THE ADEQUACY OF LAWS FOR THE PROTECTION OF INDIGENOUS PEOPLES CULTURAL HERITAGE AND CUSTOMARY RIGHTS IN NEW ZEALAND

Ka kuhu ahau ki te ture, hei matua mo te pani

I seek refuge in the law, for it is a parent of the oppressed (Te Kooti Arikirangi Te Turuki)

Judge Te Kani Williams

An important starting point for this paper is setting out the fundamental basis upon which Māori connect with their environment and their lands. Former Chief Māori Land Court Judge, who then became a Justice of the High Court, ET Durie provided the following analyses of the nature of Māori rights to land;

> *Maori see themselves not as masters of the environment but as members of it. The environment owed its origins to the union of Rangi, the sky, and Papatuanuku, the earth mother, and the activities of their descendent deities who control all natural resources and phenomena. The Maori forebears are siblings to these deities. Maori thus relate by whakapapa (genealogy) to all life forms and natural resources. There is whakapapa for fish and animal species just as there are for people. The use of a resource, therefore, required permission from the associated deity. In this order, all things were seen to come from the gods and the ancestors as recorded in whakapapa.*
>
> *There are at least two classes of land rights – the right of the community associated with the land, and the use rights of individuals or families.*[1]

Where have we come from:

On the 17th of October 1877, Chief Justice Sir James Prendergast's statements when delivering judgment in the case of ***Wi Parata v The Bishop of Wellington*** ruled that the courts lacked the ability to consider claims based on aboriginal or native title. The Treaty of Waitangi was 'worthless' because it had been signed 'between a civilised nation and a group of savages' who were not capable of signing a treaty. Since the treaty had not been incorporated into domestic law, it was a 'simple nullity'. It is from this base that, in New Zealand in 2022, our Courts are now issuing decisions decreeing that tikanga Māori is part of our common law in New Zealand.

My interest in this topic arises due to what I see as a need for indigenous rights to be recognised, and I consider that our Courts play a primary role in ensuring that this occurs. It is fundamentally important

[1] Durie, E.T. 'Custom law: address to the New Zealand Society for Legal and Social Philosophy' in Victoria University of Wellington Law Review (1994) 24: 325-331, p.328.

for Māori to have their rights, and their systems of governance, acknowledged alongside the law of the state as a matter of justice. Indigenous governance and processes for managing social interactions for dealing with conflict and social disruptions resonate particularly with Indigenous peoples. Utilising all systems of governance can help Maori address some of the big confronting societal issues they are facing at the moment.

I'd like to see the tino rangatiratanga (self-determination) space further developed, which will sometimes require stepping back from the kāwanatanga (governance) side of the equation. Te Tiriti provides us with a good framework to think about those relationships, and we can think about how to establish mutually respectful, balanced relationships between the kāwanatanga space and the tino rangatiratanga space. Again, I see our Courts as playing a vital role in helping to establish that balance, particularly when Government entities are failing to apply state law which requires that they acknowledge and give effect to Indigenous rights.

Importantly, not only are our Courts are being asked to recognise tikanga (Māori customary values and laws), but we as judges are being asked to apply tikanga as part of our common law. That is not a simple task particularly if you don't have a background in matters Māori.

Notably Chief Justice Elias, as she then was, stated in her dissenting judgement in *Takamore v Clarke*[2] that *"Maori custom according to tikanga is therefore part of the values of the New Zealand common law*".

The Trick, as Justice Joe Williams' says in relation to what he refers to as the the1st law (Tikanga Māori) and the 2nd law (Western Concepts) in Aotearoa, NZ is that we need to find a way for the 1st and 2nd laws to co-exist in the same space. He says that in order for that to occur we need to be able to:

- Discern basic Treaty principles/tikanga
- See them revealed in facts as they unfold before you as you would in any other relevant legal category
- See how they can be applied on their own terms, but alongside the other legal principles you must apply in your work

I would add as a further bullet point, that there is a need for the Judiciary to understand the nuances involved with tikanga, because discerning them is only part of the solution - understanding them is fundamental to being able to apply them, so that they can be taken into account and provide for the tribal nuances that exist.

[2] *Takamore v Clarke* [2012] NZSC 116.

TE TIRITI/THE TREATY

The Treaty of Waitangi is New Zealand's founding document. It takes its name from the place in the Bay of Islands where it was first signed, on 6 February 1840. This day is now a public holiday in New Zealand.

The Treaty is a broad statement of principles on which the British and Māori made a political compact to found a nation state and build a government in New Zealand.

Te Tiriti/The Treaty is an agreement, in Māori and English, that was made between Hobson on behalf of the British Crown and about 543 Māori rangatira (chiefs). Te Tiriti o Waitangi includes Hobson's signature on behalf of the Crown and as stated 543 signatures of rangatira, and is therefore legally the 'document of significant signature'. The English version has only 39 signatures – and those 39 rangatira had debated the meaning of the Māori text, before signing what they believed was te Tiriti.

The document in both versions has three articles. In the English version, Māori are said to have ceded the sovereignty of New Zealand to Britain; Māori give the Crown an exclusive right to buy lands they wish to sell, and, in return, are guaranteed full rights of ownership of their lands, forests, fisheries and other possessions; and Māori are given the rights and privileges of British subjects.

The Treaty in Māori was deemed to convey the meaning of the English version, but there are important differences:

- 'Sovereignty' was translated as 'kawanatanga' (governance). This was intended to allow the Crown to govern control of the lands held by settlers and retain their right to manage their own lands, possessions and affairs.
- The English version guaranteed Māori 'undisturbed possession' of all their 'properties', but the Māori version guaranteed to Māori 'tino rangatiratanga' (full authority) over 'taonga' (land, resources, treasures, which may also be intangible).

Different understandings of the Treaty have long been the subject of debate. Māori understanding was at odds with the understanding of those negotiating the Treaty for the Crown, and as Māori culture in 1840 was primarily an oral one, Māori society valued the spoken word, therefore explanations given at the time were as important as the wording of the document. In other words, what was said at the time would matter much more than what was signed (the opposite of the British model). Notably, the missionaries verbally assured rangatira that their sovereignty was acknowledged.

More importantly, Crown representatives also made oral undertakings and assurances to Māori, which included an undertaking to respect Māori customs and law. The Waitangi Tribunal has held that these also form part of the agreement reached.[3]

[3] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti* | *The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 526–527.

In the *Muriwhenua Land Report* the Waitangi Tribunal found that when the Treaty was signed Māori expected that their customary law would continue because of assurances from British representatives.[4] The Tribunal found that the remarks of Tamati Waka Nene ("you must preserve our customs") were typical of Māori opinion.[5] Such an expectation was consistent with common law principles that applied to colonies. In this sense article two may be seen as declaratory of these common law principles.[6]

Under article 3 of the English text, the Crown imparted to Māori its protection as well as all the rights and privileges of British subjects. A similar undertaking was conveyed in article 3 of the Māori text, which provides that the Crown will care for Māori and give to Māori the same rights and duties of citizenship as the people of England.[7] Article 3 has been understood as a guarantee of equity between Māori and other New Zealanders.[8]

With respect to articles 1 and 2 of te Tiriti, the Waitangi Tribunal has also observed:[9]

> *The guarantee of tino rangatiratanga requires the Crown to acknowledge Māori control over their tikanga, resources, and people and to allow Māori to manage their own affairs in a way that aligns with their customs and values*.

Within te ao Māori, rangatiratanga can embody the authority of a rangatira (a Chief) but importantly also that of the people, being the whānau (family), hapū (sub-tribe) and iwi (tribe). It involves the exercise of mana in accordance with and qualified by tikanga and its associated kawa and, through tikanga, the managing of a dynamic interface between people, their environment and the non-material world[10]. I explain these terms of rangatiratanga, mana, tikanga and kawa later in this paper.

Te Tiriti envisaged the continuing exercise of rangatiratanga while granting a place for kawanatanga. The Waitangi Tribunal has described it as providing for "different spheres of influence" that allowed for both the independent exercise of rangatiratanga by Māori and kāwanatanga by the Crown with an expectation that there would be an independant, but linked sphere where joint decisions would be made. It is within this joint sphere that I believe the Courts have a role to ensure that the Treaty relationship is upheld.

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4 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 110–115.

5 Ibid at 113.

6 McHugh "The Māori Magna Carta", at 146

7 IH Kawharu (ed) Waitangi: *Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 321.

8 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

9 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 28. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 21; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

10 New Zealand Māori Council Kaupapa: te wāhanga tuatahi (New Zealand Māori Council, Wellington, 1983) at 5–6; Hirini Moko Mead Tikanga Māori: Living by Māori Values (rev ed, Huia Publishers, Wellington, 2016) at 41–42 and 229; and Tāhū o te Ture | Ministry of Justice He Hīnātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice (March 2001) at 36–38. See also the discussion in He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation (January 2016) at 34.

RANGATIRATANGA

The concept of rangatiratanga was said to have developed in the 19th century and denotes the concept of power, which had generally been referred to as mana. The concept of mana for Māori as a political power denoted absolute authority. It was absolute in the sense that it was commensurate with independence that was exercised by hapū and an exercise of authority that could not be interfered with by others. That power was generally bestowed on a rangatira (leader or chief),and could only be bestowed by the people (not self-bestowed) and exercised in a manner that the people (hapū) thought was correct or right.

