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Stemming the Colonial Environmental Tide:
Shared Māori Governance Jurisdiction and Ecosystem-Based Management over the Marine and Coastal Seascape in Aotearoa New Zealand – Possible Ways Forward

Prepared by:

Dr Robert Joseph, Mylene Rakena, Mary Te Kuini Jones, Jenny Takuira, Mariana Te Tai and Celeste Rakena

2020

Report

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National Science Challenge Sustainable Seas Ko Ngā Moana Whakauka and Te Mata Hautū Taketake – the Māori and Indigenous Governance Centre, Te Piringa-Faculty of Law, University of Waikato

2020

Mana Whakahaere Tōtika Sustainable Seas Research Project

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

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

Executive Summary

When Māori signed the Treaty of Waitangi in 1840, rangatira (chiefs) expected the Crown to protect their rangatiratanga (chieftainship) and mana whakahaere tōtika (shared governance jurisdiction) over taonga (valued natural resources), and that the taonga would be sustained for future generations in perpetuity. In return, Māori shared concurrent governance jurisdiction with the British, and subsequently, the New Zealand Crown, thus acknowledging the mana whakahaere of both Treaty of Waitangi partners. The New Zealand Crown has a constitutional and legal duty then under the Treaty to ensure that Māori mana whakahaere tōtika over taonga is protected. The exercise of shared concurrent jurisdiction for Māori communities on the other hand includes, inter alia, the tikanga Māori right and responsibility to ensure the protection and perpetuation of natural resources for all future New Zealand – Pākehā (European)[1] and Māori - generations.

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

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

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

The New Zealand Sustainable Seas National Science Challenge agrees with the above EBM principles and has adopted them but has also adapted them to an Aotearoa New Zealand context that fundamentally acknowledges mātauranga and tikanga Māori law and shared co-governance and concurrent jurisdiction hence the following Aotearoa New Zealand EBM principles:

- a co-governance and co-design structure that recognises the Māori constitutional relationship and mana whenua at all levels (whānau, hapū, iwi), together with the

[1] Pākehā is the Māori term for newcomer, non-Māori or European. The term is used respectfully throughout this report.

guiding principles of mauri, whakapapa, kaitiakitanga, mātauranga-a-iwi and mātauranga-a-hapū;

- is place and time-specific, recognising/understanding the ecosystem as a whole in all its ecological complexities and connectedness and addressing cumulative and multiple stressors;
- acknowledges humans as ecosystem components with multiple values;
- views long-term sustainability as a fundamental value, in particular maintaining values and uses for future generations;
- includes collaborative and participatory management throughout the whole process, considering all values and involving all interested parties from agencies and iwi to industries, whānau, hapū and local communities;
- has clear goals and objectives based on knowledge; and
- includes adaptive management, appropriate monitoring and acknowledgement of uncertainty.

This report focuses on analysing EBM through the incorporation of mātauranga and tikanga Māori and shared concurrent governance jurisdiction through Treaty of Waitangi partnerships over the marine and coastal seascape.

The report analyses the legal enablers, opportunities and challenges at this law interface that enables shared Māori co-governance and concurrent jurisdiction over the marine and coastal area and proposes that we embrace the above EBM approach in an Aotearoa New Zealand context that could place us in a powerful position as a global leader.

EBM could potentially allow Māori to take a proactive role through co-governance and co-management of the coastal marine environment as originally envisaged in the Treaty of Waitangi. A well-executed inclusive EBM approach that enhances the principles of partnership underscored by the Treaty of Waitangi and that meets the diverse commitments to Indigenous peoples enunciated in the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) provides an opportunity to normalise shared Māori-Crown co-governance and concurrent governance jurisdiction in sustainable resources on the world stage.

Mātauranga and tikanga Māori environmental perspectives deserve to be fully integrated, not treated as an afterthought or as matters placed in opposition to (or as grudging concessions to) a dominant mainstream New Zealand Western paradigm. To treat them as a separate theme would deny their potential for effective synergies and mātauranga and tikanga Māori led shared environmental governance is what is distinct about effective environmental governance and potentially effective EBM in an Aotearoa New Zealand context.

The report then fully supports the adoption and adaptation of EBM within this mātauranga and tikanga Māori and New Zealand law context through, inter alia, shared co-governance and concurrent jurisdiction because they will provide an incredible opportunity for New Zealand to become a world leader in tailoring any potential EBM strategy, policy, laws and institutions around our unique legal, political, cultural and constitutional context and in a manner that is compatible with who we are and who we aspire to be as a bicultural and multicultural, prosperous and environmentally sustainable, nation.

The report moreover affirms the adoption of authentic Crown-Māori shared co-governance and concurrent jurisdiction mechanisms to implement EBM effectively through public policy, legislation, Treaty settlements, and, importantly, shared public support and education. To this end, some of the current key statutory provisions examined in this report include the Resource Management Act 1991 generally but especially ss. 6, 7, 8, 33, 36B, and 58; the Local Government Act 2002, Conservation Act 1987, Hauraki Gulf Marine Park Act 2000, Māori Fisheries Act 2004, Marine and Coastal Area (Takutai Moana) Act 2011, and the Exclusive Economic Zone and Continental Shelf Act 2012.

Some of the key regulations and special statutory initiatives for integrating EBM and shared co-governance and concurrent jurisdiction explored include Marine Protected Areas, the Fisheries (Kaimoana Customary Fishing) Regulations 1998 for taiāpure and mātaitai reserves, the Hauraki Sea Change – Tai Timu Tai Pari Marine Spatial Plan 2013, the Auckland Unitary Plan 2017, special co-governance agreements such as the Waikato River Authority under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 and, more recently, the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019. Rangatiratanga and mana whakahaere tōtika fundamentally include jurisdiction, which denotes not only the mana to possess resources but also the mana to govern and manage them in accordance with one's values and priorities.

A similar approach occurred with some modern comprehensive Treaty settlement and self-government agreements as well as the Great Bear Initiative (GBI) in Canada, along with the Great Barrier Reef Marine Park Act 1975 in Australia that promised the long-term protection and conservation of the Great Barrier Reef (GBR) through ecosystem-based management and by facilitating partnerships with Indigenous Aboriginal and Torres Strait Island Traditional Owners. These initiatives in Canada and Australia include degrees of shared concurrent jurisdiction and consensus building among Governments, stakeholders, and Indigenous communities that were underpinned by EBM.

The recent enactment of the Declaration on the Rights of Indigenous Peoples Act 2019 in B.C, Canada that incorporates UNDRIP into B.C domestic law could be pivotal for implementing EBM over the marine estate more effectively through, inter alia, shared authentic governance jurisdiction with the GBI and other initiatives.

Notwithstanding the challenges and there are many, what is urgently required in Canada and Australia is effective collaboration and genuine partnerships with other sectors of society through co-governance structures that acknowledge Indigenous peoples and that effectively and equitably incorporate Indigenous self-determination and cultural co-governance within this EBM context.

To the above ends, adopting and adapting EBM constructed on international best practices and specific compelling comparative case studies such as some comprehensive Treaty and self-government settlement agreements and the Great Bear Initiative in Canada, some key Great Barrier Reef co-management agreements and modern settlements in Australia, underpinned by shared EBM and Indigenous environmental principles in UNDRIP 2007, but tailored to be fit for purpose for Aotearoa New Zealand, are essential. The Aotearoa New Zealand approach to any EBM initiative then needs to fully acknowledge the Treaty of

Waitangi partnership and to integrate mātauranga and tikanga Māori through shared co-governance with concurrent jurisdiction over the marine and coastal seascape.

There is a pressing need then to modify mainstream policies, laws and institutions to implement EBM over the coastal marine estate by providing alternatives for Māori and other groups that would assist with sustaining the coastal marine estate for future generations, enriching national life, and to facilitate a genuine unity of people based on mutual respect. There is a pressing need to focus not only on managing cultural differences but also on acknowledging our common ground and inter-dependence including our fundamental love of New Zealand oceans and beaches for their inherent beauty, as part of our 'clean green' image and shared identity, for recreation, swimming, kayaking, walking and fishing as well as balanced commercial development for industry.

The essence of any successful collaboration relationship is in unity or oneness, not sameness, or assimilation, but in complementarity. Each group needs to respect the 'other(s)', to seek and embrace common-ground affinities, accommodate differences, and to work to change our own prejudices.

Such initiatives may appear to be radical but are actually measured options to consider as possible viable ways, some would assert the only way forward, for significantly improving sustainable resource governance and management in Aotearoa New Zealand that are suitable and sustainable for Māori, for the environment, and for the nation. In fact, the future survival of the marine and coastal seascape of Aotearoa New Zealand - and therefore of Aotearoa New Zealand as a country given we are an Island state - depends on how we effectively and appropriately implement shared co-governance and concurrent jurisdiction between the Crown, local government, Māori and other key stakeholders within this EBM context. We have to work together more than ever before. The future of this great nation depends on today and what we do with it.

Contents

> This is a Petition from us the Maniapoto, Raukawa, Tuwharetoa and Whanganui tribes, to Parliament; greeting. Your petitioners pray that you will look into and carefully consider the matters which are the cause of much anxiety to us, and are raising a barrier in front of us, because these matters that are causing us anxiety have principally emanated from you, the Europeans, in the form of legislation.
>
> - Wahanui, Taonui, Rewi Maniapoto and 412 others, 1883[2]

A. Introduction

Indigenous peoples globally are burdened by what Held refers to as nautonomy - a lack of autonomy and structured disempowerment resulting from the asymmetrical production, distribution and enjoyment of life chances.[3] At the heart of this condition is the absence of empowering possibilities for active participation in the political processes necessary for optimising life chances due to the disempowerment - often through violent colonial as well as legal processes - of Indigenous peoples from the key sites of power in society.

Indeed, colonialism is a process within human history where one group of people displaces another group (often but not exclusively Indigenous peoples) from these key sites of power which sites include prevailing worldviews and languages, political systems and governments, stewardship of the environment, land and natural resources, the economy and prosperity, health and well-being, and the prevailing education, religious and legal systems.[4] One of the main tools of colonialism has been the imposition of a new legal system – in this case British common law – that enacted new laws and institutions to deliberately displace Māori from these sites of power, as noted by the Maniapoto rangatira above in 1883, which were incidentally contrary to the guarantees of Te Tiriti o Waitangi/the Treaty of Waitangi 1840.

In Aotearoa New Zealand, such nautonomous challenges have emerged for Māori by being deliberately displaced from the sites of power such as land and natural resources,[5] economic

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[2] 'Petition of the Maniapoto, Raukawa, Tuwharetoa and Whanganui Tribes,' in *AJHR* (26 June 1883) at J-1. Available online at: https://atojs.natlib.govt.nz/cgi-bin/atojs?a=d&cl=search&d=AJHR1883 (Accessed March 2018).

[3] Held, D, *Democracy and the Global Order* (Polity Press, Cambridge, 1995).

[4] See for example Walker, R, *Ka Whawhai Tonu Matou: Struggle Without End,* (Penguin Books, New Zealand, 2004); Deloria, V, *Custer Died for Your Sins: An Indian Manifesto* (University of Oklahoma Press, Oklahoma, 1988); Shoemaker, N, *Native American Whalemen and the World: Indigenous Encounters and the Contingency of Race,* (University of North Carolina Press, North Carolina, USA, 2015); Kapellas, K & Jamieson, L, *Historical Consequences of Colonialism, Disempowerment and Reactionary Government Decisions in Relation to Imprisonment Rates in Australia's Northern Territory: A Potential Solution,* (1 Suppl, J Health Care Poor Undeserved, Australia, 27 February 2016) at 11-29; and Lippmann, L, *Generations of Resistance: The Struggle for Justice,* (Longman Cheshire, 1981).

[5] See Asher, G & Naulls, D, *Māori Land,* (Planning Paper 29, New Zealand Planning Council, Wellington, 1987), Kawharu, H, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977); Walker, R, *Ka Whawhai Tonu Matou: Struggle Without End,* (Penguin Press, 2004), Te Puni Kokiri, *Te Ture Whenua Māori Act 1991 Review Panel: Discussion Document* (Te Puni Kokiri, Wellington, 2013); Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012);

development, [6] criminal justice, [7] health, [8] housing, [9] education, [10] language, [11] culture preservation,[12] and environmental sustainability. These disturbing features of our political and legal systems have a variety of complex causes including historic (and some would argue contemporary) colonial policies and practices, associated socio-economic difficulties, and even cultural tensions given that the New Zealand legal system was monoculturally based which have all contributed to the degradation of life chances and well being for Māori.

Nevertheless, the Māori renaissance during the 1970s civil rights period stemmed the colonial tide and ushered in a new era of biculturalism with the resurrection of the Treaty of Waitangi, the establishment of the Waitangi Tribunal, the recognition of tikanga Māori cultural norms, and some sharing of power within the legal system including in natural resource management.

Waitangi Tribunal, *The Ika Whenua Rivers Report* (Wai 212, 1998); Waitangi Tribunal *The Ngawha Geothermal Resource Report* (Wai 304, 1993); Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage 1* (Wai 1200, 2008) and 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, November 2014).

[6] See Ward, A, *An Unsettled History* (Bridget Williams, Wellington, 1999) at 29; Te Puni Kokiri, *Māori in the New Zealand Economy,* (Ministry for Māori Development, Wellington, 2002), New Zealand Institute of Economic Research, Ministry of Māori Development, *Māori Economic Development Te Ōhanga Whanaketanga Māori* (NZIER, Wellington, 2003), Nana, G, Stokes, F & Molano, W, *The Asset Base, Income Expenditure and GDP of the 2010 Māori Economy* (BERL Report, Te Puni Kokiri, Wellington, 2011); Marriot, L & Sim, D, 'Indicators of Inequality for Māori and Pacific Peoples,' in *Journal of New Zealand Studies,* (Issue 20, 2015) at 24-50; and Chapmann Tripp, *Te Ao Maori Trends and Insights* (Chapmann Tripp Report, Wellington, Piripi, 2017)

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

[8] Refer to Durie, M, *Whaiora: Māori Health Development,* (2nd Ed, Oxford University Press, 1998); Ajwani, S, Blakely, T, Robson, B, Tobias, M & Bonne, M, *Decades of Disparity: Ethnic Mortality Trends in New Zealand, 1980-1999*, (Ministry of Health and University of Otago, 2003); and the New Zealand Health and Disability Bill, (As Reported to the Health Committee: Commentary, Wellington, November 2018). In 2020, the Waitangi Tribunal continued its extensive hearings on the Wai 2575 - The Health Services and Outcomes Kaupapa Inquiry into systemic Māori health disparities.

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

[10] See Simon, J, *Nga Kura Māori: The Native Schools System, 1867-1969,* (Auckland University Press, Auckland, 1998); Walker, R, 'Reclaiming Māori Education,' in Morgan, J & Hutchings, J, (Eds), *Decolonisation in Aotearoa: Education, Research and Practice,* (New Zealand Council for Education Research, Wellington, 2016) at 19-38; Smith, L, *Decolonizing Methodologies: Research and Indigenous Peoples (*Zed Books, London, University of Otago Press, 1999); Battiste, M, *Reclaiming Indigenous Voice and Vision* (UBC Press, Vancouver, 2000) and Friere, P, *Pedagogy of the Oppressed,* (Penguin, London, 1996).

[11] See Benton, R, *Who Speaks Māori in New Zealand?* (New Zealand Council for Educational Research, Wellington, 1979); Benton, R, *The Māori Language: Dying or Reviving?* (Reprinted, New Zealand Council for Educational Research, Wellington, 1997), Williams, D, *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices,* (Waitangi Tribunal, Wellington, 2001); Waitangi Tribunal, *Te Reo Māori Claim,* (Wai 11, Department of Justice, Wellington, 1989) and Waitangi Tribunal, *Ko Aotearoa Tenei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Legislation Direct, Wellington, 2011).

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

The degradation of life chances for Māori is also directly linked to their systematic exclusion from political participation in dominant polities and their lack of access to control over land, capital and other means whereby their cultural, social, economic, environmental, political and material survival may be secured.[13] Even in relatively benign nation-states such as New Zealand, Canada, Australia and the United States of America, Indigenous peoples' experience a comparable nautonomous predicament which may have been added to recently with the global COVID-19 pandemic given that those most disadvantaged in society – the poor, unhealthy, elderly and Indigenous peoples - are often vulnerable and most negatively impacted by societal crises such as global pandemics and the probable aftermath of COVID-19 – possibly, inter alia, a global financial crisis.

At the same time, the impacts of climate change compounded by the neoliberal effects of developing global economies, industry, growing populations and overconsumption of resources have led to the dramatic degradation and destruction of terrestrial and marine ecosystems globally. Climate change for example, is a long-term threat to the New Zealand (and the world) marine and coastal environments by warming the water and causing sea levels to rise around coastlines.[14] Rising sea levels is a cause of coastal flooding and erosion, which harms the habitats of shorebirds and other coastal dwellers, as well as causing lowland freshwater systems to become saltier.[15]

Warmer waters change the marine environment driving fish to swim to cooler waters. Fish stocks are also affected by commercial, customary and recreational fishing and changing environmental pressures such as ocean temperature, acidity and productivity.[16] By 2017, some 16% of fish stocks in the ocean around New Zealand were assessed as overfished and 10% were actually considered collapsed. Ocean floor trawling using large nets or dredges is destructive causing damage to seabed habitats. Between 1990 and 2016, trawling occurred over approximately 28% of the seabed of New Zealand where water depths were less than 200 metres and 40% where depths were 200-400 metres.[17]

The ocean is also becoming more acidic from high levels of carbon dioxide being emitted in the atmosphere mainly from human activities.[18] Higher ocean acidity can make it harder for shellfish to form shells and it reduces vital plankton populations – the base of the marine food chain. Our coasts are also under pressure from excess sediments, nutrients and other pollution running off the land, which degrades our coastlines and compromises tikanga Māori kaitiaki rights and responsibilities, and recreation and wildlife habitats.[19]

Human activities can harm marine habitats such as seabed trawling noted earlier and sediment or contaminant run-off from arable land or built up environments, which contribute

[13] See Havemann, P 'Enmeshed in the Web? Indigenous Peoples' Rights in the Network Society' in Cohen, R & Rai, S.M, *Global Social Movements* (The Althone Press, London, 2000) at 18 – 32.
[14] For the latest information on the dramatic degradation and destruction of New Zealand's terrestrial and marine ecosystems in New Zealand, see Ministry for the Environment, *Environment Aotearoa 2019: New Zealand's Environmental Reporting Series,* (Ministry for the Environment and Stats NZ, Wellington, 2019).
[15] Above.
[16] Above.
[17] Above.
[18] Above.
[19] Above.

to climate change, fishing, inputs from rivers, and introduce invasive species such as algal blooms and pollution.[20]

Marine debris is a further global issue with adverse effects for marine and coastal environments including seabirds and mammals becoming entangled in or ingesting debris leading to death, plastics entering the food chain, destruction of marine habitats, transport and release of chemicals contained in plastics or accumulated in the ocean, transport and introduction of invasive species, and damage to marine vehicles.[21]

Heavy metals are another challenge, which occur naturally in estuaries, but high concentrations suggest contamination from another source - from urban environments and farmlands. Heavy metals are toxic and accumulate in fish and shellfish.[22]

A further challenge is the water quality of coastal and estuarine ecosystems that are affected by changes in the levels of nutrients, turbidity (murkiness), oxygen and light, which can be toxic or can lead to algal blooms that kill marine life by depleting oxygen levels. Suspended sediment can also smother habitats or reduce light affecting photosynthesis.[23]

These negative impacts of the degradation and destruction of New Zealand's terrestrial and marine ecosystems affects all New Zealanders but more so Māori who are already in a nautonomous powerless position. The resounding awareness of the importance of repairing, maintaining and sustaining our environment for the future must be a priority for all of us and has highlighted the need to radically amend current resource management policy, practices, laws and institutions that are more effective, targeted to specific environmental challenges, and are cohesive across the New Zealand landscape, marine and coastal estate, as well as other jurisdictions.

This report analyses past and current resource management policy, practices, laws and institutions that are targeted to specific marine and coastal environmental challenges for Māori, and the various mana whakahaere tōtika - shared power and governance jurisdiction models - that are currently available within an ecosystem-based management (EBM) context. The report explores in some detail the shared governance jurisdiction models between the New Zealand Crown and Māori groups that enables and empowers Māori participation in the sustainable governance and potentially EBM of the coastal and marine areas of the country. The EBM analysis is critical to sustainably enhance the utilisation of New Zealand's marine resources within environmental and biological constraints.

The various shared power and jurisdiction models are explored in the report, which include different powers, rights and responsibilities exercisable, by either national or regional government and Māori. Any analysis of shared power and jurisdiction models, are complex and context specific. Still, various forms of shared power and jurisdiction models are apparent

[20] Above.
[21] Above.
[22] Above.
[23] Above.

throughout New Zealand and elsewhere and a spectrum of shared power and jurisdiction models is analysed in some detail throughout the report.

The report commences with an extensive discussion on ecosystem-based management, governance, governance jurisdiction, mātauranga and tikanga Māori law, and traditional kaitiakitanga jurisdiction over the coastal marine estate which concepts provide an important analytical platform for the rest of the report.

The next sections analyse how shared Māori governance jurisdiction was recognised historically in official discourse such as He Whakaputanga o Te Rangatiratanga o Niu Tireni – The Declaration of Independence of New Zealand 1835, through the common law doctrine of aboriginal title, and the Treaty of Waitangi 1840. The report then explores how shared Māori governance jurisdiction was explicitly recognised in s. 71, Constitution Act 1852, then officially denied through unjust laws and institutions as noted by Wahanui and the other rangatira in the above opening quote.

The report then shifts to an analysis of international law and the quest for recognising and realising Indigenous people's aspirations for shared governance jurisdiction through the international discourse of self-determination and self-governance, particularly under the rubric of human rights and more recently, the UN Declaration on the Rights of Indigenous Peoples 2007. The report then discusses how the Treaty of Waitangi and associated governance rights and responsibilities were resurrected from 1975 within this international law, human rights and Indigenous people's self-determination context up to the present time.

The next sections explore in detail some of the environmental, political, legal and cultural challenges of shared governance jurisdiction and recognition of mātauranga and tikanga Māori concepts, especially in the Resource Management Act 1991, Local Government Act 2002, and other key statutes such as, inter alia, the Conservation Act 1987, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Marine and Coastal Area (Takutai Moana) Act 2011, Exclusive Economic Zone and Continental Shelf Act 2012, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Ngāti Tuwharetoa, Raukawa and Te Arawa River Iwi Act 2010, Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, and the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019; regulations such as the Kaimoana Customary Fisheries Regulations 1998, and initiatives such as the Auckland Unitary Plan 2017 and Hauraki Sea Change – Tai Timu Tai Pari Project 2013.

The report then analyses international comparisons of shared governance jurisdiction models within an EBM context on reserves in Canada with some Aboriginal and Inuit comprehensive Treaty settlement and self-government agreements, as well as the Great Bear Initiative in British Columbia (B.C), Canada. We then extensively analyse the implementation of EBM over the Great Barrier Reef in Queensland, Australia, which provides compelling comparative models of EBM and shared jurisdiction with other Indigenous peoples in practice that are worthy of further consideration and possible emulation for Aotearoa New Zealand. The report then provides a somewhat detailed analysis on possible shared governance jurisdiction theory and models for implementing EBM over the coastal marine estate of Aotearoa New Zealand.

The report then concludes by analysing the common threads of shared governance and jurisdiction models that assist with co-governance and co-designed structures that acknowledge the Māori constitutional partnership in the Treaty of Waitangi and that

effectively incorporate tikanga and mātauranga Māori within an EBM context over the marine estate.

The next section then will introduce ecosystem-based management models over the coastal marine estate for consideration in Aotearoa New Zealand which model provides some scope for shared governance jurisdiction and respect for other knowledge and legal systems such as mātauranga and tikanga Māori.

B. Ecosystem-Based Management and Tikanga Māori Jurisdiction

The dramatic degradation and destruction of New Zealand's terrestrial and marine ecosystems was referred to above. The resounding awareness of the importance of repairing and maintaining our environment for the future also highlighted the need to radically amend current resource management policy, practices, laws and institutions that are more effective, targeted to specific environmental challenges, and are cohesive across the New Zealand landscape, marine and coastal estate, as well as other jurisdictions.

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

> … concerned with the processes of change within living systems and sustaining the services that healthy ecosystems produce. Ecosystem-based management is therefore designed and executed as an adaptive, learning-based process that applies the principles of scientific method.[24]

Most scholars are reluctant to provide a clear definition of EBM however, instead preferring to delineate the elements and principles that comprise an ecosystemic approach. There is a certain degree of correlation across scholarship with most sources citing EBM's defining elements as including a multi-disciplinary approach as well as the inclusion of humans as ecocentric 'integral components' of ecosystems as opposed to separate anthropocentric external actors.[25]

Consequently, how EBM has been interpreted and applied has varied from place to place and has developed immensely from its early beginnings in the 1970s. Although the interpretations are not necessarily identical across the board, when observing scholarship broadly, we do find common considerations that more or less provide a sense of congruence throughout EBM practices that set EBM apart from alternative management approaches. These EBM commonalities include:

- The connections and relationships within an ecosystem;
- The cumulative impacts that affect marine welfare; and

[24] Secretariat of the Convention on Biological Diversity, *The Ecosystem Approach* (Secretariat of the Convention on Biological Diversity, Montreal, QC, Canada, 2004).
[25] United Nations Environment Programme, *Ecosystem-based Management: Markers for assessing progress* (UNEP/GPA 2006).

- Multiple, simultaneous objectives that may be versatile in nature.[26]

The International World Wildlife Funds[27] for example, asserted the following six EBM principles:

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

The New Zealand Sustainable Seas National Science Challenge also has a set of agreed EBM principles that specifically include shared co-governance with Māori. The New Zealand sustainable seas EBM principles include:[28]

- A co-governance and co-design structure that recognises the Māori constitutional relationship and mana whenua at all levels (whānau, hapū, iwi), together with the guiding principles of mauri, whakapapa, kaitiakitanga, mātauranga-a-iwi and mātauranga-a-hapū;
- Place and time-specific, recognising/understanding the ecosystem as a whole in all its ecological complexities and connectedness and addressing cumulative and multiple stressors;
- Acknowledgement of humans as ecosystem components with multiple values;
- Long-term sustainability as a fundamental value, in particular maintaining values and uses for future generations;
- Collaborative and participatory management throughout the whole process, considering all values and involving all interested parties from agencies and iwi to industries, whānau, hapū and local communities;
- Clear goals and objectives based on knowledge; and
- Adaptive management, appropriate monitoring and acknowledgement of uncertainty.[29]

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

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[26] McLeod, K and Leslie, H, *Ecosystem Management for the Oceans* (Island Press, Washington DC, 2009) at 325.
[27] See the World Wildlife Funds website at: http://wwf.panda.org/our_ambition/our_global_goals (Accessed November 2018).
[28] Refer to https://www.sciencelearn.org.nz/resources/2506-looking-at-ecosystem-based-management-ebm-draft (Accessed August 2018).
[29] See also the very useful discussion paper by Taylor, L, Te Whenua, T and Hatami, B, '*Discussion Paper: How Current Legislative Frameworks Enable Customary Management and Ecosystem-based Management in Aotearoa New Zealand – the Contemporary Practice of Rāhui,'* (Landcare Research Contract Report LC3103, Sustainable Seas National Science Challenge: Cross Programme 1.1 Enabling EBM in the current legislative framework, April 2018) at 37. See also Thompson, A, 'Literature Review on Ecosytem-based Management,' (Unpublished Draft MIGC Report, University of Waikato, November 2018) and Rakena, M, 'Indigenous Peoples Customary Rights to Participate in the Marine Estate Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).

Diagram 1: National Science Challenge EBM[30]

[30] National Science Challenge ecosystem-based management (EBM) diagram located online at the website: https://www.sciencelearn.org.nz/system/documents/files/000/000/667/original/Sustainable_Seas_Challenge_EBM.pdf?1507494794 (Accessed March 2019). The above diagram is the latest National Science Challenge EBM iteration.

The literature highlights that EBM represents an approach that is largely still under-developed yet boasts the flexibility to accommodate changing conditions in rapidly declining environments. EBM possesses several other advantages including flexibility - EBM does not negate different paradigms and worldviews, rather it seeks to balance those interactions. Unlike other approaches to management, EBM can be implemented concurrently with other existing management plans hence it need not be considered a cut and dry replacement to any existing scheme. Furthermore, EBM is an integrative and cooperative approach between sectors, stakeholders and users at every level of society hence EBM should be more accessible and inclusive of sections of society that would not have the ability to participate otherwise. EBM in this sense can be perceived as a democratisation of ocean management.[31]

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

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

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

Aswani referred to the value of Indigenous customary practices and traditional ecological knowledge (TEK) that shapes them. Indigenous peoples often have an affinity and a familiarity with the world around them that has gradually been developed over time and space. As noted above with tikanga Māori, Indigenous people's legal systems are generally non-prescriptive, non-adversarial and non-punitive and tend to be based on ecocentric metaphysical

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

relationships within the environment. In Te Ao Māori, as noted above, this relationship between humans and nature can be understood through tikanga concepts such as whānaungatanga (inter-relationships) and whakapapa (ancestral links to the physical and metaphysical environment).

