ritenga</i>	ritual
<i>rohe</i>	tribal territory, boundary, district, area
<i>rūnanga</i>	council, assembly, debate
<i>take tūpuna</i>	rights to natural resources by right of discovery
<i>take tukua</i>	rights to natural resources by right of gift
<i>take raupatu</i>	rights to natural resources by right of confiscation
<i>takiwā/rohe</i>	tribal territory, area, space, place
<i>tangata whenua</i>	people of the land, Indigenous People of a given place
<i>taonga katoa</i>	all treasured possessions – precious objects, cultural norms, customs, values, institutions, property, treasure
<i>tauparapara</i>	chant
<i>tautuutu</i>	reciprocity and balance
<i>Te Reo Māori</i>	Māori language
<i>tika</i>	correct, straight, right ways
<i>tikanga</i>	‘right ways’, custom, from <i>tika</i> (adj.) straight, right, correct, fair, just, rules, principles
<i>tino rangatiratanga</i>	traditional authority, self-determination
<i>tapu</i>	restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose – to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects
<i>tupuna</i>	ancestor
<i>tūrangawaewae</i>	a place to stand, basis of rights of the tangata whenua
<i>ture</i>	law, authorised by government, passed by formal legislature

<i>utu</i>	reciprocity, compensation, involved the initiation and maintenance of relationships both hostile and friendly
<i>wāhi tapu</i>	sacred places, cemetery, reserved ground
<i>waiata</i>	song, to sing, psalm
<i>wairua</i>	spirit, metaphysical world
<i>wairuatanga</i>	acknowledging the metaphysical world - spirituality - including placating the departmental Gods respective realms
<i>whakaaro</i>	think, opinion, feelings, concept
<i>whānau</i>	extended family, usually 4 generations, also to give birth
<i>whānau kua hē</i>	the family or community in the wrong for committing a crime
<i>whānaungatanga</i>	maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group
<i>whaikōrero</i>	formal oratory ceremonies
<i>whakapapa</i>	genealogy, genealogical recitations
<i>whakatauki</i>	proverbs
<i>Whareniui</i>	large ceremonial house, located on the marae complex
<i>whenua</i>	land, also umbilical chord

R Appendix 1: Te Tiriti o Waitangi/The Treaty of Waitangi 1840

Māori Text of the Treaty of Waitangi 1840⁵⁸⁹

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapū o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata Māori o Nu Tirani kia wakaaetia e nga Rangatira Māori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kau ai nga kino e puta mai ki te tangata Māori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane, amoa atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapū o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

KO TE TUATAHI

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o ratou wenua.

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapū ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini Ka tiakina e te Kuini o Ingarani nga tangata Māori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] William Hobson Consul & Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapū o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

⁵⁸⁹ Taken from the internet website at <https://nzhistory.govt.nz/politics/treaty/read-the-treaty/> (Accessed August 2018).

ENGLISH TEXT OF THE TREATY OF WAITANGI 1840

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands.

Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Pre-emption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[Signed] W Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty,

accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

S Appendix 2: Resource Management Act 1991, ss. 5, 6, 7, 8, 33, 34, 36B, 58M-58U, 66, 171 and 188

Part 2

5. Purpose

- a. The purpose of this Act is to promote the sustainable management of natural and physical resources.
- b. In this Act, sustainable management means managing the use, development, and protection of natural and resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –
 1. sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generation
 2. safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
 3. avoiding, remedying, or mitigating any adverse effects of activities on the environment.

6. Matters of National Importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognize and provide for the following matters of national importance:

- (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development:
- (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development
- (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
- (d) The maintenance and enhancement of public access to and along the coastal marine areas, lakes and rivers:
- (e) The relationship of Māori and their culture and traditions with their ancestral lands, waters, sites, waahi tapu, and other taonga:
- (f) The protection of historic heritage from inappropriate subdivision, use and development:
- (g) The protection of protected customary rights:
- (h) The management of significant risks from natural hazards.

7 Other Matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have regard to –

- (a) Kaitiakitanga:

- (aa) the ethic of stewardship:
- (b) The efficient use and development of natural and physical resources:
- (ba) the efficiency of the end use of energy:
- (c) The maintenance and enhancement of the quality of the environment
- (d) Any finite characteristics of natural and physical resources
- (e) The protection of the habitat of trout and salmon
- (f) The effects of climate change
- (g) The benefits to be derived from the use and development of renewable energy.

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

33 Transfer of powers

(1) A local authority may transfer any 1 or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority in accordance with this section.

(2) For the purposes of this section, public authority includes—

- (a) a local authority; and
- (b) *an iwi authority*; [emphasis added] and
- (c) *[Repealed]*
- (d) a government department; and
- (e) a statutory authority; and
- (f) a joint committee set up for the purposes of section 80; and
- (g) a local board.

(3) *[Repealed]*

(4) A local authority shall not transfer any of its functions, powers, or duties under this section unless—

- (a) it has used the special consultative procedure set out in section 83 of the Local Government Act 2002; and
- (b) before using that special consultative procedure it serves notice on the Minister of its proposal to transfer the function, power, or duty; and
- (c) both authorities agree that the transfer is desirable on all of the following grounds:
 - (i) the authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty:

- (ii) efficiency:
- (iii) technical or special capability or expertise.

(5) *[Repealed]*

(6) A transfer of functions, powers, or duties under this section shall be made by agreement between the authorities concerned and on such terms and conditions as are agreed.

(7) A public authority to which any function, power, or duty is transferred under this section may accept such transfer, unless expressly forbidden to do so by the terms of any Act by or under which it is constituted; and upon any such transfer, its functions, powers, and duties shall be deemed to be extended in such manner as may be necessary to enable it to undertake, exercise, and perform the function, power, or duty.

(8) A local authority which has transferred any function, power, or duty under this section may change or revoke the transfer at any time by notice to the transferee.

(9) A public authority to which any function, power, or duty has been transferred under this section, may relinquish the transfer in accordance with the transfer agreement.

34 Delegation of functions, etc, by local authorities

(1) A local authority may delegate to any committee of the local authority established in accordance with the Local Government Act 2002 any of its functions, powers, or duties under this Act.

(2) A territorial authority may delegate to any community board established in accordance with the Local Government Act 2002 any of its functions, powers, or duties under this Act in respect of any matter of significance to that community, other than the approval of a plan or any change to a plan.

(3) Subsection (2) does not prevent a local authority delegating to a community board power to do anything before a final decision on the approval of a plan or any change to a plan.

(3A) A unitary authority may delegate to any local board any of its functions, powers, or duties under this Act in respect of any matter of local significance to that board, other than the approval of a plan or any change to a plan.

(3B) Subsection (3A) does not prevent a unitary authority delegating to a local board power to do anything before a final decision on the approval of a plan or any change to a plan.

(4) *[Repealed]*

(5) *[Repealed]*

(6) *[Repealed]*

(7) Any delegation under this section may be made on such terms and conditions as the local authority thinks fit, and may be revoked at any time by notice to the delegate.

(8) Except as provided in the instrument of delegation, every person to whom any function, power, or duty has been delegated under this section may, without confirmation by the local authority, exercise or perform the function, power, or duty in like manner and with the same effect as the local authority could itself have exercised or performed it.

(9) Every person authorised to act under a delegation under this section is presumed to be acting in accordance with its terms in the absence of proof to the contrary.

(10) A delegation under this section does not affect the performance or exercise of any function, power, or duty by the local authority.

(11) In subsections (3A) and (3B), **Auckland Council** and **local board** have the meanings given in section 4(1) of the Local Government (Auckland Council) Act 2009.

Powers and duties of local authorities and other public authorities

36B Power to make joint management agreement

(1) A local authority that wants to make a joint management agreement must—

(a) notify the Minister that it wants to do so; and

(b) satisfy itself—

(i) that each public authority, iwi authority, and group that represents hapū for the purposes of this Act that, in each case, is a party to the joint management agreement—

(A) represents the relevant community of interest; and

(B) has the technical or special capability or expertise to perform or exercise the function, power, or duty jointly with the local authority; and

(ii) that a joint management agreement is an efficient method of performing or exercising the function, power, or duty; and

(c) include in the joint management agreement details of—

(i) the resources that will be required for the administration of the agreement; and

(ii) how the administrative costs of the joint management agreement will be met.

(2) A local authority that complies with subsection (1) may make a joint management agreement.

Purpose and guiding principles

Heading: inserted, on 19 April 2017, by section 51 of the Resource Legislation Amendment Act 2017 (2017 No 15).

58M Purpose of Mana Whakahono a Rohe

The purpose of a Mana Whakahono a Rohe is—

(a) to provide a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under this Act; and

(b) to assist local authorities to comply with their statutory duties under this Act, including through the implementation of sections 6(e), 7(a), and 8.