For Māori, good leadership depended upon how well those leaders responded to their people and how well they were able to protect them and their whenua (lands).

In essence, rangatiratanga is the working out of a moral contract between a leader, his people and his god. It is a dynamic and not a static concept, emphasizing the reciprocity between the human, material and non-material worlds. In a pragmatic sense it means the wise administration of all assets possessed by a group for that group's benefit; in a word, trusteeship.[11]

Sir Hugh Kawharu opined that one of the features of rangatiratanga was not only the ability to control and care for the land and resources in the area of a hapū or iwi, but equally important was the exercise of rangatiratanga, which usually took the form of allowing others Māori and non-Māori, to enter, and enjoy the lands and resources under the dominion of a particular hapū or iwi, in accordance with their tikanga.

From a Māori perspective, it is the substance of this rangatiratanga that needs to be upheld and not interfered with through the guarantee of tino rangatiratanga. In effect, and as outlined earlier, te Tiriti envisages the co-existence of different but intersecting systems of political and legal authority.[12]

Tino rangatiratanga is exercised within te ao Māori every day and independently of state law, in accordance with tikanga Māori. However, in some situations, consistency with te Tiriti may require that provision for the exercise of tino rangatiratanga be made in legislation. Implicit in this is that te Tiriti requires careful thought about what responsible kāwanatanga involves.

In 2019, the Government established a Declaration Working Group to develop a plan and an engagement strategy to realise the UN Declaration. They identified[13] the potential for a Tiriti model based around 'spheres of influence' which is reflected below[14].

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11 McCully Matiu and Margaret Mutu *Te Whānau Moana, Ngā Kaupapa me ngā Tikanga: Customs and Protocols* (Reed, Auckland, 2003), p169.

12 See discussion in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti* | *The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 524; Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 42.

13 As has the Waitangi Tribunal

14 Report of the Working Group on a Plan to realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand, Diagram 1, p11

Rangatiratanga/Joint/Kāwanatanga Spheres (The blue represents rangatiratanga)[15].

Fig. 1

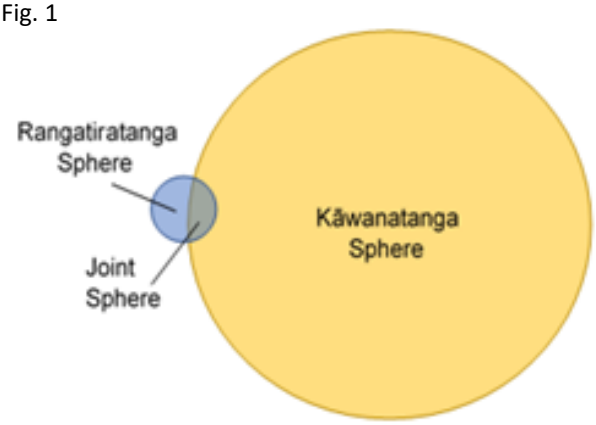
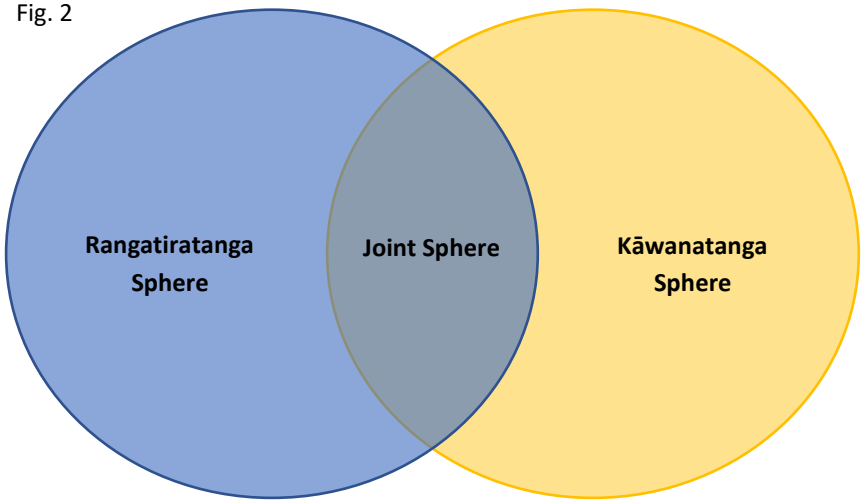


Fig. 2



The rangatiratanga(blue) sphere reflects Māori governance over people and places. The kāwanatanga sphere represents Crown governance. You will note in figure 1, the miniscule scale of the rangatiratanga sphere. That, from my perspective, has been the position in New Zealand for many years and to the present day.

Figure 2 depicts what I consider Māori thought would be reflected in Te Tiriti and had anticipated to be the position as at 1840. It continues to be what Māori desire now. There is a large 'joint sphere', in which Māori and the Crown share governance over issues of mutual concern.

[15] In their report, the DWG identified that the first diagram reflected the position in 2019, and the second diagram was what they proposed could occur by 2040.

If they choose, Māori must be able to participate in Crown governance. This is reinforced by Article 3 of te Tiriti, which confirms Māori equity and equality. There is much room for improvement in the kāwanatanga sphere, as Māori remain a minority with their rights vulnerable to the majority and face disproportionate socio-economic disparities.

The spheres, as they currently operate, do not reflect te Tiriti. In my view there needs to be a rebalancing of the spheres, giving greater space for the operation of rangatiratanga over time.

The joint sphere reflecting co-governance might entail a joint governance structure, or it might involve mechanisms for the respective governance entities to coordinate to make law and policy. There may be a need for a Tiriti body or court to regulate jurisdictional boundaries. In the meantime, it is the duty of our Courts to ensure compliance by government with its treaty obligations.

KO AOTEAROA TENEI

In July 2011, the Waitangi Tribunal issued a report entitled *Ko Aotearoa Tēnei* ('This is Aotearoa' or 'This is New Zealand') in response to the Wai 262 claim. The claim is about the place of Māori culture, identity and traditional knowledge in New Zealand's laws, and in government policies and practices. It concerns who controls Māori traditional knowledge, who controls artistic and cultural works such as haka and waiata, and who controls the environment that created Māori culture. It also concerns the place in contemporary New Zealand life of core Māori cultural values such as the obligation of iwi and hapū to act as kaitiaki (cultural guardians) towards taonga (treasured things) such as traditional knowledge, artistic and cultural works, important places, and flora and fauna that are significant to iwi or hapū identity.

It is the Tribunal's first whole-of-government report, addressing the work of more than 20 Government departments and agencies into the Wai 262 claim. In summary, the Tribunal found the following;

> *The Tribunal recommending wide-ranging reforms to laws and policies affecting Māori culture and identity and calling for the Crown-Māori relationship to move beyond grievance to a new era based on partnership.*
>
> *More than 170 years after the Treaty, 'We still seem to bear the burden of mutually felt attitudes from our colonial past', with Māori feeling that their culture is marginalised, while non-Māori fear that Māori will acquire undeserved privileges at their expense.*
>
> *New Zealand, the Tribunal says, is beginning a transition to a new and unique national identity. But for this transition to succeed, 'Over the next decade or so, the Crown–Māori relationship, still currently fixed on Māori grievances, must shift to a less negative and more future focused relationship at all levels.'*
>
> *The Treaty envisages the Crown-Māori relationship as a partnership, in which the Crown is entitled to govern but Māori retain tino rangatiratanga (full authority) over their taonga (treasures). This partnership framework provides the way forward for the Crown-Māori relationship.*
>
> *But, in many respects, current laws and government policies fall short of partnership, instead marginalising Māori and allowing others to control key aspects of Māori culture. This leads to a justified sense of grievance, and also limits the contribution Māori can make to national identity and to New Zealand's economy.*

Current laws, for example, allow others to commercialise Māori artistic and cultural works such as haka and tā moko without iwi or hapū acknowledgement or consent. They allow scientific research and commercialisation of indigenous plant species that are vital to iwi or hapū identity without input from those iwi or hapū. They allow others to use traditional Māori knowledge without consent or acknowledgement. They provide little or no protection against offensive or derogatory uses of Māori artistic and cultural works.

And they sideline Māori and Māori cultural values from decisions of vital importance to their culture – for example, decisions about the flora, fauna and wider environment that created Māori culture, and decisions about how education, culture and heritage agencies support the transmission of Māori culture and identity. Iwi and hapū are therefore unable to fulfil their obligations as kaitiaki (cultural guardians) towards their taonga – yet these kaitiaki obligations are central to the survival of Māori culture.

Ko Aotearoa Tēnei recommends reform of laws, policies or practices relating to health, education, science, intellectual property, indigenous flora and fauna, resource management, conservation, the Māori language, arts and culture, heritage, and the involvement of Māori in the development of New Zealand's positions on international instruments affecting indigenous rights. These recommendations include law changes and the establishment of new partnership bodies in several of these areas.

These reforms aim to establish genuine partnerships in which Māori interests and those of other New Zealanders are fairly and transparently balanced.

Shared authority and jurisdictional arrangements are not novel. New Zealand can learn from other jurisdictions, such as Canada,[16] which is currently in the process of implementing shared jurisdiction arrangements created by modern treaties and self-government agreements between First Nations and the Crown. I hesitate to suggest that Australia may also learn from those examples as well.

TREATY PRINCIPLES

Treaty principles flow from Te Tiriti ō Waitangi - the Treaty of Waitangi.