Kahui and Richards even shared some similarities between tikanga Māori and EBM by asserting that prior to colonial contact, Ngāi Tahu, the largest South Island tribe, practiced EBM through kaitiakitanga among other tikanga practices but the authors did warn that such a comparison be approached cautiously.[32] Indigenous customary management practices may reflect EBM in some ways but it is also important to regard them as independent. Aswani referred to such similarities as being mere intersections that allow for hybridisation.[33] Rather than a synonymous approach to resource management, Aswani asserted that a worldview – expressed as a normative approach - that correlates harmoniously with what EBM is capable of achieving, should be the focus for Indigenous peoples hence his enthusiasm for hybridisation.[34]

It is also important that Indigenous peoples retain traditional ecological knowledge and customary practices separate and distinct from EBM so that Indigenous practices are not co-opted and redefined by political processes, as is the current case in New Zealand with some tikanga Māori concepts such as kaitiakitanga for example. An acknowledgement of the distinct nature of both tikanga Māori and EBM would ensure that the role of Māori as kaitiaki for example, will not be dulled by policy, mainstream law and misinterpretation, which allows Māori to retain the mana and jurisdiction to decide how kaitiakitanga is to be enacted within an EBM hybrid context, or conversely, how EBM is to be implemented within a kaitiakitanga framework.

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

It is important to also involve Māori as Treaty of Waitangi partners with shared jurisdiction to progress EBM in New Zealand in a meaningful way. A word of caution however. Given the commercial drivers behind many Māori corporations, another challenge is whether tikanga Māori responsibilities such as kaitiakitanga would be subdued by the neoliberal economic priorities and interests of these corporations.

Still, while Indigenous involvement is important, it is just as important to ensure that processes for adopting and adapting EBM are carried out in a manner that is inclusive of local Māori communities along with others who are directly invested in the sustainability, longevity

[32] Kahui, V and Richards, A, 'Lessons from Resource Management by Indigenous Māori in New Zealand: Governing the Ecosystems as a Commons,' in *Ecological Economics,* (Vol. 102, No. 1, 2014) at 1.
[33] Aswani, S, 'The Way Forward with Ecosystem-based Management in Tropical Contexts: Reconciling with Existing Management Systems,' in *Marine Policy* (Vol. 36, 2012) at 1.
[34] Above.

and wellbeing of the local environment. EBM moreover, allows for power and jurisdiction to be shared more with Māori and other Indigenous peoples. According to the Great Bear Initiative and the Marine Plan Partnership for the Pacific North Coast in British Columbia, Canada, for example, power sharing and consensus building among stakeholder partners and First Nations communities, shifted significantly.[35] EBM could potentially then allow Māori to take a more proactive role with authentic power sharing in the governance and management of coastal marine environments as was originally envisaged in the Treaty of Waitangi.

Placing tikanga Māori at the forefront and sharing jurisdiction with Māori through authentic Treaty partnerships when implementing EBM in Aotearoa New Zealand would moreover, place New Zealand in a powerful position as a global leader in carrying out transformative ecosystem-based management. A well-executed approach that magnifies the principles of good faith and partnership underscored by the Treaty of Waitangi and that meets the diverse aspirations and commitments to Indigenous peoples enunciated in the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) provides an opportunity to normalise Indigenous participation in sustainable resource governance and management on the world stage.

Furthermore, the adoption and adaption of EBM within a tikanga Māori and mainstream New Zealand law context with shared concurrent jurisdiction creates an incredible opportunity for New Zealand to become a world leader in implementing EBM that results in the revolutionary change.[36] EBM and tikanga would also allow us to tailor any potential EBM strategy around our unique legal, political and constitutional contexts and in a manner that is compatible with who we are and who we aspire to be as a bicultural, multicultural, prosperous and environmentally sustainable nation.

The next section will briefly introduce a number of important key concepts for the report - governance, good governance, co-governance and co-management, collaboration for co-governance, and Māori governance. Each concept is important for exploring mana whakahaere tōtika – shared governance jurisdiction – over the marine estate for providing a platform for implementing effective co-governed EBM in an Aotearoa New Zealand context.

C. Governance

Governance is a term which, from about the intellectual debates of the 1980s and 1990s, has progressed from obscurity to widespread usage with the term becoming widespread in development circles and prominence in the international and local public policy lexicon. Not surprisingly, there are differences of view as to what governance and good governance mean. The need for governance however, exists anytime a group of people come together to accomplish any objective hence every form of social organisation may be said to exhibit attributes of governance, from whānau (family) trusts and iwi (tribal) organisations to

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

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

national and even global groupings such as national governments and the United Nations. Indeed, governance is as old as humanity and is reflective of multiple societies and cultures across the world.

The complexity of governance however, is difficult to capture in a simple definition. The ontological roots can be traced to the original Latin terms, 'gubernare' or 'gubernator': each an apt allusion for some Indigenous people to the navigation or steering of a ship.[37] Borrini-Feyerabend and Hill provided a succinct definition asserting that governance:

> … is about who decides what the objectives are, what to do to pursue them and with what means; how those decisions are taken; who holds power, authority and responsibility; and who is (or should be) held accountable.[38]

Ricketts' simple economic explanation is that people need to co-operate with each other in order to optimise output production, and governance is the process for giving effect to that co-operative effort.[39]

Most agree that the central component of governance has to do with making decisions about direction and the 'art of steering societies and organisations.'[40] Governance occurs through interactions between structures, processes and traditions, which in turn determine how power is exercised, how decisions are taken, and how citizens and other stakeholders have their say.[41] Governance has also been defined as the process through which institutions, businesses and citizens articulate their interests, exercise their rights and obligations and mediate their differences.[42]

The World Bank noted that governance methods include 'structures, processes, norms, traditions and institutions and their application by group members and other interested parties.'[43] Governance includes formal institutions, norms and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to, or perceive to be in their interest.[44] Fundamentally, governance is about power, relationships and accountability – who has influence, who decides, and how decision-makers

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[37] Farrar, J, *Corporate Governance: Theories, Principles and Practice,* (Melbourne, Oxford University Press, 3rd Edition, 2008) at 3.

[38] Borrini-Feyerabend, G. and Hill, R., 'Governance for the conservation of nature,' in Worboys, G.L. Lockwood, M and Kothari, A, *Protected Area Governance and Management*, (ANU Press, Canberra, 2015) at 170-205. Online at http://press.anu.edu.au/wp-content/uploads/2015/02/CHAPTER7.pdf. (Accessed May 2020).

39 Ricketts, M, *The Many Ways of Governance: Perspectives on the Control of the Firm*, (Research Report 31, The Social Affairs Unit, UK, 1999).

40 Plumptre, T and Graham, T, *Governance and Good Governance: International and Aboriginal Perspectives* (Institute for Governance, Ottawa, Canada, 1999) at 3.

41 Above. See also Aboriginal and Torres Strait Islander Commission (ATSIC), *The Importance of Indigenous Governance and its Relationship to Social and Economic Development* (Indigenous Studies, AIATSIS, Canberra, 2002).

42 Frechette, L, Deputy Secretary-General of the UN, *Speech to the World Conference on Governance* (31 May 1999).

43 World Bank, *Governance and Development* (World Bank, USA, 1992) at 1.

44 Commission on Global Governance, *Our Global Neighbourhood: Report of the Commission on Global Governance* (Oxford University Press, USA, 1995) at 2.

are held accountable which applies to both nation-state Governments and Indigenous peoples' institutions.

Governance then is conceptually complex given its cultural and contextual specificity, particularly where different cultural and political systems interface. Notwithstanding the differences, Māori and mainstream Aotearoa New Zealand governance principles, laws, institutions and systems are reconcilable to each other within an appropriate legal and political environment particularly within an EBM context. Ideally, the legal system of New Zealand should accommodate the best values and concepts from its two founding cultures – Māori and British – and it should explore appropriate pathways for these legal systems to co-exist and co-develop together particularly, in the present context, within an EBM context over the marine estate.

The effective exercise of governance impacts at all levels of society and plays an essential part in peoples' lives and communities. Indeed, governance structures and processes:

- represent constituent's welfare and basic human rights;
- create and enforce policies and laws;
- administer essential programmes and deliver services;
- manage human, land and cultural resources; and
- negotiate with governments and organisations.[45]

Good Governance

For Indigenous peoples and nation-states, good governance must be achieved at the international, national, regional and local levels for actualising self-determination, co-governance and shared jurisdiction within an EBM context. Kaufmann, Kraay, and Mastruzzi assert that 'good governance requires enabling conditions: the existence of standards, information on performance, incentives for good performance, and accountability.'[46] Specific universal good governance elements or principles rightly espoused by Dr Dalee Dorough include, inter alia, transparency; responsiveness; consensus; equity and inclusiveness; effectiveness and efficiency; accountability; participation; consultation and consent; human rights; and the rule of law.[47]

Dr Dorough added that 'whether considered as part of the rule of law or in their own right, respect and protection for human rights are key principles essential for good governance and must be consistent with the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP discussed below) which affirms the distinct status and human rights of Indigenous peoples.'[48] The international community has reaffirmed that 'human rights, the

45 Dean, W, 'The Importance of Indigenous Governance and its Relationship to Social and Economic Development,' (Patron, Reconciliation Australia, Unpublished Indigenous Governance Conference Address, Australia National University, Canberra, 3 April, 2002) at 1.

[46] Kaufmann, D, Kraay, A, and Mastruzzi, M, 'Governance Matters V,' in Lewis, M & Peterson, G, *Governance in Education: Raising Performance,* (World Bank, 2009) at 3-4.

[47] Dr Dalee Dorough, 'Concept Paper on the 2014 Theme Regarding Good Governance' (UN Permanent Forum on Indigenous Issues, 13th Session, New York, 12-23 May 2014).

[48] Above.

rule of law and democracy are interlinked and are mutually reinforcing and they belong to the universal and indivisible core values and principles of the United Nations.'[49]

Universal good governance principles apply to governments as well as to corporate and other institutions including Indigenous peoples' governments and governance institutions. Universally recognized principles for good governance must be applied and realized by Indigenous peoples and nation-states although such principles may be applied in different ways depending on specific circumstances. The literature internationally concludes that there is no single worldwide 'one size fits all' model for best practice good governance due to differences in legal systems, institutional frameworks and cultural traditions.[50]

Some good governance principles may conflict with each other in practice as well. For example, the emphasis given to different aspects of governance will vary in different settings because some cultures and societies value process, form and outcomes differently. In more utilitarian Western cultures, great value is placed on efficiency. In some Indigenous and tribal societies on the other hand, a desire for consensus may override efficiency. Some cultures give primacy to individual rights while others stress collective communal obligations. Some societies may see economic growth as their primary goal while others accord more importance to environmental sustainability, social justice and cultural diversity.

Good governance in France, Brazil, Mexico and Russia then, is not the same as it is in England, China, Senegal, Canada and the United States of America. Good governance in Tonga, Norway, Cambodia and the Cook Islands is not the same as it is in Aotearoa New Zealand, India, Uganda and Australia. These different political systems with differing values, laws, institutional frameworks and cultural traditions explain why good governance varies in different countries and even between communities within a country. Still, it is important that Indigenous traditions and values be recognised and accommodated for but in a way that contributes to good governance rather than undermines it. For constructive discourse to take place, it is important that different governance traditions, institutions and values are acknowledged and understood but are applied in a good governance manner. It behoves nation-states and Indigenous peoples then to acknowledge, understand, adopt, adapt and perhaps even celebrate these good governance principles along with 'other' cultural governance traditions and to apply them within their formal governance laws and institutions. For Indigenous peoples, good governance principles are equally important in their relationship with their respective nation-state, but also within Indigenous communities themselves as well as the natural environment. But good governance principles and human rights must be applied!

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[49] Above. See also *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, (GA Res. 67/1, 24 September 2012) (adopted without vote), para. 6: 'We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for, and the observance and protection of, all human rights and fundamental freedoms for all. The universal nature of these rights and freedoms is beyond question. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect human rights and fundamental freedoms for all, without distinction of any kind.'

[50] Jacques Bourgault for example, suggests the basic aspects of good governance comprise: (1) perception of the legitimacy of power of the public authority; (2) citizens at the centre of decision-makers' concerns; (3) a 'society-centred programme' based on listening to citizens; and (4) rapid adaptability of public administration to citizens' needs in dispensing public funds. See Corkery, J, (ed), *Governance: Concepts and Applications* (IIAS Working Group, International Institute for Administrative Studies, Brussels, 1999) at 173.

A crucial example of the need for equal application of the rule of law and for the protection of human rights is the right of Indigenous peoples to self-determination which core right of all peoples is regarded as a pre-requisite to the exercise and enjoyment of all other human rights.[51] Nation-states must therefore equally respect and recognize the right to self-determination of Indigenous peoples in order to protect and promote all of their individual and collective human rights fundamentally in their relationship with Indigenous peoples and with the good governance of Indigenous communities. Such an approach would be conducive to co-governance structures that acknowledge the Māori constitutional relationship in the Treaty of Waitangi partnership and that effectively incorporate mātauranga and tikanga Māori within an EBM context over the coastal marine estate.

Co-Management and Co-Governance

Co-management is a broad concept covering a wide range of techniques where two or more groups share in the governance and operational management of land and natural resources. There is no single accepted definition however, of co-management.[52] Tipa and Welch refer to co-management as a 'contested concept.'[53] Taiepa and others concluded that co-management typically involves the sharing of responsibility between a local community and government - broadly defined as local, regional and/or central/national government.[54]

Berkes argued that there is a continuum of many different levels of co-management and it would be inappropriate to have one fulsome definition. Still, Berkes then defined co-management as a situation in which two or more social actors negotiate, define and guarantee among themselves a fair sharing of the management functions, entitlements and responsibilities for a given territory, area or set of natural resources[55] Berkes emphasised that co-management is the sharing of power and responsibility between the government and local resource users.[56] Berkes added that the state level is the government and local level is the community.

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[51] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), para. 41: 'The right of self-determination is a foundational right, without which Indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed.' See also Human Rights Committee, *General Comment No. 12, Article 1*, 21st sess., A/39/40 (1984), para. 1: 'The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.'

[52] Berkes, F, George, P, and Preston, R, *Co-Management: The Evolution of the Theory and Practice of Joint Administration of Living Resources* (TASO Research Report, Second Series, No. 1 Paper Presented at the Second Annual Meeting of IASCP University of Manitoba, Winnipeg, Canada, Sept. 26-29, 1991) at 2.

[53] Tipa, G and Welch, R, 'Co-Management of Natural Resources: Issues of Definition from an Indigenous Community Perspective,' in *Journal of Applied Behavioral Science,* (Vol. 42, No. 3, 2006) 373 at 380.

[54] Taiepa, T, Lyver, P, Horsley, J, Davis, M, Bragg, M & Moller, H, 'Co-Management of New Zealand's Conservation Estate by Māori and Pākehā: A Review,' in *Foundation for Environmental Estate,* (Vol. 24, No. 3, 1997) 236 at 237.

[55] Borrini-Feyerabend, G, Farvar, MT Nguinguiri, JC and Ndangang, V. A, *Co-Management of Natural Resources: Organising, Negotiating and Learning-by-Doing* (Kasparek Verlag, Heidelberg, Germany, 2000) at 1.

[56] Berkes, F, George, P, and Preston, R, *Co-Management: The Evolution of the Theory and Practice of Joint Administration of Living Resources* (TASO Research Report, Second Series, No. 1 Paper Presented at the Second Annual Meeting of IASCP University of Manitoba, Winnipeg, Canada, Sept. 26-29, 1991) at 2.

However, governments often tend to have different expectations and objectives to local communities which often results in disputes in court. In addition, there are generally 'multiple government agencies and multiple local interests at play, rather than a unitary state and a homogeneous 'community' [57] which further complicates co-management objectives, arrangements and results.

Berkes identified that multi-stakeholder agreements, policy networks, polycentric governance systems and epistemic communities as being similar to co-management but lack the inclusion of community resource users and do not possess the 'hall mark of co-management' which is 'to have at least one strong vertical linkage involving the government and a user group, and some formalised arrangement for sharing power and responsibility.'[58]

The term co-management was first used in the USA in the coastal west Washington State during the 1960s and late 1970s due to clashes between US Treaty tribes and Washington State agencies over salmon fishing.[59] Co-management was the terms used by these Treaty tribes to describe the relationship they aspired to in managing the salmon fisheries with state managers.[60] These tribes protested over salmon regulations and staged 'fish ins' but the State of Washington refused to recognise their rights.[61] The tribes appealed for assistance from the federal government who filed a successful suit against Washington State in 1973 to support the Treaty tribe's rights.[62] The 1974 decision of *United States v. Washington*,[63] held that the tribes were entitled to 50% of the fish harvest in their traditional fishing grounds.[64] In addition, the tribes were designated as co-managers of the salmon resources alongside the State of Washington.[65]

A subsequent environmental 'crisis' of depleted fish stocks led to the emergence of co-management agreements between government and local fisheries.[66] Pinkerton commented that fishermen had lost faith in the government's ability to manage the resource sustainably and they sought real decision-making power, acknowledging that it was more beneficial for the two parties to work together for the shared common goal of fisheries conservation rather than working separately.[67]

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[57] Above.

[58] Above, at 5.

[59] Berq, L, 'Let Them Do as They Have Promised,' in *Hastings West-Northwest Journal of Environmental Law and Policy,* (Vol. 3, No. 1, 1995) 7 at 8.

[60] Pinkerton, E, 'Toward Specificity in Complexity: Understanding Co-management from a Social Science Perspective,' in Wilson, DC, Nielson, JR, Degnbol, P, (eds) *The Fisheries Co-Management Experience,* (Kluwer Academic Publishers, Dordrecht, 2003) at 62.

[61] Above, at 10.

[62] Above, at 14.

[63] *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

[64] Above at paragraph 36, fish that was for ceremonial or personal subsistence purposes was not included in the commercial quota.

[65] Berq, L, 'Let Them Do as They Have Promised,' in *Hastings West-Northwest Journal of Environmental Law and Policy,* (Vol. 3, No. 1, 1995) 7 at 17.

[66] Pinkerton, E, (ed) *Co-operative Management of Local Fisheries* (University of British Columbia Press, Vancouver, 1989) at 4.

[67] Above.

Co-management is now widely used globally in the management of a variety of natural resources such as fisheries,[68] forests,[69] and rivers.[70] Co-management is also used in a wide range of settings such as national parks[71] and for different purposes including for recognising Indigenous rights to land and natural resources.[72]

Examples of Indigenous co-management in Canada are typically categorised as 'land-claim based' – arising from obligations under comprehensive land claim settlements between First Nations and the government; or 'crisis-based' - a result of real or perceived resource crises.[73] Indigenous co-management agreements also tend to fall into two additional categories:

1. co-management structures which establish a relationship of equal partnership between First Nations and the government; and
2. community-based co-management arrangements that incorporate First Nations as one of many local interest groups with a legitimate stake in environmental management.[74]

In addition, co-management arrangements may be area-specific or relate to a particular species or resource.

The majority of co-management definitions then requires some sort of institutionalised arrangement for intensive user participation, not just ad hoc public participation and consultation.[75]

Across the various definitions of co-management, the common features include:

- management of natural resources;
- a non-static formalised arrangement;
- generally, for the purpose of sustainability;
- over a resource not managed solely by the state;
- inclusive of local stakeholders; and
- shared power and responsibility.

[68] Above, at 5.

69 See for example Wollenberg, E, Edmunds, D & Nuck, L, 'Using Scenarios to Make Decisions about the Future: Anticipatory Learning for the Adaptive Co-management of Community Forests,' in *Landscape and Urban Planning,* (Vol. 47, Nos. 1-2, 2000) at 65.

70 Refer to Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

[71]See Robinson, C.J and Wallington, TJ, 'Boundary Work: Engaging Knowledge Systems in Co-Management of Feral Animals on Indigenous Lands,' in *Ecology and Society*, (Vol. 17, No. 2, 2012) at 16.

[72] See for example Local Government New Zealand Co-management: Case Studies Involving Local Authorities and Māori (2007) online at: http://policyprojects.ac.nz (Accessed May 2020).

[73] Scott, C, 'Co-Management and the Politics of Aboriginal Consent to Resource Development: The Agreement Concerning a New Relationship between Le Gouvernement du Québec and the Crees of Québec,' in Michael Murphy, M, (ed) *Canada: The State of the Federation 2003: Reconfiguring Aboriginal-State Relations* (McGill-Queen's University Press, Montreal, 2005) 133 at 134.

[74] Above.

[75] Above.

However, like any term, co-management depends on one's worldview: for Indigenous people, co-management is intended to be a joint management arrangement of shared power, jurisdiction and responsibility; while from a government perspective, often co-management could be perceived as simply consultation. Such confusion over expectations exacerbates the potential for misunderstanding and heated disputes (not to mention ineffective outcomes), given the different even contradictory expectations.

In summary, it is clear that there is no one single definition: co-management can be viewed as an umbrella term requiring, as a minimum, two entities 'managing' a natural resource together, with numerous variations of structural arrangements, shared power and authority expectations, and law.

Still, Governance, as noted above, is about who makes decisions and how. Governance is about who has power to decide what the objectives are of an organisation; what to do to pursue the objectives and with what means. Governance is how those decisions are made, who holds power, authority and responsibility; and who is held accountable for results of the lack thereof.

Management, on the other hand, is a subset of governance. Management is about what is done in pursuit of certain agreed objectives set by governance.[76] Governance is very different to management. Similarly, co-governance is very different to co-management. Co-governance is about shared governance; jointly deciding objectives and priorities, sharing power, authority, jurisdiction and responsibility, and being jointly held accountable for outcomes.

Co-management on the other hand, is about sharing the responsibility for management. Co-management is about jointly undertaking actions to achieve given objectives. Co-management is about what is done in pursuit of given objectives. Co-management is the means and actions to achieve shared objectives.

Collaborative Co-Governance

The dramatic degradation and destruction of New Zealand's terrestrial and marine ecosystems and repairing, restoring and sustaining our environment demands a more collective, collaborative, targeted, effective and cohesive approach from all New Zealanders. Ecosystem-based management (EBM) is New Zealand's response for addressing this alarming environmental degradation, and is designed and executed as an adaptive, learning-based process that includes, inter alia, being based on a shared vision of all key participants. All New Zealanders have a role to play in this shared goal and vision. For EBM to be effective as a minimum in this ambitious repairing, restoring and sustaining goal of our coastal marine estate demands effective collaboration. Collaboration and strong relationships will be key success factors for shared collaborative EBM co-governance and co-management implementation over the coastal marine estate.[77]

[76] Borrini-Feyerabend, G. and Hill, R., 'Governance for the conservation of nature,' in Worboys, G.L. Lockwood, M and Kothari, A, *Protected Area Governance and Management*, (ANU Press, Canberra, 2015) at 170-205. Online at http://press.anu.edu.au/wp-content/uploads/2015/02/CHAPTER7.pdf. (Accessed May 2020).

[77] See Smith, G.H, Tinirau, R., Gilles, A. & Warriner, V. *He Mangopare Amohia: Strategies for Māori Economic Development*, (Te Whare Wānanga o Awanuiārangi, Whakatāne: 2015).

To these ends, the Māori and Indigenous Governance Centre (MIGC) at the University of Waikato was involved in another research project on Māori economic performance.[78] The report identified key factors for Māori organisations to aggregate - to collaborate effectively - on the shared vision of economic performance. The same key collaboration factors, we believe, share some resonance for effectively implementing EBM over the coastal marine estate for the purposes of this report. Accordingly, our former MIGC report explored collaboration conceptually and identified a number of key collaboration findings for consideration for this report

Collaboration, to effectively implement EBM over the marine and coastal estate of New Zealand, is defined as working with others towards a shared goal or to manage differences.[79] Collaboration is often perceived as a way to do something that would not otherwise be possible on one's own.[80]

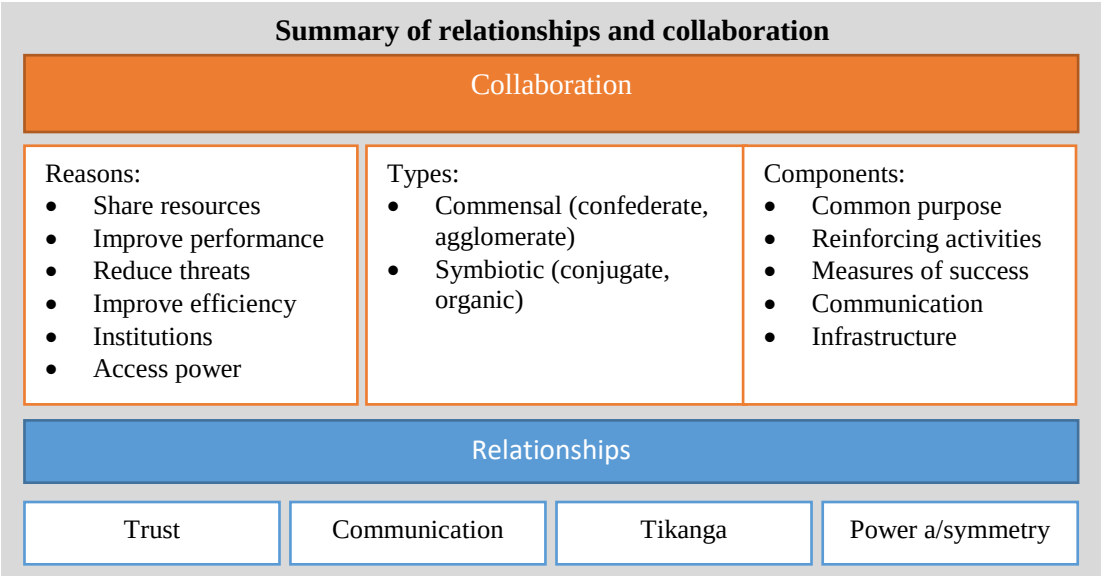


Diagram 2: Summary of relationships and collaboration

[78] Joseph, R, Tahana, A, Kilgour, J, Mika, J, Rakena, M & Jeffries, T.P, *Te Pae Tawhiti: Exploring the Horizons of Māori Economic Performance through Effective Collaboration,* (Māori and Indigenous Governance Centre (MIGC), University of Waikato, Hamilton, prepared for Ngā Pae o te Māramatanga, 2016).

[79] Gray, B. *Collaborating: Finding Common Ground for Multiparty Problems*, (Jossey-Bass, San Francisco: 1989); Kania, J. & M. Kramer, 'Embracing Emergence: How Collective Impact Addresses Complexity,' in *Stanford Social Innovation Review,* (Vol. 21, January 2013); and Kania, J., & Kramer, M. 'Collective Impact,' in *Stanford Social Innovation Review*, (Vol. 9, No. 1, 2011) at 36-41.

[80] Wood, D. J. and B. Gray, 'Toward a Comprehensive Theory of Collaboration,' in *The Journal of Applied Behavioural Science,* (Vol. 27, No. 2, 1991) at 139-162.

Collaboration is project and time-bound, which is a useful contrast of how collaboration and relationships relate particularly in a Māori context. Collaboration is highly dependent on relationships because collaborations are a negotiation of how a relationship is structured to deliver a collective strategy.[81] Consequently, collaboration is underpinned by trust[82] and communication.[83] It must manage power asymmetries in a way that shares power between organisations;[84] does not dilute the objectives that each organisation seeks from the collaboration;[85] and should empower the group as a whole.[86]

The relationship should be seen as sharing power at the start of the collaboration, rather than the outcome.[87] Furthermore, the relationships should be considered paramount to the collaboration, so that if collaboration puts the relationship under strain, then the collaboration, as a project, should be reconsidered.[88]

How the collaboration is structured and the form it takes can depend on the reason for collaborating and the nature of the collaboration. According to Wood and Gray, there are six broad reasons for collaboration:

1. sharing resources or intelligence;
2. improving performance;
3. reducing strategic threats;
4. improving efficiency;
5. creating structures or institutions; or
6. increasing access to power or resources.[89]

[81] Astley, W. G., & Fombrun, C. J. 'Collective Strategy: Social Ecology of Organizational Environments,' in *Academy of Management Review*, (Vol. 8, No. 4, 1983) at 576-587; and Cyert, R.M. and March, J.G. *A Behavioural Theory of the Firm,* (Englewood Cliffs: Prentice Hall, 1963).

[82] Martinez-Moyano, I. 'Exploring the Dynamics of Collaboration in Interorganizational Settings,' in *Creating a Culture of Collaboration: The International Association of Facilitators Handbook*, (Vol. 4, No. 69, 2006).

[83] Kania, J. & M. Kramer, 'Embracing Emergence: How Collective Impact Addresses Complexity,' in *Stanford Social Innovation Review,* (January, 2013); and Kania, J., & Kramer, M. 'Collective Impact,' in *Stanford Social Innovation Review*, (Vol. 9, No. 1, 2011) at 36-41.

84 Wollenberg, E., Iwan, R., Limberg, G., Moeliono, M., Rhee, S., & Sudana, M. 'Facilitating Cooperation During Times of Chaos: Spontaneous Orders and Muddling through in Malinau District, Indonesia,' in *Ecology and Society*, (Vol. 12, No. 1, 2007) at 65; Bene, C. & Neiland, A.E. 'Empowerment Reform, Yes… but Empowerment of whom? Fisheries decentralization reforms in developing countries: a critical assessment with specific reference to Poverty Reduction,' in *Aquatic Resources, Culture and Development*, (Vol. 1, 2004) at 35-49.