58N Guiding principles

In initiating, developing, and implementing a Mana Whakahono a Rohe, the participating authorities must use their best endeavours—

(a) to achieve the purpose of the Mana Whakahono a Rohe in an enduring manner:

(b) to enhance the opportunities for collaboration amongst the participating authorities, including by promoting—

(i) the use of integrated processes:

(ii) co-ordination of the resources required to undertake the obligations and responsibilities of the parties to the Mana Whakahono a Rohe:

(c) in determining whether to proceed to negotiate a joint or multi-party Mana Whakahono a Rohe, to achieve the most effective and efficient means of meeting the statutory obligations of the participating authorities:

(d) to work together in good faith and in a spirit of co-operation:

(e) to communicate with each other in an open, transparent, and honest manner:

(f) to recognise and acknowledge the benefit of working together by sharing their respective vision and expertise:

(g) to commit to meeting statutory time frames and minimise delays and costs associated with the statutory processes:

(h) to recognise that a Mana Whakahono a Rohe under this subpart does not limit the requirements of any relevant iwi participation legislation or the agreements associated with that legislation.

580 Initiation of Mana Whakahono a Rohe

Invitation from 1 or more iwi authorities

(1) At any time other than in the period that is 90 days before the date of a triennial election under the Local Electoral Act 2001, 1 or more iwi authorities representing tangata whenua (the initiating iwi authorities) may invite 1 or more relevant local authorities in writing to enter into a Mana Whakahono a Rohe with the 1 or more iwi authorities.

Obligations of local authorities that receive invitation

(2) As soon as is reasonably practicable after receiving an invitation under subsection (1), the local authorities—

(a) may advise any relevant iwi authorities and relevant local authorities that the invitation has been received; and

(b) must convene a hui or meeting of the initiating iwi authority and any iwi authority or local authority identified under paragraph (a) (the parties) that wishes to participate to discuss how they will work together to develop a Mana Whakahono a Rohe under this subpart.

(3) The hui or meeting required by subsection (2)(b) must be held not later than 60 working days after the invitation sent under subsection (1) is received, unless the parties agree otherwise.

(4) The purpose of the hui or meeting is to provide an opportunity for the iwi authorities and local authorities concerned to discuss and agree on—

- (a) the process for negotiation of 1 or more Mana Whakahono a Rohe; and
- (b) which parties are to be involved in the negotiations; and
- (c) the times by which specified stages of the negotiations must be concluded.

(5) The iwi authorities and local authorities that are able to agree at the hui or meeting how they will develop a Mana Whakahono a Rohe (the participating authorities) must proceed to negotiate the terms of the Mana Whakahono a Rohe in accordance with that agreement and this subpart.

(6) If 1 or more local authorities in an area are negotiating a Mana Whakahono a Rohe and a further invitation is received under subsection (1), the participating iwi authorities and relevant local authorities may agree on the order in which they negotiate the Mana Whakahono a Rohe.

Other matters relevant to Mana Whakahono a Rohe

(7) If an iwi authority and a local authority have at any time entered into a relationship agreement, to the extent that the agreement relates to resource management matters, the parties to that agreement may, by written agreement, treat that agreement as if it were a Mana Whakahono a Rohe entered into under this subpart.

(8) The participating authorities must take account of the extent to which resource management matters are included in any iwi participation legislation and seek to minimise duplication between the functions of the participating authorities under that legislation and those arising under the Mana Whakahono a Rohe.

(9) Nothing in this subpart prevents a local authority from commencing, continuing, or completing any process under the Act while waiting for a response from, or negotiating a Mana Whakahono a Rohe with, 1 or more iwi authorities.

58P Other opportunities to initiate Mana Whakahono a Rohe

Later initiation by iwi authority

(1) An iwi authority that, at the time of receiving an invitation to a meeting or hui under section 58O(2)(b), does not wish to participate in negotiating a Mana Whakahono a Rohe, or withdraws from negotiations before a Mana Whakahono a Rohe is agreed, may participate in, or initiate, a Mana Whakahono a Rohe at any later time (other than within the period that is 90 days before a triennial election under the Local Electoral Act 2001).

(2) If a Mana Whakahono a Rohe exists and another iwi authority in the same area as the initiating iwi wishes to initiate a Mana Whakahono a Rohe under section 58O(1), that iwi authority must first consider joining the existing Mana Whakahono a Rohe.

(3) The provisions of this subpart apply to any initiation under subsection (1).

Initiation by local authority

(4) A local authority may initiate a Mana Whakahono a Rohe with an iwi authority or with hapū.

(5) The local authority and iwi authority or hapū concerned must agree on—

- (a) the process to be adopted; and
- (b) the time period within which the negotiations are to be concluded; and
- (c) how the Mana Whakahono a Rohe is to be implemented after negotiations are concluded.

(6) If 1 or more hapū are invited to enter a Mana Whakahono a Rohe under subsection (4), the provisions of this subpart apply as if the references to an iwi authority were references to 1 or more hapū, to the extent that the provisions relate to the contents of a Mana Whakahono a Rohe (see sections 58M, 58N, 58R, 58T, and 58U).

58Q Time frame for concluding Mana Whakahono a Rohe

If an invitation is initiated under section 58O(1), the participating authorities must conclude a Mana Whakahono a Rohe within—

- (a) 18 months after the date on which the invitation is received; or
- (b) any other period agreed by all the participating authorities.

58R Contents of Mana Whakahono a Rohe

(1) A Mana Whakahono a Rohe must—

- (a) be recorded in writing; and
- (b) identify the participating authorities; and
- (c) record the agreement of the participating authorities about—
 - (i) how an iwi authority may participate in the preparation or change of a policy statement or plan, including the use of any of the pre-notification, collaborative, or streamlined planning processes under Schedule 1; and
 - (ii) how the participating authorities will undertake consultation requirements, including the requirements of section 34A(1A) and clause 4A of Schedule 1; and
 - (iii) how the participating authorities will work together to develop and agree on methods for monitoring under this Act; and
 - (iv) how the participating authorities will give effect to the requirements of any relevant iwi participation legislation, or of any agreements associated with, or entered into under, that legislation; and
 - (v) a process for identifying and managing conflicts of interest; and
 - (vi) the process that the parties will use for resolving disputes about the implementation of the Mana Whakahono a Rohe, including the matters described in subsection (2).

(2) The dispute resolution process recorded under subsection (1)(c)(vi) must—

(a) set out the extent to which the outcome of a dispute resolution process may constitute an agreement—

(i) to alter or terminate a Mana Whakahono a Rohe (see subsection (5));

(ii) to conclude a Mana Whakahono a Rohe at a time other than that specified in section 58Q:

(iii) to complete a Mana Whakahono a Rohe at a later date (see section 58T(2));

(iv) jointly to review the effectiveness of a Mana Whakahono a Rohe at a later date (see section 58T(3));

(v) to undertake any additional reporting (see section 58T(5)); and

(b) require each of the participating authorities to bear its own costs for any dispute resolution process undertaken.

(3) The dispute resolution process must not require a local authority to suspend commencing, continuing, or completing any process under the Act while the dispute resolution process is in contemplation or is in progress.

(4) A Mana Whakahono a Rohe may also specify—

(a) how a local authority is to consult or notify an iwi authority on resource consent matters, where the Act provides for consultation or notification:

(b) the circumstances in which an iwi authority may be given limited notification as an affected party:

(c) any arrangement relating to other functions, duties, or powers under this Act:

(d) if there are 2 or more iwi authorities participating in a Mana Whakahono a Rohe, how those iwi authorities will work collectively together to participate with local authorities:

(e) whether a participating iwi authority has delegated to a person or group of persons (including hapū) a role to participate in particular processes under this Act.

(5) Unless the participating authorities agree,—

(a) the contents of a Mana Whakahono a Rohe must not be altered; and

(b) a Mana Whakahono a Rohe must not be terminated.

(6) If 2 or more iwi authorities collectively have entered into a Mana Whakahono a Rohe with a local authority, any 1 of the iwi authorities, if seeking to amend the contents of the Mana Whakahono a Rohe, must negotiate with the local authority for that purpose rather than seek to enter into a new Mana Whakahono a Rohe.

58S Resolution of disputes that arise in course of negotiating Mana Whakahono a Rohe

(1) This section applies if a dispute arises among participating authorities in the course of negotiating a Mana Whakahono a Rohe.

(2) The participating authorities—

- (a) may by agreement undertake a binding process of dispute resolution; but
- (b) if they do not reach agreement on a binding process, must undertake a non-binding process of dispute resolution.

(3) Whether the participating authorities choose a binding process or a non-binding process, each authority must—

- (a) jointly appoint an arbitrator or a mediator; and
- (b) meet its own costs of the process.

(4) If the dispute remains unresolved after a non-binding process has been undertaken, the participating authorities may individually or jointly seek the assistance of the Minister.

(5) The Minister, with a view to assisting the participating authorities to resolve the dispute and conclude a Mana Whakahono a Rohe, may—

- (a) appoint, and meet the costs of, a Crown facilitator;
- (b) direct the participating authorities to use a particular alternative dispute resolution process for that purpose.