Our Treaty principle jurisprudence is derived from our Courts and from Waitangi Tribunal Reports, and is constantly evolving. The Treaty principles identified in this jurisprudence include the principles of:

Partnership - *An overarching principle of the Treaty is that the Crown should deal with Maori in an honourable and good faith way,[17] and should ensure the protection and prosperity of Maori as a people including their economic, physical, spiritual and cultural wellbeing.*[18]

Autonomy - *Matters affecting Māori should be determined by Māori.[19]*

Active protection - *A fundamental principle is the protection and preservation of Māori property and taonga[20] as well as the right to control such property in accordance with their own customs[21]and to have*

16 See for example the Impact Assessment Act 2019.

17 *Te Runanga O Wharekauri Rekohu Inc. v Attorney*-General [1993] 2 NZLR 301, CA 305-306.

18 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Orakei Report* (Wai 9, 1987) at 147; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 194.

19 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) at 281-282.

20 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513.

21 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Motunui-Waitara Report* (2 ed, Wai 6, 1989) at 51.

protected their tino rangatiratanga being the full authority, status and prestige with regard to Maori possessions and interests.[22]

Reciprocity – *'The exchange of the right to govern is the right of Māori to retain their full tribal authority and control over their lands and all other valued possessions'.*[23]

Options – *That Māori can pursue a direction based on personal choice. The tribunal has explained that the treaty protected traditional Māori rights, and also gave Māori the rights of British subjects. As a result, Māori have the option to operate in one or other world, or to 'walk in two worlds'.*[24]

Mutual benefit - *Acting in a manner that would enable Maori, despite settlement, not only to survive but to progress because of it.*[25]

Equity – *Māori would be and are now entitled to peace and law and order.*[26]

Equal treatment - *Equal treatment by the law and by all government agencies*[27]

Redress - *Another overarching principle of the Treaty is that the Crown should remedy past breaches in all but very special circumstances.*[28]

These principles have been derived or developed in order for Western society to understand and apply Te Tiriti in a context relevant to the Crown and Māori in the present day. The Courts and the Waitangi Tribunal have sought to consider the broad sentiments, intentions and goals of the treaty and identified its principles on a case-by-case basis. These principles have been developed over time and often been quite controversial. I consider that the Courts should look at a different approach to the application of these principles, and instead of using them as a measuring stick that they, in conjunction with tikanga Māori, become the starting point.

WHAT IS TIKANGA MĀORI & HOW DOES IT FIT

Tikanga Māori, as explained by Ngāti Kahu elders, is the correct way to carry out something in Māori cultural terms.[29] Tikanga sets the parameters of legitimate political and constitutional conduct and tikanga was in turn enhanced by the power and certainty of mana.[30]

Tikanga Māori, for the purposes of this conference, is the foundation of Māori understandings of rights in respect of their land and the natural environment and all things that affect their iwi (tribe), hapū (sub-tribe) and whānau (family units). Tikanga has also been described as a set of behaviour guidelines for

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22 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Manukau Report* (Wai 8, 1995) at 67.

23 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of the Waitangi Tribunal on claims concerning the allocation of radio frequencies* (Wai 26, 1990) at 237.

24 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 195.

25 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 194

26 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 CA at 715 per Bisson J

27 Labour Government Statement of the Principles of the Treaty of Waitangi, 1989, Principle (C)

28 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 664-665

29 McCully Matiu and Margaret Mutu *Te Whānau Moana, Ngā Kaupapa me ngā Tikanga: Customs and Protocols* (Reed, Auckland, 2003), p161

30 The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation (January 2016) at 36

daily life and interaction in Māori culture[31] and is commonly based on experience and learning that has been handed down through generations.[32] It is based on logic and common sense associated with a Māori worldview.[33]

The former Chair of the Waitangi Tribunal Sir Edward Taihakurei Durie regards tikanga as Māori law and suggests that the question is not whether it has Pākehā-type rules but –

> *"Whether there were values to which the community generally subscribed. Whether those values were regularly upheld is not the point but whether they had regular influence. Māori operated not by finite rules (but) by reference to principles, goals, and values…Tikanga derived from 'tika' or that which is right or just. Tikanga may be seen as Māori principles for determining justice…(It) was pragmatic and open-ended…flexible and subject to reinterpretation according to circumstances…The principles of tikanga provided the base for the Māori jural order".*[34]

Although tikanga is not necessarily the same across tribal groups, tikanga Maori is derived from a vast body of knowledge, wisdom and custom gained from residing in a particular rohe (geographic area) for many hundreds of years, developing relationships with other neighbouring communities as well as those further afield, and learning from practical experience what works and what does not. [35] To that extent, tikanga Māori is considered by our indigenous people to be the equivalent of English law with the important distinction that it derives from a very different place to the English law and as such it cannot be reduced to writing and thereby set in concrete by legislation.[36]

Tikanga Māori as with all aspects of Māori life, therefore underpins from a Māori worldview what guidelines/rules apply to the use, management and protection of the rohe of a hapū or iwi and that interrelationship has been aptly captured by the Waitangi Tribunal in the hearings involving the Foreshore and Seabed where it said:[37]

> "*In the traditional Māori worldview, there is no matter that does not have tikanga attached to it. And the foreshore and seabed – te takutai moana, te papamoana – are quintessentially bound up with tikanga. Tikanga imbues consideration of every aspect of the elements themselves, and how humans interact with them*."

In accordance with tikanga Māori there is no distinction to be drawn between whenua (land) that is dry and land that is covered by the sea. It is simply the case that the whenua continues underneath the sea[38] or rivers and any other waterways.

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31 Te Taura Whiri website, accessed 6 November 2018, http://www.tetaurawhiri.govt.nz/maori-language/tikanga-maori/

32 Ibid.

33 Ibid.

34 The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation (January 2016) at 41,42

35 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 2.

36 Ibid at p2, Te Whanau Moana, Nga Kaupapa me nga Tikanga:Customs and Protocols, McCully Matiu and Margaret Mutu p161

37 Ibid at p1.

38 Professor Margret Mutu and Sir Hugh Kawharu, Evidence to the Waitangi Tribunal (2004) Wai 1071.

Tikanga Māori remained the unfettered law of the land until Te Tiriti o Waitangi was signed on 6 February 1840. The signing of Te Tiriti ultimately resulted in a declaration of British sovereignty over New Zealand (a fact which is still disputed by Māori and which has been the subject of a separate Waitangi Tribunal inquiry[39]) and the application of British laws and customs to all peoples of New Zealand including Māori.

The two texts of Te Tiriti (being the English text and the Māori text) have been a central focus of legal debate over the decades. What has become clear is that the two texts are not a translation of the other and do not mean the same thing. For example, important and often talked-about discrepancies between the two texts include that the use of the word 'kāwanatanga' in the Māori text does not translate to 'sovereignty' as set out in the English Text of Te Tiriti, but is more appropriately described as 'governance' or 'governorship'. Conversely, the use of the phrase 'tino rangatiratanga' or 'unfettered chiefly powers'[40] in the Māori Text is often relied upon by Māori to assert that sovereignty over their lands, resources and other taonga was never ceded to the British Crown, but rather Māori authority was retained and preserved. Pākehā (non-Māori) have traditionally based their understanding on the English Text, which supports the prevailing view and the view which our New Zealand legal system is based upon, that Māori ceded sovereignty to the Crown.

TIKANGA MĀORI

Having indicated earlier that tikanga Māori cannot be reduced to writing and thereby set in concrete by legislation, I have set out below a number of tikanga that most tohunga (Māori experts in matters Māori) would agree exist and should be applied. The list is not comprehensive, nor should they be considered as such, as there are nuances and variations dependant on rohe (the region) and tribal custom.

In the recent High Court decision of *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843, there was considerable discussion of tikanga Māori in the context of who exercised mana whenua where the following were found;

- Tikanga Māori is a source of broadly shared core values (tāhuhu) that may inform the development of the law and in some contexts is law.
- Tikanga-ā-iwi are systems of law based on the lived experiences of each iwi.
- Tikanga Māori and Tikanga-ā-iwi are not static and may evolve over time.
- Tikanga disputes between iwi are better addressed on the marae.
- The Crown is not bound by tikanga per se, but tikanga may give rise to legally enforceable obligations.

[39] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Paparahi o Te Raki Stage One Report He Whakaputanga me Te Tiriti* (Wai 1040, 2014).

[40] Brief of Evidence of Professor Anne Salmond, Te Paparahi o Te Raki Inquiry, Wai 1040, #A22 including translations from the works of Merimeri Penfold.

Whilst I agree with all of these points, my view in respect of point four is that, if iwi cannot and have not been able to agree their tikanga disputes on the marae (and on occasion they are not), then there must be an alternative method for a decision to be made. In the Central North Island, dispute about who had mana whenua to various portions of Kaingaroa forest, agreement could not be reached between the iwi. In that situation an Alternative Dispute Resolution process had been agreed, that process was required, and it was undertaken with findings ultimately made. That process was outside of the marae and a decision had to be made to provide finality.

If the iwi come to a Court for a resolution, then in my view it is incumbent on us to make a decision, as the parties have ended up in Court, fully cognisant that by being there, the ultimate decision is no longer theirs to be made, and that it is now a matter for the Court to decide. It is not a decision or obligation we should avoid.