[85] Dolsak, N. & Prakash, A. 'Government Contractors as Civil Society?' in *Stanford Social Innovation Review*, (Vol. 9, Nov. 2015); Cornell, S. & Kalt, J. *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't*, (Harvard University Press, 2006); and Cornell, S., & Kalt, J. P. 'Sovereignty and Nation-Building: The Development Challenge in Indian Country Today' in *American Indian Culture and Research Journal*, (Vol. 22, No. 3, 1998) at 187-214.

[86] Berkes, F., & Social, A. *Coasts for People: Interdisciplinary Approaches to Coastal and Marine Resource Management*, (New York: Routledge, 2015).

[87] Carlsson, L. & Berkes, F, 'Co-Management: Concepts and Methodological Implications,' in *Journal of Environmental Management,* (Vol. 75, 2005). 65-76.

[88] Smith, G.H, Tinirau, R., Gilles, A. & Warriner, V. *He Mangopare Amohia: Strategies for Māori Economic Development*, (Whakatāne: Te Whare Wānanga o Awanuiārangi, 2015).

[89] Wood, D. J. and B. Gray, 'Towards a Comprehensive Theory of Collaboration,' in *The Journal of Applied Behavioural Science,* (Vol. 27, No. 2, 1991) at 139-162.

The nature of the collaboration can be determined by how the collaborating organisations interact with each other.[90] For example, where the organisations do the same activity, then the relationship may be commensal; where the organisations do different activities, but derive mutual benefit from working together, they may be symbiotic. [91] Whether collaborating parties have a direct or indirect relationship can also determine whether they are confederate or agglomerate (commensal relationships), or conjugate or organic (symbiotic relationships).

More direct and transactional arrangements tend to be conjugate in nature (e.g. contracts, shared services and joint ventures). More direct and commensal arrangements tend to be confederate in nature (e.g. collusion). Understanding both arrangements, the purpose of collaboration (e.g. improving efficiency) and the nature of the collaboration (e.g. conjugate) can determine the structure and form of the collaboration (e.g. shared services to improve efficiency).

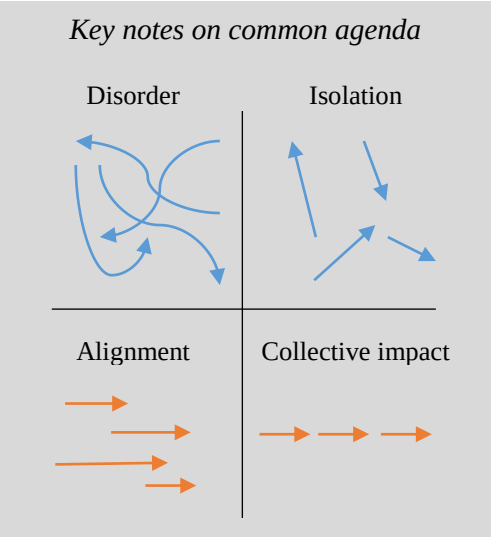


Diagram 3: Key Notes on Common Agenda

Kania and Kramer refer to collective impact collaboration, which is comprised of five key elements:

1. a common agenda or purpose,
2. a series of mutually reinforcing activities,
3. continuous and open communication;
4. backbone infrastructure; and

[90] Astley, W. G., & Fombrun, C. J, 'Collective Strategy: Social Ecology of Organizational Environments,' in *Academy of Management Review*, (Vol. 8, No. 4, 1983) at 576-587; and Wood, D. J. and B. Gray, 'Toward a Comprehensive Theory of Collaboration,' in *The Journal of Applied Behavioural Science,* (Vol. 27, No. 2, 1991) at 139-162.

[91] Hawley, A. *Human Ecology*, (New York: Ronald Press Company, 1950); and Astley, W. G., & Fombrun, C. J. 'Collective Strategy: Social Ecology of Organizational Environments,' in *Academy of Management Review*, (Vol. 8, No. 4, 1983) at 576-587.

5. shared framework for measuring results.[92]

These five elements provide a process template to collaborate with others. In essence, collaboration comprises two parts: (1) clarifying the common agenda, and setting the collective strategy and measures of success; and (2) structuring delivery through a backbone organisation and mutually reinforcing activity to achieve the measures of success. These mirror the simple organisation theory of strategy and structure in a single organisation as a complex organisation and collaboration across multiple organisations.[93] As a complex organisation, both examples draw on emergence and adaptive management practice, for creating a cycle for iterative opportunities for organisational learning over time.[94] In practice, this can initially mean very frequent meetings so that all collaborating parties come to a common understanding of what the issue or purpose is, based on available evidence; what the group collectively aspires to achieve based on the aggregate and common purposes of those involved (the common agenda); and design of activity and organisation (the action plan and the backbone infrastructure). These iterate complex opportunities for organisation learning as an 'experimental' process, requiring more frequent communication, more frequent reflection opportunities and adaptability, while also increasing communication to build trust and engage public will.[95]

[92] Kania, J. & M. Kramer, 'Embracing Emergence: How Collective Impact Addresses Complexity,' in *Stanford Social Innovation Review,* (January 2, 2013); Kania, J., & Kramer, M, 'Collective Impact,' in *Stanford Social Innovation Review*, (Vol. 9, No. 1, 2011) at 36-41; and Wood, D. J. and B. Gray, 'Toward a Comprehensive Theory of Collaboration,' in *The Journal of Applied Behavioural Science,*(Vol. 27, No. 2, 1991) at 139-162.

[93] Mintzberg, H. *The Structuring of Organizations*, (Englewood Cliffs, NJ, 1979); Mintzberg, H. 'The Design School: Reconsidering the Basic Premises of Strategic Management,' in *Strategic Management Journal*, (Vol. 11, 1990) at 171-195; Amburgey, T. L., & Dacin, T. 'As the Left Foot Follows the Right? The dynamics of Strategic and Structural Change,' in *Academy of Management Journal*, (Vol. 37, No. 6, 1994) at 1427-1452.

[94] Argyris, C. & Schön, D.A. *Organizational Learning: A Theory of Action Perspective*, (Reading: Addison-Wesley, 1978).

[95] Kania, J. & M. Kramer, 'Embracing Emergence: How Collective Impact Addresses Complexity,' in *Stanford Social Innovation Review,* (January 2, 2013); Kania, J., & Kramer, M, 'Collective Impact,' in *Stanford Social Innovation Review*, (Vol. 9, No. 1, 2011) at 36-41; and Turner, S., Merchant, K., Kania, J., & Martin, E. Understanding the Value of Backbone Organizations in Collective Impact: Part 2,' in *Stanford Social Innovation Review*. (2012).

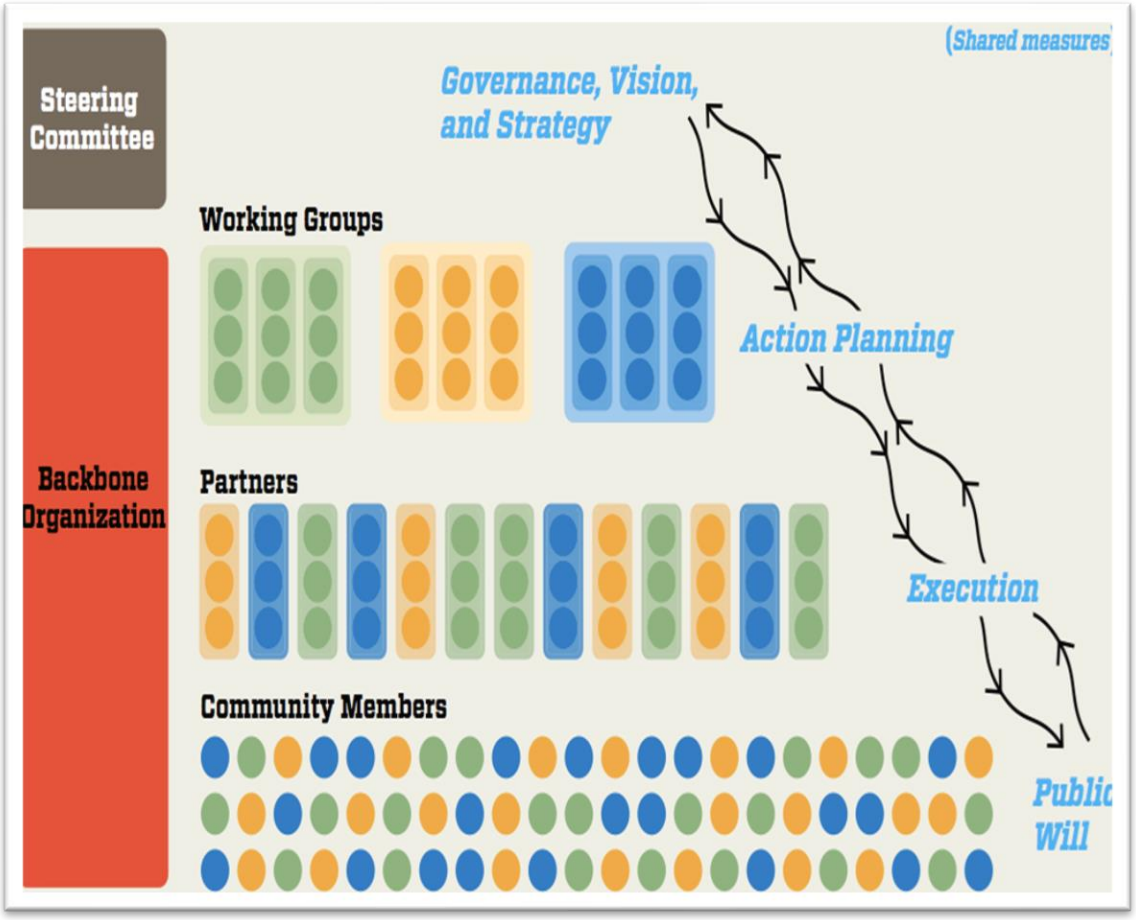


Diagram 4: Collaboration Vision

As noted above, the key collaboration factors, we believe for Māori economic performance[96] share some resonance for effectively implementing EBM over the coastal marine estate for the purposes of this report. Accordingly, our former MIGC report identified the following key collaboration findings for consideration for this report:

1. **Collaboration is assisted by a catalyst for change usually in the form of a crisis or an opportunity**:

The catalyst for this research report is obviously is the dramatic degradation and destruction of New Zealand's terrestrial and marine ecosystems which are at crisis levels but also the

[96] Joseph, R, Tahana, A, Kilgour, J, Mika, J, Rakena, M & Jeffries, T.P, *Te Pae Tawhiti: Exploring the Horizons of Māori Economic Performance through Effective Collaboration,* (Māori and Indigenous Governance Centre, (MIGC), University of Waikato, Hamilton, prepared for Ngā Pae o te Māramatanga, 2016).

opportunity for repairing, restoring and sustaining our environment that all New Zealanders must embrace, not just Māori.

2. **Geographic and/or ideological proximity provide a foundation for building relationships and trust for collaboration**:

The geographic and ideological proximity in this context is the degradation and destruction of New Zealand's terrestrial and marine ecosystem, which affects all New Zealanders. For the purpose of this report, co-governance and co-designed structures that acknowledge the Māori constitutional partnership – political, geographic and ideological proximity - and that effectively incorporate tikanga and mātauranga Māori within an EBM context over the marine estate are key for effective collaboration.

3. **Strategic communication is important to manage collaboration expectations and to emphasise long term views, intergenerational vision and balanced development**:

To manage EBM collaboration expectations to accomplish the lofty intergenerational goal of repairing, restoring and sustaining our coastal marine estate is going to be a colossal challenge that will require strong effective communication across all disciplines, sectors, cultures, interest groups and worldviews. Effective communication requires collective shared long-term views, intergenerational vision and balance, which demands compromise by all collaboration partners.

4. **Good governance and robust leadership are critical to develop and sustain collaborative action**:

Good governance and robust leadership from the Crown and Māori community as well as all other key stakeholders will be critical to effectively co-govern and co-design structures to implement EBM over the marine estate.

5. **Clear roles and responsibilities are essential to monitor collaborative action performance**:

Clear governance and management leadership roles and responsibilities are also critical for monitoring co-governance and co-designed structures to implement EBM over the marine estate.

6. **Active management and increased participation in the value chain are critical for effective collaborative action**:

Although the value chain is not applicable to EBM over the coastal marine estate, active management and increased participation are for all participating organisations and at all levels for effective EBM over the coastal marine estate.

7. **Increased capacity and capability building – professional, sector specific, cultural and adaptive**:

As noted throughout this report, professional, sectoral cultural and adaptive capacity and capability building will be critical for effective EBM over the coastal marine estate of New Zealand in all organisations from national government to iwi, industry to local government, recreational to commercial and customary fisheries, and all other stakeholders and interest groups.

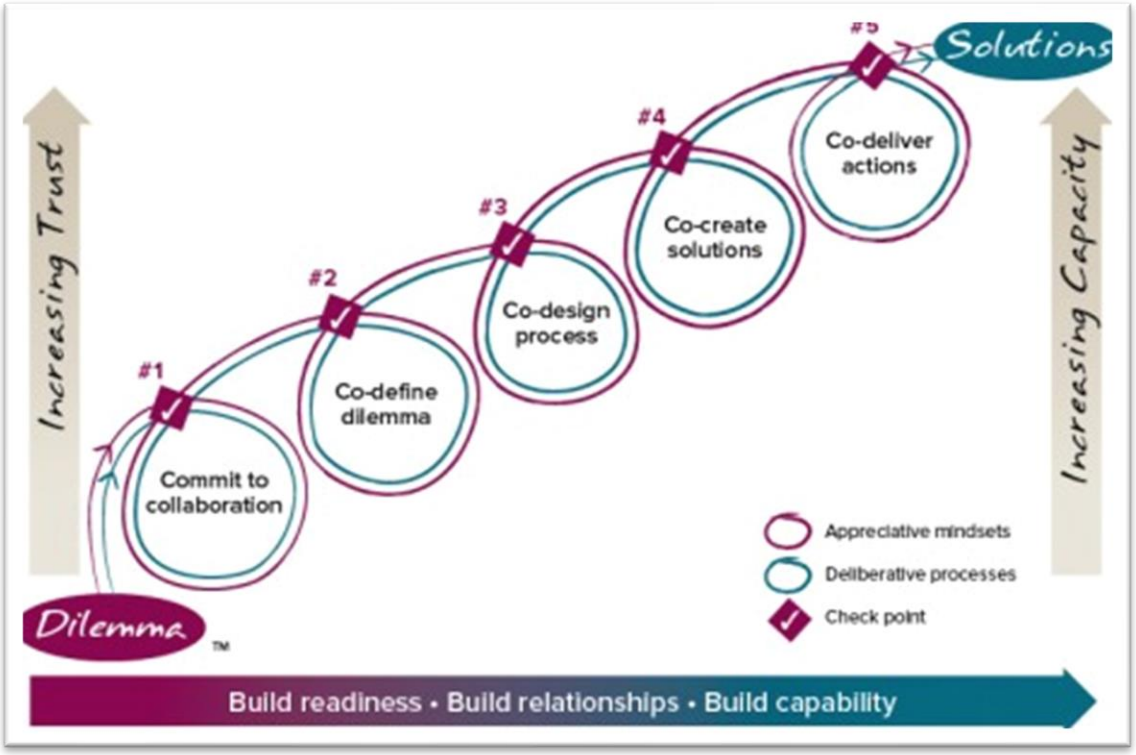
8. **A fit for purpose legal form or forms is important to perform the intended functions of the collaboration**:

The effective co-governance and co-management of the coastal marine estate in New Zealand will require fit for purpose institutionalised arrangements – what Kania and Kramer refer to with collective impact as backbone infrastructure - not just ad hoc public participation and consultation policy. Additional fit for purpose collaborative co-governing and co-managing organisations will be required at the different levels – national, regional, local community.

9. **Appropriate dispute resolution fora and processes are essential to mitigate relationship tensions and to maintain trust in the collaboration investment**"[97]

Given the diversity and complexity of the various groups involved in participating and implementing EBM over the marine and coastal estate of New Zealand – the Crown, regional and local government, Māori, industry, recreational, customary and commercial fisheries, aquaculture, mining, NGOs, local communities, etc. – and the associated and varied differences in worldviews, values, objectives, laws, regulations, expectations and priorities – relationship tensions and disputes will be inevitable. What will be key is establishing appropriate dispute resolution fora and processes to mitigate the differences and tensions to maintain trust in the collaboration relationships and investment.

[97] Joseph, R, Tahana, A, Kilgour, J, Mika, J, Rakena, M & Jeffries, T.P, *Te Pae Tawhiti: Exploring the Horizons of Māori Economic Performance through Effective Collaboration,* (Māori and Indigenous Governance Centre, University of Waikato, Hamilton, prepared for Ngā Pae o te Māramatanga, 2016) at 9.



(Twyfords https://www.twyfords.com.au/)

Diagram 5: Collaboration Relationships

Māori Governance

Māori in Aotearoa New Zealand provide an interesting international case study for actualising Indigenous self-determination, human rights and good governance. Māori are an influential sector within 21st century Aotearoa New Zealand society. Te Reo Māori is an official language along with English and American sign language, the Treaty of Waitangi and its implications for Māori and the nation have been acknowledged and negotiated since 1975, Māori political influence is approximately 20% in Parliament, Māori are involved in the highest levels of most national sports, business and public office, Māori television, news and radio are broadcast daily to the nation, Māori place names are well known throughout much of the countryside, and Māori make up approximately 15% of the New Zealand population.[98] The growing prominence of the Māori community nurtures understanding of cultural similarities and differences.

[98] In Aotearoa New Zealand in 2013, around 1 in 7 New Zealanders were Māori. There were 598,605 people of Māori ethnicity and 668,724 people of Māori descent living in New Zealand in 2013, which is 33,276 more than at the 2006 Census. Around one-third (33.1 percent) of people of Māori descent were aged under 15 years, while 5.6 percent were aged 65 years and over. http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-Māori-english/population.aspx. (Accessed February 2014). The more updated 2018 census statistics were supposed to be available in March 2020 but were not for some reason. Stats New Zealand online at https://www.stats.govt.nz/news/expected-updates-to-Māori-population-statistics (Accessed May 2020).

Interest in the good governance of Māori communities [99] has commensurately grown considerably over the past three decades as significant Treaty of Waitangi settlements have been negotiated between the Crown and various tribes under the Treaty of Waitangi and as Māori collectives take an increasing role in providing social service delivery on behalf of the Government to Māori communities.[100] Since the 1980s, there has been an explosion of new Māori governance entities formed at the community, regional and national levels. Today there are literally thousands of separately incorporated Māori organisations throughout Aotearoa New Zealand.

Progress towards more Treaty of Waitangi settlements that are governed by post-settlement governance entities (PSGEs),[101] requirements for greater engagement between Māori and local government under the Local Government Act 2002, proposals for mandated Iwi (tribal) organisations under the Māori Fisheries Act 2004,[102] proposed allocations of marine farming space to Iwi under the Māori Commercial Aquaculture Claims Settlement Act 2004,[103] the prospect for Māori group involvement in marine and coastal area administration under the Marine and Coastal Area (Takutai Moana) Act 2011,[104] the thousands of not-for-profit Māori organisations who provide social services, [105] and the current trend to enter into joint management agreements (JMAs)[106] and co-management agreements over natural resources with local Māori under the Resource Management Act 1991 (RMA) and specific legislation such as the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Ngāti Tuwharetoa, Raukawa and Te Arawa River Iwi Act 2010, and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; regulations such as the Kaimoana Customary Fisheries Regulations 1998, and initiatives such as the Auckland Unitary Plan 2017 and Hauraki Sea Change – Tai Timu Tai Pari Project 2013, and recent co-governance models[107] including over

[99] See Joseph, R, 'Contemporary Māori Governance: New Era or New Error?,' in *New Zealand Universities Law Review*, (Vol. 22, 2007) at 682 – 709 and Joseph, R., 'Contemporary Māori Governance: New Error' in Farrar, J and Watson, S, (eds) *Contemporary Issues in Corporate Governance* (The Centre for Commercial & Corporate Law Inc, University of Canterbury, Christchurch, 2011) at 327 – 368.

[100] In 2019, there were at least 70 or more iwi (tribal) organisations that were mandated to manage the proceeds of the nearly $1 billion from the fisheries settlement; 72 or more iwi and hapū organisations were mandated to manage the proceeds of comprehensive Treaty of Waitangi settlements; 8,500 representative management entities – Māori Incorporations and Ahu Whenua Trusts - under the Te Ture Whenua Māori Act 1993; 44 or more Māori health providers, and at least 500 Marae (Māori meeting complex areas).

[101] Over 80 post-settlement governance entities have been established to date to manage settlement assets and govern Māori settlement communities. In 2019, over 80 Deeds of Settlement have been signed by Māori and the New Zealand Crown and it is anticipated approximately 60 more will be signed.

[102] Māori Fisheries Act 2004, ss. 13, 14, 21, 27, 28, 40 and 130.

[103] Māori Commercial Aquaculture Claims Settlement Act 2004, ss. 32, 33 and 45.

[104] There are currently over 300 Coastal Marine (Takutai Moana) Act 2011 applications being processed throughout the country but the Government is still developing its policy on this area and some of the claims are very challenging to research and process and are costly.

[105] Such as Māori Health Authorities (MHAs) and private and charitable trusts. In 2009, there were approximately 44 MHAs.

[106] Resource Management Act 1991, ss. 33, 34, 35.

[107] See Fagan, C *The Successes and Failures of Indigenous Co-Management Regimes in Canada: Possible Ways the Waikato River Claim Settlement Process Can Learn from the Canadian Experience* (Hamilton: Waikato Raupatu Trustee Co. Ltd, 2005); Craig, D 'Recognising Indigenous Rights through Co-Management Regimes: Canadian and Australian Experiences' in *New Zealand Journal of Environmental Law* (Vol. 199, 2002) at 25-28; Coombes, B & Hill, S, 'Na whenua, Na Tuhoe. Ko D.o.C te partner – Prospects for co-management of Te Urewera National Park' in *Society & Natural Resources: An International Journal* (Vol. 18, Issue 2, 2005); Norman, P, 'Crown and Iwi Co-Management: A Model for Environmental Governance in New Zealand? (University of

Te Oneroa-a-Tōhē (Ninety Mile Beach in the Far North) and the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019; all highlight the visibility and importance of Māori self-determination and good governance through shared jurisdiction in law and fact in Aotearoa New Zealand.

How well such governance structures and processes perform these functions has a direct impact on the strength and well-being of the respective community they represent. The key challenges for contemporary Māori governance will be balancing and enhancing traditional, transactional, transcendental and transformational Māori governance. Still, effective and stable Māori governance organisations reflective of, and accountable to their community's needs and values, can play a crucial role in regional and community well-being and environmental sustainability including with the application and implementation of EBM over the coastal marine estate.

Furthermore, maintaining distinct Māori governance values, laws, institutions and practices is important so that Māori are not lost in the cacophony of colossal pressure to conform and assimilate into global corporate structures, processes, values and priorities. Briefly, some distinct Māori governance features include, inter alia:

- The fundamental place of mātauranga and tikanga Māori besides a karakia and mihi to start and finish board meetings;
- The Treaty of Waitangi constitutional relationship, rights and responsibilities;
- Balancing mixed, evolving and contradictory governance objectives – commercial, economic and political v cultural, social and environmental rights and responsibilities;
- Intergenerational responsibilities for adopting a long-term view - 50 to 300 years governance vision and decision-making;
- Unique board appointments and dynamics such as tuakanatanga (whānau and tribal seniority) and the place of Kaumātua (Elders);
- Board members' kaitiakitanga rights and responsibilities to resources, assets and people - past, present and future generations;
- Consideration of the duality of both wealth and well-being;
- Broad stakeholder ownership and involvement;
- Māori governance entities involved in multi-sector interests – land, forests, fisheries, marine estate, beef, dairy, honey, etc;
- Restrictive, paternalistic and parallel legislative prescriptions such as Te Ture Whenua Māori Act 1993, Māori Affairs Act 1955 and the Māori Fisheries Act 2004;
- Complex challenges for appropriately resolving internal governance disputes outside of litigation;
- Inappropriate fora for resolving Māori governance disputes.[108]

Auckland Policy 701, 2011) and Dodson, G & Papoutsaki, E (Eds), *Communication issues in Aotearoa New Zealand: A collection of research essays* (Epress Unitec, Auckland, 2014) at 62-73.

[108] Fodder, T, Davis-Ngatai, P & Joseph, R, *Ka Takahia ano o Tātou Tapuae: Retracing our Steps: A Maori Governance Overview and Literature Review,* (Māori and Indigenous Governance Centre, University of Waikato, Hamilton, prepared for Ngā Pae o te Māramatanga, 2014) at 8-15.

In addition, governance is not synonymous with government, and the tendency to confuse the terms can have unfortunate consequences. Indeed, equating governance with government constrains the way in which problems with policy, law and practice are conceived. For example, the confusion in terminology can lead to policy issues being defined implicitly as a problem of government, with the result that the onus for fixing it is necessarily seen to rest with the government which can severely narrow the range of effective strategies available to deal with problems such as the dramatic destruction of terrestrial and marine ecosystems in New Zealand and elsewhere. In short, definitional confusion related to governance has important practical consequences – it may affect not only the definition of a problem, but also the policy analysis and law reform on how to resolve it and the assignment of responsibility for taking action.[109]

While governments have a critical influence on many issues of public concern, it is with respect only one of many stakeholders. As issues of governance, decision-making and accountability become more complex, and the limitations of government are more apparent, it is becoming clearer that government programmes, initiatives and law reform are far from the sole determinants of repairing and restoring environmental conditions within communities and regions. Many political, social, cultural, economic and environmental issues are simply too complex to be addressed by governments acting alone and require collaboration and partnerships with other sectors of society including with Māori co-governance structures that acknowledge the Māori constitutional relationship in the Treaty of Waitangi partnership and that effectively incorporate mātauranga and tikanga Māori within an EBM context over the coastal marine estate.

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In this respect, Kooiman identified that governments are not the only entity equipped to manage societal problems: other groups such as NGOs, village councils and volunteer groups can and should participate in shaping society.[110] The recognition of and potential role of non-governmental actors is crucial to the development of co-management and co-government agreements. Policy development and governance changes such as implementing EBM over the coastal marine estate should be collaborative 'bottom-up' approaches decided with the local people, not exclusively by governments.

To these ends, the next section will explore this notion of shared governance jurisdiction by drawing on some of the international literature on self-determination and governance jurisdiction.

D. Governance Jurisdiction

Māori self-determination, autonomy, tino rangatiratanga, mana motuhake, mana whakahaere tōtika and shared governance jurisdiction are inter alia, about governmental authority that is exercisable and shared by governments and governing organisations.[111] This

109 Plumptre, T and Graham, T, *Governance and Good Governance: International and Aboriginal Perspectives* (Institute for Governance, Ottawa, Canada, 1999) at 2.

[110] Kooiman, J & Bolvink, M, 'The Governance Perspective,' in Kooiman, J, Bolvink, M, Jentoft, S and Pullin, R, (Eds), *Fish for Life: Interactive Governance for Fisheries* (Amsterdam University Press, Amsterdam, 2005) at 15.

[111] McNeil, K, 'The Jurisdiction of Inherent Right Aboriginal Governments' (Research Paper for the National Centre for First Nations Governance, 11 October 2007) at 1. See also Barsh, R, 'Aboriginal Peoples and the Right

section will briefly focus on governance jurisdiction to introduce this key theme as a focus for this report in terms of effectively implementing the co-governance aspect of ecosystem-based management over the marine estate in New Zealand between Māori and Pākehā. Different types of jurisdiction models exist legally and politically. Kent McNeil referred to six jurisdiction models that are relevant for and align with this report - territorial, personal, subject matter, exclusive, concurrent, inherent and delegated jurisdiction.[112]

Territorial jurisdiction includes the authority to enact laws and regulations that apply solely within a specified geographical territory such as on a Native American reservation in the USA, First Nations reserves in Canada, and perhaps marae and customary marine title over the marine estate in New Zealand. Territorial jurisdiction is authority exercisable over a specific geographical space and it applies over any one who happens to be physically present within that specific territory.[113]

Personal jurisdiction includes the authority to pass laws that are exercisable over a particular people due to characteristics of those people such as citizens of an Indigenous nation with tribal whakapapa (genealogical connections) to whenua (land) and moana (the marine and coastal area), or a religious group such as Muslims or Jews.[114] Personal jurisdiction is exercisable over a particular people whether they are physically present in a territory or not.

Subject matter jurisdiction on the other hand includes authority to pass laws on specified subjects but not others such as customary fishing rights in a hapū coastal area and customary marine title (CMT) under the Coastal Marine Area (Takutai Moana) Act 2011. Subject matter can be very broad from prescribing citizenship rights and responsibilities, to probating a will, performing marriages and child adoptions, to regulating environmental protections and catch limits.