58T Review and monitoring

(1) A local authority that enters into a Mana Whakahono a Rohe under this subpart must review its policies and processes to ensure that they are consistent with the Mana Whakahono a Rohe.

(2) The review required by subsection (1) must be completed not later than 6 months after the date of the Mana Whakahono a Rohe, unless a later date is agreed by the participating authorities.

(3) Every sixth anniversary after the date of a Mana Whakahono a Rohe, or at any other time by agreement, the participating authorities must jointly review the effectiveness of the Mana Whakahono a Rohe, having regard to the purpose of a Mana Whakahono a Rohe stated in section 58M and the guiding principles set out in section 58N.

(4) The obligations under this section are in addition to the obligations of a local authority under—

- (a) section 27 (the provision of information to the Minister);
- (b) section 35 (monitoring and record keeping).

(5) Any additional reporting may be undertaken by agreement of the participating authorities.

58U Relationship with iwi participation legislation

A Mana Whakahono a Rohe does not limit any relevant provision of any iwi participation legislation or any agreement under that legislation.

66 Matters to be considered by regional council (plans)

- (1) A regional council must prepare and change any regional plan in accordance with—
- (a) its functions under section 30; and
 - (b) the provisions of Part 2; and
 - (c) a direction given under section 25A(1); and
 - (d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
 - (e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
 - (ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and
 - (f) any regulations.
- (2) In addition to the requirements of section 67(3) and (4), when preparing or changing any regional plan, the regional council shall have regard to—
- (a) any proposed regional policy statement in respect of the region; and
 - (b) the Crown’s interests in the coastal marine area; and
 - (c) any—
 - (i) management plans and strategies prepared under other Acts; and
 - (ii) *[Repealed]*
 - (iia) relevant entry on the New Zealand Heritage List/Rārangi Kōrero required by the Heritage New Zealand Pouhere Taonga Act 2014; and
 - (iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Māori customary fishing); and
 - (iv) *[Repealed]* to the extent that their content has a bearing on resource management issues of the region; and
 - (d) the extent to which the regional plan needs to be consistent with the regional policy statements and plans, or proposed regional policy statements and proposed plans, of adjacent regional councils; and
 - (e) to the extent to which the regional plan needs to be consistent with regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; and
- (2A) When a regional council is preparing or changing a regional plan, it must deal with the following documents, if they are lodged with the council, in the manner specified, to the extent that their content has a bearing on the resource management issues of the region:
- (a) the council must take into account any relevant planning document recognised by an iwi authority; and
 - (b) in relation to a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, the council must, in accordance with section 93 of that Act,—

- (i) recognise and provide for the matters in that document, to the extent that they relate to the relevant customary marine title area; and
- (ii) take into account the matters in that document, to the extent that they relate to a part of the common marine and coastal area outside the customary marine title area of the relevant group.

(3) In preparing or changing any regional plan, a regional council must not have regard to trade competition or the effects of trade competition.

171 Recommendation by territorial authority

(1A) When considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.

(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—

- (a) any relevant provisions of—
 - (i) a national policy statement:
 - (ii) a New Zealand coastal policy statement:
 - (iii) a regional policy statement or proposed regional policy statement:
 - (iv) a plan or proposed plan; and
- (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
 - (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
 - (ii) it is likely that the work will have a significant adverse effect on the environment; and
- (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
- (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

(1B) The effects to be considered under subsection (1) may include any positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from the activity enabled by the designation, as long as those effects result from measures proposed or agreed to by the requiring authority.

(2) The territorial authority may recommend to the requiring authority that it—

- (a) confirm the requirement:
- (b) modify the requirement:
- (c) impose conditions:
- (d) withdraw the requirement.

(3) The territorial authority must give reasons for its recommendation under subsection (2).

188 Application to become heritage protection authority

(1) Any body corporate having an interest in the protection of any place may apply to the Minister in the prescribed form for approval as a heritage protection authority for the purpose of protecting that place.

(2) For the purpose of this section, and sections 189 and 191, place includes any feature or area, and the whole or part of any structure.

(3) The Minister may make such inquiry into the application and request such information as he or she considers necessary.

(4) The Minister may, by notice in the *Gazette*, approve an applicant under subsection (1) as a heritage protection authority for the purpose of protecting the place and on such terms and conditions (including provision of a bond) as are specified in the notice.

(5) The Minister shall not issue a notice under subsection (4) unless he or she is satisfied that—
(a) the approval of the applicant as a heritage protection authority is appropriate for the protection of the place that is the subject of the application; and
(b) the applicant is likely to satisfactorily carry out all the responsibilities (including financial responsibilities) of a heritage protection authority under this Act.

(6) Where the Minister is satisfied that—
(a) a heritage protection authority is unlikely to continue to satisfactorily protect the place for which approval as a heritage protection authority was given; or
(b) a heritage protection authority is unlikely to satisfactorily carry out any responsibility as a heritage protection authority under this Act,—
the Minister shall, by notice in the *Gazette*, revoke an approval given under subsection (4).

(7) Upon—
(a) the revocation of the approval of a body corporate under subsection (6); or
(b) the dissolution of any body corporate approved as a heritage protection authority under subsection (4)—
all functions, powers, and duties of the body corporate under this Act in relation to any heritage order, or requirement for a heritage order, shall be deemed to be transferred to the Minister under section 192.

T. Appendix 3: Fisheries Act 1999, ss. 185, 186, 186A

185 Power to recommend making of regulations

(1) A committee of management appointed for a taiāpure-local fishery may recommend to the Minister the making of regulations under section 186 or section 297 or section 298 for the conservation and management of the fish, aquatic life, or seaweed in the taiāpure-local fishery.

(2) Regulations made under any section referred to in subsection (1) (other than section 186), and made pursuant to a recommendation under that subsection, may override the provisions of any other regulations made under section 297 or section 298.

(3) Except to the extent that any regulations made under any section referred to in subsection (1), and made pursuant to a recommendation under that subsection, override or are otherwise inconsistent with the provisions of any other regulations made under that section, those provisions shall apply in relation to every taiāpure-local fishery.

(4) Any provision of regulations made under any section referred to in subsection (1), and made pursuant to a recommendation under that subsection, that relates only to a taiāpure-local fishery may be made only in accordance with subsection (1).

(5) No regulations made under any section referred to in subsection (1), and made pursuant to a recommendation under that subsection, shall provide for any person—

(a) to be refused access to, or the use of, any taiāpure-local fishery; or

(b) to be required to leave or cease to use any taiāpure-local fishery,—

because of the colour, race, or ethnic or national origins of that person or of any relative or associate of that person.

186 Regulations relating to customary fishing

(1) The Governor-General may from time to time, by Order in Council, make regulations recognising and providing for customary food gathering by Māori and the special relationship between tangata whenua and places of importance for customary food gathering (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.

(2) Without limiting the generality of subsection (1), regulations made under that subsection may—

(a) regulations relating to taiāpure-local fisheries; and declare that the first-mentioned regulations are to prevail over the other regulations:

(b) empower the Minister to declare, by notice in the *Gazette*, any part of New Zealand fisheries waters to be a mataitai reserve; and any such regulations shall require that, before any such notice is given, the Minister and the tangata

whenua shall consult with the local community and the Minister shall have regard to the need to ensure sustainability in relation to the reserve:

(c) provide for such matters as may be necessary or desirable to achieve the purpose of this Act in relation to mataitai reserves, including general restrictions and prohibitions in respect of the taking of fish, aquatic life, or seaweed:

(d) empower any Māori Committee constituted by or under the Māori Community Development Act 1962, any marae committee, or any kaitiaki of the tangata whenua to make bylaws restricting or prohibiting the taking of fish, aquatic life, or seaweed:

(e) empower any such Māori Committee, marae committee, or kaitiaki to allow the taking of fish, aquatic life, or seaweed to continue for purposes which sustain the functions of the marae concerned, notwithstanding any such bylaws.

f) bylaws shall not come into force until they have been approved by the Minister and have been published in the *Gazette*:

(g) the publication in the *Gazette* of bylaws purporting to have been approved under this subsection shall be conclusive evidence that the bylaws have been duly made and approved under this section.

(3) The following provisions apply in relation to bylaws made under regulations made under subsection (2)(d):

(a) every restriction and every prohibition imposed on individuals by such bylaws shall apply generally to all individuals: declare the relationship between such regulations and general fishing regulations.