This is the position that the Māori Land Court took in *Tautari v Mahanga*[41] where Judge Ambler stated;

> "*Clearly many owners feel whanaungatanga to both owners. The Act*[42] *promotes owners resolving such disputes themselves but, where they are unable to do so, the Court must resolve the dispute. Indeed, the owners all accept that I must resolve the issue in this instance"*

Tikanga Māori is defined in Te Ture Whenua Māori Act 1993 (the Māori Land Act) as "*Māori Customary rights and values".*

For present purposes, it has been said that tikanga is constitutionally significant to the development of the law in four mutually reinforcing respects:

(a) First, as an independent source of rights and obligations in te ao Māori and the first law of Aotearoa.[43]

(b) Second, in terms of the Treaty rights and obligations that pertain to tikanga.

(c) Third, where tikanga values comprise a source of the New Zealand common law.[44] or have been integrated into law by statutory reference[45]

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41 *Tautari v Mahanga – Mohinui 3B2B* (2011) 18 Taitokerau MB 6 (18 TTK 6) at [33].

42 Te Ture Whenua Māori Act 1993.

43 See Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David V Williams (eds) Waitangi Revisited: Perspectives on the Treaty of Waitangi (2nd ed, Oxford University Press, Auckland, 2005) 331 and 334; and Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 2–5.

44 As recognised by the Supreme Court in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95]. In *Ellis v R* [2020] NZSC 89, submissions were sought on the application of tikanga on the question of whether the Court has jurisdiction to hear an appeal against conviction after the death of the appellant. The Court issued its judgment allowing the appeal to proceed, but reasons for that decision are to be provided with the judgment on the substantive appeal: at [5]. See also *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291 at [43]–[47] and [58]

45 statutes referencing tikanga include the Oranga Tamariki Act 1989 (see s 2 definitions of "tikanga Māori" and "mana tamaiti (tamariki)"); Resource Management Act 1991; and Taumata Arowai–the Water Services Regulator Act 2020. See also Justice Christian N Whata "Evolution of legal issues facing Maori" (paper presented to Maori Legal Issues Conference, Legal Research Foundation, Auckland, 29 November 2013).

(d) Fourth, to give effect to Aotearoa New Zealand's international obligations in relation to Māori as indigenous people, including under the UNDRIP.[46]

PRINCIPLES OF TIKANGA MĀORI

I was invited to be a member on a panel of advisors to the New Zealand Law Commission[47] recently, in a review by the Law Commission of Succession Laws in New Zealand. In the issues paper produced in April 2021 by the Law Commission entitled "Review of Succession: Rights to a person's property on death" the paper identifies a number of tikanga that I consider to be relevant and reproduce here.

TIKA

Professor Hohepa has described tika as the "major principle" that overarches and guides formalities and practice in Māori society. Tika has a range of meaning from "right and proper, true, honest, just, personally and culturally correct or proper" to "upright". It forms the basis of the word tikanga. The practice of a particular tikanga therefore needs to be correct and right, or tika[48].

WHANAUNGATANGA

One of the most fundamental values that holds any Māori community together is whanaungatanga, or the manner in which everyone is related genealogically.[49] Knowledge of how one is related to everyone else within a particular community and to neighbouring hapū is fundamental to the understanding of an individuals identity within Māori society. It also determines how an individual relates to and behaves towards other individuals of that community.[50]

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46 Aotearoa New Zealand affirmed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) GA Res 61/295 (2007) in 2010. The UNDRIP recognises the importance of protecting the collective rights of indigenous peoples and addresses the rights to self-determination, preservation of culture and institutions, participation in decision-making and consultation, and rights to lands and resources. As a declaration rather than a convention, the UNDRIP does not have legally binding force attached to it in international law. However, the UNDRIP is widely viewed as not creating new rights, but rather elaborating on internationally recognised human rights as they apply to indigenous peoples and individuals, thus in this way having a binding effect: see Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim (Wai 2417, 2015) at 34–35, 38–39 and 40–44); Te Rōpū Whakamana | Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity — Te Taumata Tuatahi (Wai 262, 2011) at 42 and 233; and Claire Charters "The UN Declaration on the Rights of Indigenous Peoples in New Zealand Courts: A Case for Cautious Optimism" in UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS – Special Report (Centre for International Governance Innovation, 2020) 43 at 48–50. This is reflected in the right to self-determination in art 3 being characterised as "essential to the enjoyment of all human rights": Melissa Castan "DRIP Feed: The Slow Reconstruction of Self-determination for Indigenous Peoples" in Sarah Joseph and Adam McBeth (eds) Research Handbook on International Human Rights Law (Edward Elgar Publishing, Cheltenham, 2010) 492 at 499; see also Office of the High Commissioner for Human Rights CCPR General Comment No 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples (13 March 1984).

47 Along with Judge Stone and Judge Coxhead of the Māori Land Court,

48 Hirini Moko Mead Tikanga Māori: Living by Māori Values (rev ed, Huia Publishers, Wellington, 2016) at 29.

49 McCully Matiu and Margaret Mutu *Te Whānau Moana, Ngā Kaupapa me ngā Tikanga: Customs and Protocols* (Reed, Auckland, 2003), p162

50 Ibid p 163

Whanaungatanga has been described as “the glue that held, and still holds, the system together”.[51] It has been said to be:[52]

> *… the fundamental law of the maintenance of properly tended relationships. The reach of this concept does not stop at the boundaries of what we might call law, or even for that matter, human relationships. It is also the key underlying cultural (and legal) metaphor informing human relationships with the physical world – flora, fauna, and physical resources – and the spiritual world – the gods and ancestors.*

Whanaungatanga includes the idea that, in te ao Māori, relationships among people and with the natural and spiritual worlds are fundamental to communal well-being, and all individuals owe certain responsibilities to the collective.

Rights to belong to the hapū and participation in resources are crucial from a whanaungatanga perspective and help promote a sense of belonging.

WHAKAPAPA

Whakapapa is ones genealogy. A lineage or descent line which is important in Māori society in terms of leadership, land and fishing rights, kinship and status. It is central to Māori institutions.

Māori history contains a detailed account of Māori origins from Papatūānuku and Ranginui to Tāne-mahuta, Tangaroa, Tūmatauenga, Haumia-tiketike, Tāwhiri-mātea, Rongo and their siblings across many generations and significant figures and stories, to the tangata whenua of today. This detailed history shows the power and importance of whakapapa to the Māori worldview.

Whakapapa literally means “to place in layers”. It has been described by Sir Apirana Ngata as:

> *… the process of laying one thing upon another. If you visualise the foundation ancestors as the first generation, the next and succeeding ancestors are placed on them in ordered layers.*

Whakapapa therefore details the nature of the relationships between all things. Because all things come from Papatūānuku and Ranginui, all things are connected through whakapapa.

Whakapapa is crucial to succession for Māori because it underpins connections to whānau, tribal groups and whenua. A primary function of succession for Māori is to maintain whakapapa connections to their whenua (land), whānau(family), tupuna (ancestors) and atua (gods).

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51 Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 4.

52 Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 4.

MANA

As identified earlier, mana denotes power. In a narrow sense, mana can be defined as "the integrity of a person or object". In a wider sense, it is a measure of all things that is gathered from "ancestral and spiritual inheritance, prestige, power, recognition, efficacy, influence, authority and personal ability".

There are many aspects that comprise mana[53]:

- Mana atua — power that is derived from the atua Māori (Māori gods).
- Mana tūpuna — authority that is ascribed mana from one's lineage.
- Mana tangata — power acquired by an individual from one's ability to develop skills, gain knowledge and provide leadership.
- Mana whenua - the ability to exercise control or dominion over land and resources and this is reserved to the tribe of the area
- Mana Moana - the equivalent of mana whenua as it applies to the sea and its resources

Although these aspects of mana are distinct (and reflect the different ways mana may manifest itself) it is said that the source of all mana is the atua Māori. The whakataukī "Ko te tapu te mana o ngā kāwai tūpuna" ("tapu is the mana of the kāwai tūpuna") demonstrates that mana shares a very strong positive connection with tapu.

The term *mana motuhake* is a term that encompasses all of the above elements, but serves to point out that mana is something that applies to Māori people of Aotearoa and to them only. It also points to the fact that with such mana, Māori people are imbued with the eternal right to live under their own mana and hence determine their own way of life as they themselves see fit to choose[54].

TAPU AND NOA

Tapu is to be sacred or prohibited. Tapu has been described by Māori Marsden as having both religious and legal connotations. A person, place or thing is dedicated to a deity and by that act it is set aside or reserved for the sole use of that deity. The person or object is thus removed from the sphere of the profane and put into the sphere of the sacred. It is untouchable, no longer to be put to common use[55].

From a purely legal perspective it suggests a contractual relationship has been made between the individual (or group) and his (their) deity whereby he or they dedicate themselves or an object to the

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53 McCully Matiu and Margaret Mutu *Te Whānau Moana, Ngā Kaupapa me ngā Tikanga: Customs and Protocols* (Reed, Auckland, 2003), pp157,158

54 McCully Matiu and Margaret Mutu *Te Whānau Moana, Ngā Kaupapa me ngā Tikanga: Customs and Protocols* (Reed, Auckland, 2003), p158

55 Ibid

service of the deity in return for protection against malevolent forces and the power to manipulate the environment to meet needs and demands.[56]

Tapu is a principle in te ao Māori that acts as a "corrective and coherent power".