Political jurisdiction can also be exclusive, concurrent or both. Exclusive jurisdictional authority is exercised by one Government, which in Canada, can be an Aboriginal, Provincial

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to Self-Determination in International Law,' in Hocking, B, (Ed.), *International Law and Aboriginal Human Rights,* (Carswell Co, Agincourt, 1988) at 68-69; Anaya, J, *Indigenous Peoples in International Law* (2nd Ed, Oxford University Press, Oxford, 2004) at 97-112; Hogg, P & Turpel, M, 'Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues,' in *Canadian Bar Review,* (Vol. 74, 1995) at 187-199; Cornell, S & Kalt, J, 'Sovereignty and Nation-Building: The Development Challenge in Indian Country Today,' in *A.I.C.J.R,* (Vol. 22, 1998) at 187-209; and generally the right and responsibility of Indigenous peoples to internal self-determination as articulated in the United Nations Declaration on the Rights of Indigenous Peoples 2007 as discussed in more detail below.

[112] Above. See also Penikett, T, *Six Definitions of Aboriginal Self-Government and the Unique Haida Model,* (Action Canada, B.C, September 2012) and Christie, G, *Aboriginal Nationhood and the Inherent Right to Self-Government,* (Research paper for the National Centre for First Nations Governance, May 2007). For references on jurisdiction in an EBM context, see Karkkainen, B, 'Collaborative Ecosystem Governance: Scale, Complexity and Dynamism,' in *Virginia Environmental Law Journal,* (Vol. 21, No. 2, 2002) at 189-243; Gunningham, N, 'The New Collaborative Environmental Governance: The Localization of Regulation,' in *Journal of Law and Society,* (Vol. 36, No. 1, Economic Globalization and Ecological Localization: Socio-legal Perspectives, March 2009) at 145-166; Emerson, K, Nabatchi, T & Balogh, S, 'An Integrative Framework for Collaborative Governance,' in *Journal of Public Administration Research and Theory,* (Vol. 22, No. 1, Jan. 2002) at 1-29; and Green, O, Garmestani, A, Allen, C, Gunderson, L, Ruhl, J, Arnold, C, Graham, N, Cosens, B, Angeler, D, Chaffin, B & Holling, C, 'Barriers and Bridges to the Integration of Social-Ecological Resilience and Law,' in *Frontiers in Ecology and the Environment,* (Vol. 13, No 6, Aug 2015) at 332-337.

[113] McNeil, K, 'The Jurisdiction of Inherent Right Aboriginal Governments' (Research Paper for the National Centre for First Nations Governance, 11 October 2007) at 1.

[114] Above.

or Federal Government, while in the USA, it is Tribal, State or Federal Government. In New Zealand, exclusive jurisdiction would be Local and Regional Councils as well as National Government and to some extent Māori tribal authorities.[115]

Concurrent jurisdiction is shared jurisdiction and can be exercised by two or more Governments, be they Indigenous, Local, Regional, Provincial/State or Federal Government, over a specified area.[116] When jurisdiction is concurrent, rules are needed to determine which Government's laws prevail in the event of conflicting jurisdiction. For example, where the Federal and Provincial Governments in Canada have concurrent jurisdiction over a particular subject matter, Canadian constitutional law provides that Federal laws are paramount over Provincial laws in the event of a direct conflict between them.[117]

[115] Above.
[116] Above.
[117] Above, at 2. See also Hogg, P, *Constitutional Law of Canada,* (Carswell, Toronto, 2019) at 16-20.

Table 1: McNeil's Jurisdiction Spectrum of the Inherent Right of Aboriginal Governments[118]

7	**Delegated**	Delegated jurisdiction occurs when legal and political authority is delegated from a Government to another authority.
6	**Inherent**	Inherent jurisdiction is legal and political authority of a people over an area by virtue of inheritance – of being the first citizens of an area, inhered through genealogy to a culture, place and political system.
5	**Concurrent**	Concurrent jurisdiction is shared legal authority exercised by two or more Governments. Legal rules are required to determine prevailing laws in the event of conflicting jurisdiction.
4	**Exclusive**	Where legal jurisdictional authority is exercised exclusively by one Government – Local, Regional, State/Province, Federal /National Government; Aboriginal, Indian, Māori tribal authorities.
3	**Subject Matter**	Subject matter jurisdiction includes the legal authority to pass laws on specified subjects. Subject matter can be very broad from prescribing citizenship rights and responsibilities, to probating a will, performing marriages and child adoptions, to regulating environmental protections and catch limits.
2	**Personal**	Legal authority to pass laws exercisable over a particular people due to characteristics of those people such as citizens of a nation or a religious group. Personal jurisdiction is exercisable over a people whether they are physically present or not in a territory.
1	**Territorial**	Legal authority to enact laws and regulations that apply solely within a specified geographical territory that applies to anyone within the specific territory.

[118] McNeil, K, 'The Jurisdiction of Inherent Right Aboriginal Governments' (Research Paper for the National Centre for First Nations Governance, 11 October 2007).

Jurisdiction can also either be inherent or delegated. Inherent jurisdiction is legal and political authority over an area by virtue of inheritance – of being the first citizens of an area, tangata whenua – local people of the land - which is inhered through whakapapa (genealogy) to a culture, place and political system – tikanga Māori – from the creator. Delegated jurisdiction on the other hand, is authority legally and politically delegated from a higher to another authority. The Parliaments of New Zealand, Canada and Australia exercise legislative jurisdiction that was delegated to them from the British Parliament under a specific official act of state and a statute. For New Zealand, it was the Treaty of Waitangi 1840, the New Zealand Constitution Act 1852,[119] and subsequently the New Zealand Constitution Act 1986. Whereas for Canada, it was the Royal Proclamation 1763, the North American Treaties, the Constitution Act 1867, formerly known as the British North America Act 1867, [120] and, subsequently, the Canada Constitution Act 1982. For Australia, it started with the annexation by the British of the colony of New South Wales in 1788, then the enactment of the Commonwealth of Australia Constitution Act 1901 by the British Parliament and later the Australia Act 1986. The source of the jurisdictional authority of the British Parliament to legislate for New Zealand, Canada and even Australia however, has never been adequately explained.[121]

For Māori iwi, hapū and whānau, mana whakahaere tōtika – governance jurisdiction - is inherited from the tūpuna (ancestors) going back to divine inheritance from the Gods. The concept of land, waterways and seas as a divine inheritance was not unique to Māori but prevailed throughout the Pacific and with other Indigenous peoples globally. The next section on tikanga Māori will explore divine inherited jurisdiction to land, water and seas in more detail. But inherent governance jurisdiction over whenua (land), waimaori (waterways), takutai moana (the coastal marine estate) and other natural resources traditionally was a divine right, relationship and responsibility of all Māori whānau, hapū and iwi.

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[119] See Joseph, P, *Constitutional and Administrative Law in New Zealand,* (4th Ed., Thomson Reuters, Brookers Ltd, Wellington, 2014).

[120] Hogg, P, *Constitutional Law of Canada,* (Carswell, Toronto, 2019) at 16-20.

[121] See Oliver, P 'Cutting the Imperial Link - Canada and New Zealand,' in Joseph, P (ed) *Essays on the Constitution* (Brookers Ltd, Wellington, 1995). For Canada, see *R v Sparrow,* [1990], 1 SCR 1075 at 1103. Asch, M, & Macklem, P, 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*,' in *Alberta Law Review,* (Vol. 29, 1991) at 498. Henderson takes the position that the British sovereign's jurisdiction in North America had to be acquired derivatively from the Aboriginal Peoples by Treaty. See Youngblood Henderson, J, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society,* (University of Saskatchewan Native Law Centre, Saskatoon, 2006) at 6; and Youngblood Henderson, J, 'Empowering Treaty Federalism,' in *Saskatchewan Law Review,* (Vol. 58, 1994) 241 at 247-248. For New Zealand, see Brookfield, F.M 'Kelsen, the Constitution and the Treaty' in *New Zealand University Law Review* (Vol. 15, 1992) 163; Brookfield, F.M 'The New Zealand Constitution: the Search for Legitimacy' in Kawharu, I.H, *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989), Cooke, R 'The Suggested Revolution Against the Crown' in Joseph, P (ed) *Essays on the Constitution* (Brookers Ltd, Wellington, 1995); *R v Kaihau* (AP 5/2000, High Court, Palmerston North, 11 May 2000), *R v Knowles* (12 October 1998; CA 146/98; Unreported); *Burkett v Tauranga District Court* [1992] 3 NZLR 206, *Confederation of Chiefs of the United Tribes of Nu Tireni (New Zealand) v Director-General of Fisheries* (HC, 29 April 1999, M298-SD/99 Unreported); *Takamore v Clarke* (Court of Appeal, CA525/2009, 23 November 2011); and *R v Mason,* (High Court, CRI 2011 – 070-1249, 3 May 2012). See also 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, Wellington, 2014) and Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake,* (Wai 2417, Waitangi Tribunal Report, 2015).

Still, each of McNeil's elements of governance jurisdiction - territorial, personal, subject matter, exclusive, concurrent, inherent and delegated jurisdiction[122] - are relevant for Māori co-governance and co-designed structures that acknowledge the Māori constitutional partnership and that effectively incorporate tikanga and mātauranga Māori. Māori governance jurisdiction is also a Treaty of Waitangi right and responsibility that can be incorporated into the Treaty of Waitangi principles of tino rangatiratanga and the right to development, which are discussed in more detail below.

As explored deeper throughout the remainder of this report, Māori mana whakahaere tōtika - governance jurisdiction - today could include the shared right, relationship and responsibility of Māori communities with local authorities to maintain a degree of law and order within their respective tribal rohe (territories) and to resolve disputes between tribal citizens and others which could include some type of adjudicatory power within the community for both criminal actions such as breach of rāhui, and civil disputes over marine resources such as poaching. Regulatory jurisdiction authority includes the regulation of health and safety standards, customary rights such as to customary fishing and collecting of traditional medicines, zoning and environmental hazards. More on these areas to follow.

The next section will discuss mana whakahaere tōtika – Māori governance jurisdiction - within its historic and cultural context anchored within mātauranga and tikanga Māori to explore how it aligns with EBM.

E. Māori Culture and Tikanga Māori

From the outset, culture is a notoriously difficult term to explain but for the purposes of this chapter, culture is the shared patterns of behaviors and interactions, cognitive constructs, and affective understandings that are learned through a process of socialisation. Culture is day-to-day living patterns that pervade all aspects of human social interaction[123] that identify the members of a culture group while also distinguishing those of another group. [124] Culture

[122] Above. See also Penikett, T, *Six Definitions of Aboriginal Self-Government and the Unique Haida Model,* (Action Canada, B.C, September 2012) and Christie, G, *Aboriginal Nationhood and the Inherent Right to Self-Government,* (Research paper for the National Centre for First Nations Governance, May 2007). For references to jurisdiction in an EBM context, see Karkkainen, B, 'Collaborative Ecosystem Governance: Scale, Complexity and Dynamism,' in *Virginia Environmental Law Journal,* (Vol. 21, No. 2, 2002) at 189-243; Gunningham, N, 'The New Collaborative Environmental Governance: The Localization of Regulation,' in *Journal of Law and Society,* (Vol. 36, No. 1, Economic Globalization and Ecological Localization: Socio-legal Perspectives, March 2009) at 145-166; Emerson, K, Nabatchi, T & Balogh, S, 'An Integrative Framework for Collaborative Governance,' in *Journal of Public Administration Research and Theory,* (Vol. 22, No. 1, Jan. 2002) at 1-29; Green, O, Garmestani, A, Allen, C, Gunderson, L, Ruhl, J, Arnold, C, Graham, N, Cosens, B, Angeler, D, Chaffin, B & Holling, C, 'Barriers and Bridges to the Integration of Social-Ecological Resilience and Law,' in *Frontiers in Ecology and the Environment,* (Vol. 13, No 6, Aug 2015) at 332-337.

[123] Damen, L. *Culture Learning: The Fifth Dimension on the Language Classroom.* (Reading, MA: Addison-Wesley, 1987) at 367. See also Spencer-Oatey, H, *Culturally Speaking: Culture, Communication and Politeness Theory,* (2nd Ed, Continuum, London, 2008); Kroeber, A and Kluckhohn, C, *Culture: A Critical Review of Concepts and Definitions,* (Papers of the Peabody Museum of American Archaeology and Ethnology, Harvard University, Vol. XLVII-No.1, 1952); Geertz, C, *The Interpretation of Cultures* (Basic Books, New York, 1973) and Avruch, K, *Culture and Cultural Conflict* (United States Institute of Peace, Washington D.C, 1998).

[124] Hofstede, G. 'National Cultures and Corporate Cultures' in L.A. Samovar & R.E. Porter (Eds.), *Communication Between Cultures*. (Belmont, CA: Wadsworth, 1984) at 51.

is the shared knowledge and schemes created by a set of people for perceiving, interpreting, expressing, and responding to the social realities around them.[125]

Culture consists in those patterns relative to behavior and the products of human action that may be inherited and passed on from generation to generation independently of biological genes.[126] Traditions, established patterns of behaviour transmitted from generation to generation and their attached values are inherent parts of culture.[127] Culture and its related traditions help establish one's sense of identity and fill the vital human need to belong. Culture is also humankind's primary adaptive mechanism.[128] Culture therefore, influences how we look and dress, the foods we eat or not and how we think and act individually and collectively, as well as our perceptions of other groups.

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

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

> Cultures pattern perceptions of reality into conceptualisations of what they perceive reality to be, of what is to be regarded as actual, probable, possible or impossible. These conceptualisations form what is termed the 'worldview' of a culture. The worldview is the central systematisation of conceptions of reality to which members of its culture assent and from which stems their value system. The worldview lies at the very heart of the culture, touching, interacting with and strongly influencing every aspect of the culture.[129]

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[125] Lederach, J.P. *Preparing for Peace: Conflict Transformation Across Cultures,* (Syracuse University Press, Syracuse, New York, 1995) at 9.

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

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

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

[129] Royal, C.T, *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Estate of Rev. Māori Marsden, 2003) at 56. See also Royal, C, *The Purpose of Education: Perspectives Arising from Mātauranga Māori: A Discussion Paper* (Report Prepared for the Ministry of Education, Version 4, January 2007) at 38. Much of this section of the report has been drawn on from section 1 of Durie, E, Joseph, R, Erueti, A, Toki, V, Ruru, J, Jones, C & Hook, R*, 'Ngā Wai o Te Māori: Ngā Tikanga me Ngā Ture Roia: The Waters of the Māori: Māori Law and State Law,'* (Report Prepared for the New Zealand Māori Council, for the Waitangi Tribunal Fresh Water and Geothermal Resources WAI 2358 Inquiry, 23 January 2017) and Joseph, R, Rakena, M, Jones, M, Sterling, R & Rakena, C, '*The Treaty, Tikanga Maori, Ecosystem-based Management, Mainstream Law and Power Sharing for Environmental Integrity in Aotearoa-New Zealand – Possible Ways Forward*,' (Te Mata Hautū Taketake – the Maori and Indigenous Governance Centre, Te Piringa-Faculty of Law, University of Waikato, November 2018).

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

Importance of Values

As noted above, the Marsden definition draws the link between worldview and values. By understanding the worldview of a culture, we can come to an understanding of its values and its normative behaviour. New Zealand public institutions have acknowledged (albeit sometimes begrudgingly) the importance of understanding Māori worldviews and values. The New Zealand Environment Court for example, concluded that to understand Māori views of the landscape and how it affects Māori conduct, one must step deeply inside Māori thinking. One must see the world through Māori eyes, and assess Māori values within a Māori worldview.[130] A culture cannot be understood fully in terms of the worldview of another.[131]

The Waitangi Tribunal[132] also concluded that 'the values of a society, its metaphysical or spiritual beliefs and customary preferences are regularly applied in the assessment of

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

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

[132] Waitangi Tribunal, *The Manukau Report* (Wai 8, Government Printer, Wellington, 1985). The Waitangi Tribunal is a permanent commission of inquiry that was established under the Treaty of Waitangi Act 1975 to

proposals without a thought as to their origin.'[133] The Tribunal added that the 'current' values of a community:

> … are not so much to be judged as respected. We can try to change them but we cannot deny them for as Pascal said of the Christian religion, 'the heart has its reasons, reason knows not of.' That view alone may validate a community's stance.[134]

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

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

> A normative legal theory, which can be described as expressing a particular *worldview*, is one that says what the law should be.[135]

The report continued:

> Normative approaches to resource management are therefore linked to ethical discussions of what is right and what is wrong.[136]

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

The traditional Māori legal system then was based on tikanga Māori customary law as well as kawa (rituals) which were generated by the performative social practice and acceptance as distinct from 'institutional law, which is generated from the organs of a super-ordinate authority such as Parliament.[137] The principles of tikanga Māori provided the jural order that embodies core ethical values and principles that reflect doing what is right, correct or appropriate. 'Tika' means correct, right or just and the suffix 'nga' transforms 'tika' into a

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make recommendations on claims brought by Māori relating to Crown actions and inactions, which allegedly breach the promises made in the Treaty of Waitangi 1840. Refer to its website: https://www.waitangitribunal.govt.nz/(Accessed August 2018).

[133] Above, at 78.

[134] Above, at 124.

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

[136] Above.

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

noun thus denoting the system by which correctness, justice or rightness is maintained.[138] The late and highly respected Anglican Bishop, Manuhuia Bennett, defined tikanga as 'doing things right, doing things the right way, and doing things for the right reasons.'[139] He also added:

> Each generation leaves its imprint on it, and our generation and my generation and the generation before me got mixed up with Pākehās, and we have left our print on it, and that's what makes it very meaningful to us today because we let Pākehā imprint as well as Māori.[140]

Professor Hirini Mead comprehensively described tikanga as embodying:

> … a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do.[141]

Mead continued:

> Tikanga are tools of thought and understanding. They are packages of ideas which help to organize behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us through some huge gatherings of people and some tense moments in our ceremonial life. They help us to differentiate between right and wrong in this sense have built-in ethical rules that must be observed. Sometimes tikanga help us survive.[142]

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

British Law and Tikanga Māori Contrast

In terms of contrasting British (and New Zealand) newcomer and Māori customary law, Durie highlighted the former as being rules-based Western law (literate) while the latter is governed

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[138] Williams, J, 'Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law,' in *Waikato Law Review: Taumauri,* (Vol. 21, 2013) at 2. See also Joseph, R, 'Re-Creating Space for the First Law of Aotearoa-New Zealand,' in *Waikato Law Review: Taumauri,* (Vol. 17, 2009) at 74-97. See also Jones, C, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* (UBC Press, Vancouver, 2016).

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

[140] Above.

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

[142] Above.

by values to which the community generally subscribed (non-literate and performative).[143] While Western culture tends to make a clear distinction between morality and the law, the Māori legal system sees values, ethics, practices and rules as being very much interrelated. Metge noted however, that 'Western laws are also values-based; the values concerned being interpreted by the law makers.'[144] Mulgan added:

> All law, Pākehā as well as Māori, arises out of social norms and the need to enforce these norms within society. The ultimate source of Pākehā law is not the courts or statutes but the social values reflected by Parliament in statutes and by judges in their decisions.[145]

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

> Tikanga arise out of on-going community debate and practice and are communicated orally; as a result they are adapted to changing circumstances easily, quickly and without most people being consciously aware of the shift. Western laws are formulated and codified by a formal law-making body and are published in print; their amendment, while possible, is a complex and lengthy process. As a result laws often lag behind community opinion and practice; at times, however, they can be ahead and formative of it.[146]

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

> Except in times of exceptional crisis, all human societies pursue as key aims the maintenance of order, the reinforcement of accepted values and the punishment of breaches. Large-scale, complex state societies codified into a system courts and judges. Small-scale societies with simpler political structures use means which are mainly informal, implicit and serve other purposes as well.[147]

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

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

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

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

[147] Above, at 2.

In some circles, the study of customary law has been described as legal anthropology,[148] which Rouland points out is the study of law in society.[149] It begins from the premise that all societies have law and therefore implicit and explicit jurisdiction to govern. Rouland identified that there are over 10,000 distinct known legal systems operating in the world today. A study of those systems indicates the following generalisations can be made:

- Law emerges with the beginning of social existence;
- The complexity of law in a society will depend on the complexity or simplicity of that society; e.g. How many strata in that society, the nature of its economy etc.;
- All societies possess political power that relies to some degree on the coercive power of law, while the modern state is only present in some of these societies;
- Where the state exists, customs and ritual may have been codified or reduced to judgment by the instruments of the state e.g. the common law imported into New Zealand from Britain in 1840;
- In all societies law represents certain values and fulfils certain functions; however, the common principles of law are:
    - the search for justice; and
    - the preservation of social order and collective security;
- Law is obeyed in different societies because individuals are socialised to obey, they believe in the just nature of the law, they seek the protection of the law, or they fear sanctions associated with non-observance.[150]

On this approach, laws are nothing more than societal rules, which have to be practically sanctioned in the here-and-now. Legal anthropology sets itself the objective of understanding these rules of human behaviour,[151] which must be designed to address wrongdoing and, inter-alia, be capable of being socially and practically enforced in the interests of the community. Only then will they be considered part of the legal domain of a society.[152]

Tikanga Māori Legal System

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

A key difference between Māori and Pākehā law was that while Pākehā had formulated their views into a formal system which separated the areas of life into 'religious' or 'spiritual' and

[148] Wickliffe, C, Maranui, K & Meredith, P, 'Access to Customary Law,' (Visible Justice: Evolving Access to Law, Wellington, 12 September 1999) at 1-2.
[149] See generally Rouland, N, *Legal Anthropology,* (The Athlone Press, London, 1994) and the discussion by Boast, R, 'Māori Customary Law and Land Tenure,' in Boast, R, Erueti, A, McPhail, D and Smith, N, *Māori Land Law,* (Butterworths, Wellington, 1999) at 2.
[150] Above.
[151] Above.
[152] Wickliffe, C, Maranui, K & Meredith, P, 'Access to Customary Law,' (Visible Justice: Evolving Access to Law, Wellington, 12 September 1999) at 2.

'secular,' 'public' and 'private' domains, and in a mainstream New Zealand context, unitary jurisdiction; the world views of Māori were not formalised and no such dichotomy existed between the sacred and profane, secular and spiritual, public and private domains, and shared jurisdiction. Consequently, Māori considered spiritual matters to be a natural part of daily existence. All behaviour was ordered according to the demands of the spiritual world based on tikanga laws and values and shared jurisdictions, which underlay all existence. Tikanga ceremonies and kawa rituals addressed to the spiritual realm and shared spheres of influence preceded and accompanied every stage of life and every significant daily undertaking.

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

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

Dr Manuka Henare referred to the inherent and intrinsic relationship of Māori with the environment when he opined:

> The wellbeing of Te Ao Turoa [the environment] is inextricably linked with Mana Māori and is an essential element in the identity and integrity of the people. Without the natural environment, the people cease to exist as Māori.[153]

Tony Love further discussed the inherent relationship of Māori to Te Ao Turoa when he asserted:

> For Māori, Tu Ao Turoa (the environment) is intimately linked with the people. Nature and the environment cannot be isolated from the people that inhabit it. In the language of EBM, management must be inherently 'place-based' and must consider the ecosystem as a whole in all its complexities and connectedness, which necessarily acknowledges humans as a component of that ecosystem, rather than distinct or separate. In order to understand the connection of Māori with Te Ao Turoa it is essential to understand the key concepts of [tikanga Māori] whakapapa, whānaungatanga, and kaitiakitanga, which are underpinned by the concepts of mauri, mana, and tapu.[154]

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

[153] Henare, M, 'Ngā Tikanga me ngā Ritenga o Te Ao Māori,' (Report of the Royal Commission on Social Policy, Wellington, 1988) at 28.
[154] Love, T, 'Incorporating Māori Approaches to Ecosystem-based Management in Marine Management,' *Māori Law Review,* (July 2018) at 2.

- leadership and governance jurisdiction concerning all matters including Māori land, fresh waterways, marine space and other natural resources, and matters of religion;[155]
- intra and inter-relationships with whānau (extended families) hapū (sub-tribes), iwi (tribes/nations);[156]
- relationships with Pākehā including missionaries and traders;[157]
- determining rights to land and other resources based on take tūpuna (discovery), take tukua (gift), take raupatu (confiscation) and ahi kaa (occupation);[158]
- the exercise of kaitiakitanga[159] (stewardship) practices including the imposition of rāhui[160] (bans on the taking of resources or the entering into zones within a territory) and other similar customs and exercising responsible stewardship over the community on all matters;[161]
- regulating use rights for hunting, fishing and gathering and sanctioning those who transgressed tikanga Māori or Māori rights and responsibilities (or both) in natural resources;[162]
- regulating Māori citizenship rights to resources.[163]

From this worldview come the cardinal customary tikanga values:

- Whānaungatanga – maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights and obligations that follow from the individuals place in the collective group;
- Wairuatanga – acknowledging the metaphysical world - spirituality - including placating the departmental Gods respective realms,
- Mana – encompasses intrinsic spiritual authority as well as political influence, honor, status, control, and prestige of an individual and group;

[155] Wickliffe, C, Maranui, K & Meredith, P, 'Access to Customary Law,' (Visible Justice: Evolving Access to Law, Wellington, 12 September 1999) and Boast, R, 'Māori Customary Law and Land Tenure,' in Boast, R, Erueti, A, McPhail, D and Smith, N, *Māori Land Law,* (Butterworths, Wellington, 1999) at 30-37. See also Iorns, C, 'Māori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment,' in *Widener Law Review,* (Vol. 21, 2015) at 1-55 and Iorns, C, 'Improving the Global Environmental Rule of Law by Upholding Indigenous Rights: Examples from Aotearoa New Zealand,' in *Global Journal of Comparative Law,* (Vol. 7, 2018) at 61-90;

[156] Above, (Boast) at 33-37, 38-41.

[157] Above, at 28-30.

[158] Erueti, A, 'Māori Customary Law and Land Tenure' in Boast, R, Erueti, A, McPhail, D and Smith, N, *Māori Land Law,* (Butterworths, Wellington, 1999).at 42-45; Asher, G & Naulls, D, *Māori Land* (New Zealand Planning Council, Wellington, 1987) at 5-6; and Kawharu, H, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 55-56.

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

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

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

[162] Above, at 58-61.

[163] Kawharu, H, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 39; Asher, G & Naulls, D, *Māori Land,* (Planning Paper 29, New Zealand Planning Council, Wellington, 1987) at 7; and Durie, E *Custom Law,* (Address to the New Zealand Society for Legal and Social Philosophy, 1994) 24 V.U.W.L.R. at 5.

- Tapu – restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose – to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects;
- Noa – free from tapu or any other restriction; liberating a person or situation from tapu restrictions, usually through karakia and water;
- Koha - gift exchange;
- Utu – maintaining reciprocal relationships and balance with nature and persons;
- Rangatiratanga – effective leadership; appreciation of the attributes of leadership;
- Manaakitanga – enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honor requires;
- Aroha – charity, generosity;
- Mauri – recognition of the life-force of persons and objects;
- Hau – respect for the vital essence of a person, place or object;
- Kaitiakitanga – stewardship and protection, often used in relation to natural resources.

Tikanga also include adherence to a proper form and process in karakia (incantations), waiata (songs), whakapapa (genealogical recitations), whaikōrero (oratory) and debate.[164]

Tikanga Māori then, reflects a metaphysical cosmology, which is pervasive in determining how Māori relate to landforms and all forms of life[165] including how they relate to each other and outsiders. Their conception of the origin of all things on earth determines their ritenga (ritual), tikanga (law or customary values) and their perceptions of what is tika (right) or hē (wrong). Their law is aspirational, setting standards of best conduct based on ancestral exploits, with prescription mainly reserved for ritenga (custom) including the propitiation of hara (spiritual offences).[166]

Compliance was largely self-enforced, driven by whakamā (shame), mataku (fear of spiritual retribution) or community acceptance, ostracism or even capital punishment for serious hara (offences). Muru (community stripping of the goods of a whānau) was also practised, as utu (redress or restoration of balance) for some aituā (misfortune) like the careless loss of life or property or some breach of social laws. Muru was usually undertaken with the full acquiescence of the whānau kua hē (the family or community in the wrong).[167] Furthermore, each iwi (tribe) and hapū (sub-tribe) had its own variation of the values and customs listed – some will have slightly different ideas as to the values that inform tikanga.

[164] Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25-32. See also Patterson, J, *Exploring Māori Values* (Dunmore Press, 1992) at 3-4.
[165] Korero by Te Rangikaheke on āwhina, among other topics, as cited in Grey, G, *Polynesian Mythology* (Whitcombe & Tombs, Wellington, 1956) at 15.
[166] Patterson, J, *Exploring Māori Values* (Dunmore Press, 1992).
[167] See the topic 'Muru' in Benton, R, Frame, A, Meredith, P, *Te Mātāpunenga*. *A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 254.

Tikanga Māori is moreover, values based and aspirational, setting desirable standards to be achieved.[168] Thus, where state law sets bottom lines, or Pākehā aspire to minimum standards of conduct below which a penalty may be imposed, tikanga Māori sets top-lines, describing outstanding performance where virtue is its own reward. Such top line tikanga Māori expectations and standards should be a welcome policy and legislative shift for co-governing the coastal marine estate within an EBM context.