186A Temporary closure of fishing area or restriction on fishing methods

- (1) The Minister may from time to time, by notice in the *Gazette*,—
- (a) temporarily close any area of New Zealand fisheries waters (other than South Island fisheries waters as defined in section 186B(9)) in respect of any species of fish, aquatic life, or seaweed; or
 - (b) temporarily restrict or prohibit the use of any fishing method in respect of any area of New Zealand fisheries waters (other than South Island fisheries waters as defined in section 186B(9)) and any species of fish, aquatic life, or seaweed.
- (2) The Minister may impose such a closure, restriction, or prohibition only if he or she is satisfied that it will recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing rights by—
- (a) improving the availability or size (or both) of a species of fish, aquatic life, or seaweed in the area subject to the closure, restriction, or prohibition; or
 - (b) recognising a customary fishing practice in that area.
- (3) Before imposing a fishing method restriction or prohibition under subsection (1)(b), the Minister must be satisfied that the method is having an adverse effect

on the use and management practices of tangata whenua in the exercise of non-commercial fishing rights.

(4) A notice given under subsection (1) must be publicly notified.

(5) A notice given under subsection (1)—

(a) may be in force for a period of not more than 2 years and, unless sooner revoked, is revoked at the end of that 2-year period:

(b) subject to paragraph (a), may be expressed to be in force for any particular year or period, or for any particular date or dates, or for any particular month or months of the year, week or weeks of the month, or day or days of the week.

(6) Nothing in subsection (5)(a) prevents a further notice being given under subsection (1) in respect of any species and area before or on or about the expiry of an existing notice that relates to that species and area.

(7) Before giving a notice under subsection (1), the Minister must—

(a) consult such persons as the Minister considers are representative of persons having an interest in the species concerned or in the effects of fishing in the area concerned, including tangata whenua, environmental, commercial, recreational, and local community interests; and

(b) provide for the input and participation in the decision-making process of tangata whenua with a non-commercial interest in the species or the effects of fishing in the area concerned, having particular regard to kaitiakitanga.

(8) A person commits an offence who, in contravention of a notice given under subsection (1),—

(a) takes any fish, aquatic life, or seaweed from a closed area; or

(b) takes any fish, aquatic life, or seaweed using a prohibited fishing method.

(9) A person who commits an offence against subsection (8)—

(a) is liable to the penalty specified in section 252(6) if—

(i) the person is an individual other than a commercial fisher; and

(ii) the person satisfies the court that the fish, aquatic life, or seaweed was taken otherwise than for the purpose of sale:

(b) is liable to the penalty specified in section 252(5) in every other case.

Section 186B, Fisheries Act 1999 is similar to s. 186 only it permits the chief executive to impose a temporary closure of fisheries.

U. Appendix 4: Treaty of Waitangi Settlement Co-Management and Co-Governance Redress Models over the Coastal Marine Space

TREATY SETTLEMENT CO-MANAGEMENT, CO-GOVERNANCE OF MARINE AREAS ¹		REDRESS DESCRIPTION
REGION	HAPŪ	NAME OF PROTECTED AREA
HAUJAUURU	1. Ngāti Mutunga (Taranaki)	Statutory Acknowledgements (SAs) are recognised under the Resource Management Act 1991 and the Historic Places Act 1993. The acknowledgements also require that consent authorities provide Ngāti Mutunga with summaries of all resource consent applications that may affect the areas named in the acknowledgements. These include Part of Mimi – Pukearuru Coast Marginal Strip; Waitoetoe Beach Recreation Reserve, Onaero Coast Marginal Strip, Coastal Marine Area adjoining the Area of Interest. Deeds of Recognition (DoRs) oblige the Crown to consult with Ngāti Mutunga and have regard for their views regarding the special association Ngāti Mutunga have with a site. They also specify the nature of the input of Ngāti Mutunga into management of those areas by the Department of Conservation and/or the Commissioner of Crown Lands. There will be 12 Deeds of Recognition covering: Part of Mimi – Pukearuru Coast Marginal Strip, Waitoetoe Beach Recreation Reserve, Mimi Scenic Reserve
TAI TOKERAU	2. Ngāti Rehua-Ngātiwai ki Aotea	Ngāti Rehua will have an enhanced role in parts of the Auckland Conservation Management Strategy that cover Aotea/Great Barrier Island, Rakitu Island/Arid Island and the Mokohinau Islands.
TAI TOKERAU	3. Ngāti Rehua-Ngātiwai ki Aotea	A statutory acknowledgement area recognises the association between Ngāti Rehua and a particular site or area and enhances the iwi's ability to participate in specified Resource Management Act 1991 processes. The Crown offers statutory acknowledgement areas over the following areas. Overtons Beach Marginal Strip, Sandy Bay Marginal Strip, S.S. Wairarapa Graves (Tapuwai Point) Historic Reserve, Whakatautuna Point Marginal Strip.
HAUJAUURU	4. Ngāti Tama (Taranaki)	Statutory Acknowledgements are recognised under the Resource Management Act 1991 and the Historic Places Act 1993. The acknowledgements also require that consent authorities provide Ngāti Tama with summaries of all resource consent applications that may affect the areas named in the acknowledgements. Part of the Mimi-Pukearuru Coast Marginal Strip, Mohakatino Coastal Marginal Strip, Marginal Strip, the Coastal Marine Area adjoining the Ngāti Tama area of interest. Deeds of Recognition oblige the Crown to consult Ngāti Tama and have regard for its views regarding Ngāti Tama's special association with a site and specifies the nature of Ngāti Tama's input into management of those areas by the Department of Conservation and the Commissioner of Crown Lands. These include Part of the Mimi-Pukearuru Coast Marginal Strip.

¹ The above Treaty of Waitangi Settlement Co-Management of Marine Areas Table comes from the literature review of Takuiria, J., 'Treaty of Waitangi Settlement Redress Options Literature Review Draft', (Unpublished Draft MIGC Report, University of Waikato, November 2018).

HAUURU	5. Taranaki Whānui ki Te Upoko o Te Ika	THE KOROKORO GATEWAY SITE (HARBOUR AT PETONE)	The Korokoro Gateway site (on the harbour at Petone), The settlement legislation will provide for the establishment of a Harbour Islands Kaitiaki Board to administer Makaro Scientific Reserve, Mokopuna Scientific Reserve, Matiu Scientific Reserve and Matiu Historic Reserve. The Board will consist of an equal number of representatives from both the Department of Conservation, who will continue to carry out the day to day management of the islands, and Taranaki Whānui ki Te Upoko o Te Ika.
HAURAKI	6. Te Patukirikiri		The settlement does not provide for redress in relation to Tikapa Moana/ the Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Te Patukirikiri have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas.
HAURAKI	7. Ngāti Maru		A statutory acknowledgement recognises the association between Ngāti Maru and a particular area and enhances the ability of the iwi to participate in specified resource management processes. The Crown offers a statutory acknowledgement over the following areas: Mercury Islands;
HAURAKI	8. Ngāti Maru	Tikapa Moana/ Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine	The settlement does not provide for redress in relation to Tikapa Moana/ Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Ngāti Maru have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas.
HAURAKI	9. Pare Hauraki Collective	Harbours and Hauraki Gulf/Tikapa Moana	The Deed does not provide for cultural redress in relation to these harbours at this time. Harbours redress will be developed in separate negotiations as soon as practicable. Iwi of Hauraki have recognised interests in Tauranga Moana. The Deed acknowledges the Iwi of Hauraki and the Tauranga Moana Iwi Collective have agreed to discuss through a tikanga-based process how Tauranga Moana is to be protected and enhanced. The Tauranga Moana Framework will be provided for in separate legislation if agreement is reached between the Tauranga Moana Iwi Collective, the Hauraki Collective and the Crown on certain items.
HAURAKI	10. Marutūāhu Iwi	Ngāti Maru, Ngāti Pāoa, Ngāti Tamaterā, Ngāti Whanaunga and Te Patukirikiri	A statutory acknowledgement recognises the association between the Marutūāhu Iwi and a particular area and enhances the ability of the Iwi to collectively participate in specified resource management processes. The Deed includes coastal statutory acknowledgement to the Marutūāhu Iwi over: a statutory acknowledgement being Ngā Tai Whakarewa Kauri Marutūāhu Iwi.
HAURAKI	11. Ngāti Whanaunga	Harbours and Hauraki Gulf	The settlement does not provide for redress in relation to Tikapa Moana/the Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Ngāti Whanaunga have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas.