Professor Hohepa has defined it as:

> *… the essence of sanctity, cultural protection, sacredness, set apartness. It is not only a possible source of protection for all things, it also has a 'potential for power'.*

Similar to mana, tapu can be traced to the tūpuna, then to the atua Māori, and then to Ranginui and Papatūānuku. This gives rise to an "intrinsic tapu" that all people, places and things possess by virtue of their connection to the atua Māori. A hara (violation or offence) against tapu demanded utu (reciprocity, retribution) for the hara. Because of these consequences, tapu is sometimes seen as a form of social control based on the avoidance of risk.

If tapu has the "potential for power", then noa acts as a counter or antidote to that: it values the importance of ordinary, everyday human activity. However, noa should not be viewed as the opposite of tapu or the absence of tapu. Rather, noa indicates that, following an incursion on tapu, a balance has been reached, a crisis is over and things are back to normal again. One way to think of tapu and noa might be as complementary opposites operating on a spiritual level to restore balance.

Whakapapa is intrinsically tapu because it connects people directly to the atua Māori and also to their mate (dead). Maintaining whakapapa connections and ensuring taonga and other items are treated appropriately are therefore vitally important, and sanctions may follow if the tapu of whakapapa is breached. It is the laws of tapu which play the most influential role in regulating Māori society.

UTU

Utu establishes principles and protocols in which relationships are created and maintained. It can be thought of as "compensation, revenge, or reciprocity". Utu is relevant to: … both the positive and negative aspects of Māori life governing relationships within Māori society. It was a reciprocation of both positive and negative deeds from one person to another. Utu was a means of seeking, maintaining and restoring harmony and balance in Māori society and relationships.

Utu is closely linked with mana and tapu. Where utu is sought, the take (cause) was usually a breach of tapu or an increase or decrease in mana. The extent and form of utu depends on the circumstances, making it highly contextual.

Utu can be linked to the analytical framework of take–utu–ea. The framework measures breaches of tikanga that require certain action to be taken in order to resolve the matter.

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[56] Ibid

KAITIAKITANGA

Kaitiakitanga means the exercise of guardianship by the tangata whenua (the home people) of an area in accordance with tikanga Māori in relation to natural and physical resources, includes the ethic of stewardship.[57]

Kaitiakitanga is also an obligation on those who have mana to act unselfishly, with right mind and heart and with proper procedure in accordance with their tikanga. Mana and kaitiakitanga operate together as "right and responsibility". Kaitiakitanga obligations exist over all taonga. Rights to resources are dependent on maintaining kaitiakitanga obligations over that resource. Kaitiakitanga might thus be described as the reciprocal obligation to care for the wellbeing of a person or resources.

Maintaining kaitiakitanga obligations is vital to fostering a sense of belonging. Ensuring that kaitiakitanga rights and obligations can pass down to the next generation is a crucial part of succession in te ao Māori.

As minders, kaitiaki (the guardians) must ensure that the mauri or the life force of their taonga (treasures) is healthy and strong. This includes *te hau o te kainga*, the very life essence or winds of home, which carry and waft the life essences emanating from both the land and sea. Tangata whenua are warned of the onset of the depletion in the mauri of their ancestral lands when the characteristics of the hau kainga start to change as they do with any major development.[58]

MANAAKITANGA

Manaakitanga literally translated means to care for a person's mana. Manaakitanga is required no matter what the circumstances might be, so even if there is no aroha in the situation, the obligation still applies. An obvious place where manaakitanga is important is looking after guests, but the obligation is always present.

KAWA

One cannot speak of tikanga without also referring to the concept of kawa.

Kawa is commonly referred to as Maori protocol and etiquette, particularly the behaviour expected in a Maori meeting house. Hirini Moko Mead in his book *Tikanga Māori* [59] outlines a distinction between tikanga and kawa and notes that while tikanga can include mātauranga Māori (the knowledge base and ideas associated with tikanga), and the protocols associated with the correct practice of a tikanga, that

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57 McCully Matiu and Margaret Mutu *Te Whānau Moana, Ngā Kaupapa me ngā Tikanga: Customs and Protocols* (Reed, Auckland, 2003), p167

58 McCully Matiu and Margaret Mutu *Te Whānau Moana, Ngā Kaupapa me ngā Tikanga: Customs and Protocols* (Reed, Auckland, 2003), p168.

59 Tikanga Māori, Living by Māori Values, Hirini Moko Mead, p9.

some practices or protocols may be called kawa. When this occurs, the knowledge base is the tikanga Māori aspect, and the practice of it is the kawa.

For the writer, kawa is the manner by which tikanga is applied. That can vary between iwi and rohe and it is for tangata whenua to determine the kawa by which they apply their tikanga.

The Waitangi Tribunal has recognised that the fundamental purpose of Maori law was to maintain appropriate relationships of people to their environment, their history and each other.[60] The writer wholeheartedly agrees.

LEGISLATIVE PROVISION FOR MĀORI CULTURAL AND CUSTOMARY RIGHTS

Returning then to the theme of this paper, whether New Zealand's laws are adequate for the Protection of Indigenous Peoples Cultural Heritage and Customary Rights, I consider that some attempts have and are being made to provide for, protect and preserve Māori Cultural and Customary rights. There are over forty nine statutes that refer to various obligations in relation to treaty principles. However there are a number of flaws and concerns with the terminology in those statutes, and the method by which bodies have, or predominantly have, not appropriately applied the provisions, some of which I outline below.

It should be noted that in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC), the Court stated that;

> *"…the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the Crown's Treaty obligations"*

More recently in the case of *Ngāti Whātua Orakei Trust v Attorney General* [2002] NZHC 843 the Court stated;

> *... tikanga [is[a free-standing legal framework recognised in New Zealand law. Tikanga is often assumed, recognised and referred to by New Zealand legislation. Tikanga was recognised by English common law that accompanied the Crown to New Zealand. It is recognised by New Zealand common law today. It can determine a direct source of legal rights. The Court can make declarations about tikanga, where that is appropriate.*

As identified there are a number of statutes that refer to Te Tiriti and are intended to provide recognition of the Crowns obligations under Te Tiriti. I have attached as an appendix to this paper a list of those statutes.

You will observe that most of those statutes refer to the principles of the Treaty. However, there are a few exceptions;

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60 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 21.

MUSEUM OF TRANSPORT AND TECHNOLOGY ACT 2000

> *"The Board must recognise and provide for …biculturalism and the spirit of partnership and goodwill envisaged by the Treaty of Waitangi"*

CLIMATE CHANGE RESPONSE ACT 2002

> *"…for the Commission to have members who, collectively, have-…(ii)the Treaty of Waitangi (TeTiriti o Waitangi) and te ao Māori (including tikanga Māori, te reo Māori, mātauranga Māori, and Māori economic activity)"*

CHILDREN'S ACT 2004

> *"…provide a practical commitment to the Treaty of Waitangi"*

KĀINGA ORA–HOMES AND COMMUNITIES ACT 2019

> *"…to uphold the Treaty of Waitangi (Te Tiriti o Waitangi) and its principles…"*

TAUMATA AROWAI–THE WATER SERVICES REGULATOR ACT 2020

> *"…the board must include members who, collectively, have knowledge and experience of and capability in,*
>
> *(i) the Treaty of Waitangi (Te Tiriti o Waitangi) and its principles; and*
> *(ii) perspectives of Māori and tikanga Māori"*

PUBLIC SERVICE ACT 2020

> *"The role of the public service includes supporting the Crown in its relationship with Māori under the Treaty of Waitangi (te Tiriti o Waitangi)"*

MENTAL HEALTH AND WELLBEING COMMISSION ACT 2020

> *-"In order to recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi… the Minister to have regard to the need for members of the board to collectively have knowledge, understanding, and experience of (i) te ao Māori (Māori world view), tikanga Māori (Māori protocol and culture), and whānau-centred approaches to wellbeing;*
>
> *…the board to ensure that… the Commission has the capability and capacity (i) to uphold the Treaty of Waitangi (Te Tiriti o Waitangi) and its principles and (ii) to engage with Māori and to understand perspectives of Māori…"*

It should be noted that there is a shift to mentioning the Treaty specifically and not just the principles. It is a subtle but important change. However, as this conference has a specifc focus on Environmental and Land issues, I will limit the rest of this paper to discussing just a few of the statutes that I consider pertinent from an Indigenous persepctive and the reasons why I focus on them.

TE TURE WHENUA MĀORI ACT 1993

This is the Act that governs my jurisdiction. It is intended to assist Māori to retain what little lands they continue to hold following on from the colonisation of New Zealand. It provides our Court with sole jurisdiction to deal with Maori land as well as general land held by Māori.

PREAMBLE

Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

SECTION 2: INTERPRETATION OF ACT GENERALLY

(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.

(2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

(3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

SECTION 4: TO GIVE EFFECT TO TREATY OF WAITANGI

This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi

Current estimations of Māori land in New Zealand show that approximately only 5.6% of New Zealands total land area of 26.9 million hectares is Māori land. It is usually of poorer quality than general land and the bulk of it was lost to Māori in the 1800s to the early 1900s. A considerable proportion of Māori land is in fragile natural environments such as wetlands and coastal areas or bordering rivers and lakes.

There is a strong direction in the Act to apply Te Tiriti ō Waitangi, and that the Māori version of the document is to prevail if there is any conflict between the English version and the Māori in terms of the Court's application. Fundamentally, our Court is tasked with helping Māori to protect and retain their lands and support them in utilising their lands and resources for their own benefit.