Fundamental to tikanga Māori is a conception of how Māori should relate to the Gods, land, water, all lifeforms and each other which again implies shared jurisdiction between the Gods, people and the resources. It is a conception based on:

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

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

> Tikanga described Māori law, and kawa described ritual and procedure … ritual and ceremony themselves were described by kawa … [which] referred also to process and procedure of which karakia (the rites of incantation) formed part.[169]

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

> Before the coming of the Pākehā [European] to New Zealand… all literature in Māori was oral. Its transmission to succeeding generations was also oral and a great body of literature, which includes haka [dance], waiata [song], tauparapara [chant], karanga [chant], poroporoaki [farewell], paki waitara [stories], whakapapa [genealogy], whakatauki [proverbs] and pepeha [tribal sayings], was retained and learnt by each new generation.[170]

Kaitiakitanga - Stewardship Jurisdiction

The cultural significance of rangatiratanga, mana and kaitiakitanga of iwi, hapū and whānau with an interest in natural resources including the coastal and marine estate of New Zealand cannot be underestimated. Indeed, the ancestral, customary and traditional relationships and usage of the coastal and marine estate prior to the arrival of Europeans was one of taonga that existed beyond mere ownership, use, or collective possession to one of personal and tribal identity, jurisdiction - authority and control, and the right to access subject to tribal tikanga. In summary, the relationship was one of collective kaitiaki or stewardship jurisdiction.

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

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

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

In contrast, when one contemplates European notions of ownership rights and property title of resources such as lands, forests, fisheries and other properties including waterways, the associated rights that accrue to property title of any resource includes an inverse relationship to the world of individualistic (but not always) quality of title (particularly indefeasibility of real property), exclusivity (others keep out), durability (time immemorial), transferability (one can sell or purchase) and the right (if not the duty) to exploit the resource for commercial gain or even to neglect or outright pollute, abuse or overuse it.

The worldviews, the way Māori traditionally viewed land and the coastal and marine areas then, are very different to how many Europeans view them. These differences of worldviews are some of the causes for much of the tensions between the groups historically and today.[171] Table 1 below illustrates potential sources of conflict and misunderstanding, arising from different worldviews in relation to land and waterways, which need to be reconciled for co-governance structures that acknowledge the Treaty of Waitangi partnership and mātauranga and tikanga Māori within this EBM context.

Mana whakahaere tōtika confers a larger capacity than kaitiakitanga, which is the basic concept in giving expression to Māori rights and responsibilities. Mana whakahaere tōtika – governance jurisdiction - covers both ownership (the right to use and possess against all others), and the over-riding political authority to control the use and management of the marine estate. In tikanga Māori, the hapū had the mana whakahaere tōtika over their territorial lands, waters and the coastal marine estate. Unfortunately, the contemporary recognition of kaitiaki has been taken as an alternative to jurisdiction, when it is in fact an incident of mana whakahaere tōtika.

As explored further in the report, the government provides a benefit for the commercial exploiters of the coastal marine estate, it does not provide a benefit for the tikanga customary owners, but recognises the customary responsibility of the whānau hapū and iwi, as kaitiaki, to maintain the coastal marine estate except for Māori commercial fisheries and aquaculture. Māori may do so through co-management and joint agreements with local authorities. The law appears to provide a free ride for commercial exploiters and for the hapū and local Māori and even Pākehā communities, the cost of cleaning up the rubbish, as was the case with the disastrous Rena oil spill in 2011.

Embedded in tikanga Māori is a concept, which transcends the right to use. It is the responsibility to use and to maintain to the fullest practicable extent, pure, clean coastal marine regimes. Responsibility is a concept that an incident of mana whakahaere tōtika that requires a balancing of the benefits of ownership with the responsibilities of ownership. It is a responsibility, which is owed to one's tūpuna (forebears) and one's mokopuna (descendants). The concept, based upon the natural world as a divine inheritance, questions our current understanding of what constitutes sustainable development and points to the need for greater constraint in the interests of the survival of the natural world and human survival which fits well with EBM.

[171] We do acknowledge however, that neither all Māori nor do all Europeans neatly subscribe to these contrasting worldviews.

Table 2: Māori and Colonial Attitudes to Land and Waterways (Fresh & Coastal)[172]

Category	**Land – Māori**	**Land – Colonial**	**Water – Māori**	**Water–Colonial**
Jurisdiction	Inherent, whakapapa, mana whenua, kaitiakitanga	Delegated Crown grant to freehold, lease, licence	Inherent, whakapapa, mana whenua, moana, kaitiakitanga	Ambiguous, common property, no one owns ocean, EEZ
Ownership	Taonga, kaitiaki, collective (tribal) stewardship	Individual title,	Taonga, kaitiaki, collective (tribal) stewardship	No one owns water? Crown 'managed' Individual title?
Proof of ownership	Occupation, use, stewardship, rangatiratanga authority, kaitiakitanga, ahikāroa	Deed of sale	Occupation, use, kaitiakitanga, rangatiratanga authority	Riparian rights with a deed of sale adjoining water body, lease, rates, EEZ
Significance	Economic, cultural, spiritual	Economic, status	Economic, cultural, spiritual	Economic, status
Transfer	By conquest, abandonment or succession; take tūpuna, take raupatu, take tuku	By sale, lease or Crown directive	By conquest, abandonment or succession	By sale, lease or Crown directive
Occupants	Taonga, kaitiaki, part–owners, tūpuna, trustees	Owners or tenants	Taonga, kaitiaki, part–owners, tūpuna awa, trustees	Owners or tenants
Classes of land & water	Ancestral (take tūpuna) Gifted (take tuku) Conquered (take raupatu)	Freehold, leasehold, waste land/arable land	Ancestral (take tūpuna) Gifted (take tuku) Conquered (take raupatu)	Riparian, navigable, leasehold, waste, fishing, discharge pollutants
Utilisation	Agriculture, hunting, resource management	Agriculture, horticulture, mining settlements	Aquaculture, hunting, fishing resource management, blessing rituals	Aquaculture, Extraction, mining settlements
Value	Taonga, Tribal identity, well-being and security for generations, spiritual, ways of life	Market potential, employment	Taonga, tribal identity, well-being and security for generations, spiritual, ways of life	Market potential, employment, discharge pollutants, commercial fisheries, mining

[172] Part of this table is taken from Durie, M, *Te Mana Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 117. The rest has been added to by the MIGC researchers.

While the concepts in table 1 above are obviously simplified, they do highlight some of the more obvious differences. The common ground for Māori and the Crown, industry and all stakeholders is sustainably cleaning up the land, waterways and coastal marine estate to ensure they are available, accessible, and affordable for present and future generations. We also need to acknowledge and reconcile our differences, accommodate, and perhaps even celebrate them, which appears possible within an EBM environment including shared governance jurisdiction.

However, the legal semantics around 'ownership' of the coastal marine estate is a hotly contested topic in New Zealand, legally and politically, as well as elsewhere. Who 'owns' or perhaps 'manages' freshwater rivers, lakes, and springs, and the coastal and marine estate in New Zealand law is contentious. Do Māori have pre-existing aboriginal title over freshwater and the coastal and marine estate as was guaranteed in the Treaty of Waitangi 1840? For Māori and other New Zealanders, some important challenges over the coastal and marine estate then are:

- Availability – ensuring the coastal and marine estate are clean (unpolluted) and available for future use for all;
- Accessibility – ensuring the coastal and marine estate is able to be accessed for people to utilise for cultural practices, fishing, economic development, recreation, sanitation, healing etc; and
- Affordability – if the coastal and marine estate is deemed to be property, will people be able to afford the cost for use or will they be excluded by costs, maintenance, rates, etc?

Hence, who has 'ownership', 'control' and 'management' over the coastal and marine estate in New Zealand, who has jurisdiction rights and responsibilities, are fundamental Treaty of Waitangi and even constitutional questions.

For all coastal iwi, hapū and whānau – the takutai moana (ocean), awa (rivers), manga (streams), moana (lakes) and puna (springs) – are integral, defining parts of their personal and tribal identity, security and prosperity. The fundamental concept of whakapapa considers Te Ao Turoa - the environment - a whānaunga or relation which intimate link was captured in Dr Henare Tuwhangai who opined:

> That Māori people did not just own whenua or Te Ao Turoa, but that they, the people, were also the possession and the land and Te Ao Turoa were the possessors.[173]

In the Ngāti Raukawa, Whanganui, Tainui and other tribal traditions, rivers are regarded not only as a prominent marker for identity, but they are also revered as tupuna awa – an ancestor. In Māori idiom, rivers are associated with tūpuna or leading rangatira. Erenora Taratoa of Ngāti Raukawa for example, associated the natural features of the land with famous hapū

[173] Henare, M, 'Ngā Tikanga me ngā Ritenga o Te Ao Māori,' (Report of the Royal Commission on Social Policy, Wellington, 1988) at 28.

leaders.[174] A Ngāti Parewahawaha informant also discussed how waterways may be referred to as tūpuna awa:

> Tūpuna Awa, the nurturing, cleansing, healing waters bringing life to every organism on the land, is the cultural reminder of who we are, our identity as Māori.[175]

Tupuna awa also include river mouths, lagoons, estuaries, and harbours where the awa discharges into the coastal marine area.

Similarly, coastal tribes refer to the ocean as an ancestor – Ko au te moana, ko te moana ko au – I am the ocean, the ocean is me.[176]

Furthermore, Māori traditionally located kāinga (villages) strategically near waterways along the coastline for numerous reasons including for sanitation – cleaning and toiletries; consumption – drinking, cooking and collecting kai moana such as tuna (eels), piharau (lamprey), pātiki (flounder), kākāhi and kutae (fresh and saltwater mussels), Īnanga (whitebait), kōkopu (native trout), kōura (crayfish), tāmure (snapper) and other fish, watercress, whio (duck) and other water fowl; to procure spiritual rituals – tohi (baptism), blessings, healing, meditation and for washing tūpāpaku (deceased ones); for trade – of goods and services otherwise unavailable within a group's rohe; and as aqua–highways linking close and distant settlements together for trade, social and political events and other activities.

To site one example, the Kāwhia coast, rivers and bushlands were well known for their abundance of food and resources as reflected in the Tainui whakatauki - Kāwhia Kai, Kāwhia Moana, Kāwhia Tangata. A fascinating account of the daily life of the people on the south side of Kāwhia, was recorded in James Cowan's *The Māori: Yesterday and To-day* published in 1930. The account is given by the 85-year-old kuia, Ngarongo-Herehere Rangitaawa, to Raureti te Huia from the Waipa in the early 1900s. Raureti recorded this account in Māori and then sent his transcript to Cowan. Rangitaawa had an intimate knowledge of all the streams and bays around Kāwhia and the rich abundance of resources there. She placed on record her recollections of the prolific variety of food that was harvested all year around by the many hapū at Kāwhia. Rangitaawa recollected:

> The waters of Kāwhia Harbour were our chief food supply—they were waters of abundance. I shall enumerate the parts where we obtained our *kai-mataitai*, the food of the salt waters. The *pipi* shellfish was one of our most abundant foods; our *hapū's* ground was Taaoro yonder; the kind of *pipi* found there was the *kokota*. There was another cockle called the *pipi hungangi*; this was very plentiful, and for it we worked

[174] 'Poia atu tāku poi' He Patere Ara He Rangi: An Action Song or Poi Accompaniment,' Nā, Erenora Taratoa, Ngāti Raukawa, in Ngata, A & Jones, P.T, '*Ngā Mōteatea: The Songs: Scattered Pieces from Many Canoe Areas Collected by Sir Apirana Ngata and Translated by Pei Te Hurinui*,' (Auckland University Press, Auckland, Part 2, 2006) at 202-209.

[175] Ona Heitia, Ngāti Parewahawaha, WAI-2197 Claimant, 30 January 2012, cited in Alexander, D, 'The Rangitīkei River, Its Tributary Waterways, and Other Taihape Waterways: Scoping Report,' (A Report commissioned by the Crown Forestry Rental Trust, February 2012) at 44.

[176] For example, see the recent thesis completed by Ben Matthews, 'Ko Au te Moana, Ko te Moana, Ko Au: Te Rangatiratanga me te Kaitiakitanga o roto i te Rangai Kaimoana Māori: I am the Ocean, the Ocean is Me: Rangatiratanga and Kaitiakitanga in the Māori Seafood Sector,' (Master of International Relations and Diplomacy Thesis Dissertation, University of Canterbury, 2018).

the sand-banks and tide-washed flats at Tuhingara, Toreparu, Otaroi, Hakaha, Te Wharau, Tahunaroa, Te Maire, and other places. For the *pupu* shellfish we worked Tarapikau and other banks.

Another food was the *tuna*, the eel. We had many eel weirs, too, but my food-gathering was chiefly on the seashore and in the estuaries. There were many places where we hauled the nets for fish of the sea; we had landing-places for *tamure* (snapper), and *mango* (shark) at Te Umuroa, at Te Maire, at Ohau, at Whangamumu, and many other beaches, where we brought the hauls ashore and split the fish up and hung them in long lines to dry in the sun. There was the *patiki*, too, the flounder.

It was most pleasant work, that fishing of old. There were three places in particular where our *hapū* brought its catches of sharks and dogfish ashore; they were Ngawhakauruhanga, Ohau, and Purakau. We had special places where we fished for *moki* (cod) and for the *koiro* (conger-eel), and there was also a place where the *whai* (stingray) abounded. That was at Koutu-kowhai. There was, too, small fresh-water fish called the *mohi-mohi*, and there was an appointed place for taking it.

Our best time for catching fish of all kinds was from November to March, when the north and north-east winds blew and the weather was pleasant and warm. That was when the nets were drawn. All the people were engaged in this work, and great numbers of fish were sun-dried for winter food.

And there was, too, the spearing of flounder by torchlight at night. My son, that was a delightful occupation, the *rama patiki*. There were certain nights when these *patiki* were plentiful on the sand-banks and that was when we got great numbers of them by means of torch and spear.

Then later in the year we turned to the land for our food. We went into the forests, we climbed the mountains, we snared and speared the birds of the bush. There was that range called Paeroa; that was where we set many *wai-tuhi*, which were wooden canoe-like troughs, or sometimes hollows in prostrate logs, which we filled with water; over these we arranged flax and cabbage tree nooses in which the pigeon and other birds would be caught as they came down to drink after feeding on the berries. All along the Paeroa Range (which is south yonder towards Kinohaku) we had these *wai-tuhi*. The forest was full of food for the birds: the fruit of the *miro*, the *hinau*, the *mangeo*, was in exceeding abundance. Many of us were busy in the season of birds in the work of snaring (*takiri*) the *tui*, and also the *kokomako* (bell-bird); the best place for catching those birds was on the *poroporo* shrubs, which were covered with delicious fruit for the birds. A woman could often take as many as a hundred birds in a day's work, from morning till dark.

Also we took many *titi* (the petrel called muttonbird). The best place for killing the *titi* was at Te Rau-o-te-huia. The work was done at night. Fires were made at places over which the *titi* flew, and these attracted the birds, which came flying low, and were killed with sticks by the people around the fires. There was a season when these birds were abundant and in the right condition for killing.

> Other foods of our people, which we got at various times, were fern root, the pith of the *mamaku* fern-tree, and the large berries of the *hinau* and *tawa* trees; these were dried and treated in various ways. And then, too, we had foods of the *Pākehā* kind in great abundance. Kāwhia was a most fruitful place. We had apples, peaches, figs, pears, and grapes. We sent the best of the fruit away to Auckland and sold it. We had our own small vessels (schooners and cutters) in those days before the war.
>
> I remember the vessels our people had in our part of Kāwhia. There was the *Aotearoa*; she was owned and sailed by Paiaka. There was the *Nepukaneha* (Nebuchadnezzar), which was Hone te One's vessel. These craft traded to Onehunga, and they carried much produce from Kāwhia. We shipped in them wheat and maize, fruit, pigs, pumpkins, vegetable marrows, and dressed flax. Many *hapū* were concerned in this trade; we all shipped cargo for sale to the *Pākehā*, and all was done agreeably; there were no quarrels among the people over trade. …
>
> That was how we lived here in Kāwhia in the days of our youth. We were always employed and there was no trouble; we lived happily there, in the midst of abundance, and then when the war began our troubles came.[177]

In fact, the tribal waterways and coastal marine areas are integral to the survival and prosperity of Māori communities and for sustaining their taha wairua (spiritual), taha tinana (physical), taha hinengaro (psychological, intellectual), and taha whānau (family) health and well–being. Indeed, the waterways and coastal and marine areas for Māori communities are about sustaining and developing a way of life.

Accordingly, when introducing themselves, Māori refer to their awa (river) and coastal areas (takutai moana) as important parts of their mihi (greeting) alongside their maunga (mountain), iwi (tribe), hapū (subtribe) and tūpuna (ancestors). Hence, in this way, waterways and coastal marine areas are intrinsically linked to one's whakapapa (genealogy). Waterways and coastal and marine areas concern personal and tribal identity, jurisdiction authority, rights of access, and responsibilities of stewardship. Indeed land, rivers, the ocean, mountains and the spirits of the departed are captured in whānaungatanga which transcends blood and biological unions for all are inextricably interconnected.

Referring to Winiata Te Whaaro's nineteenth century map of the Rangitīkei area which outlined the tribal rohe and sites of significance, an informant asserted:

> …it identifies who we are to the land, who we are to the river, who we are to the sea, who we are to everything that we breathe and live life for. So that's what it all is.[178]

The identity and well–being then of Māori communities are inextricably linked to the land, the waterways and coastal and marine areas.

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[177] Cowan, J, *The Māori Yesterday and Today* (Whitcombe and Tombs Ltd, Christchurch, 1930) at 194-198.

[178] Cited in Alexander, D, 'The Rangitīkei River, Its Tributary Waterways, and Other Taihape Waterways: Scoping Report,' (A Report commissioned by the Crown Forestry Rental Trust, February 2012) at 24-26.

Waterways & Coastal and Marine Areas - Stewardship Jurisdiction Indicia

The Waitangi Tribunal articulated in the 2012 *Water and Geothermal Resources Report*[179] certain indicia or signposts of Māori 'ownership' over fresh waterways.[180] The same kaitiaki indicia apply to the coastal and marine estate which captures the taonga relationship between local Māori and the coastal marine environment. The kaitiaki indicia can also be applied as tribal signposts for jurisdiction which includes personal and tribal identity, rangatiratanga rights to access, and reciprocal responsibilities to care for and sustain the resources. The Waitangi Tribunal at the time noted what it termed a 'taonga test' for, and proofs of 'ownership,' of proprietary interests, which are also appropriate for 'stewardship jurisdiction' for this report over the coastal and marine areas:

> In assessing whether a waterway was a taonga to any particular group, the [Waitangi] Tribunal took into account the intensity of the Māori association with the waterway including originating ancestral relationship and an ongoing cultural and spiritual relationship with the waterway; the exercising of control and authority [jurisdiction] over the resources, and the fulfilment of obligations to conserve, nurture and protect the waterway.[181]

The Tribunal also cited the *Ko Aotearoa Tenei Wai 262 Report* whether a resource is a taonga:

> Whether a resource or place is a taonga can be tested … Taonga have mātauranga Māori relating to them, and whakapapa that can be recited by tohunga. Certain iwi or hapū will say they are kaitiaki [jurisdiction]. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have korero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested.[182]

Hence the Waitangi Tribunal signposts to test whether an iwi, hapū or even whānau have a taonga relationship with reciprocal jurisdiction responsibilities or, for the purposes of this report, jurisdiction over the coastal and marine area, includes the following:

1. Whakapapa identifies a cosmological connection with the waterway;
2. Exercised mana or rangatiratanga over the waterway;
3. Exercised kaitiakitanga;
4. It has a mauri – life force;
5. Performance of rituals central to the spiritual life of the hapū;
6. Identified taniwha residing in the waterway;
7. Is celebrated or referred to in waiata;

[179] Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).

[180] The authors deliberately re-ordered these signposts to fit more cohesively our approach to this report.

[181] Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 51.

[182] Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 269.

8. Is celebrated or referred to in whakatauki;
9. The waterway was relied on as a source of food;
10. A source of textiles or other materials;
11. For travel or trade; and
12. There is a continuing recognized claim to land or territory in which the resource is situated, and title has been maintained to 'some, if not all of the land on (or below) which the waterway sits.[183]

It is important to also recognise that this list is not exhaustive but it is convenient for the purpose of this jurisdiction report. The rest of this section has been organised according to the above taonga jurisdiction signposts with a general discussion of the first three indicia given their relevance to the report focus on mana whakahaere tōtika - tribal governance jurisdiction.

Whakapapa identifies a cosmological connection with the Takutai Moana

Ko tātou ngā kanohi me ngā waha korero o rātou mā kua ngaro ki te pō
We are but the seeing eyes and speaking mouths of those who have passed on.[184]

Traditional Māori knowledge is encoded and recorded in a mental construct that is termed whakapapa (genealogy) which is central to Māori society. The concept whakapapa derives from the word *papa* – which is anything broad and flat such as a flat rock, slab or a flat board. *Whaka* – is a causative prefix that enables something to occur. *Whakapapa* then literally means to place in layers, layer upon layer, to lay one upon another.[185] The concept of whakapapa is thus used to describe both the recitation in proper order of genealogies and also to name the genealogies. Whakapapa functions as a genealogical table or group pedigree in which the lineages connect each papa or layer – a metaphorical reference to each generation of a whānau. The visualisation is of building layer by layer upon the past towards the present and on into the future.

The Tuhoe scholar John Rangihau identified whakapapa as the most fundamental aspect of the way in which Māori think about and come to know the world.[186] Whakapapa is a way of thinking, a way of learning, a way of being, a way of storing knowledge, and a way of debating knowledge.[187] The concept of whakapapa embraces much of how Māori view themselves in relation to everything else. Consequently, whakapapa includes not just the genealogies but

[183] Above.

[184] Ministry of Justice, *Hinatore ki te Ao Māori: A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001) 'Māori Social Structures.'

[185] Williams, H, A *Dictionary of the Māori Language*. (Reprint of 7th ed. A R Shearer, Government Printer, Wellington, 1975, 7th ed first published in 1971) at 259.

[186] Rangihau, J, 'Being Māori' in King, M (Ed), *Te Ao Hurihuri: The World Moves On* (3rd Ed, Longman Paul Press, Auckland, 1981) at 165-175.

[187] Smith, G.H, (Ed) *Nga Kete Wānanga Readers* (Vol. 2, Auckland College of Education, Auckland, 1987).

also the many spiritual, mythological and human stories that construct and reconstruct one's identity and associated jurisdiction rights and responsibilities to the past, present and future.

The Ngāti Maniapoto scholar Dr Pei Te Hurinui Jones discussed the importance of whakapapa in understanding tribal histories when he concluded:

> The Māori placed great importance on his genealogies and on the genealogical method of fixing the sequence of events ... [and] it is necessary that a wide knowledge of the tribal lines of descent should be acquired. Before attempting a critical evaluation of the traditions of our people as handed down through successive generations, the whakapapa lines should be carefully examined in conjunction with the history.[188]

Traditionally, whakapapa was recounted and celebrated in oratory, song and chant on the Marae (tribal meeting houses) thus transferring knowledge from one generation to another. Māori tohunga (experts) possessed highly developed powers of memory and relied on oral tradition, on verbal teaching, in preserving all genealogy and traditional narratives and passing it on to his or her progeny.

In 1929, Sir Apirana Ngata presented a paper to the Wellington Branch of the Historical Association entitled, 'The genealogical method as applied to the early history of New Zealand'. Ngata stressed the importance of Māori genealogical records in the compilation of the history of pre–European settlement. In defence of whakapapa as a tool of historical investigation however, he asserted:

> The ancient Māori knew no writing, and in order to learn the history and traditions of his ancestors he had to rely on the teachings of his elders, and his memory. Thus, he acquired an aptitude to recite his genealogical tree or whakapapa and those of his kinsmen, which was perfectly amazing to Europeans; and in order to establish a claim to land through ancestry, he had to resort to this knowledge to show, not only the actions and exploits of his antecedents, but also his right to claim by tribal relationship.[189]

Whakapapa then, informs and determines the membership of Māori iwi, hapū and whānau with kaitiaki jurisdiction over marine areas. The study of the whakapapa of important tūpuna and key marriages however, reveals shared identities, relationships, connections and responsibilities among iwi, hapū and whānau to each other and to other tribes. Whakapapa also determines and informs rank and status, as well as birth rights and jurisdiction responsibilities to lands, waterways, and of course people. This was most evident in the early workings of the Native Land Court where claimants argued and debated lines of descent and

[188] Jones, Pei Te Hurinui, 'Māori Genealogies', in *The Journal of the Polynesian Society* (Volume 67, No. 2, 1958) at 162.

[189] Ngata, A, 'The genealogical method as applied to the early history of New Zealand', (ATL Ref. qMS-1587, 1929).

succession to establish those ancestral rights. This is also evident in the current working of the Waitangi Tribunal and other contemporary adjudication processes.

Tribal identity and landscapes can be complex and complicated however, especially for those hapū and whānau that share borders with other tribes. Moreover, iwi and hapū appear to have waxed and waned over time amid the tribal politics of mana and rangatiratanga (power relations). Current Māori iwi, hapū and whānau that have some historical continuity and who continue to exist as a living entity today on the coastline must have an intimate whakapapa connection back to the kawai tūpuna – the Gods – and an equally intimate metaphysical relationship with their tūpuna awa – river - and/or takutai moana – marine and coastal area.

Whakapapa Relationships to Each Other

Whakapapa defines both the individual and kin groups but it also governs the relationships between them. Whakapapa moreover confirms associated rights and jurisdiction responsibilities to the collective. Māori viewed whakapapa as the crucial marker that determined and connected one with whānau, hapū, iwi and other kin groups. In this context, kin groups could expect assistance and support from each other but depending on the kaupapa at hand.

Māori iwi hapū and whānau believe that the Gods, the ancestors and guardians, create all things on earth and it is the kaitiaki duty of their descendants to care for and honor these elements thus aligning this signpost of stewardship jurisdiction, which is discussed in more detail below.

Exercised mana moana & rangatiratanga over the coastal marine area

Rangatiratanga authority and mana whakahaere tōtika have temporal and spiritual sources. Aspects of mana and rangatiratanga authority can be personal as well as expressive of authority over a place, people or taonga. Māori generally have rights of te tino rangatiratanga, kaitiakitanga and mana – jurisdiction - in respect of the waterways – rivers, lakes, streams, springs and the ocean. Rangatiratanga and mana include tribal jurisdiction - authority and control - which includes such actions as the kaitiaki obligation to care for the resources and the people including future generations. Many iwi and hapū had full authority and control over the waterways and coastal areas at the time of the Treaty of Waitangi – and for some time afterwards.

Māori however, distinguished between goods (taputapu, rawa), which were possessed as property, and real estate (whenua) which was not.[190] Authority consistent with their perception that lands and waters were used by divine permission, they did not talk of land and waters as property in absolute ownership but simply referred to them as ancestral beings with the mana (authority) to use being vested in a rangatira as the hapū representative (mana being a personal endowment rather than an institutional capacity).

[190] Taputapu or implements, weapons and ornaments were seen to be invested with the hau of the maker, the hau being transferred to the original possessor and carried within the object to succeeding generations. Benton, R, Frame, A, Meredith, P, *Te Mātāpunenga*. *A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press 2013) at 76-84, 402-403 and 424-425.

Given the philosophy of divine permission, Māori had no word to fit precisely with the English verb 'to own' insofar as 'to own' includes a right to transfer that which is held absolutely, in addition to a right to exclude others. However, the lack of an equivalent word for ownership was not because that which the hapū possessed was less than ownership but because in tikanga Māori it was, on balance, more. The expression that Māori regularly used to describe the relationship between a hapū and its water was that 'so and so has the mana of the water'.[191] Mana in such a context means the absolute and exclusive power and jurisdiction authority over something. Accordingly, mana covers not only the private right to own, but also the public right to control.

The mechanisms for the exercise of control included rāhui (conservation declarations) and tapu (environmentally restricted areas) but also aukati (geographic boundaries restricting passage) which enabled tangata whenua to restrict and control usage. Mana and rangatiratanga were also expressed through customary use such as fishing, physical occupation with community mara (gardens), Pā (fortified areas), kainga (villages) and wāhi tapu (scared areas); and most importantly, by carrying out whānaungatanga responsibilities by caring for relationships within and between tribal groups.

Māori had different views from the settlers about what could be sold and held as private property which is a manifestation of jurisdiction authority. For example, fresh water could in fact be sold for drinking as the early sailors found out in the Hokianga Harbour when they sought to provision their ships with water from local streams.[192] In terms of private property over fresh waterways and even the marine and coastal area with associated jurisdiction authority, the *Te Karere o Nu Tireni* newspaper reported in 1843, the editor attempted a fishing trip in the Northland area and a meeting of some wary Māori residents who opposed the 'incursion.'

> A Māori fellow once set off (Ngapo is his name, he is from the sub-tribe of Ngati Korokoro) with a tomahawk in his hand, his boat approaching another and saying, 'weigh anchor and row on, you'd be angry if someone came to steal from your store.' Then one of us said, 'is this your store, the sea?' He replied, 'yes indeed, the sea belongs to me, no one is allowed to fish, it has already been asset aside for us.'[193]

Following the New Zealand Wars of the 1860s, the government began to regulate fisheries. The Thames Sea Beach Bill was proposed as a solution to problems that arose at the Thames goldfields with the rush of miners and the ensuing challenges over title to the foreshore and

[191] See Ngata, H, *English-Māori Dictionary* (Learning Media, Wellington, 1993) at 319. Rangatiratanga is also used for 'ownership'. But see also Te Mātāpunenga reference on Rangatiratanga in Benton, R, Frame, A, Meredith, P, *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press 2013) at 331-334. 'Rangatiratanga' appears to have been coined for the purposes of Te Tiriti o Waitangi/the Treaty of Waitangi 1840.