HAURAKI	12. Ngāti Hei	Otama Beach	A statutory acknowledgement recognises the association between Ngāti Hei and a particular site or area and enhances the ability of the iwi to participate in specified resource management processes. The Crown offers a statutory acknowledgement over the following areas: Otama Beach
HAURAKI	13. Ngāti Hei	Ohinaiu Island	The settlement legislation will enact a Māori Land Court order and will vest Ohinaiu Island in the Ngāti Hei governance entity as if the property were a cultural redress property
HAURAKI	14. Ngāti Porou ki Hauraki	Harbours and Hauraki Gulf/Tikapa Moana	The Deed does not provide for cultural redress in relation to these harbours at this time. Harbours redress will be developed in separate negotiations as soon as practicable.
HAURAKI	15. Ngāti Rāhiri Tumutumu	Harbours and Hauraki Gulf	The settlement does not provide for redress in relation to Tikapa Moana/ the Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Ngāti Rāhiri Tumutumu have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas.
HAURAKI/TAMAKI MAKAURAU	16. Ngāti Paoa	Harbours and Hauraki Gulf	The settlement does not provide for redress in relation to Tikapa Moana/ the Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Ngāti Paoa have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas
HAURAKI/TAMAKI MAKAURAU	17. Ngāti Tamaterā	Harbours and Hauraki Gulf	The settlement does not provide for redress in relation to Tikapa Moana/ Hauraki Gulf or Te Tai Tamawahine. The Crown and Ngāti Tamaterā have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas
HAURAKI/TAMAKI MAKAURAU	18. Ngāti Tara Tokanui	Harbours and Hauraki Gulf	The settlement does not provide for redress in relation to Tikapa Moana/ the Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Ngāti Tara Tokanui have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas.
MANAWATU	19. Ngāti Apa (North Island)	PUKEPUKE LAGOON, OMARUPAPAKO, RUAKIWI	There will be Statutory Acknowledgements over three sites, five waterways, and the coastal marine area within Ngāti Apa's area of interest, including: Pukepuke Lagoon, Omarupapako, Ruakiwi. Deeds of Recognition oblige the Crown to consult with Ngāti Apa and have regard to their views regarding the special association Ngāti Apa have with a site. They also specify the nature of the input by Ngāti Apa into management of those areas by the Department of Conservation and/or the Commissioner of Crown Lands. There will be five Deeds of Recognition which include Pukepuke Lagoon, Omarupapako, Ruakiwi.

MATAATUA	20. Ngāti Awa	<p>Statutory Acknowledgements of Part of Ohiwa Harbour. The Deed of Settlement provides for the establishment of protocols to promote good working relationships between Ngāti Awa and the Ministry of Fisheries, the Department of Conservation and the Ministry of Culture and Heritage on matters of cultural importance to Ngāti Awa. The Department of Internal Affairs has undertaken to consult Ngāti Awa should the Department conduct a review of the administration by local government of the following: Motiti Island, Tokata Island, Rurima Island, Moutoki Island, Moutohora Island, Whakaari/White Island and Te Paepae o Aotea (Volkner Rocks). Ngāti Awa will also be able to express their views to the Ministry for the Environment on the application of the Treaty and relevant parts of the Resource Management Act in Ngāti Awa's area of interest. The Ministry will monitor the performance of local authorities in Ngāti Awa's area of interest in relation to these matters. In addition, the Crown has written to a number of third parties, such as Environment Bay of Plenty, inviting them to consider meeting with Ngāti Awa to discuss matters of importance to the iwi.</p>
MATAATUA	21. Ngāti Awa	<p>Statutory Acknowledgements register the special association Ngāti Awa has with an area including Part of Ohiwa Harbour. A Deed of Recognition requires the Crown to consult Ngāti Awa and have regard for their views about Ngāti Awa's special association with a particular Crown-owned site. The Deed specifies the nature of Ngāti Awa's input into management of those areas by the Department of Conservation and Commissioner of Crown Lands. There will be four Deeds of Recognition covering the Crown-owned parts including Whakatane, Uretara Island.</p>
TAITOKERAU	22. Ngāti Kuri	<p>TE ONEROA-A-TOHE</p> <p>The settlement will create the Te Oneroa-a-Tohe Board to manage the beach - a new permanent joint committee between iwi, Northland Regional Council and Far North District Council. The Te Oneroa-a-Tohe Board will have 50% iwi members and 50% local authority members. It will be chaired by iwi and make decisions by a 70% majority. The Board will provide governance and direction in order to promote the use, development and protection of the Te Oneroa-a-Tohe/Ninety Mile Beach management area and its resources in a manner which ensures its environmental, economic, social, spiritual and cultural wellbeing for present and future generations. The Board is responsible for developing a Beach Management Plan. It will publicly advertise the plan and seek submissions on it. The Plan will be recognised and provided for in the next revisions of the relevant Regional Policy Statement, Regional Plan and District Plan. The Board will consult with communities through the Beach Management Plan regarding any changes to beach access (eg by changing access points and reducing environmental damage on and to the beach). The feedback from this consultation will influence the Plan which the Board will then implement. The iwi members of the Board will appoint up to half of the hearing panel for consent applications within the beach management area.</p> <p>A statutory acknowledgement recognises the association between Ngāti Kuri and a particular site and enhances Ngāti Kuri's ability to participate in specified resource management processes. The Crown offers statutory acknowledgements over Paxton Point Conservation Area (including Rarawa Beach camp ground), Motuopao Island, Three Kings Islands (Manawatawhi) and Kermadec Islands (Rangitahua).</p>
TAITOKERAU	23. Ngāti Kuri	

TAITOKERAU	24. Ngāi Takoto	TE ONEROA-A-TŌHĒ	<p>The settlement will create the Te Oneroa-a-Tohe Board to manage the beach - a new permanent joint committee between iwi, Northland Regional Council and Far North District Council. The Te Oneroa-a-Tohe Board will have 50% iwi members and 50% local authority members. It will be chaired by iwi and make decisions by a 70% majority. The Board will provide governance and direction in order to promote the use, development and protection of the Te Oneroa-a-Tohe/Ninety Mile Beach management area and its resources in a manner which ensures it's environmental, economic, social, spiritual and cultural wellbeing for present and future generations. The Board is responsible for developing a Beach Management Plan. It will publicly advertise the plan and seek submissions on it. The Plan will be recognised and provided for in the next revisions of the relevant Regional Policy Statement, Regional Plan and District Plan. The Board will consult with communities through the Beach Management Plan regarding any changes to beach access (eg by changing access points and reducing environmental damage on and to the beach). The feedback from this consultation will influence the Plan which the Board will then implement. The iwi members of the Board will appoint up to half of the hearing panel for consent applications within the beach management area.</p>
TAITOKERAU	25. Te Aupōuri	TE ONEROA-A-TŌHĒ	<p>The settlement will create the Te Oneroa-a-Tohe Board to manage the beach - a new permanent joint committee between iwi, Northland Regional Council and Far North District Council. The Te Oneroa-a-Tohe Board will have 50% iwi members and 50% local authority members. It will be chaired by iwi and make decisions by a 70% majority. The Board will provide governance and direction in order to promote the use, development and protection of the Te Oneroa-a-Tohe/Ninety Mile Beach management area and its resources in a manner which ensures its environmental, economic, social, spiritual and cultural wellbeing for present and future generations. The Board is responsible for developing a Beach Management Plan. It will publicly advertise the plan and seek submissions on it. The Plan will be recognised and provided for in the next revisions of the relevant Regional Policy Statement, Regional Plan and District Plan. The Board will consult with communities through the Beach Management Plan regarding any changes to beach access (eg by changing access points and reducing environmental damage on and to the beach). The feedback from this consultation will influence the Plan which the Board will then implement. The iwi members of the Board will appoint up to half of the hearing panel for consent applications within the beach management area.</p>
TAITOKERAU	26. Te Aupōuri		<p>A statutory acknowledgement recognises the association between Te Aupōuri and a particular site and enhances Te Aupōuri's ability to participate in specified resource management processes. The Crown offers statutory acknowledgements over Paxton Point Conservation Area (including Rarawa Beach camp ground), Motuopao Island, Three Kings Islands (Manawatawhi), Kermadec Islands (Rangitahua), Simmonds Islands, North Cape Scientific Reserve</p>

TAKITIMU	27. Ahuriri Hāpu	TE WHANGANUI-Ā-OROTU	<p>In the Deed of Settlement the Crown acknowledges that Te Whanganui-ā-Orotu and the islands in it were prized taonga of Ahuriri Hāpu and remain valued today. The Crown also recognises the role of Ahuriri Hāpu as Kaitiaki of Te Muriwai o Te Whanga (the Ahuriri Estuary and catchment areas). In recognition of this, the settlement legislation will also establish a permanent statutory committee called Te Komiti Muriwai o Te Whanga. The purpose of the Komiti is to promote the protection and enhancement of the environmental, economic, social, spiritual, historical and cultural values of Te Muriwai o Te Whanga (Ahuriri Estuary) for present and future generations. Mana Ahuriri Trust will hold the permanent chair position and four of the eight seats. Other seats are held by the Department of Conservation, Hawke's Bay Regional Council, Napier City Council and Hastings District Council. Te Komiti Muriwai o Te Whanga will provide guidance and coordination in the management of Te Muriwai o Te Whanga to local authorities and Crown agencies that exercise functions in relation to Te Muriwai o Te Whanga. The Komiti will prepare and approve a plan for Te Muriwai o Te Whanga called the Te Muriwai o Te Whanga Plan. To assist Ahuriri Hāpu to engage in management of Te Muriwai o Te Whanga, on the settlement date the Crown will provide Ahuriri Hāpu with a \$500,000 kaitiaki fund.</p>
TAKITIMU	28. Maungaharuru-Tangitū Hāpu		<p>A Statutory Acknowledgement recognises the association between the Maungaharuru-Tangitū Hāpu and a particular site or area and enhances the ability of the Hāpu to participate in specified Resource Management processes. Deeds of Recognition oblige the Crown to consult with the Maungaharuru-Tangitū Hāpu on specified matters and have regard to their views regarding their special associations with certain areas. The Crown offers the Maungaharuru-Tangitū Hāpu Statutory Acknowledgements and Deeds of Recognition over the following areas: the Hāpu coastal marine area, rocks and reefs of Tangitū (coastline), Tangoio marginal strip, Waipātiki Beach marginal strip, Whakaari Landing Place Reserve.</p>
TAKITIMU	29. Te Rohe o Te Wairoa		<p>The settlement legislation will provide for the establishment of a joint board known as Te Rohe o Te Wairoa Reserves Board-Matangiārau to jointly administer and manage the Ngamotu Lagoon Wildlife Management Reserve, the Whakamahi Lagoon Government Purpose (Wildlife Management) Reserve, the Rangihoua/Pilot Hill Historic Reserve and two Local Purpose (Esplanade) Reserves. The board will comprise three members appointed by Tātau Tātau o Te Wairoa Trust and three members appointed by the Wairoa District Council.</p>