However, some of the following are difficulties that arise in our jurisdiction;

1. As a result of the Native Land Court and the Torrens land system which was designed to break down the group ownership that Māori enjoyed previously, Māori land has become highly individualised, resulting in situations with tens or hundreds of land-owners being recorded on the title and all holding miniscule shares in the land;

2. This makes management and utilisation of the land extremely difficult, which is exacerbated by the Court being underfunded and under-resourced. In addition, maintaining up to date details of the owners is an on-going problem particularly if people do not update their contact details with the Court or the land registry, or they pass away and that detail isn't provided to the Court for updating;
3. While Trusts are often set up that creates a whole new set of problems as often Māori do not have the training or experience to act as good trustees, nor do the trusts have resourcing to fund their operations or obtain independent advice;
4. Approximately 90% of litigants are self-represented and as such they have considerable difficulties in relying and applying the provisions of the Act to their particular circumstances;
5. There are only nine Maori Land Courts within New Zealand. That means (prior to the advent of COVID and the use of AVL or Zoom) litigants were having to travel vast distances in order to attend Court often at considerable cost;
6. Many Māori cannot afford legal representation for their matters. This means flawed applications are being made often with insufficient evidence, resulting in them either being dismissed or delayed for many months. There are also a limited number of lawyers that work in this jurisdiction which makes the issue even more problematic;
7. The Act also provides for the ability for Māori to develop their land. However, Māori are often in the lower socio-economic bracket of society so they cannot afford the Council costs for planning, resource or building consents much less the ability to retain the planners, engineers or surveyors that are often required to provide advice and guidance on the development of their lands. Then there are the legal costs on top of that which must all come through the Māori land Court for approval.

The biggest issue for our Court is that despite the primary considerations in the Act that I have outlined above, the fundamental policy of the Act is still based on Western notions of property rights being held by individuals. There have been recent attempts at redrafting the Act which have been largely unsuccessful with relatively minor amendments being the result instead. Therefore it falls to us as Judges to try to apply tikanga in as many ways and places that we can whilst respecting the property rights held by the individuals.

For example in *Tautari v Mahanga* the Māori Land Court when considering the extent to which tikanga governs the use of land and influences the Courts exercise of powers held the following;

> *Prior to the Crown granting freehold title, land was held by Māori in accordance with custom and, therefore, tikanga largely prevailed. Following the granting of freehold title, the land was held by the owners as tenants in common and each owner was at law entitled to the use of the whole land, that is, there were no separate areas. However, notwithstanding the position at law, owners invariably agreed on the allocation and use of land without resort to legal tools such as licences, leases or orders of the Court. Such arrangements may be expected in relation to any*

land in multiple-ownership. In respect of Māori freehold land, these arrangements may be regarded as a form of tikanga.[61]

It then went on to say;

> *…..before the Court will endorse a tikanga concerning land allocation the Court must be satisfied that it is fair in its treatment of the owners. That is, it cannot compromise the underlying property interests in the land.*[62]

And as a result stated;

> *Consequently, the Court will, in accordance with the Preamble and ss 2 and 17 of the Act, endeavour to give effect to such tikanga where its purpose remains valid, it has not changed, it has continued to be practised and it is fundamentally fair.*[63]

RESOURCE MANAGEMENT ACT 1991

The Resource Management Act (RMA) and its application, and the Conservation Act (CA), involves areas of law where others such as Judge Smith hold considerably more expertise than I in New Zealand as an Environment Court Judge, so I don't propose to go into any detail on matters involving this Act. However, from a Māori perspective the RMA and CA are highly important and relevant pieces of legislation.

Specific provision is made in these Acts ostensibly to account for the protection of Māori culture, taonga and their lands and resources.

SECTION 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 recognise and provide for the following matters of national importance:

(a) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;

(b) the protection of historic heritage from inappropriate subdivision, use and development

(c) the protection of protected customary rights

(d) the management of significant risks from natural hazards

SECTION 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 particular 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:

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61 *Tautari v Mahanga – Mohinui 3B2B* (2011) 18 Taitokerau MB 6 (18 TTK 6) at [37].
62 ibid at [42].
63 ibid at [43].

(c) the maintenance and enhancement of amenity values:
(d) intrinsic values of ecosystems:
(e) [Repealed]
(f) maintenance and enhancement of the quality of the environment:
(g) any finite characteristics of natural and physical resources:
(h) the protection of the habitat of trout and salmon:
(i) the effects of climate change:
(j) the benefits to be derived from the use and development of renewable energy.

SECTION 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).

Whilst these sections appear at first blush to be quite favourable for Māori, the problem lies firstly in the terminology, with terms such as "shall recognise and provide for"(s6), "have particular regard to" (s7) and "take into account"(s8). It's clear that the phraseology establishes a hierarchy of importance for decision-makers to follow. However, the application of that hierarchy often involves non-Māori decision makers who have little comprehension of what customary rights are for the relevant hapū; what treaty principles are, let alone which should apply; nor of the importance of the relationships that Māori have with their lands and resources, let alone any comprehension of what is entailed in kaitiakitanga . So Māori have little to no confidence that the local or regional bodies can and will apply the provisions of this Act appropriately.

What appears to occur (and again others can speak with more authority on this point) is that the decision makers (local and regional councils primarily), consider the consents sought and either go through the motions of engaging in consultation, as a guise to considering whether the application will impact negatively on Māori, and more often than not, appear to grant the consent, despite objections often being raised by Māori to these consent applications. It appears that Western Concepts including the benefit of commercial development to the wider public, or that land is to be seen primarily as an opportunity for economic development, will often override or minimalise the impact that development may and will have on the taonga and cultural values that Māori seek to protect.

There is also the potential impact of section 36A of the RMA;

Section 36A - No duty under this Act to consult about resource consent applications and notices of requirement.

(1) The following apply to an applicant for a resource consent and the local authority;

(a) Neither has a duty under this Act to consult any person about the application

(b) Each must comply with a duty under any other enactment to consult any person about the application; and

(c) Each may consult any person about the application

This effect of this provision sadly provides developers and local consent authorities with the justification to potentially ignore the interests of Māori and grant consents to developers or other entities without

needing to engage with Māori and ascertain the potential effect of the proposed development or consent sought on their Māori land, resources and treasures.

However, the decision of High Court in *Tauranga Environmental Protection Society v Tauranga City Council & Bay of Plenty City Council*[64] (commonly known as the *Transpower* case) which involved an appeal of an Environment Court decision, appears to have placed an onus on decision makers to engage with Māori.

In the *Transpower* case, the High Court determined that the effect of the Environment Court's decision was to substitute its view of the cultural effects of Ngāti Hē for Ngāti Hē's own view. The High Court went on to say that the Environment Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and their Māori values, it is not open to the Court to decide it would not.

Further that Ngāti Hē's view is determinative of those findings. Deciding otherwise is inconsistent with Ngāti Hē's rangatiratanga, guaranteed to them by article 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA. It is inconsistent with the requirement on the Court, as a decision-maker under the RMA, to "recognise and provide for" "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance in s 6(e) of the RMA. It is inconsistent with the approach in *SKP Incorporated v Auckland Council*, approved by the High Court in 2018, that:

> *… persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters*

This is at odds with s 36A and seems to clearly indicate that in order for a decision maker to appropriately identify the impact of a consent application on Māori, then the consent applicant and decision makers must not only consult but engage with the relevant Māori grouping to determine what, from their perspective will be the impact on their lands, waters, sites, waahi tapu and other taonga of the proposed consent. Further that the decision maker (whether they are the local authority or the Court) cannot substitute their views about the impact,for those provided by Māori.

Interestingly, section 45 of the RMA outlines the provision in relation to the purpose of National Policy Statements which are intended to state the Governments objectives and policies for matters of national significance that are relevant to achieving the purpose of the Act. The only reference requiring the Minister to have regard to matters Māori, the Treaty or its principles is at subsection (h) which provides for *'anything which is significant in terms of section 8 (Treaty of Waitangi).* However, that obligation is

64 *Tauranga Environmental Protection Society Incorporated v Tauranga City Council* [2021] NZHC 1201.

watered down by the “take into account” terminology in section 8 and Māori litigants are left largely to rely on references to “features” or “places” when seeking protection for their cultural heritage sites.

It is then up to government bodies such as the Department for Conservation (DOC) to consider whether relevant bodies are acting consistently with the legislation. Those obligations arise under the Conservation Act 1987.

> **Section 6 – Conservation Act 1987**
>
> Functions of the Department
>
> The functions of the Department are to administer this Act and the enactments specified in Schedule 1, and subject to this Act and those enactments and to the directions (if any) of the Minister,-
>
> ……..
>
> (b) to advocate the conservation of natural and historic resources generally;

It is this section of the Act in particular, that I consider DOC is required to advocate for the preservation of Māori natural and historic resources. However, and somewhat disappointingly, Māori cannot fully rely upon DOC to exercise their advocacy obligations. This was evident in the Ngai Tai ki Tamaki decision issued by the Supreme Court in relation to section 4 of the Conservation Act which provides as follows;

> *This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.*

In the *Ngai Tai ki Tamaki*[65] decision, the Supreme Court held at para 104;

> *“Section 4 is a provision of fundamental importance in the exercise by the Department of Conservation of its powers and responsibilities. The effective sidelining of s.4 in the decisions under challenge , in circumstances where the Ngati Tai’s interest was based on its mana whenua in relation to the Motu, was a failure to comply with this fundamentally important requirement. It was therefore an error of some consequence”*

Following this decision an independent report was sought and provided by the Options Development Group, in 2020 to consider the implications of the *Ngai Tai* case that challenged aspects of the department’s decision-making – particularly its obligations to give effect to the Treaty of Waitangi principles.