[192] British Resident, James Busby, refers to this in 1835 in a dispatch to the Colonial Secretary: 'A payment has been pretty regularly exacted in this harbour for permission to water and I have heard of a demand for harbour dues having been made by one of the chiefs of the Hokianga River.' Despatch from British Resident,' (ATL, qMS-0344, No. 65/2)

[193] 'Hi Ritenga Māori' in *Ko Te Karere o Nu Tireni,* (Vol. 2, No. 6, 1 June 1843) at 23.

seabed lands. Tanameha Te Moananui and others from Pukerahui sent a petition to the government regarding mana whakahaere tōtika jurisdiction during this time:

> You, the Government, have asked for the gold of Hauraki; we consented. You asked for a site for a town; you asked also that the flats of the sea off Kauaeranga should be let; and those requests were acceded to. And now you have said that the places of the sea which remain to us will be taken. O friends, it is wrong, it is evil. Our voice, the voice of Hauraki, has agreed that we shall retain the parts of the sea from high water mark outwards. These places were in possession from time immemorial; these are the places from which food was obtained from the time of our ancestors even down to us their descendants … O friend, our hands, our feet, our bodies are always on our places of the sea … The men, the women, the children are united in this, that they alone are to have the control of all the places of the sea.[194]

A second Kohimarama Conference was convened by Paora Tuhaere of Ngati Whatua at Orakei, Auckland, in 1879 where it was reported:

> The Queen in the Treaty of Waitangi promised that the Māoris should retain their mana. That word is correct because the Queen accepted us as her subjects, and she said to the Māori belonged the mana over his pipi grounds. … The Queen also said that the Māori should retain their mana over the sea.[195]

That same year, the rangatira, Apihai Te Kawau, of Ngāti Whatua discussed a sale of coastal land he was involved in when he informed the Governor at Orakei in 1879:

> It was only the land that I gave over to the Pākehās. The sea I never gave, and therefore the sea belongs to me. Some of my goods are there. I consider the pipis and fish are my goods.[196]

Hori Tauroa added:

> I was not aware of the Government taking all my large pipi-banks and shoals in the Manakau (Manukau harbour). Those large banks have all gone to the Government. I was not told why these were taken. I wish to know now whether they belong to the Queen or remain my property.[197]

It appears that for Māori, fish (and presumably other wild creatures), are property when they are in the hapū territory. They are in the same position as fresh water and the coastal and marine environment in that respect.

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[194] 'Report of the Select Committee on the Thames Sea beach Bill,' in *AJHR,* (Vol. 2, 1869, F-7) at 18.
[195] 'Paora Tuhaere's Parliament at Orakei,' in *AJHR,* (1879, Sess. II, G-8) at 20.
[196] Cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 2nd ed. Wellington, 1989) at 113.
[197] Above.

The Māori view that a water resource and a land resource were conceptually the same, and were capable of being owned as hunting grounds, is supported by several 19th and 20th century observers. Thus, the 1921 Native Land Claims Commission reported with reference to Napier Inner Harbour that in Native custom, Māori rights were not confined to the mainland, but extended as well to the sea where 'deep-sea fishing grounds were recognised by boundaries fixed by the Māoris in their own way; they were well known, and woe betide any alien who attempted to trespass upon them.'[198]

The Native Land Claims Commission investigating the Napier Inner Harbour added that the inshore fishery had more restricted rights where 'particular spots would be recognised as the sole privilege of a single family, just as eel-weirs in fresh-water rivers.'[199]

Writing in 1930, James Cowan considered that in 1840 in the central plateau lakes:

> … the fisheries were jealously guarded … the boundaries of the various hapū were carefully defined by the leading marks. Every yard of these lakes had its owners … sometimes a rahui or close-season mark or post indicative that such a place was tapu was set up.[200]

In 1918, Captain Gilbert Mair advised the Native Land Court on some of the Te Arawa lakes:

> …no land in New Zealand has been more absolutely, more completely and more thoroughly under Māori owners' customs and rights than these two lakes, nor do I know of any piece of land in New Zealand in all my experiences that has been used or that can show more marks of ownership, individual or tribal than those lakes, and the surrounding lands.[201]

During the Native land Court hearing, Mair was cross-examined by the Crown over fishing beds at sea:

> Q. Did the Arawas go to the Bay of Plenty sea fishing?
> A. Yes, the Arawas had fishing grounds off Maketu.
> Q. Did they claim fishing grounds several miles out?
> A. Yes, quite in accordance with their Māori custom.
> Q. Would those fishing grounds be staked out at all, or marked off or located from the shore?
> A. Yes, they had marks on the land which were only disclosed to the favoured few, and even those miles off Maketu were the property of tribes and not common grounds. They caught hapūku and other fish there.[202]

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[198] 'Whanganui-o-Rotu' in '*Report of the Native Land Claims Commission'*, *AJHR*, (1921, Vol.2, G-5) at 13.
[199] Above.
[200] Cowan, J, *The Māori Yesterday and Today,* (Whitcombe & Tombs, Wellington, 1930) at 182.
[201] 'Evidence of Captain Gilbert Mair,' (National Archives, Wellington, Crown Law Office, File CLO 174, Part I) at 184.
[202] Above, at 270.

Te Rangi Hiroa (Sir Peter Buck) added:

> It will be seen that the tumu (stakes) in the lake were used like surveyors' pegs in modern times: they marked off the parts of the lake that belonged to the various families and subtribes ... it was far more valuable to the old-time Māori than any equal area of land.[203]

Te Rangikaheke, an advisor to Governor Grey, moreover, emphasised how no distinction was made between land and water resources. Elsdon Best recorded him as stating:

> The tumu on which Hinemoa rested in Rotorua Lake was a post (or stake) erected in a shoal part of the lake. It was named Hinewhata and was erected as a token of mana of Umukaria. Ka whiwhi te tino rangatiratanga i te one, whiwhi ana ki uta, whiwhi ana ki te moana. … When a chief of high rank gains possession of land he possesses it on shore and in the lake, hence it is said that some of his lands are ashore and some in the water.[204]

Māori then possessed territory, or areas over which they had jurisdictional authority or mana whakahaere tōtika, and the territory which they possessed was not just land but included the whole of the territorial resources of land, lakes, rivers, springs, swamps, estuaries, lagoons, inland seas, coastal marine areas and even the deep sea. In fact, in 1955 some Ngapuhi leaders lodged an application with the Māori Land Court for title to Te Moana-nui-a-Kiwa – the Pacific Ocean. The claim was based on rights from Tangaroa, as a descendant of Rangi and Papatuanuku; the act of Maui-tikitiki-a-Taranga in fishing up the North Island from the sea, Kupe through his voyage to the island across this ocean, and his naming of points on land alongside it; and through human blood which Maui smeared on his face when fishing the island from the sea. The Newspaper reported:

> The Māoris said they had a duty to their ancestors to have the waters vested in the Māoris as a mark of respect to the wisdom of the moana, the personification of the ocean, in making this part of the world so extensive that Maui could fish New Zealand from the sea, 'far from land involved in trouble.' … Mr Hohepa Heperi … spoke on the last grounds of the claim. This was the Great Ocean of Kiwa [Te Moananui-a-Kiwa] was the Māoris' marae. 'By the time Europeans discovered the oceans,' he said, 'it had already been crossed many times by the Māori people. Therefore it was the main *marae* of our ancestors.[205]

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[203] Te Rangi Hiroa, P, 'Māori Food-supplies of Lake Rotorua,' in *Transactions of the New Zealand Institute*, (Vol III, 1921) at 433-451.

[204] Letter to Solicitor-General Salmond, (5 October 1918, National Archives, Wellington, File CLO 174, Part 2). Translation of Māori in original text.

[205] 'Claim to the Pacific,' in *New Zealand Herald,* (24 February 1955). See also 'Claim to the Pacific,' in *Journal of the Polynesian Society,* (Vol. 64, 1955) at 162.

Māori iwi and hapū then had strong mana whakahaere tōtika and rangatiratanga relationships with the coastal and marine estate including the ocean itself and they continue to exercise mana whakahaere tōtika and rangatiratanga responsibilities over the coastal and marine estate. Indeed, Māori have durable traditional and contemporary mana whakahaere tōtika – jurisdiction - responsibilities over the coastal marine estate, which includes kaitiakitanga responsibilities.

Exercised Kaitiakitanga

The kaitiaki responsibilities of Māori over fresh waterways, lands and the coastal and marine areas were covered in some detail above and do not need to be discussed more here. Suffice to say that Māori had intimate knowledge of their environment. They not only viewed themselves as beneficiaries of the resources but also as kaitiaki – stewards - which acknowledges the mana and tapu of the environment. Kaitiakitanga traditionally refers to a watcher or guard. The modern usage of the term encapsulates an emerging ethic of stewardship, guardianship or trusteeship especially over natural resources such as lands and waterways but also people - whānau (family), tamariki (children), mokopuna (grandchildren), and for those appointed to governance and management positions of organisations and in other distinguished positions of authority.[206] In former times, rāhui, tapu and even aukati were the kaitiaki forms of stewardship governance and management of waterways and coastal and marine areas. Māori iwi and hapū continue to exercise their tangata whenua responsibilities as kaitiaki of land, lakes, rivers, springs, swamps, estuaries, lagoons, inland seas, coastal and marine areas, and the rest of the environment, thus satisfying this signpost of stewardship jurisdiction.

That said, the next section will discuss how tikanga Māori adapts and will explore how the tikanga concept of kaitiakitanga has evolved over time into the modern usage as an emerging ethic of stewardship, guardianship or trusteeship especially over natural resources.

Tikanga Adapts

It is important to also emphasise here that traditional mātauranga, tikanga and Māori mana whakahaere - jurisdiction authority – were neither static nor unchanging, can, and need to be updated to the 21st century. All cultures adapt and evolve in time and with new technology and tikanga Māori is capable of being updated for contemporary times. While the traditional tikanga Māori governance principles and jurisdiction values are deeply embedded and enduring, they are always interpreted, differentially weighted and applied in practice in relation to particular contexts, giving ample scope for choice, flexibility and innovation. If anything can be identified as originating in and handed down from the pre-European Māori ancestors unchanged, it is not any particular social form, such as iwi (tribes) and hapū (sub-tribes), or particular practices, such as kaitiakitanga (stewardship) and mana whenua (authority over land) but the principle of creative adaptation itself. Indeed, the 2006 Waka Umanga Report noted that:

> The culture of the people is not limited to historic conceptions. A credible [governance] structure is one that conforms to the peoples' current

[206] Benton, R, Frame, A & Meredith, P, *Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 105.

> understanding of themselves as a tribe or general Māori community, of where they have been as a people, of who they are now and where they seek to be. [207]

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

> Culture is production and not a product, we must be attentive in order to not be deceived; what we must guarantee for the future generations is not the preservation of cultural products, but the preservation of the capacity for cultural production. [208]

Professor Mason Durie added:

> Governance at local or national levels requires a level of organisation which incorporates both customary Māori practices and the application of democratic principles. The two are not incompatible, nor should their juxtaposition be discounted. Māori can be strengthened by the past and can learn from it. But the challenges of tomorrow will require a canopy of skills and wisdoms many of which will come from other cultures and nations. [209]

However, what is critical with cultural adaptation, good governance, human rights, the rule of law and updating traditional governance practices for Māori and other Indigenous people is that Māori and other Indigenous people should be controlling the process of cultural change and governance adaptation rather than being controlled by government policy, legislation and other external factors. As in the past, Māori and other Indigenous people have survived dramatic changes of colonisation, urbanisation and now globalisation, individually and collectively, by deploying their capacity for adaptation; on the one hand modifying traditional forms to serve new functions and on the other creatively adapting introduced forms to their own ends, transforming both in the process. The ability to adjust while maintaining the group's cultural uniqueness, values and customary norms is crucial for appropriately acknowledging and reconciling traditional Māori mana whakahaere tōtika jurisdiction in the 21st century.

Kaitiakitanga Adapts

To illustrate the point further, we will next analyse how the concept of kaitiakitanga has evolved and adapted over time into an emerging ethic of stewardship, guardianship or

207 New Zealand Law Commission, *Waka Umanga: A Proposed Law for Māori Governance Entities* (New Zealand Law Commission, Wellington, 2006) at 69.

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

209 Durie, M, *Te Mana Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 238.

trusteeship especially over natural resources, but also to illustrate a clear example of Māori governance jurisdiction through fulfilling a group's kaitiakitanga rights and responsibilities.

According to Royal, kaitiakitanga is the most important concept for environmental management.[210] Kaitiakitanga is often translated as guardianship, and in the context of the environment, it is a way of managing the environment based on the traditional Māori worldview.[211] The kaitiaki (guardians) are those that exercise kaitiakitanga.[212] Kaitiakitanga encompasses ideas of mana whakahaere tōtika responsibilities that are inherent in the term guardianship.[213] The kaitiaki must manage the environment for the benefit of future generations which obligation is considered mandatory, and an inability to fulfil this mana whakahaere tōtika obligation results in a diminution of mana.[214]

Given that Māori consider themselves related to all living things through whakapapa,[215] they express whānaungatanga with their surrounding environment in the form of kaitiaki relationships.[216] Whakapapa creates an intimate link between relations, a link that extends to the mana of a person or a place.[217] Any diminution in the mana of a place, will result in a diminution of an individual's mana through shared whakapapa.[218]

Kaitiakitanga moreover, entails rights and obligations that are obligatory according to tikanga Māori.[219] If a person cannot exercise kaitiakitanga, then that person is not fulfilling their legal mana whakahaere tōtika duty to the wider collective,[220] which are reflected in the EBM principles of long-term sustainability and maintenance of environmental value for future generations; the coupling of social-ecological systems, with decisions accommodating cultural and societal values; and an emphasis on accountability. Kaitiakitanga in this sense is more than simply guardianship; it entails a positive duty to act in a way that benefits the wider collective including in the sustainable governance and management of Te Ao Turoa - the environment.

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[210] Royal, C, 'Kaitiakitanga – Guardianship and Conservation - Understanding Kaitiakitanga,' (22 September 2012) Te Ara – The Encyclopedia of New Zealand online at www.teara.govt.nz (Accessed January 2020).
[211] Above, at 14.
[212] Above.
[213] Jones, C, 'Tino Rangatiratanga and Sustainable Development: Principles for Developing a Just and Effective Resource Management Regime in Aotearoa/New Zealand,' (Masters Dissertation, York University, Toronto, Ontario, 2003) at 42 and 44.
[214] Jackson, M, 'Tipuna title as a Tikanga Construct re the Foreshore and Seabed,' (March 2010) Online at: http://www.converge.org.nz/pma/mjtipuna.htm (Accessed December 2019); and Henare, M, 'Ngā Tikanga me ngā Ritenga o Te Ao Māori,' (Report of the Royal Commission on Social Policy, Wellington, 1988) at 18.
[215] Jones, C, 'Tino Rangatiratanga and Sustainable Development: Principles for Developing a Just and Effective Resource Management Regime in Aotearoa/New Zealand,' (Masters Dissertation, York University, Toronto, Ontario, 2003) at 41-42.
[216] Williams, N and Broadley, ME, 'Ngā Taonga Whakaako – Underlying Theoretical Principles of Tikanga,' (Ako Aotearoa, Open Polytechnic Kuratini Tuwhera and Te Tari Puna Ora o Aotearoa, 2012) at 20.
[217] Royal, C, 'Kaitiakitanga – Guardianship and Conservation - Understanding Kaitiakitanga,' (22 September 2012) Te Ara – The Encyclopedia of New Zealand online at www.teara.govt.nz (Accessed January 2020).
[218] Above.
[219] Jackson, M, 'Tipuna title as a Tikanga Construct re the Foreshore and Seabed,' (March 2010) Online at: http://www.converge.org.nz/pma/mjtipuna.htm (Accessed December 2019); and Henare, M, 'Ngā Tikanga me ngā Ritenga o Te Ao Māori,' (Report of the Royal Commission on Social Policy, Wellington, 1988) at 18.
[220] Above.

This tikanga Māori concept kaitiakitanga is provided for in s. 7, Resource Management Act 1991 (RMA) which provides that all persons exercising functions and powers in relation to managing the use, development and protection of natural and physical resources are required to have 'particular regard to' certain specified matters, including kaitiakitanga. Kaitiakitanga is defined in the RMA as:

> The exercise of guardianship [jurisdiction]; and in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself.[221]

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

> [T]he exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship.[222]

Some current statutes that refer to kaitiakitanga include:

1. Fisheries Act 1996,
2. Marine and Coastal Area (Takutai Moana) Act 2011,
3. Ngāti Kuri Claims Settlement Act 2015,
4. Nga Wai o Maniapoto (Waipa River) Act 2012,
5. Ngaa Rauru Kiitahi Claims Settlement Act 2005,
6. Ngāti Tamaoho Claims Settlement Act 2018,
7. Ngāti Koroki Kahukura Claims Settlement Act 2014,
8. Environment Canterbury (Transitional Governance Arrangements) Act 2016,
9. Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014,
10. Ngāti Pūkenga Claims Settlement Act 2017,
11. Game Animal Council Act 2013,
12. Iwi and Hapū of Te Rohe o Te Wairoa Claims Settlement Act 2018,
13. Te Aupouri Claims Settlement Act 2015,
14. Ngāti Hauā Claims Settlement Act 2014,
15. Ngati Kahu ki Whangaroa Claims Settlement Act 2017,
16. Rangitāne Tū Mai Rā (Wairarapa Tamaki nui-ā-Rua) Claims Settlement Act 2017,
17. Te Uri o Hau Claims Settlement Act 2002,
18. Ngāti Awa Claims Settlement Act 2005,
19. Environmental Reporting (Topics for Environmental Reports) Regulations 2016,
20. Ngāti Manuhiri Claims Settlement Act 2012,
21. Ngati Toa Rangatira Claims Settlement Act 2014,
22. Kaikōura (Te Tai o Marokura) Marine Management Act 2014,
23. Tapuika Claims Settlement Act 2014,
24. Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014,

[221] Resource Management Act 1991, s. 2(1).
[222] Resource Management Amendment Act 1997, s. 2(4).

25. Raukawa Claims Settlement Act 2014,
26. Waitakere Ranges Heritage Area Act 2008,
27. Maraeroa A and B Blocks Claims Settlement Act 2012, and
28. Fiordland (Te Moana o Atawhenua) Marine Management Act 2005.
29. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

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

To fully appreciate and even understand kaitiakitanga and how it applies to the takutai moana, one cannot simply refer to a sterile account in a dictionary that provides a meaning and derivation of words and concepts. In this respect Bentham,[223] Hart[224] and Harris all concluded:

> Legal concepts cannot be defined, but only described by reference to illustrative cases. … two judges have overlooked that lesson, by trying to define Māori culture with the help of conventional dictionary definitions. [225]

To understand the legal system of other cultures such as mātauranga and tikanga Māori, mainstream New Zealand needs to understand the legal, cultural and political contexts of Māori culture, mātauranga and tikanga Māori as noted above. The purpose of the context is to enable everyone (Māori and non-Māori alike) to understand the circumstances in which mātauranga and tikanga Māori arise, and to judge their credibility, legitimacy, jurisdiction authority and efficacy. As noted by Lord Cooke: 'In law … context is everything.'[226]

To this end and in the authors' opinions, the best reference to start for exploring mātauranga and tikanga Māori concepts such as kaitiakitanga is the seminal work by Benton, Frame and Meredith – *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*[227] although admittedly, Dr Robert Joseph was one of the researchers for the Compendium. Benton, Frame and Meredith provided comprehensive examples of kaitiakitanga as follows:

> *Kaitiakitanga.* To do with being a watcher or guard; in modern usage this word has come to encapsulate an emerging ethic of guardianship or trusteeship, especially over natural resources. A combination of kai- 'agent' (from Proto Eastern Oceanic *kai 'people of a place'); tiaki guard, keep; watch for, wait for' (from Proto Eastern

[223] Bentham, J, *Deontology together with A Table of the Springs of Action and Article on Utilitarianism* (Vol. 1, Athlone Press, 1983) at 99.
[224] Hart H, 'Definition and Theory of Jurisprudence,' in *LQR* (Vol. 70, 1954) at 37.
[225] Harris D, '*The Concept of Possession in English Law*,' (Oxford Essays in Jurisprudence, 1968) at 69.
[226] *McGuire v Hastings District Council* [2001] NZRMA 557 at 561.
[227] Benton R, Frame A, and Meredith P, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*. (Wellington: Victoria University Press, 2013).

Polynesian tiaki to guard; wait for'); and the nominalising prefix -tanga, which denotes the place, time, circumstances or associations of the word to which it is suffixed.

The wide range of protective duties encompassed by this concept is traversed by the Entries below and elsewhere in *Te Mātāpunenga*.[228] Many Entries focus on land and the management of natural resources, but the term may also cover responsibilities in relation to artefacts, buildings and social relations.[229]

The following 12 excerpts are illustrative of the long history and application of kaitiakitanga by Māori as documented in *Te Mātāpunenga*[230] which is drawn on extensively here.

[KAITIAKITANGA 01] An unnamed person from Ngati Ruanui related aspects of his life in a short piece of writing dated 21 February 1846, possibly under missionary influence. This Taranaki person was taken as a slave by Waikato and seems to have spent some time with the Methodist missionary John Whitely at Ahuahu, Kawhia, around the early 1840s. The writer recounted as a child observing the appropriate rites to ensure a plentiful kumara harvest. These rites were performed by his father as the tohunga and he was destined to assume this responsibility as kaitiaki:[231]

Te Reo Māori	English translation by Te Mātāhauariki
E ai ki te whakaaro o nga kaumatua ka hikitia ahau e toku matua ki nga wahi e kore ai e tae atu nga tangata noa, nga tangata haere ki nga kauta, e kore ratou e kai tahi mai ki ahau, e kore ratou e haere mai ki oku moenga he tangata noa ratou, e ai te whakaro o toku matua, ka mea te whakaaro o toku matua, ko ahau hei **kai tiaki**	In keeping with the elders' point of view, I would be taken by my father to places where common people cannot venture, people who go in to the cooking sheds cannot eat with me, they cannot come to my sleeping places, they are profane from my father's viewpoint; my father's intention is that I will be the **caretaker** of the image after his death. My father instructed me, do not go into

[228] Above.
[229] Above, at 105.
[230] Above.
[231] Hare Hongi (1859-1944) writing as HM Stowell, 'Reliable Ancient Māori History,' (Unpublished Manuscript, ATL gMS-929).

mo te whakapakoko i muri i tona matenga, ka mea toku matua ki ahau, kaua koe e haere ki nga kauta, ka mate koe i te atua rakau, ka mataku ahau ki taua kupu, me te kai ratou i te tangata …	the cooking sheds, you will die by the god stick, those words terrified me, it seemed that they ate people…

[Translation by Te Mātāhauariki].

[KAITIAKITANGA 02] In a Native Land Court hearing into the Mataitai Block in 1866, Ngatai of Te Urikaraka claimed the piece known as Rotopiro, asserting that:[232]

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

[KAITIAKITANGA 03] In the Native Land Court hearing into the Pukekura Block in 1867, Wiremu Whitu, of Ngati Kahukura living at Maungatautari, stated: [233]

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

[KAITIAKITANGA 04] A Māori known only as Te Wehi expresses his support in an open column (22 September 1874), *Te Waka o Te Iwi*, for the conservation of forests and the concept of kaitiakitanga:[234]

E whakatika rawa ana au ki taua mahi tiaki ngaherehere. Na matou auatikanga, no mua mai ano no o matou tupuna a tae noa mai ki tenei takiwa... He mea nui ki a matou o matou ngaherehere, he taonga no	I entirely approve of protecting and preserving forests. It has ever been considered an important matter among the Māoris, from the time of our ancestors down to the present time… We consider our forests a rich

[232] *Hauraki Native Land Court* (MB 1 186) at 49.
[233] 'Enclosure A, Proceedings of Native Land Court', *AJHR,* (1873. Vol 3, G-3) at 14.
[234] Te Wehi, *Te Waka o Te Iwi,* (Vol. 10, No. 19, 22 September 1874).

matou nga rakau; nga rata, nga matai, nga miro, nga pukatea, nga kahikatea nga rimu, nga totara, nga maire, me nga tini rakau e kainga aua e te tini o nga manu o te ngaherehere me nga karaka me nga kiekie hei kai ma nga tangata.. Inaianei kua kore te manu kua mate kua ngaro te kaka me te kakariki …

possession, and our trees a valuable property, our rata trees, and our matai, miro, pukatea, kahikatea, rimu, totora, maire, and all other kinds of trees upon which the birds of the forest feed, and also the karaka and kiekie which produce food for man…In the present day the birds are but few, but the kaka and the kakariki have almost disappeared.

[KAITIAKITANGA 05] Te Awhiorangi is a *toki*, or adze, and is said to be one of the possessions of the Māori. It is said that in the beginning, when Tane separated Rangi the Sky and Papa the Earth, it was with this adze that he cut the sinews that bound them together. The Māori text here is a contemporary account of the finding of Te Awhiorangi by Wiremu Kauika in 1887. The adze had been lost for seven generations. The account appeared in 1888 in issue 71 of the Maori newspaper *Te Korimako*. Tomairangi, a young woman, admitted she was the one who had inadvertently come upon the sacred place where Te Awhiorangi was placed:[235]

Ka ki atu a Tomairangi, 'Ko au, Tomairangi
Kahore au i mohio he wahi tapu tera.

Engari kotahi te mea i kite ai au i reira, ano he atua, ka nui taku mataku.

Katahi ka tikina, ka tirohia, ka mohio ratou katoa ko Te Awhiorangi. E noho

ana ano nga **Kaitiaki**, ara, nga uri o Tutangatakino raua ko Mokohikuaro.

Katahi ka karakiatia e Te Rangi

Whakairione. Ka mutu, katahi ka tangohia mai e ratou, katahi te iwi ra

ka tangi; ka mutu, ka tangohia te Toki

ram ki ko mai o te kainga takoto ai.

Then the young woman

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

[Translation in *Te Ao Hou*]

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

[KAITIAKITANGA 06] In a Māori newspaper of 1878, several individuals published a notice reporting a meeting held at Te Hauke concerning the taking of eels from Lake Rotorua despite a *rāhui* (prohibition). The meeting appointed *kaitiaki* for the lake s future protection: [236]

Whakataua ana e taua whakawa ko Renata Kawepo, Arihi Teinahu, Watene Hapūku, Renata Pukututu i nga **kai- tiaki** mo taua Roto kei haere pokanoa tetahi tangata ki taua Roto mahi ai, maua tangata e mau enei o ratou ingoa e whakarite kia mahia, ka haere ai te katoa ki te mahi, ki te whakahe tetahi I muri iho o tenei whakaotinga, ka hinga te ture kia a ia. RENATA KAWEPO, ARIHI TEINAHU, WATENE HAPŪKU, RENATA PUKUTUTU Te Hauke, October 23 1878.	We have appointed Renata Kawepo, Arihi Teinahu, Watene Hapūku, and Renata Pukututu as **guardians** of that lake. Let not any one take fish out of that lake unless authorised by the above named persons. RENATA KAWEPO, ARIHI TEINAHU, WATENE HAPŪKU, RENATA PUKUTUTU, Te Hauke, October 23, 1878. *Te Wananga,* Vol. 5, No. 44, November 1878, p 55 [Translation in the original source].

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

> At that time you perfectly understood what *kaitiaki* meant? – I understand it means that when ten men are into an order of the Court that they are to take care of the land for the rest of the people.
> It was the custom of the Court to put in an explanatory word to the ten names? -Yes but they were caretakers and the Court used to tell them that they were caretakers for the land.
> You and Hunia at that time quite clearly understood what ***kaitiaki*** meant in regard to the land?-Yes; we heard it and understood it because the Court explained it to us.
> And have you since heard the Pākehā word 'trustee'?-Yes
> And do you quite understand that it means the same as ***kaitiaki***? - Now I know it.[237]

[236] *Te Wananga,* (Vol. 5, No. 44, 2 November 1878) at 550.
[237] Horowhenua Commission Report and Evidence, *AJHR* (1896, Vol 3, G-2) at 165.

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

> Koira hoki te kaupapa o te waiata a Eraihia i te whakapuaretanga o te whare o Te Aitanga a Hauiti, e mea ra: "Ki a Hikataurewa, **te kaitiaki** o taku whata kao i Toka a Kuku.'
>
> That is the theme of Eraiha's song when the house of Te Aitanga a Hauiti was opened, it was sung 'To you Hikataurewa the **caretaker** of my sweet-kumara storehouse at Toka a Kuku' (Translation by Te Mātāhauariki).[238]

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

> The ancient ones (tawhito), the spiritual sons and daughters of Rangi and Papa were the Kaitiaki or guardians. Tane was the **Kaitiaki** of the forest, Tangaroa of the sea, Rongo of herbs and root crops; Hine Nui Te Po of the portals of death and so on. Different tawhito had oversight of the various departments of nature. And whilst man could harvest those resources they were duty bound to thank and propitiate the guardians of those resources. Thus the Māori made ritual acts of propitiation before embarking upon hunting, fishing, digging root crops, cutting down trees and other pursuits of a similar nature.[239]

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

> Patuna: Because of the perennial value as a sure source of food supply these pa-tuna were of great economic importance. Hence the bestowal of the care and management (**manaaki--tanga**) by virtue of an ohaki gave the donee much prestige with his adopted tribe. Only he could exercise the fishing rights to such a pa-tuna or give assent to others to so do, and only to those within the tribal group.[240]

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[238] *Te Toa Takitini*, (No. 9, October 1930) at 2161.