TAKITIMU	30. Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua	Wairarapa Moana Statutory Board	<p>Joint redress legislation will provide for the establishment of a Wairarapa Moana Statutory Board (the Board). The Board will comprise 4 members appointed by the Settlement Trust (including two members representing Papawai Marae and Kohunui Marae), one member appointed by the Rangitāne Tū Mai Rā Trust, 2 members appointed by the Minister of Conservation, 2 members appointed by Wellington Regional Council and one member appointed by South Wairarapa District Council. The Board will act as a guardian of the Wairarapa Moana and the Ruamahanga River catchment for the benefit of the present and future generations by: administering the Wairarapa Moana reserves for the purposes set out in the Reserves Act 1977 and the joint redress legislation including to protect and enhance their cultural, spiritual and ecological values being the manager of the Wairarapa Moana marginal strips providing leadership on the sustainable management of the Wairarapa Moana and the Ruamahanga River catchment promoting the restoration, protection and enhancement of the social, economic, cultural, environmental and spiritual health and wellbeing of Wairarapa Moana and the Ruamahanga River catchment as they relate to natural resources.</p>
TAMAKI MAKAURAU	31. Ngāti Manuhiri		<p>Statutory Acknowledgements recognise the association between Ngāti Manuhiri and ability to participate in specified Resource Management Act processes. The Crown offers Statutory Acknowledgements over Ngāti Manuhiri coastal area of interest; the Hoteo, Puhoi, Pakiri, Matakana, Waiwerawera and Poutawa Rivers; Ngaroto lakes (Spectacle, Slipper, Tomarata and Ngaroto lakes); Tohitohi o Reipae (The Dome); Pohuehue Scenic Reserve; and Kawau Island.</p>
TAMAKI MAKAURAU	32. Te Kawerau ā Maki	TAMAKI COLLECTIVE	<p>Te Kawerau ā Maki will also receive cultural redress through Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed (the Tāmaki Collective), including: vesting of particular Crown-owned portions of maunga in Tāmaki Makaurau and motu of the inner Hauraki Gulf governance arrangements relating to four motu of the inner Hauraki Gulf</p>
TAMAKI MAKAURAU	33. Ngāti Whātua o Kaipara	Te Kawenata Taiao o Ngāti Whātua o Kaipara	<p>Te Kawenata Taiao o Ngāti Whātua o Kaipara (a Co-management Agreement) will be entered into on settlement between the Department of Conservation and Ngā Maunga Whakāhii o Kaipara Development Trust. Te Kawenata Taiao o Ngāti Whātua o Kaipara provides a framework for how Ngāti Whātua o Kaipara and the Department of Conservation will establish and maintain a positive and enduring partnership regarding public conservation land within the Ngāti Whātua o Kaipara area of interest.</p>

TAMAKI MAKAURAU	34. Ngāi Tai ki Tāmaki	<p>The Statutory Acknowledgements are acknowledgements by the Crown of statements by Ngāi Tai ki Tāmaki of Ngāi Tai ki Tāmaki's special cultural, historical, or traditional association with certain areas of Crown-owned land. Relevant consent authorities (ie local authorities), the Environment Court and Heritage New Zealand Pouhere Taonga must have regard to these statements for certain purposes, in particular resource consent applications under the Resource Management Act 1991 for an activity within, adjacent to, or directly affecting a statutory acknowledgement area and certain applications under the Heritage New Zealand Pouhere Taonga Act 2014. The acknowledgements also require that the local authorities provide Ngāi Tai ki Tāmaki with summaries of all resource consent applications that may affect the areas named in these acknowledgements prior to any decision being made on those applications - a specified coastal marine area.</p>
TAMAKI MAKAURAU	35. Ngāi Whātua o Kaipara	<p>A Coastal Statutory Acknowledgement area - Kaipara Harbour. The Deed does not provide for cultural redress in relation to Kaipara Harbour, as that is to be developed in negotiations with the Crown that will include Ngāi Whātua o Kaipara at a future date.</p>
TAURANGA MOANA	36. Ngāi Te Rangī and Ngā Pōtiki	Coastal Statutory Acknowledgment - Waiorooro ki Maketu
TAURANGA MOANA	37. Ngāi Pūkenga	A Statutory Acknowledgement recognises the association between Ngāi Pūkenga and a particular site or area and enhances the iwi's ability to participate in specified resource management processes. The Crown offers a statutory acknowledgement over the following areas, Te Tumu to Waihi Estuary, Manaiia Harbour
TE ARAWA	38. Ngāi Tuwharetoa (Bay of Plenty)	A Joint Advisory Committee will be established over the Matatā Scenic Reserve and the Matatā Wildlife Refuge Reserve. The committee will be made up of equal numbers of members nominated by Ngāi Tuwharetoa (Bay of Plenty) and the Department of Conservation and will provide for the exchange of advice regarding each body's management of land under its respective ownership .
TE ARAWA	39. Waitaha	A Statutory Acknowledgement recognises the association between Waitaha and a particular site or area and enhances the ability of Waitaha to participate in specified Resource Management Act processes. The settlement provides statutory acknowledgements over the coastal area from Maketū to Mauao
TE MOANA O RAUKAWA	40. Ngāi Toa Rangātira	Kapiti Island was, and is, a place of immense significance to Ngāti Toa Rangātira. The Kapiti Island redress will continue to protect the high conservation values of Kapiti Island. Public access to the island will continue to be restricted. The Kapiti Island redress package includes: A Strategic Advisory Committee will be established with governance responsibilities over the Kapiti Island North Nature Reserve site and the Kapiti Island Nature Reserve site. The Committee will include Ngāti Toa Rangātira and the Department of Conservation with provision for other iwi to be included in the future. Reserve site and the Kapiti Island Nature Reserve site will be jointly approved by the Strategic Advisory Committee and the Wellington/ Hawke's Bay Conservation Board.

TE MOANA O RAUKAWA	41. Ngāti Toa Rangātira	KAPITI ISLAND	<p>A Statutory Acknowledgement recognises the association between Ngāti Toa Rangātira and a particular site or area and enhances the iwi's ability to participate in specified Resource Management processes. Deeds of Recognition oblige the Crown to consult with Ngāti Toa Rangātira on specified matters and have regard to their views regarding their special associations with certain areas. The Crown offers a Coastal Statutory Acknowledgement over the following areas, Te Tau Ihu coastal marine area, Cook Strait, Te Awarua-o-Porirua Harbour, Thoms Rock/Tokahaere, Kapukapuāriki Rocks, Toka-a-Papa Reef, Tawhitikuri/Goat Point, Wellington Harbour (Port Nicholson).</p>
TE MOANA O RAUKAWA	42. Ngāti Toa Rangātira	POUTIAKI	<p>Poutiaki is the Ngāti Toa Rangātira word for guardianship of an area. The redress recognises the role of Ngāti Toa Rangātira as a kaitiaki of Cook Strait and the coastal marine area in Porirua Harbour, Port Underwood and Pelorus Sound. The Poutiaki redress primarily focuses on iwi identification of values, principles and issues in a Poutiaki plan which is to be produced by Ngāti Toa Rangātira. The Poutiaki Plan will be considered by Regional Councils within the regional planning framework. Ngāti Toa Rangātira will also be one of the interested parties invited to participate in a Cook Strait Forum to be chaired by the Wellington Regional and Marlborough District Councils. The forum will bring together Local and Central Government, iwi and other entities with interests in the Cook Strait to discuss issues of concern about the Cook Strait coastal marine area and share information.</p>
TE MOANA O RAUKAWA	43. Ngāti Toa Rangātira		<p>The Crown offers Statutory Acknowledgements (SA) and Deeds of Recognition (DoR) in relation to the following areas within Ngāti Toa Rangātira's area of interest of Mana Island (SA, DoR), Red Rocks Scientific Reserve (SA, DoR), Pukerua Bay Scientific Reserve (SA, DoR), Oteranga Bay Marginal Strip (SA)</p>
TE TAI RAWHITI	44. Ngai Tāmanuhiri		<p>Statutory Acknowledgement recognises the association between Ngai Tāmanuhiri and a particular site or area and enhances Ngai Tāmanuhiri's ability to participate in specified Resource Management Act processes. The Crown offers Statutory Acknowledgements over the Ngai Tāmanuhiri coastal marine area.</p>
TE TAI RAWHITI	45. Ngai Tāmanuhiri		<p>A Statutory Acknowledgement recognises the association between Ngai Tāmanuhiri and a particular site or area and enhances Ngai Tāmanuhiri's ability to participate in specified Resource Management Act processes. The Crown offers Statutory Acknowledgements over Waipaoa River, and the Ngai Tāmanuhiri coastal marine area.</p>
TE TAI RAWHITI	46. Ngai Tāmanuhiri		<p>The settlement includes an undertaking to establish a Central Leadership Group, which will also include Rongowhakaata and Te Whakarau, to provide a forum for Tūranga iwi to engage with central government. The settlement will also establish through legislation a Local Leadership Body with members appointed by Ngai Tāmanuhiri, Rongowhakaata, Te Whakarau and the Gisborne District Council to enhance the engagement of Tūranga iwi in local decision making.</p>