[65] *Ngai Tai ki Tamaki v Minister of Conservation* [2018] NZSC 122.

The report indicated that "either by accident or design, the general policies have been constructed and articulated in such a way as to substantially ignore partnership and reduce the role of tangata whenua from Te Tiriti partner to stakeholder in the definition and delivery of conservation".

It went on to say that the Department of Conservation has failed to consistently fulfil its Te Tiriti o Waitangi obligations and a major overhaul is needed. Further that for the past 35 years, the department has "fundamentally misapplied" a section of its core legislation, so it recommends "a fundamental rethinking of the entire conservation system.

In the absence of this review occurring, if DOC do not resolve to internally and expeditiously rethink its conservation system and the method by which it should and could apply its obligations under Te Tiriti, then it will continue to fall to the Courts to ensure that occurs. That is not a job that we as Judges should avoid or shy away from.

It must be noted that even the Waitangi Tribunal, which is the body vested with the obligation of considering whether the Crown have acted in accordance with its obligations under Te Tiriti, also get things wrong. Most recently in the High Court decision of *Mercury NZ Ltd v Waitangi Tribunal* the High Court held that:[66]

> *"The Tribunal has effectively treated them [tikanga] as an important relevant consideration, but it has decided that in the exercise of its statutory powers it has a discretion to depart from tikanga. I disagree. In my view, this is one of the situations where, as a matter of interpretation of the statute the Tribunal does not have a discretion to make decisions that are inconsistent with tikanga. Neither does it have a discretion to direct remedies that are inconsistent with the principles of the Treaty. This is one of the situations where both tikanga principles, and the principles of the Treaty are essentially binding. In this context, tikanga forms a key part of the law to be applied rather than merely being a relevant consideration.*

MARINE AND COASTAL AREA ACT 2011 PROVISIONS

It is important to provide some context into how this piece of legislation arose. In the Court of Appeal decision of *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA), several Maori iwi applying to the Māori Land Court for declarations as to the status of land comprising the foreshore and seabed in the Marlborough Sounds. Both the Māori Land Court (under the 1993 Act) and Māori Appellate Court determined that the Māori Land Court had jurisdiction to hear the application. The Crown then appealed by way of case stated to the High Court and the High Court held that the Māori Land Court had no jurisdiction to hear the application.

66 *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654 at [104].

On appeal the Court had a very narrow issue to decide upon. The question to be answered was whether or not the Maori Land Court had jurisdiction to investigate Māori customary ownership to the foreshore and seabed. In the end, the Court of Appeal in *Ngati Apa* overturned the High Court decision and reaffirmed the doctrine of native title established in *R v Symonds*.[67]

Chief Justice Elias in *Ngati Apa* stated*:*

> "*I am of the view that the appeal must be allowed and the applicants must be permitted to go to hearing in the Maori Land. Court. I am of the view that the judgment of Judge Hingston in the Maori Land Court was correct. I consider that in starting with the English common law, unmodified by New Zealand conditions (including Maori customary proprietary interests), and in assuming that the Crown acquired property in the land of New Zealand when it acquired sovereignty, [as seems the premise of Judge Ellis], the judgment in the High Court was in error. The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with the law*"

Immediately following the *Ngati Apa* decision the government of the day began to develop an urgent foreshore and seabed policy to effectively reverse the *Ngati Apa* decision through the introduction of the Foreshore and Seabed Act 2004. Of particular concern for Māori was that the proposed legislation provided that "*…the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown."*[68] This provision was intended to remove the possibility that anyone else could be found to have ownership or property interests in the public foreshore and seabed (unless those interests derived from the Crown).

There was also a distinction made in the proposed Act between "public" foreshore and seabed and "private" foreshore and seabed which resulted in an extra sting for Māori as those areas of the foreshore and seabed which were then held in private ownership would be exempt from the legislation. No group other than Maori had its rights affected to such an extent. The proposed Act would extinguish un-investigated customary title in the foreshore and seabed and would preclude Maori from seeking customary title through Courts.

However, despite findings from the Waitangi Tribunal that the government's action in implementing the Foreshore and Seabed Act was in several ways in breach of Te Tiriti, and considerable criticism from the United Nations Committee on the Elimination of Racial Discrimination that the Act discriminated against Māori, the Crown eventually moved to implement the Foreshore and Seabed Act 2004.

However, following further Government review in 2009 the Government looked to implement a new Act, the Marine and Coastal Area Act 2011 (MACA).[69] This legislative action followed a recommendation

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67 A decision I refer to later.
68 Section 13(1) of the Foreshore and Seabed Act 2004
69 Ministerial Review of Foreshore and Seabed Act 2009

from a 2009 Ministerial Review Panel that recommended that the new legislation should provide that no one owns, or can own, what was designated the "public foreshore and seabed"[70].

The Act proposed a moved away from a Crown ownership regime to a non-ownership regime in an attempt to address the criticisms arising from the 2004 Act.

Some of the relevant provisions for Māori in the MACA Act include;

SECTION 7- TREATY OF WAITANGI (TE TIRITI O WAITANGI)

In order to take account of the Treaty of Waitangi (te Tiriti o Waitangi), this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing,—

(a) in subpart 1 of Part 3, for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and

(b) in subpart 2 of Part 3, for customary rights to be recognised and protected; and

(c) in subpart 3 of Part 3, for customary marine title to be recognised and exercised.

DETERMINATION OF WHETHER CUSTOMARY MARINE TITLE EXISTS

SECTION 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 substantial interruption; or

(ii) received it, at 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.

SECTION 62 - RIGHTS CONFERRED BY CUSTOMARY MARINE TITLE

(1) The following rights are conferred by, and may be exercised under, a customary marine title order or an agreement on and from the effective date:

(a) a Resource Management Act 1991 (RMA) permission right (***see*** sections 66 to 70); and

(b) a conservation permission right (***see*** sections 71 to 75); and

[70] *Notably the new act maintained the arguably discriminatory distinction between public and private foreshore and seabed areas)*

(c) a right to protect wāhi tapu and wāhi tapu areas (***see*** sections 78 to 81); and

(d) rights in relation to—

(i) marine mammal watching permits (***see*** section 76); and

(ii) the process for preparing, issuing, changing, reviewing, or revoking a New Zealand coastal policy statement (***see*** section 77); and

(e) the prima facie ownership of newly found taonga tūturu (***see*** section 82); and

(f) the ownership of minerals other than—

(i) minerals within the meaning of section 10 of the Crown Minerals Act 1991; or

(ii) pounamu to which section 3 of the Ngai Tahu (Pounamu Vesting) Act 1997 applies (***see*** section 83); and

(g) the right to create a planning document (***see*** sections 85 to 93).

SECTION 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.

SECTION 52 - SCOPE AND EFFECT OF PROTECTED CUSTOMARY RIGHTS

(1) A protected customary right may be exercised under a protected customary rights order or an agreement without a resource consent, despite any prohibition, restriction, or imposition that would otherwise apply in or under sections 12 to 17 of the Resource Management Act 1991.

(2) In exercising a protected customary right, a protected customary rights group is not liable for—

(a) the payment of coastal occupation charges imposed under section 64A of the Resource Management Act 1991; or

(b) the payment of royalties for sand and shingle imposed by regulations made under the Resource Management Act 1991.

(3) However, subsections (1) and (2) apply only if a protected customary right is exercised in accordance with—

(a) tikanga; and

(b) the requirements of this subpart; and

(c) a protected customary rights order or an agreement that applies to the customary rights group; and

(d) any controls imposed by the Minister of Conservation under section 57.

(4) A protected customary rights group may do any of the following:

(a) delegate or transfer the rights conferred by a protected customary rights order or an agreement in accordance with tikanga:

(b) derive a commercial benefit from exercising its protected customary rights, except in relation to the exercise of—

(i) a non-commercial aquaculture activity; or

(ii) a non-commercial fishery activity that is not a right or interest subject to the declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992:

(c) determine who may carry out any particular activity, use, or practice in reliance on a protected customary rights order or agreement:

(d) limit or suspend, in whole or in part, the exercise of a protected customary right.

However, the starting position, that no one owns the land comprising the foreshore and seabed, is prejudicial and continues to be discriminatory for Māori. This general position exempts those who hold existing private title to any land falling on the foreshore/seabed.

In my view, the concept of no ownership overlooks a key problem with the existing system, in that it is a complete failure to recognise the rights of Maori on three levels. Firstly, from a tikanga basis, it ignores mana whenua and mana moana. Secondly, from a common law perspective, it abrogates aboriginal title (and associated rights) by imposing a perception that the land is *terra nullius*, when it has already been established that in Aotearoa this is not the case. Additionally, the rights to customary title provided for in Te Ture Whenua Maori Act 1993 are extinguished. Finally, the starting point continues to breach Article 2 of the Treaty of Waitangi and the associated principles recognized by the Waitangi Tribunal.

A further problem with this starting point is that existing privately-owned land on the foreshore and seabed is exempt. Again, this qualification appears to blatantly disregard the existing rights of Maori, as detailed above. Furthermore, this provision has the effect of prioritizing the rights of private landowners before the rights of Maori.