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

[240] Graham, G, 'Whangai Tamariki,' in *Journal of the Polynesian Society (JPS)* (Vol 57, No. 276, 1948) note 10.

[KAITIAKITANGA 11] In an appeal from a decision of the Regional Council to grant consents for an oyster farm on the foreshore at Paritata Bay, Raglan Harbour, Judge Treadwell commented on s.7, RMA directing the Tribunal to have regard to kaitiakitanga:[241]

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

[KAITIAKITANGA 12] The inclusion of the principle of *kaitiakitanga* in the Resource Management Act 1991 has created a statutory obligation for Local Government to consider the issue. Many Councils have reflected this requirement in their District Plans. The Wellington City Council's District Plan which details the objectives, policies and rules describes *kaitiakitanga* under 'Issues for Tangata Whenua' and provides a summary of the Māori Environmental Management System as follows:[242]

> Kaitiakitanga
>
> Kaitiakitanga or guardianship is inextricably linked to tino rangatiratanga and is a diverse set of tikanga or practices which result in sustainable management of a resource. Kaitiakitanga/guardianship involves a broad set of practices based on a world and environmental view. The root word is tiaki, to guard or protect, which includes the ideas and principles of:
>
> - guardianship
> - care
> - wise management
> - resource indicators, where resources themselves indicate the state of their own mauri.
>
> The prefix *kai* denotes the agent by which tiaki is performed. A kaitiaki is the person or other agent who performs the tasks of guardianship. The addition of a suffix brings us kaitiakitanga or the practice of guardianship, and contains the

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

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

assumption that guardianship is used in the Māori sense meaning those who are genealogically linked to the resource.

Kaitiakitanga is practised through:

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

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

2.2.6 Summary of the Māori Environmental Management System

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

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

> The ***kaitiaki...*** acts as both benefactor and beneficiary, in the sense that they protect the resource from harm while still reaping the benefits of the resource. An intrinsic part of this concept is the recognition that each generation has an inherited responsibility to protect and care for the natural world. Kaitiakitanga carried with it an obligation not only to care for the natural world, but also for each successive generation, by ensuring that a viable livelihood is passed on... Concern remains however, in regard to the use of the words 'guardianship' and 'stewardship' to define kaitiakitanga. Both terms tend to cloak the concept of kaitiakitanga in Pākehā terms of lesser importance and entirely different origins. The role of kaitiaki is considerably more significant than simply that of a guardian or steward. It is a vital component in the spiritual and cultural relationship of tangata whenua with their land.[243]

Anthropologist and author Dr Merata Kawharu of Ngati Whatua, in an article developed from her doctoral thesis, argued that while the term *kaitiakitanga* is commonly used in legal and

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

environmental contexts, particularly since the RMA, there are other dimensions and applications of the concept, especially in the social realm:

> Māori philosophy emphasises that kaitiakitanga is a socio-environmental ethic. While policy-makers have commonly given attention to its relevance in bio-physical resource management, its application is primarily concerned with social relations. . The customary framework for giving relevance to kaitiakitanga is whakapapa, a structural principle which weaves together a triadic relationship between human beings, their environment and the spiritual realm.[244]

Dr Kawharu argues that kaitiakitanga cannot be understood without regard to other key concepts, including mana (rangatiratanga), mauri, tapu, rāhui, manaaki a tuku.[245]

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

> We act as eyes and ears on behalf of the Iwi watching over environmental matters that may affect their values and concerns. [246]

> Another challenge our Iwi has is that we are becoming isolated as most of our younger generation move away in search of work so those left behind are few. So that knowledge of practicing kaitiakitanga or harvesting that kaimoana slowly disappears because you only have a handful left.[247]

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

In fact, a dynamic society will evolve as it encounters other societies and other knowledge systems and there will be ongoing maintenance of the customary traditional values and their relevance. It is worth repeating Da Cunha's observations here again regarding cultural adaptation:

> Culture is production and not a product, we must be attentive in order to not be deceived; what we must guarantee for the future generations is not the preservation of cultural products, but the preservation of the capacity for cultural production. [248]

[244] Kawharu, M, 'Kaitiakitanga: A Māori Anthropological Perspective of the Māori Socio- Environmental Ethic of Resource Management,' *JPS* (Vol 109, 2000) at 366-367.
[245] Above.
[246] MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).
[247] Above.
[248] Da Cunha, M.C, 'The Case of Brazilian Indians,' in Stephens, S., (ed), *Children and the Politics of Culture,* (Princeton University Press, 1995) at 282-291.

Selbin similarly referred to agency and culture in revolution that acknowledges how culture allows for individual agency and navigation for cultural adaptation and change.[249]

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

Perhaps a new approach to environmental governance and management that Māori and New Zealand ought to seriously consider, negotiate, adopt and adapt within this general tikanga Māori and specific kaitiakitanga jurisdiction context to stem the current environmental degradation and destruction, is ecosystem-based management that includes shared governance jurisdiction between Māori, the Crown and other key stakeholders over our natural resources. Such an approach aligns with Māori self-determination, mana whakahaere – good Māori governance – and mana whakahaere tōtika – shared governance jurisdiction - aspirations.

To these ends, the next section will discuss somewhat extensively the historic, legal and political precedents for shared Māori governance jurisdiction over natural resources, including over the marine and coastal areas of New Zealand. We will start with a discussion of the Declaration of Independence 1835, the doctrine of aboriginal title and the Treaty of Waitangi 1840.

F. Historic Precedent for Shared Māori Governance Jurisdiction

Māori people claim an inherent mana whakahaere tōtika jurisdiction and kaitiaki responsibility over themselves, the people and the natural resources since time immemorial as noted above. The British historically also acknowledged this political reality when they signed He Whakaputanga o te Rangatiratanga o Niu Tireni - the Declaration of Independence of the United Tribes of New Zealand 1835, through the common law doctrine of aboriginal title and in the Treaty of Waitangi 1840. Subsequent legislation after the Treaty of Waitangi continued with this shared jurisdiction precedent especially s. 71, Constitution Act 1852 which are all discussed in the next section in some detail.

He Whakaputanga o Te Rangatiratanga o Niu Tireni – The Declaration of Independence of the United Tribes of New Zealand 1835

Before New Zealand became a British Colony, many European traders, whalers and settlers arrived who were reckless, lawless and often committed many crimes which was a major concern for Māori. As a result of concerns about the lack of laws to govern Europeans, the

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

British Government appointed James Busby to be an official 'British Resident' at Waitangi, in the Bay of Islands, in 1833. Busby was not well equipped however, so he had to use diplomacy to achieve anything. Busby was described by Māori as being a man o 'war (warship) without guns.[250]

Furthermore, Busby was concerned by the interest in New Zealand shown by France and the United States of America. In 1834, the French national, Baron Philippe Hippolyte de Thierry, sought to declare the Hokianga as a sovereign and independent state with him as Lord Governor as he had done previously in the Marquesas Islands. Numerous whaling ships from the United States of America and elsewhere were moreover, visiting the shores of New Zealand. The fact that if Britain did not intervene in New Zealand, another country might do so was a cause of concern for Busby.[251]

Furthermore, many Māori tribes were engaging in international trade exporting various goods to Australia, England, and the Americas. Māori owned ships exported goods around the globe under their own tribal jurisdiction (mana whakahaere tōtika) but under international maritime law, all ships needed to fly a flag of a recognised nation. New Zealand was neither a recognised nation under Ius Gentium – the Law of Nations – nor did Māori have a national flag to engage in international trade successfully. Predictably, a Māori-owned ship was seized in Sydney, Australia, for not flying a recognised flag in 1830 due to breaching maritime law which was a slight on the mana of the chiefs.[252]

Consequently in 1831, 13 Nga Puhi chiefs wrote to King William IV of the United Kingdom to seek an alliance and protection from other European powers. In March 1834, Busby called together some chiefs in Northland to decide on a flag, while in 1835, with assistance from the evangelical side of the Anglican Church - the Church Missionary Society (CMS) – missionaries, Henry Williams, his son Edward Williams, and William Colenso, he drafted a statement for the chiefs to sign in which they declared themselves rulers of New Zealand with absolute sovereignty and governance jurisdiction.

As for the flag, Māori were presented with three options, and the one they chose became known as the United Tribes' flag. Busby also hoped he might encourage the different tribes to work together rather than fight each other given the preceding Musket Wars.[253]

There was an English version - drafted by Busby - and a Māori version – translated by Henry Williams and his son Edward Williams - of He Whakaputanga o te Rangatiratanga o Niu Tireni - the Declaration of Independence of the United tribes of New Zealand 1835 and the version that was signed was the Māori version.[254] The Declaration consisted of four articles:

In the first article the chiefs declared New Zealand a 'w[h]enua rangatira' (independent state).

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[250] See generally, 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, 14 October 2014).
[251] Above.
[252] Above.
[253] See Ballara, A, *Taua: 'Musket Wars', Land Wars' or Tikanga?: Warfare in Māori Society in the Early Nineteenth Century*, (Penguin, Auckland, 2003); Crosby, R. D, *The Musket Wars: A History of Inter-Iwi Conflict, 1806–45*, (Reed, Auckland, 1999) and Wright, M, *Guns and Utu: A Short History of the Musket Wars*. Penguin, Auckland, 2011).
[254] See 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, 14 October 2014).

The second stated that 'all sovereign power and authority in the land ('Ko te kingitanga ko te mana i te w[h]enua') was held collectively by the chiefs, resided with Te Whakaminenga, the Confederation of United Tribes, and that no foreigners could make laws.

The third article stated that a huihuinga (Māori Congress) would meet in autumn each year for the purposes of framing laws for the dispensation of justice, the preservation of peace and good order and the regulation of trade.

The fourth article said a copy of this declaration would be sent to the King of England to, inter alia, acknowledge the Māori flag, and Māori asked him to be a parent of the infant state.

In return for their protection of British subjects in their territory, Māori sought King William's protection against threats to their mana including jurisdiction powers.

Subsequently, He Whakaputanga o te Rangatiratanga o Niu Tireni - the Declaration of Independence of the United tribes of New Zealand 1835 was sent to King William IV and was recognised by Britain. Other chiefs also signed the Declaration up until 1839 including Potatau Te Wherowhero of Waikato and Te Hapūku of Ngāti Kahungunu. The Pan-tribal political movements, such as the confederation of Northern Tribes with the Declaration of Independence 1835,[255] emerged to unite Māori, to expedite free trade agreements, confront the challenges of colonisation[256] and clearly to affirm Māori tribal jurisdiction over resources.

More recently in 2010, the Waitangi Tribunal held an inquiry into the meaning and effect of He Whakaputanga and Te Tiriti – the Declaration and the Treaty.[257] The Tribunal commented on the nature of Māori jurisdiction that was recognised in the Declaration and, specifically, the recognition of 'ko te kingitanga ko te mana i te whenua.' The Tribunal acknowledged that the Declaration was an 'ambiguous' declaration but hapū and rangatira authority – jurisdiction – was acknowledged and continued on the ground.[258] A further Tribunal conclusion was that Declaration was a declaration by rangatira in response to a perceived foreign threat to their mana whakahaere tōtika - jurisdictional authority - which:

> Emphatically declared the reality that rangatiratanga, kingitanga, and mana in relation to their territories rested only with them on behalf of their hapū;
>
> Declared that no one else could come into their territories and make laws and nor could anyone exercise any function of government unless appointed by them and acting under their authority;
>
> Agreed to meet annually at Waitangi and make their own decisions about matters such as justice, peace, good order and trade involving Europeans and Māori-European relationships in their territories;

[255] For an in-depth analysis of the Declaration of Independence and the reflexive move towards a pan-Māori nation, see Henare's chapter 'The Phenomenon of the Māori Nation' in Henare, M 'The Changing Images of Nineteenth Century Māori Society – From Tribes to Nation' (Unpublished PhD Thesis, Victoria University of Wellington, August 1003) at 107 – 199.

[256] Ballara, A, *Taua: 'Musket Wars', Land Wars' or Tikanga?: Warfare in Māori Society in the Early Nineteenth Century*, (Penguin, Auckland, 2003) at 335.

[257] 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, 14 October 2014).

[258] Above.

> Acknowledged their friendship with Britain and the trading benefits it brought; and
>
> Renewed their request for British protection against threats to their authority, in return for their protection of British people and interests in their territories.[259]

The Tribunal also found that nothing in He Whakaputanga would have suggested to the chiefs that a loss of jurisdiction authority of themselves or their hapū, or any transfer of authority would occur under the document.[260]

The doctrine of aboriginal title also allows some continuity of Indigenous tribal jurisdiction under British common law, which is discussed next.

Doctrine of Aboriginal Title Rights

The doctrine of Aboriginal title is the political and legal acknowledgement under Ius Gentium (the Law of Nations) and English common law that presumes and recognises some continuity of the local aboriginal law and jurisdiction subsequent to British annexation.[261] The elements of pre-existing aboriginal title were not extinguished[262] but were subject to the Crown's plenary powers during the assumption of British Crown sovereignty.[263] Professor Slattery distilled his understanding of aboriginal rights as follows:

> The doctrine of aboriginal rights, like other doctrines of colonial law, applied automatically to a new colony when the colony was acquired. In the same way that colonial law determined whether a colony was deemed to be 'settled' or 'conquered', and whether English law was automatically introduced or local laws retained, it also supplied the presumptive legal structure governing the position of native peoples. The doctrine of aboriginal rights applied, then, to every British colony that now forms part of Canada, from Newfoundland to British Columbia [and New Zealand]. Although the doctrine was a species of unwritten British law, it was part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony.[264]

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[259] Above, at 502.

[260] Above.

[261] *The Case of Tanistry* (1608) Davies 28 (K.B); *Memorandum* (1722) 2 P Wms 75 (P.C); *Campbell v Hall* (1774) 1 Cowp 204 (K.B); see also McHugh, P *The Aboriginal Rights of the New Zealand Māori at Common Law* (Unpublished PhD. Thesis, Sydney Sussex College, Cambridge, 1987) at 152-8.

[262] As a body, the colonists erroneously viewed native land not so much as the property of the Māori as the property of the Colony, merely encumbered with a certain native right of occupancy, a right which was acknowledged as a matter of expediency rather than of justice and which it was the Government's duty to clear away in accordance with the needs of European settlement. See Dalton, B *War and Politics in New Zealand 1855 - 1870* (Sydney University Press, 1967) at 8.

[263] McHugh, P 'Constitutional Theory and Māori Claims' in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 40-1.

[264] Slattery, B 'Understanding Aboriginal Rights' in 66 *Can Bar Rev* (727, 1987) at 737- 8. This reference was adopted by Lamer CJ C in the Supreme Court of Canada in *R v Côtē* (1996) 138 DLR 385 at 405.

Baragwanath noted that 'this doctrine was part of English common law in its broadest sense, to the protection of which Māori as British subjects became entitled to in 1840, even apart from the provision of Article III of the Treaty.'[265] The former New Zealand Chief Justice, Sir William Martin, published a pamphlet in 1846 acknowledging aboriginal title and Māori jurisdiction over property where he observed:

> The whole surface of these Islands, or as much of it as is of any value to man, has been appropriated by the Natives, and, with the exception of the part which they have sold, is held by them as property. Nowhere was any piece of land discovered or heard of [by the commissioners] which was not owned by some person or set of persons.[266]

The elements of aboriginal rights maintained were those that were not repugnant to common law and which did not interfere with or challenge the new sovereign.[267] The rules governing aboriginal title were not solely rules for the extinguishment of an aboriginal title but rules providing for the continuity of tribal property rights and therefore jurisdiction. They were common law rules establishing a type of legal pluralism.[268] The continuity of tribal title was defined by customary laws[269] and to that limited extent; Māori chiefs retained some degree of legally recognised de jure jurisdiction power. Such jurisdiction authority was exercised de facto by the chiefs after British sovereignty and until the Crown was practicably able to exercise what it had claimed as a matter of law and jurisdiction,[270] which meant that some tribes remained subject to their traditional laws, norms, jurisdiction and institutional forms of government.[271]

The Land Purchase Department was forced to follow the traditional Māori custom of communal jurisdictional rights to land for example, which meant that no individual tribal member could sell land because no individual held pieces of the tribal estate in their own right. This made it impossible for a land block to be sold without the consent of all owners. Use rights over places for bird-snaring and fishing moreover, were indicia of aboriginal title, property control, ownership and jurisdiction or, at the very least, seasonal rights of access to resources and therefore aboriginal title. Some examples are taken from aboriginal title

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[265] Baragwanath, D 'The Treaty of Waitangi and the Constitution' in *Treaty of Waitangi Issues – the Last Decade and the Next Century* (New Zealand Law Society Seminar, April 1997) at 1.

[266] Martin, S. W. 'England and the New Zealanders,' (Part 1: Remarks upon a Despatch from the Right Hon. Earl Grey, to Governor Grey dated December 23 1846. Auckland, Auckland College Press, 1847) at 3-4.

[267] McHugh, P 'Constitutional Theory and Māori Claims' in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 50.

[268] Above, at 51.

[269] A definition of 'customary law' is provided by the Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (2 Vols, 1986) as 'both a body of rules backed by sanctions and a set of dispute resolution mechanisms. At a more informal level it was also a series of accepted behaviours which allowed daily social life to proceed ... the stuff of interpersonal relationships, the self-regulating patterns of interaction.' (Para. 37, vol. 1).

[270] The first Attorney-General William Swainson tried to argue that the Crown did not have sovereignty over those tribes who had not signed the Treaty of Waitangi or had done so with the imperfect knowledge of its consequences. Swainson / Shortland, 27 December 1842, CO 209/16: 487; Opinion of 13 July 1843, (enclosure in Shortland / Stanley (no. 2), 13 July 1843, CO 209/22) 245 at 285-93.

[271] In many rural areas, Māori leaders continued to exercise de facto jurisdiction until after World War II.

evidence presented in the Native Land Court relating to the Maraeroa block in the King Country region in the 19th century.

> Paehua also gave the names of bird snaring places on Maraeroa: Otaikaka a maire tree a rakau tahere. Pikiariki a miro tree of Maniapoto & Matakore. Whatawhata-a-ponga a miro. Kawauahi a papauma tree a rakau tahere. Te Tuke a papauma tree. Kaeaearua a papauma tree. Te Akatea a miro. Wharepapa a tutu a kahikatea tree. Kurahutia a kahikatea a tutu. Te Kopiko a tutu a toatoa.
>
> Birds were also snared at places on the following streams: Te Paepae-a-Tamarahi, Heruewe, Te Roto, Opaku, Te Waipuna, Te Waionetea, Waipahekeheke, Te Waipohatu and many others.
>
> Eel traps were set on the Maraeroa block at Te Raumawhai, Totaraohoa and Pareraurekau on the Waimiha stream, Te Rere in the Ruataki stream, Turangarahui, Te Kotuku and Matapuia on the Kotuku stream, Te Horakuri on the Kakaho stream and on the Whaingarorohe stream among other places.[272]

Similarly, the locations of pā tuna were often used to define block boundaries, while access to and jurisdiction control of such resources were frequently subjected to dispute as one witness observed.

> In the time of Ingoa and Te Kanawa, a quarrel arose between Ngāti Apakura and Ngāti Puhiawe then in residence in the Te Awamutu region. Fighting started between crews of canoes on Lake Ngāroto, just north of Te Awamutu, which gave the quarrel its name, the battle of canoes. The cause of the fighting was access to an eel weir called Tautepo on the Mangotama stream which drains into Lake Ngāroto.[273]

In addition, the notion that some tribes should have remained subject to their traditional laws, jurisdiction and forms of government was firmly challenged during and following the New Zealand Wars. There were some notable exceptions however, mainly Ngāti Maniapoto and other tribes under King Tawhiao behind the aukati (border) in Te Rohe Pōtae - the King Country; and the Tuhoe tribes in the isolated Urewera region. Both groups were eventually co-opted into submission. Ngāti Maniapoto when the main North Island main trunk railway went through the King Country in 1889, and the with the armed altercation in Maungapohatu, Te Urewera, that resulted in Rua Kenana's imprisonment in 1916.[274]

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[272] *Waikato Maniapoto Minute Book*. (No.28, National Archives of New Zealand, Wellington, New Zealand) at 66-67.

[273] Wai 898, #1.1.131., *Statement of Claim for Ngati Ingoa*, (17 December 2008) at 4

[274] See Simpson, T *Te Riri Pākehā The White Man's Anger* (Alister Taylor, Martinborough, 1979) at 198 - 224, and Webster, P *Rua and the Māori Millennium* (Price Milburn for Victoria University Press, Wellington, 1979).

Still, the doctrine of aboriginal title established legal grounds for a proprietal legal system with shared jurisdiction and parallel Māori institutions governed by tikanga Māori so long as they were not repugnant to the common law. Given that customary law defines this doctrine, the judiciary could to some extent precipitate the Indigenisation of the New Zealand legal system as well as shared governance jurisdiction over natural resources. Still, for long periods local New Zealand Courts did not react favourably to arguments based on aboriginal title and tikanga Māori custom particularly between 1877 and the confrontation era of the 1970s. Interestingly, Boast concluded that 'to bring Māori rights in under the resuscitated doctrine of aboriginal title is merely to view them through the monocultural prism of the common law and does not affirm their unique and independent status.'[275]

Nonetheless, another key constitutional document affirming tikanga Māori, protection of property and shared governance jurisdiction was the Treaty of Waitangi 1840 which is discussed in detail in the next section.

Te Tiriti o Waitangi 1840/Treaty of Waitangi 1840

The Treaty of Waitangi has generated much debate and controversy in terms of what was agreed to and signed by Māori and the British Crown, what was ceded and guaranteed, and how does the Treaty apply today as the Waitangi Tribunal concluded in 2014:

> No other document in the nation's history has been written about so much or generated so much controversy.[276]

The Māori understanding of the Treaty of Waitangi is important and should be considered in any regime that impacts on Māori jurisdiction rights and responsibilities over the marine estate.

Treaties between European nations, particularly the British (but not exclusively) and Indigenous peoples were concluded since the 15th century in India, South East Asia, Africa, the Americas and the Pacific.[277] The British even entered into a number of Treaties with Indigenous peoples that were similar to the Treaty of Waitangi.[278] There was, for example, a

[275] Boast, R 'Treaty Rights or Aboriginal Rights' *NZLJ,* [1990] at 32, 33; see also Turpel, M 'Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies and Cultural Differences' in *Canadian Human Rights Yearbook* (Vol. 6, 1989-90) at 3.

[276] 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, 14 October 2014) at 113.

[277] See Smith, N *Native Origins of European Settlement in Kenya* (Oxford, 1967); Shaw, M *Title to Territory in Africa International Legal Issues* (Clarendon Press, 1986); Alexandrowicz, C.H *An Introduction to the History of the Law of Nations in the East Indies* (Clarendon Press, 1967); Slattery, B *The Land Rights of Indigenous Canadian Peoples* (PhD Thesis, University of Oxford, 1979); Jain, T (2nd ed) *Outlines of Indian Legal History* (Tripathi Private Ltd, New Mexico, 1966); Ward, J.M *British Policy in the South Pacific (1786-1893)* (Australian Publishing Co, 1948); and Bennion, T *Treaty Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi* (Research Paper for Administrative Law, LLM, Wellington, 1987).

[278] British Treaties in Africa included the Convention of Sherbo, Bendo, Bullom, Bagroo, Bompey, Char, Jenkins, Plantain Islands, Sherbo Island, Tasso and Ya Comba (Sierra Leone) Plantain Isles 1824, which were similar to the *Treaty of Waitangi*. Others included the Treaty of Kafir Chiefs of Gaika 1835 and the Treaty of Kafir Chiefs of T'Slambie 1835. Treaties in Canada included the Treaty of Paris 1763, the Royal Proclamation 1763 and the 11 Numbered Treaties signed from 1871 - 1921. Treaties in India included the Treaty of Surat 1752, the Agreement of Colonel Clive, Nabob, Serajah, Dowla (Moghul Empire, Bengal) 1757, the Treaty of Illiabad, Bengal 1765 and

Treaty that Britain concluded in 1825 with Banka, King of Sherbro, as part of the British acquisition of Sierra Leone.[279] The Treaty stipulated that in return for a cession of sovereignty, the African parties were to retain the full, free and undisturbed possession and enjoyment of the lands they now hold and occupy and to receive the rights and privileges of British subjects.[280] As noted by Sorrenson,[281] Hobson and Busby possibly knew of this agreement or similar agreements since both had been briefed at the Colonial Office before the Treaty of Waitangi was drafted. Sorrenson does mention, however, that a significant difference between the Treaty of Waitangi and other Treaties concluded by the British was the inclusion of a Māori version which has been a point of contention.[282] There was therefore a 'Treaty language' and a shared jurisdiction precedent through Treaty for the accommodation of Indigenous laws and institutions (at least in theory) throughout the British Empire and the three articles of the Treaty of Waitangi were deeply embedded in an older Colonial policy drawn from various corners of the Empire.[283] Hence, in 1840, the Crown developed a Charter[284] for the Colony of New Zealand with accompanying Royal Instructions.[285] The Instructions reiterated the main features of the Charter and included direction that no law passed by the Legislative Council should diminish the prerogative powers of the Crown.[286] Moreover, Governor Hobson was instructed not to propose or assent to any Ordinance that would result in non-Europeans being treated less favourably than Europeans.[287]

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the Treaty of Hyerabad 1768. Treaties were even signed in the Pacific including the Hawaii Lahaina Agreement 1844, the Fiji Islands Agreement 1859; the Apia Treaty 1879 and the Alofi Agreement 1900.

[279] Cited in Law Commission, *The Treaty of Waitangi and Māori Fisheries: Mataitai: Nga Tikanga Māori Me Te Tiriti o Waitangi* (Preliminary Paper No 9, Wellington, New Zealand) at 43.

[280] Sir E Hertslet, *The Map of Africa by Treaty,* (Frank Cass & Co Ltd, 1967) at 32.

[281] Sorrenson, M.P.K 'Treaties in British Colonial Policy: Precedents for Waitangi' in Renwick, W (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) at 15 – 29.

[282] In 1865, the House of Representatives debated and carried a motion to table a copy of the 'original' Treaty and a literal translation of this into English. The Irishman, James FitzGerald, Native Minister (who was considered to be a philo-Māori (Māori lover) by his colleagues for promoting equal civil and political rights and for describing the raupatu land confiscations as an 'enormous crime,' reminded the House that if the document was signed in its Māori version, the English version was irrelevant as to its binding effect. Carleton added: 'In the Māori copy, chiefs were guaranteed chieftainship over their land … The Governor was under a misapprehension in thinking this had been yielded.' See *NZPD* [1864-66] at 292. See also 'James Edward FitzGerald,' New Zealand History Nga Korero a Ipurangi o Aotearoa, online at: https://nzhistory.govt.nz/people/james-e-fitzgerald (Accessed May 2020). For a good discussion of the differences in translation of Te Tiriti o Waitangi/the Treaty of Waitangi and its implications see Biggs, B in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989).

[283] Sorrenson noted that the precedent for the cession of sovereignty in Article I came from Africa and North America; the full and exclusive and undisturbed possession of lands in Article II from North America and West Africa; Article II Crown pre-emption came from the Royal Proclamation 1763 in North America, and Article III citizenship rights came from Africa and was heavily influenced by genocide in Australia. Sorrenson, M.P.K 'Treaties in British Colonial Policy: Precedents for Waitangi' in Renwick, W (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) at 15-29.

[284] 'Charter for Erecting the Colony of New Zealand, and for Creating and Establishing a Legislative Council and an Executive Council, and for Granting Certain Powers and Authorities to the Governor for the time being of the said Colony,' in *GBPP* (I.U.P. Shannon, Ireland) [1835-1842] Vol. 3, at 153.

[285] 'Royal Instructions,' in *GBPP* (I.U.P Shannon, Ireland, 5 Dec. 1840) [1835-1842] Vol. 3, 156.

[286] Above, at 156, 158, para. 13.

[287] There was special mention made that the Governor 'especially take care and protect [Māori] in their persons, and in the free enjoyment of their possessions, and that you do by all lawful means prevent and restrain all violence and injustice which may ... be practiced or attempted against them, and that you take such measures

Subsequently on 6 February 1840, Te Tiriti o Waitangi - the Māori version of the Treaty of Waitangi - was signed by approximately 40 rangatira (chiefs) and the British Crown. The two texts of the Treaty are fundamentally different but are both presented as being authoritative. Te Tiriti - the Māori version - was explained in the preceding discussions on 5 February and was understood by Māori and signed. Te Tiriti guaranteed to the chiefs the retention of their mana, their rangatiratanga, and their supreme jurisdictional decision-making authority within their rohe.[288] The English text of the Treaty of Waitangi on the other hand, was drafted by the English as a Treaty of cession – where Māori voluntarily agreed to cede their sovereignty and jurisdiction to the British Crown.