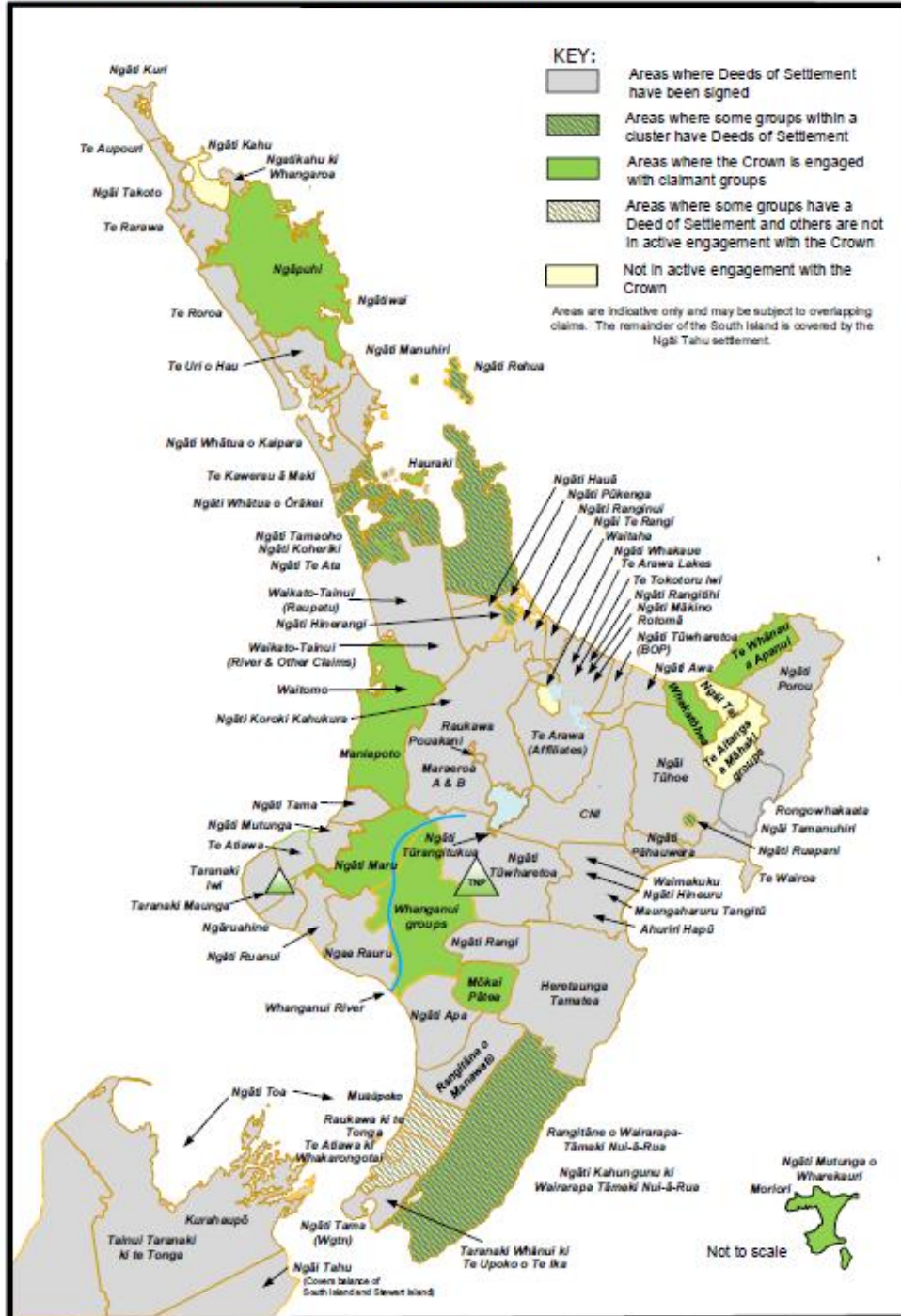
TE TAU IHU	47. Ngāti Apa ki te Rā Tō		The Crown offers a Coastal Statutory Acknowledgment over all the Te Tau Ihu coastal marine area north of the Ngāi Tahu takiwā. Acknowledgements and deeds in the agreement relate to the Marine Reserve and Westhaven (Whanganui Inlet)
TE TAU IHU	48. Ngāti Kōata	TE TAU IHU COASTAL MARINE AREA	The Crown offers a Coastal Statutory Acknowledgment over the following area: Te Tau Ihu coastal marine area. Statutory Acknowledgments and Deeds of Recognition are non-exclusive redress, meaning more than one iwi can have a Statutory Acknowledgment or Deed of Recognition over the same site.
TE TAU IHU	49. Ngāti Kōata	RURUKU NGĀI TAI	The Deed of Settlement provides for Ruruku Ngā Tai, a statement of the maritime association of Ngāti Kōata. It includes an Iwi Management Plan lodged with Tasman District Council, Nelson City Council and Marlborough District Council.
TE TAU IHU	50. Ngāti Kūia	TE TAU IHU COASTAL MARINE AREA	The Crown offers a Coastal Statutory Acknowledgment over the following area: Te Tau Ihu coastal marine area. Statutory Acknowledgments and Deeds of Recognition are non-exclusive redress, meaning more than one iwi can have a Statutory Acknowledgment or Deed of Recognition over the same site.
TE TAU IHU	51. Ngāti Kūia		The Crown offers Statutory Acknowledgments and Deeds of Recognition in relation to the following Titi Island Nature Reserve and Chetwode Islands Nature Reserve and associated rocks Pelorus Sound, Takapourewa (Stephens Island), Parikarearea (Maungatapu) Tītīrangi Bay, Marlborough Sounds, Te Matau (Separation Point) and Jointly with other iwi Tarakaipa Island, Paroirangi (Kenepuru Sound), Te Ope o Kupe (Anamahanga/Port Gore), Puhikereru/Mt Furneaux, The Brothers Islands, Kohi te Wai (Nelson)
TE TAU IHU	52. Ngāti Rārua	TE TAU IHU COASTAL MARINE AREA	The Crown offers a Coastal Statutory Acknowledgment over all the Te Tau Ihu coastal marine. Statutory Acknowledgments and Deeds of Recognition are non-exclusive redress, meaning more than one iwi can have a Statutory Acknowledgment or Deed of Recognition over the same site.
TE TAU IHU	53. Ngāti Tama ki Te Tau Ihu	TE TAU IHU COASTAL MARINE AREA	The Crown offers a Coastal Statutory Acknowledgment over all the Te Tau Ihu coastal marine. Statutory Acknowledgments and Deeds of Recognition are non-exclusive redress, meaning more than one iwi can have a Statutory Acknowledgment or Deed of Recognition over the same site.
TE TAU IHU	54. Rangitāne o Wairau	TE TAU IHU COASTAL MARINE AREA	The Crown offers a Coastal Statutory Acknowledgment over all the Te Tau Ihu coastal marine area north of the Ngāi Tahu takiwā. Acknowledgements and deeds in the agreement relating to Wairau Lagoons, Paroirangi, Te Ope a Kupe, Puhikereru, The Brothers Islands, Kohi te Wai
TE TAU IHU	55. Te Ātiawa o Te Waka-a-Māui		Kaitiaki The settlement provides for the appointment of Te Ātiawa as statutory kaitiaki with the ability to provide advice in relation to the restoration of native flora and fauna in the following areas: Matapara/Pickersgill Island, Blumine Island, Allports Island, Mabel Island, Amerikihati Island. The Crown also acknowledges the role of Te Ātiawa as kaitiaki over the coastal marine area in Queen Charlotte Sound. Te Ātiawa will produce a kaitiaki plan which will be taken into account by the Marlborough District Council.