I consider that the appropriate starting point would be for ownership of the foreshore and seabed to be vested solely in Maori. This position would accurately reflect not only the law (both common law and legislation) and the Treaty, but also, and most importantly, the mana whenua of hapu and iwi.

This is consistent with the views expressed, once again by Chief Justice Elias in *Paki v Attorney-General (No 1)* [2012] NZSC 50, [2012] 3 NZLR 277 where she stated;

> "*Presumptions of Crown Ownership under the common law could not arise in relation to land held by Māori under their customs and usages, which were guaranteed by the terms of Te Tiriti ō Waitangi*"

In addition, claimants have filed applications to the Waitangi Tribunal, to complain that the implementation of the MACA Act was and is in breach of Te Tiriti. In a two-stage hearing approach, adopted by the Tribunal, where the first stage focuses on alleged deficiencies in the procedural and funding regime under the Act. The Tribunal have concluded that;[71]

[71] I have not engaged in an analysis of the provisions of the MACA Act as that would be a paper on its own and it is appropriate to await the Stage 2 report which is to issue from the Waitangi Tribunal. It is perhaps suffice to say that in the writers view, the provisions do not recognise or restore to Māori that which they enjoyed prior to the implementation of either Act and pre-supposes that the Government have the right to grant to Māori, that which Māori would say already

"*Overall we conclude that many aspects of the procedural and resourcing regime fall well short of treaty compliance. This is particularly regrettable given the context in which the Marine and Coastal Area Act was developed- as a replacement for the controversial Foreshore and Seabed Act 2004, which left such a damaging imprint on Māori- Crown relations and the social fabric of Aotearoa New Zealand. The new legislation was an opportunity for the Crown, working with Māori, to start afresh. Instead, the Act appears to reprise many of its predecessor's more egregious features, not least its capacity to generate grievances and division"*[72]

APPLICATION OF TIKANGA IN GENERAL

Importantly, the Courts have also referred to the fact that a lack of reference to Te Tiriti in statutes as not being determinative. For example in *Barton-Prescott v Director General of Social Welfare* [1997] 2 NZLR 179 (HC) the High Court stated that;

> *"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.*

Also in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [73] the Supreme Court determined that;

> *"The Courts will not easily read statutory language as excluding consideration of the Treaty principles if a statute is silent on the question"*

They also said that;

> *"The Court of Appeal said that tikanga Māori must be treated as an "applicable law" under s 59(2)(l) where it is relevant to an application before the EPA. That approach followed from the fact that the tikanga that "defines the nature and extent of all customary rights and interests in taonga protected by the Treaty" is part of the common law of New Zealand"*[74]*.*

Whilst this case focuses on the application of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, the Court also said that;

> *"…….tikanga is a body of Māori customs and practices, part of which is properly described as custom law. Thus, tikanga as law is a subset of the customary values and practices referred to in the Act. It follows that any aspects of this subset of tikanga will be "applicable law"*[75]

exist. The intent of the Act would appear to be to try to limit Māori exercise of their mana and rangatiratanga as much as possible and then if rights are recognised, to try to justify to non-Māori why they are being recognised at all.

72 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) Letter of Transmittal, pg x.

73 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [151].

74 Ibid at [164].

75 Ibid at [169].

CONCLUDING REMARKS

MATEMATEAONE

In the Māori world view context is fundamental and vital. Knowledge is not disembodied information but part of a living matrix of encounters and relationships, past and present, natural and spiritual.

We have a saying in Tuhoe[76] which is “matemateaone”. This refers to the unseverable connection that our people have with each other and with the land, their resources, their taonga (treasures-animal, plant and metaphysical). It is analogous to the feeling one has when wrapped or cocooned by the earth. That is the connection Māori people have with their land. It is that connection which I invite you to start with as the pervading basis, before you then deliberate upon the application of western law and the possible usages of that land by a community that does not have the same connection or care.

It will perhaps be evident that in answering the question about whether or not existing legislation is adequate to protect the Cultural Heritage and Customary Rights of the Indigenous people of New Zealand (Māori), that my view is that it isn’t and they aren’t in their current forms.

It is falling to the Courts to require observation and enforcement of Māori indigenous rights apparently imbedded in current legislation, stipulating that obligations in respect of Te Tiriti and Māori exist for decision makers to take account of and in some instances give effect to, and yet they continue to fail to do so.

Historically there have been several inhibiting factors for Māori, restraining Court action being taken, such as the cost of litigation which has often been the primary obstacle, but also a lack of confidence that those who sit in our position, have the knowledge, ability and willingness to give effect to their rights.

Therefore, I invite you who sit on these benches, deliberating upon the usage of land and resources which for indigenous people, is not a commodity, endlessly transferable or sellable, to reflect upon the connection that these people have with land. They do not own it, in a typical western sense. It is not a void which is to be filled. They belong to the land and it is the land which gives them identity and status.

We have a saying in Tuhoe. We refer to the womb as the “whare tangata” (the birthplace of our people). We also use it to refer to the lands that we connect and derive from. The lands and resources that our people exercise dominion over regardless of the imposition of western laws and policies.

Perhaps of final note is the decision of Chapman J in *R v Symonds* (1847) NZPCC 388 where he stated;

> “ *Whatever may be the opinion of jurists as to the strengths or weaknesses of Native Title, whatsoever may be their present clearer and still growing conception of their own dominion*

[76] Tuhoe is the primary iwi that I affiliate to. It is the iwi that has been the most influential in mine and my families life.

over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of native occupiers"

The view of Māori is that they have never provided their consent to the extinguishment of their dominion over their lands, and their culture, their values, their tikanga need to be respected by all who wish to deal in and with their lands in Aotearoa.

The conventional role of the judiciary is to use reason to decide disputes about legal rights in specific factual circumstances. That includes disputes between indigenous peoples and the state. Two fundamental aspects of judicial decision-making seem to me to be particularly important to how the judiciary adjudicates in a common law system: the judiciary applies the law in specific factual contexts and it uses reason in decision-making. Both of these aspects are important. Their power may be under-appreciated. And they distinguish judicial from political decision-making.[77]

Te Kooti Arikirangi te Turuki

Ko te waka hei hoehoenga mō koutou i muri i ahau ko te ture

Mā te ture anō te ture e aki

The canoe for you to paddle after I am gone is the law

Only the law can set be set against (or right) the law

I started with a whakatauki (proverb) by Te Kooti, so it is appropriate that I end with one from him again.

He is saying to his people, that after I'm gone the path that you need to follow is one of law. Because only the law can challenge the law. So how can you use that as a tool to overcome oppression. Using the law but in a way that upholds tikanga Māori.

The vision should be one where rangatiratanga is realised, where Māori and the Crown enjoy a harmonious and constructive relationship, and work in partnership to restore and uphold the wellbeing of Papatūānuku, tāngata and the natural environment.

Until that occurs, we as the Judiciary must assist Māori and any other Indigenous peoples, to overcome what has been, for them, an oppressive regime which to date has only served to alienate Indigenous people from their lands and resources, their mana motuhake.

Kia ora

[77] J Palmer paper, p9.

Appendix 1

Treaty principles can be found in a number of Acts, including[78]:

►Auckland War Memorial Museum Act 1996

►Children's Act 2014

►Children, Young Persons and Their Families (Oranga Tamariki) Legislation Act 2019

►Climate Change Response Act 2002

►Climate Change Response (Zero Carbon) Amendment Act 2019

►Conservation Act 1987

►Covid-19 Recovery (Fast-track Consenting) Act 2020

►Criminal Cases Review Commission Act 2019

►Crown Forest Assets Act 1989

►Crown Minerals Act 1991

►Crown Pastoral Land Act 1998

►Crown Research Institutes Act 1992

►Education Act 1989

►Education Lands Act 1949

►Employment Relations Act 2000

►Energy Efficiency and Conservation Act 2000

►Environment Act 1986

►Environmental Protection Authority Act 2011

►Environmental Reporting Act 2015

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

►Fisheries Act 1966

►Harbour Boards Dry Land Endowment Revesting Act 1991

►Hauraki Gulf Marine Park Act 2000

►Hazardous Substances and New Organisms Act 1996

►Heritage New Zealand PouhereTaonga Act 2014

►Human Rights Act 1993

►Kainga Ora –Homes and Communities Act 2019

►Land Transport Management Act 2003

►Local Government (Auckland Council) Act 2009

►Local Government Act 2002

►Māori Language Act 2016

[78] List provided by Justice Whata at the New Zealand Judicial Induction Course, Rotorua, May 2022

►Marine and Coastal Area (TakutaiMoana) Act 2011

►Mental Health and Wellbeing Commission Act 2020

►Museum of Transport and Technology Act 2000

►New Zealand Geographic Board (Ngā Pou Taunahao Aotearoa) Act 2008

►New Zealand Public Health and Disability Act 2000

►Oranga Tamariki Act 2019

►Public Finance Act 1989

►Public Records Act 2005

►Public Service Act 2020

►Resource Management Act 1991

►Royal Society of New Zealand Act 1997

►State-Owned Enterprises Act 1986

►Taumata Arowai–the Water Services Regulator Act 2020

►Te Ture Whenua Maori Act 1993

►Treaty of Waitangi Act 1975

►Urban Development Act 2020

►Many Settlement Acts also have references to the Treaty