TE TAU IHU	56. Te Ātiawa o Te Waka-a-Māui		<p>Waikawa Bay and Waikawa Marina The settlement provides for the Crown to provide Te Ātiawa with advice and/or expertise to undertake a study evaluating the options to improve the quality of the marine environment in Waikawa Bay.</p>
TE TAU IHU	57. Te Ātiawa o Te Waka-a-Māui		<p>Memorandum of Understanding. The settlement provides for a Memorandum of Understanding to be created between Te Ātiawa and the Department of Conservation. The Memorandum of Understanding will require that when the Department of Conservation undertake certain activities within Matapara/Pickersgill Island and Otuwhero (Motueka), the trustees of Te Ātiawa Trust will be consulted.</p>

Progress Map

The map below provides an overview of the areas where Treaty settlements have been completed and areas currently subject to negotiations or preparing for negotiations.

FIGURE 1: Completed Treaty Settlements and Current Negotiation



Completed Treaty Settlements & Current Negotiations September 2018 - OTS

Claimant Group Status Summary by Stages in the Negotiation Process

The following table indicates the progress and status of claimant groups in negotiations. It includes settlements that have been implemented. The table is broken down into regional groupings.

GROUP	Mandate recognised by Crown	Terms of Negotiation signed	Agreement in Principle signed	Deed of Settlement signed	Enacted through legislation	Negotiation status
Te Tai Tokerau						
Te Uri o Hāu						Legislation for this settlement was passed on 17 October 2002
Te Roroa						Legislation for this settlement was passed on 25 September 2008
Te Rarawa						Legislation for this settlement was passed on 9 September 2015
Te Aupōuri						Legislation for this settlement was passed on 9 September 2015
Ngāi Takoto						Legislation for this settlement was passed on 9 September 2015
Ngāti Kuri						Legislation for this settlement was passed on 9 September 2015
Ngāti Kahu						A collective Agreement in Principle for Te Hiku iwi was signed on 16 January 2010
Ngāpuhi						Terms of Negotiation were signed on 22 May 2015
Ngatikahu ki Whangaroa						Legislation for this settlement was passed on 16 August 2017
Ngātiwai						A Deed of Mandate was recognised by the Crown on 21 October 2015
Tāmaki Makaurau						
Ngāti Whātua Ōrākei						Legislation for this settlement was passed on 19 November 2012
Ngāti Whātua o Kaipara						Legislation for this settlement was passed on 6 June 2013
Te Kawerau ā Maki						Legislation for this settlement was passed on 9 September 2015
Ngāti Manuhiri						Legislation for this settlement was passed on 19 November 2012
Ngāti Rehua-Ngātiwai ki Aotea						A Deed of Settlement was initialled on 19 December 2016
Tāmaki Collective						Legislation for this settlement was passed on 24 July 2014
Ngāti Tamaoho						Legislation for this settlement was passed on 5 July 2018
Ngāti Kōheriki						Terms of Negotiation were signed on 6 June 2013
Ngāti Te Aka						Terms of Negotiation were signed on 29 June 2011
Te Ākitai Waohua						An Agreement in Principle was signed on 16 December 2016
Ngāti Whātua remaining and Kaipara Harbour						An Agreement in Principle was signed on 18 August 2017

Te Whānau a Apanui					Terms of Negotiation were signed on 7 September 2017
CNI					
Central North Island Collective					Legislation for this settlement was passed on 25 September 2008
Ngāti Manawa					Legislation for this settlement was passed on 28 March 2012
Ngāti Whare					Legislation for this settlement was passed on 28 March 2012
Ngāti Tūhoe					Legislation for this settlement was passed on 24 July 2014
Ngāti Tūwharetoa					Legislation for this settlement was introduced on 1 August 2017
Te Arawa					
Te Arawa Lakes					Legislation for this settlement was passed on 25 September 2006
Te Arawa Affiliates					Legislation for this settlement was passed on 25 September 2008
Ngāti Mākiriri					Legislation for this settlement was passed on 31 July 2012
Waiataha					Legislation for this settlement was passed on 6 June 2013
Pouakani					Legislation for this settlement was passed on 12 December 2000
Ngāti Tūrangitukua					Legislation for this settlement was passed on 14 October 1999
Ngāti Rangiteaorere (Te Tokotoru)					Legislation for this settlement was passed on 9 April 2014
Tapuika (Te Tokotoru)					Legislation for this settlement was passed on 9 April 2014
Ngāti Rangiwewehi (Te Tokotoru)					Legislation for this settlement was passed on 9 April 2014
Ngāti Whakaue					Terms of Negotiation were signed on 3 April 2014
Ngāti Rangitahi					Terms of Negotiation were signed on 31 October 2015
Te Taiāwhitū					
Tūranganui-a-Kiwa					An Agreement in Principle was signed on 29 August 2008
Rongowhakaata					Legislation for this settlement was passed on 31 July 2012
Ngāti Taranuhiri					Legislation for this settlement was passed on 31 July 2012
Ngāti Porou					Legislation for this settlement was passed on 29 March 2012
Takārimu					
Ngāti Pāhauwera					Legislation for this settlement was passed on 29 March 2012
Maungaharuru Tangitū Hapū					Legislation for this settlement was passed on 9 April 2014
Ngāti Hineuru					Legislation for this settlement was passed on 29 June 2016
Ahuriri Hapū					A Deed of Settlement was signed on 2 November 2016
Ngāti Kahungunu ki Heretaunga Tamarua					Legislation for this settlement was passed on 21 June 2018
Te Tira Whakaemi o Te Wairoa					Legislation for this settlement was passed on 6 September 2018
Rangitāne o Wairarapa-Tāmaki Nui ā Rua					Legislation for this settlement was passed on 10 August 2017
Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua					A Deed of Settlement was initiated on 22 March 2018
Hawkes Bay Regional Planning Committee Bill					Legislation was passed on 12 August 2015

Te Tai Hauāuru	
Ngāti Ruanui	Legislation for this settlement was passed on 5 May 2003
Ngāti Tama	Legislation for this settlement was passed on 25 November 2003
Ngāa Rauo Kiritahi	Legislation for this settlement was passed on 27 June 2005
Ngāti Mutunga	Legislation for this settlement was passed on 21 November 2006
Ngāti Apa (North Island)	Legislation for this settlement was passed on 9 December 2010
Te Iwi o Whanganui (River Claim)	Legislation for this settlement was enacted on 15 March 2017
Rangiaene o Manawatū	Legislation for this settlement was passed on 7 December 2016
Te Ātiawa (Taranaki)	Legislation for this settlement was passed on 30 November 2016
Ngāruahine	Legislation for this settlement was passed on 30 November 2016
Taranaki Iwi	Legislation for this settlement was passed on 30 November 2016
Ngāti Rangī	Legislation for this settlement was introduced on 21 June 2018
Ngāti Maru	Legislation for this settlement was introduced on 21 June 2018
Te Korowai o Waimānuru	An Agreement in Principle was signed on 20 December 2017
Taranaki Māunga	Terms of Negotiation were signed on 2 February 2017
Whanganui Iwi – Ngāti Hāua	A Record of Understanding was signed on 20 December 2017
Whanganui Lands – Southern Groups	Terms of Negotiation were signed on 24 July 2017
Whanganui Lands – Northern Groups	Terms of Negotiation were signed on 24 July 2017
Te Whanganui ā Tara / Te Waipounamu	
Ngāti Tahu	Legislation for this settlement was passed on 1 October 1998
Taranaki Whānui ki Te Upoko o Te Ika	Legislation for this settlement was passed on 30 July 2009
Muaūpoko	Terms of Negotiation were signed on 14 December 2013
Ngāti Kūia	Legislation for this settlement was passed on 17 April 2014
Ngāti Apa ki te Rā Tō	Legislation for this settlement was passed on 17 April 2014
Rangiaene o Wairau	Legislation for this settlement was passed on 17 April 2014
Ngāti Toa Rangāira	Legislation for this settlement was passed on 17 April 2014
Ngāti Kōkō	Legislation for this settlement was passed on 17 April 2014
Te Ātiawa o Te Waka-ā-Maui	Legislation for this settlement was passed on 17 April 2014
Ngāti Rānua	Legislation for this settlement was passed on 17 April 2014
Ngāti Tama ki Te Tau Ihu	Legislation for this settlement was passed on 17 April 2014
Ngāti Tama (Wellington)	Terms of Negotiation were signed on 28 March 2014
Mōriori	An Agreement in Principle was signed on 16 August 2017
Ngāti Mutunga o Wharekauri	Terms of Negotiation were signed on 16 March 2015

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