McHugh however, suggests that Article II of the Treaty of Waitangi, and its promise of te tino rangatiratanga implies the continued viability of personal jurisdiction for customary law where Māori 'offenders' were concerned.[289] He added: 'the chiefs thought simply that they were to retain their customary authority [jurisdiction] over and amongst their own people.'[290] On the 5th February during the debates preceding the Treaty's signing, Tamati Waka Nene warned:

> O Governor … You must preserve our customs, and never permit our lands to be wrested from us … Stay thou here, dwell in our midst.[291]

Waka Nene's view was generally accepted as being influential if not decisive in persuading those present to sign Te Tiriti which view supports McHugh's suggestion about retaining jurisdiction. After the official proceedings at Waitangi, copies of the Treaty of Waitangi were taken around the country by Crown agents to secure more rangatira signatures to further legitimate the Treaty.

Still, Article II of Te Tiriti itself recognised and protected Māori custom: '...te tino Rangatiratanga ... o o ratou taonga katoa.' The English text of the Treaty defines this phrase to mean 'the full exclusive and undisturbed possession of their other properties.'[292] In 1860, Governor Gore Browne defined taonga katoa as 'all other possessions.'[293] In 1898, Te Heuheu referring to the Māori text before the Select Committee on the Native Lands Settlement and Administration Bill stated:

> … what we understand, and what we have always understood, is this: that section 2 of the Treaty of Waitangi assures to the Natives all their rights, title and management of their own affairs [jurisdiction].[294]

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as may appear to you to be necessary for the conversion to the Christian faith, and for their advancement in civilisation.' Above, at 127, 158, para. 15.

[288] 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, 14 October 2014) at 433, 509, 512, 514, 528.

[289] McHugh, P, *The Māori Magna Carta,* (Oxford University Press, Auckland, 1991) at 287.

[290] Above.

[291] Buick, L, *The Treaty of Waitangi,* (3rd ed, Avery Press, Auckland, 1936) at 143.

[292] Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 317. To view a copy of Te Tiriti o Waitangi/the Treaty of Waitangi see Appendix 2.

[293] *Māori Messenger* (10 July and 26 July 1860).

[294] *AJHR* (1898, I-3A) at 7.

In addition, a direct reference to Māori custom is in the 'fourth article' of the Treaty (as it has been called). William Colenso noted an amendment to the Treaty of Waitangi in the debate at Waitangi.[295] While Article IV does not occupy much attention today, it very likely had considerable significance for Māori at the time. It was debated in the presence of Māori, in the manner of the oral tradition, an agreed position was read out, and it was debated by the missionaries who, over the previous 25 years, had competed with the tohunga as advisors on te taha wairua (life's spiritual dimension). At the request of Bishop Jean Baptiste Pompallier, Reverend H. Williams with the assistance of W. Colenso drafted the article as follows:

> E mea ana te Kawana, ko ngā whakapono katoa, o Ingarani, o ngā Weteriana, o Roma, me te ritenga Māori hoki, e tiakina ngatahitia e ia.
>
> The Governor says that the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Māori custom, shall be alike protected by him.[296]

Hobson assented and also referred to the protection of Māori customs and beliefs.[297] Hobson even tried to avert suspicion of the Treaty by issuing a circular to the chiefs assuring them that 'their native customs would not be infringed, except in cases that are opposed to the principles of humanity and morals.'[298]

Alan Ward has described how official messages recognising Māori customary rights were then conveyed throughout the country.[299] These included a circular from Governor Hobson and a message from him through Willoughby Shortland that 'the Queen will not interfere with your native laws and customs.'[300]

In more recent times, Te Atiawa claimants provided evidence before the Waitangi Tribunal that taonga katoa embraced all things treasured by the ancestors, and it covered a variety of possibilities rather than itemised specifics,[301] which was consistent with the Māori use of language.[302]

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[295] Colenso, W, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Capper Press, reprint, 1890) at 31-32.

[296] Above. '[beliefs]' is part of the original text.

[297] The alleged fourth Article seems to have been a proclamation of religious freedom and customary law. Above. Although Claudia Orange depreciates the significance of this Article, it was nonetheless recorded. See Orange, C, *The Treaty of Waitangi* (Allen Unwin Press, Auckland, 1987) at 53.

[298] *GBPP*, (1844) at 556, Appendix, at 349.

[299] Ward, A, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand* (Reprinted with Corrections, Auckland University Press, 1995) at 45.

[300] The source of Shortland's statement in Kaitaia is John Johnson's Journal, (23 April 1840, Auckland Public Library).

[301] *Report Findings and Recommendations of the Waitangi Tribunal ...in Relation to Fishing Grounds in the Waitara District* (WAI-6) 17 March 1983 (Te Atiawa Report) para. 10.2 (a).

[302] Williams, D 'Unique Relationship Between Crown and Tangata Whenua?' in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 81.

Furthermore, the Tribunal concluded that taonga katoa covers both tangible and intangible things that regulated daily life[303] and can best be translated by 'other properties' including 'all things highly prized as their own customs and culture.'[304] Under these juristic definitions and applying the ejusdem generis maxim, taonga katoa should be construed to include Māori culture and customary law and jurisdiction which were all treasured by Māori ancestors; were considered to have immense value; and Māori jurisdiction authority was enmeshed in tikanga Māori.

Thus both the common law and Ius Gentium doctrine of aboriginal title and the contested partnership discourse within He Whakaputanga o te Rangatiratanga o Niu Tireni - the Declaration of Independence of the United Tribes of New Zealand 1835, and the Treaty of Waitangi 1840 strengthen the principle that Māori jurisdictional authority over resources was not only to be officially recognised within the legal system, but also to be preserved, protected and perhaps even perpetuated by the Imperial, Colonial and subsequent New Zealand Governments.

Parallel Māori jurisdictional institutions should have followed the Treaty of Waitangi given that the recognition of the Treaty and Māori jurisdiction also carried with it an acknowledgment of the laws and institutions that had developed over many years to maintain harmony within Māori society.[305] Given that shared governance jurisdiction strengthens the notion of a partnership of good faith that is centrally explicit and implicit in He Whakaputanga and the Treaty, then perhaps He Whakaputanga and the Treaty sought to reconcile and even encourage the co-existence and co-governance of both Māori and British law and jurisdiction over New Zealand. Hence the partnership and the fiduciary duty established by the Treaty were and continue to be the lynch pins for constructing a parallel shared jurisdictional future. It is within this controversial relationship between affinity and difference that both Māori and Pākehā should have a parity of respect for notions of shared jurisdiction, fundamental values and the best law of both cultures within the legal system – a shared Aotearoa New Zealand jurisdiction and jurisprudence.

Such a situation could explain why Governor Hobson in 1840 issued orders to Shortland, police magistrate of Kororareka, that 'a rigid application of British law to the Māori should be avoided in favour of some sort of compromise.'[306] Furthermore, when Governor Grey asked the Secretary of State for the Colonies how far he had to abide by the Treaty, Lord Stanley replied: 'In the name of the Queen ... you will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi.'[307]

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[303] *Report Findings of the Waitangi Tribunal. Relating to Te Reo Māori* (WAI-11) 29 April 1986, para. 4.2.4; 4.2.8.
[304] Above. See also Jackson, M *He Whaipaanga Hou: Māori and the Criminal Justice System: A New Perspective* (2 Vols, Department of Justice, Wellington, 1987, 1988) at 49.
[305] A description of the recognition of different jurisdictions and the application of Māori and European norms in appropriate contexts occurred when Governor Grey travelled with Iwikau Te Heuheu to Taupo in 1849. See Frame, A, *A Journey Overland to Taupo in 1849 by Governor Grey and Te Heu Heu Iwikau* (Te Mātāhauariki Research Institute, University of Waikato, 1988) at 2.
[306] Cited in Adams, P *Fatal Necessity: British Intervention in New Zealand 1830 - 1847* (Oxford University Press, Auckland, 1977) at 211, 286.
[307] Stanley / Grey, 12 March 1845, C.O No.1, G1 at 13, as cited in McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971) at 120.

In addition, the 2003 Foreshore and Seabed Tribunal referred to the Crown's duty of 'active protection' of Māori rangatiratanga over the marine and coastal area and concluded that Māori rangatiratanga included a duty:

> To actively protect and give effect to property rights, management rights, Māori self-regulation [jurisdiction], tikanga Māori, and the claimants relationship with their taonga; in other words, te tino rangatiratanga.[308]

The Waitangi Tribunal further observed that the forms of jurisdiction authority encapsulated in rangatiratanga and therefore protected under the Treaty, in this respect over the marine and coastal area, and included:

> A spiritual dimension: By karakia, rahui, naming of places and rituals [subject jurisdiction], tangata whenua created and maintained whakapapa and spiritual links with the foreshore and sea;
>
> A physical dimension: Mana and authority [exclusive general jurisdiction] was held by tribes, and the failure to respect that in the access and use of the takutai moana could result in sanctions;
>
> A dimension of reciprocal guardianship: Māori exercised kaitiakitanga [territorial jurisdiction] over the takutai moana and cared for it as a taonga to ensure its survival for future generations;
>
> A dimension of use: Tribes had rights to use [personal jurisdiction] the takutai moana and carry out practices as they saw fit;
>
> Manaakitanga: Sharing through manaaki and authority (mana) [subject jurisdiction] are applied concurrently;
>
> Manuhiri from across the seas: Māori granted certain use rights [concurrent jurisdiction] as part of the relationship established between the peoples before 1840.[309]

Crown Assumption of Sovereignty?

A fascinating 1846 newspaper account referred to and questioned the assumption of sovereignty by the British Crown following the Treaty of Waitangi as follows:

> The Treaty of Waitangi was founded upon wise and equitable principles we admit; but the manner in which they were unfolded and explained to the Natives (as far as the Treaty itself is concerned) was most defective. An engagement so solemn, and pregnant with such important consequences, should have been as clear and specific in its phraseology, and as particular in its definitions, as the Native language could have made it. It should have explained, minutely to those about to become amenable to its restrictions, the nature and extent of the powers it constituted, the concessions it

[308] Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy,* (Wai 1071, Legislation Direct, Wellington, 2004) at 28.
[309] Above, at 25-26, 130.

granted and the privileges it conferred: whereas the miserable document upon which the right of the Crown to exercise in detail.

Consequently, the Chiefs on the one hand had but little conception of the character of the power they had acknowledged, and the extent of the obedience that would be required from them, and on the other hand, the Government had no just idea of the nature of those claims which it had guaranteed to respect. In fine, the natives ceded the sovereignty of the islands without well knowing what they were doing; and the Government glided into power by a sort of hocus pocus process of unpremeditated deceit. What could reasonably be expected to result from such a commencement but rebellion and strife?[310]

A careful examination of the circumstances surrounding the British proclamation of sovereignty then, shows that the Crown's acquisition of sovereignty did not occur from informed consent by Māori as required by Lord Glenelg's instructions to Hobson,[311] but through leading the chiefs to sign through an incorrect translation of the texts and Crown assumption of sovereignty.[312]

As a result of not securing enough rangatira signatures to the Treaty of Waitangi, particularly in the South Island, and having received news that members of the New Zealand Company at Port Nicholson (Wellington) were attempting to start their own Government and had written their own constitution to this end, Hobson had to take action. Governor William Hobson issued a Royal Proclamation on 22 May 1840 that asserted British sovereignty over the North Island on the basis of a cession of sovereignty and the South Island under the doctrine of discovery. The Proclamation read:

Royal Proclamation:

[310] *The New Zealander,* (18 July 1846).

[311] Lord Glenelg's Instructions to William Hobson were: 'They are not savages living by the Chase, but Tribes who have apportioned the country between them, having fixed abodes, with an acknowledged Property in the Soil, and with some rude approaches to a regular system of internal Government. It may therefore be assumed as a basis for all Reasoning and all conduct on this Subject, that Great Britain has no legal or moral right to establish a Colony in New Zealand, without the free consent of the Natives, deliberately given, without Compulsion, and without Fraud.' (Lord Glenelg, Memo 14 June 1837, CO 209/2:409). Subsequently, Lord Normanby's Instructions were similar: 'We acknowledge New Zealand as a sovereign and independent State, so far at least as it is possible to make such acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other … But the admission of their rights though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate predecessor, disclaims, for Herself and for Her Subjects, every pretention to seize on the islands of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established uses, shall first be obtained.' (Normanby to Hobson, 11 Aug 1839, CO 1839; cited in McNab, R (ed) *Historical Records of New Zealand* (Government Printer, Wellington, 1908) at 729.

[312] See for example, Orange, C *The Treaty of Waitangi* (Allen Unwin Press, Auckland, 1987); McHugh, P *The Māori Magna Carta,* (Oxford University Press, Auckland, 1991) and 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, 14 October 2014) at 433, 509, 512, 514, 528.

> In the Name of Her Majesty VICTORIA, Queen of the United Kingdom of Great Britain and Ireland. By William Hobson, Esquire, a Captain in the Royal Navy, Lieutenant Governor of New Zealand.
>
> Whereas I have it in Command from Her Majesty Queen VICTORIA, through Her principal Secretary of State for the Colonies, to assert, on the grounds of Discovery, the Sovereign Rights of Her Majesty over the Southern Islands of New Zealand, commonly called, "The Middle Island", and "Stewart Island"; and, the Island commonly called, 'The Northern Island", having been ceded in Sovereignty to Her Majesty.
>
> Now, therefore, I, William Hobson, Lieutenant Governor of New Zealand, do hereby Proclaim and Declare to all men, that from and after the Date of these Presents, the full Sovereignty of the Islands of New Zealand, … vests in Her Majesty Queen VICTORIA, Her Heirs and Successors forever.
>
> William Hobson, Lieutenant Governor. GOD SAVE THE QUEEN[313]

Notwithstanding the Royal Proclamation, Māori may observe that their forebears did not cede their mana in the Treaty of Waitangi. In the Declaration of Independence of 1835 the 'tino rangatira' (great chiefs) were recognised as having 'ko te kingitanga, ko te mana' - all sovereign power and authority - within their territories, and thus, all sovereign power and authority over their respective forests and fisheries, lakes and rivers, marine and coastal areas. This kingitanga and mana were not ceded to the Crown in the Treaty of Waitangi. Instead, the tino rangatira bequeathed to the Crown the power to share in making laws, but not to infringe upon tribal tino rangatiratanga.[314]

Treaty Rights and Contra Proferentum – which text?

When the Treaty of Waitangi was printed in London in 1841, Te Tiriti o Waitangi - the Māori version – was labelled the 'Treaty' and the English version was labelled a 'translation.'[315] Questions were raised as to the differences in the texts in both versions and a number of back translations of Te Tiriti – the Māori text – were requested. Salmond even noted that this request for back translations was recognition by various European authorities that Te Tiriti o Waitangi and the Treaty of Waitangi were different and that they needed an accurate translation of the text in Māori.[316]

For Māori, the retention of tino rangatiratanga jurisdiction under Te Tiriti was guaranteed to them. The Crown and Pākehā perspectives on the other hand that have dominated political, legal and academic discourse over time have assumed that Māori voluntarily ceded and the Crown acquired legitimate sovereignty under the English text – the Treaty of Waitangi. On this basis, the Crown proceeded to colonise New Zealand on the assumption that it was

[313] See 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, 14 October 2014) at 394-395.
[314] Above, (Wai 1040, November 2014) at 528-529 which concluded that the chiefs who signed the Treaty did not cede sovereignty to the British Crown but agreed 'to share power and authority with Britain.'
[315] Above, at 389.
[316] Above, at 393.

legitimate sovereign and had the jurisdiction and authority to make laws for all of New Zealand and New Zealanders including over the marine estate.

Under this assumption, the Crown acquired imperium – sovereignty that included the underlying title under the doctrine of imminent domain to all dry land in the Colony but this title was encumbered by dominium – Māori customary title under the common law doctrine of aboriginal title unless the customary title could be shown to have been validly extinguished through voluntary abandonment, a Crown grant or an Act of Parliament.[317] There was and continues to be then a fundamental difference in translation and interpretation of the texts and the effects of Te Tiriti and the Treaty – the Māori and English versions of the Treaty where much is lost in translation.

Interestingly, Walter Mantell of the Legislative Council asked for both an accurate translation of Te Tiriti o Waitangi into English and a translation of the official English text back into Māori in the 1869 *Kauaeranga Decision,* [318] which was an early legal dispute over ownership including jurisdiction of the marine area in Thames by Māori.

The nature of rights that arise from Treaties is often contested for a number of reasons. First, it depends on the type of Treaty signed – was it a Treaty of settlement, discovery, cession, trade and intercourse, or power sharing? Then there is the argument as to who Treaties actually grant rights to – Indigenous peoples or the British Crown? There is often disagreement over the actual text and provisions of Treaties and the importance of the Indigenous understanding and what Treaty rights and responsibilities actually encompass. In terms of bilingual and multilingual Treaties, the contra proferentem rule has been applied by some international tribunals, which dictates that in cases of ambiguity, a Treaty is to be interpreted against the party drafting it. In the United States, the interpretation of Treaties with native American Indians was dealt with in the 1899 Supreme Court decision of *Jones v Meehan*[319] which laid down an indulgent rule requiring Treaties to be construed 'in the sense which they would naturally be understood by the Indians.'[320]

International law contains further rules for the interpretation of Treaties such as the international legal doctrine of good faith which includes the rule that parties to Treaties must perform their obligations in good faith. [321] Principles of estoppel and preclusion at international law provide that parties to a Treaty are entitled to rely on the acceptance of Treaty obligations by other State parties and to act accordingly. Finally, there is the assertion that Treaties are invalid and have little or no meaning particularly if they are either not implemented in word or deed, or just outright ignored which was often the case for Indigenous peoples within the British Empire.

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[317] See McHugh, P, 'Sovereignty this Century – Māori and the Common Law Constitution,' in *Victoria University Law Review,* (Vol. 31, 2000) at 1-28;

[318] (1870) reprinted in *VUWLR* (Vol. 14, 1984) at 227.

[319] (1899) 175 US 1.

[320] *Jones v Meehan* (1899) 175 US 1. This decision was cited by the Waitangi Tribunal in the *Manukau Report* (Wai 8, GP Publications, Wellington, 1985) at 65.

[321] See Articles 26 and 31(1) of the *Vienna Convention on the Law of Treaties* (Done at Vienna on 23 May 1969, Entered into force on 27 January 1980, United Nations, *Treaty Series*, Vol. 1155) at 331. Richardson J referred to a statement from a Canadian Judge on the international legal principle of good faith which included reference to the Vienna Convention articles in *New Zealand Māori Council v Attorney-General* [1987] 1NZLR 641 (CA) at 682.

As with other Treaties, the orthodox view is that if Treaties are neither adopted nor implemented by statute, they are not part of domestic law and they create no rights directly enforceable in Court.[322] The Treaty of Waitangi 1840 in New Zealand for example holds no legal status under New Zealand law unless it has been incorporated into New Zealand municipal law.[323] Viscount Simon LC held in the 1941 Judicial Committee of the Privy Council decision, *Hoani Te Heu Heu Tukino v Aotea District Māori Land Board*,[324] that the Treaty of Waitangi was a valid Treaty of cession and that the Treaty was enforceable of itself in the New Zealand courts except to the extent that it had been given effect by statute. The Lordship stated:

> It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except insofar as they have been incorporated in municipal law. … So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that must refer to the Courts to some statutory recognition of the right claimed by him.[325]

Still the Judicial Committee of the Privy Council did note earlier on the doctrine of aboriginal title how Indigenous worldviews need to be considered when defining aboriginal rights. Māori land title could be subject to Māori customary right and could also be unappropriated which was highlighted by the Privy Council's 1921 decision in *Amodu Tijani v The Secretary Southern Nigeria.*[326] Viscount Haldane remarked on 'native title':

> … in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates…[327]

[322] Borrows, J, *Statute Law in New Zealand* (Butterworths of New Zealand, Wellington, 1999) at 300-301.
[323] *Te Heu Heu Tukino v Aotea District Māori Land Board* [1941] AC 308 at 324. For a discussion on the background of this case, see Duncan, C.J, *Hoani Te Heu Heu Tukino v Aotea District Māori Land Board: Māori Land Administration in West Taupo 1906-41* (LLB (Hons) Research Paper, Law Faculty, Victoria University of Wellington, 1994) and Frame. A, 'Hoani Te Heu Heu's Case in London 1940-41: An Explosive Story' in *New Zealand Universities Law Review* (Vol. 22, No. 1, 2006) at 148-180.
[324] [1941] AC 308 at 324.
[325] Above.
[326] [1921] 2 AC 399 at 402.
[327] Above.

Viscount Haldane thus reinforced the hybrid nature of the legal systems of the British Empire in relation to property.[328]

Still, the Treaty of Waitangi has gained some interpretive importance to statute law regardless of the absence of statutory reference.[329] Sakeij Youngblood Henderson noted that in Canada, British Imperial Treaties established vested Treaty federalism and rights.[330]

Furthermore, the 'principles of the Treaty of Waitangi' have been formulated by the 1987 Court of Appeal decision in *New Zealand Māori Council v Attorney-General*[331] which principles have legal standing in public discourse.[332]

However, what was instead created is a more Court defined concept of what the Treaty of Waitangi meant where the locus has shifted from the actual Treaty to what the Courts perceive it to represent.

Before the development of the Treaty of Waitangi jurisprudence over the last four decades in New Zealand, the Treaty did not confer rights on Māori because it had no legal standing at law and even if it did, a Treaty of cession could only confer rights on a 'sovereign' and not on private individuals.[333] Māori legal rights prior to Treaties existed through the common law doctrine of aboriginal title as noted above and the Treaty of Waitangi merely affirmed Māori property rights and jurisdiction responsibilities over taonga – it did not create them.

The Constitution Act 1852 affirmed continuing Māori property rights and shared jurisdiction responsibilities in s. 71 native districts, which are explored next.

Constitution Act 1852, s. 71, Native Districts – Full Shared Jurisdictional Authority

During Governor Grey's first term as Governor of New Zealand (1846-1852), limited provision was made for shared Māori governance jurisdiction in the Constitution Act 1852 (the Constitution). This was because of Grey's erroneous belief that together with the settlers, Māori had formed a harmonious union and they were both rapidly becoming one people.[334] A grant for native purposes was entrenched in the Civil List and the purchase of Māori lands remained a Crown monopoly. The Constitution[335] provided the settlers with wide power over

[328] It is worth mentioning that Viscount Haldane's view was also endorsed by the New Zealand Court of Appeal in *Te Rūnanga o te Ika Whenua v Attorney- General* [1990] 2 NZLR 641.
[329] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 and *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 656 per Cooke P.
[330] Henderson, J Y, *Treaty Rights in the Constitution of Canada* (Thomson Carswell, Scarborough, 2007). See also Barsh, R.L, and Henderson, J.Y, 'Aboriginal Rights, Treaty Rights and Human Rights: Indian Tribes and Constitutional Renewal' in *Journal of Canadian Studies* (Vol. 2, No. 55, 1982) at 17.
[331] [1987] 1 NZLR 641 (CA).
[332] See Te Puni Kokiri, *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Te Puni Kokiri: Ministry of Māori Development, Wellington, 2002).
[333] *Te Heu Heu Tukino v Aotea District Māori Land Board* [1941] AC 308 at 324 (PC); *Wallis v Solicitor-General for New Zealand* [1903] AC 173 (PC).
[334] Pakington, J *Hansard* CXX, 136 -8. Cf . F. Peel, *Hansard* 947-51 and Lord Desart, *GBPP*, (1851-53) at 1134.
[335] For a comprehensive discussion on the Constitution Act 1852, see Scott, K.J *The New Zealand Constitution* (Oxford Clarendon Press, London, 1962) and Brookfield, F.M 'Parliamentary Supremacy and Constitutional

internal affairs including the development of their own laws subject to certain reserve powers of the Colonial Office, control over land legislation and the sale of wasteland. Although the Constitution conferred upon the General Assembly wide powers of legislation on internal affairs, s. 71 posed an important exception. The control of Māori policy was to be retained by the Crown with right of delegation to the Governor. This was a logical sequel to the policy developed (by Governor Grey) and expounded in a series of persuasive despatches, which had conditioned the Colonial Office to believe that the surrender of Imperial authority would adversely affect the welfare of Māori.

Section 71 was included and was perhaps the most liberal example, theoretically, of 19th century shared jurisdiction measures (besides the Treaty itself) in New Zealand. Section 71 read:

> LXXI. And whereas it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed:
>
> > It shall be lawful for her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from time to time to make provision for the purposes aforesaid, any repugnancy[336] of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.[337]

Thus s. 71 potentially enabled the Queen by Order in Council to set apart native districts in New Zealand in which – exclusive, inherent, territorial, subject matter and personal - jurisdiction for the laws and customs of the Māori were to be preserved and observed in governing relations between Māori. Tikanga Māori laws and customs within native districts were not to be invalid merely for repugnancy to English law, as long as they did not conflict

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Entrenchment: A Jurisprudential Approach' in *New Zealand Law Review* 5 (1984) No.4 at 603; Palmer, G *New Zealand's Constitution in Crisis: Reforming our Political System* (John McIndoe Ltd, Dunedin, 1992) and Joseph, R, *The Government of Themselves: Case Law, Policy and Section 71, Constitution Act 1852,* (Te Matahauariki Research Institute Monograph Series, University of Waikato Press, 2002).

[336] The doctrine of repugnancy was an expression of the broader principle of the legislative supremacy of the United Kingdom Parliament. The prohibition against repugnancy was the only respect in which the legislative supremacy of the United Kingdom Parliament actually limited the legislative competence of the New Zealand Parliament. Consequently, the United Kingdom Parliament had the power, limited only by convention, to enact statutes extending to New Zealand without consulting the New Zealand Government and even in opposition to the wishes of the New Zealand Government or Parliament. See Aikman, C 'Parliament,' in Robson, J (eds.) *New Zealand: The Development of its Laws and Constitution,* (Stevens & Sons Ltd, London, 1954) at 59-60.

[337] New Zealand Constitution Act 1852, section 71. The sub-heading describes this section, 'Her Majesty may cause Laws of Aboriginal Native Inhabitants to be maintained.' It is interesting to note that there is a similar statutory provision for native districts in the Cook Islands Constitution. Further, there was a similar statutory provision establishing Māori schools in Māori Districts pursuant to s. 101(2) Education Act 1964. The provision for native districts in the Cook Islands still exists, but the provision for Māori Schools in Māori Districts was subsequently repealed.

with the principles of humanity.[338] It was left to the Governor himself to portion out native districts, exempting them as it were from the common law of the settled portions of New Zealand. It appears then that s. 71 native districts were constitutional grounds for a hybrid bicultural justice system with shared concurrent jurisdictional authority. However, the section was never used. No districts were established under the Constitution Act 1852.

Earlier Constitution for Concurrent Jurisdiction 1846

After the Treaty of Waitangi was signed the settlers became disillusioned with government land transfer mechanisms and autocratic Governors so they appealed to the Imperial Parliament. Initially Lord Stanley, the Colonial Secretary, was conscious that British commitment to Māori welfare meant that steps toward self-government must be taken cautiously.[339] However, when Gladstone became Prime Minister and Earl Grey Colonial Secretary in 1846, it became British policy to grant New Zealand self-government as soon as possible. Accordingly, the first New Zealand Government Act passed through the British Parliament in 1846. Enacted by the House of Commons, for whom the rights of British nationals were superseding earlier humanitarian concerns towards Indigenous peoples, the New Zealand Government Act 1846 sought to provide an acceptable avenue for settler participation in the governance of New Zealand. The Act also attempted to balance settler governance aspirations with the affirmed continuation of the tikanga Māori within native districts. Section 10 stated:

> And whereas it may be expedient that the Laws, Customs, and Usages of the aboriginal or native Inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves in all their relations to and dealings with each other, and that particular districts should be set apart within which such Laws, Customs and Usages should be so observed; Be it Enacted, That it shall be lawful for Her Majesty, by any such Letters Patent as aforesaid, to make provision for the purposes aforesaid; any repugnancy of any such native Laws, Customs, or Usages in force in the said Islands of New Zealand, or any part thereof, in anywise notwithstanding.[340]

[338] Cameron, J 'Sovereignty, Equality and Plural Justice in New Zealand' (Research Paper for the Law Commission, 1997) at 47.
[339] Dalziel, K 'The Politics of Settlement' in Rice, G.W (ed.) *The Oxford History of New Zealand* (2nd Ed.) (Oxford University Press, Auckland, 1992) at 91.
[340] New Zealand Government Act 1846, (U.K) s. 10.

Later that year, a Dispatch[341] was sent from Earl Grey,[342] Secretary of State for the Colonies, to Governor Grey advising that the 1840 Charter of the Colony had been amended by the New Zealand Government Act 1846 [343] and provided further instructions:

> Parliament has adopted and given their sanction to the principles laid down by his Lordship in that Dispatch that the laws and customs of the native New Zealanders, even though repugnant to our own laws, ought, if not at variance with general principles of humanity, to be for the present maintained for their government in all their relations to and dealings with each other; and that particular districts should be set apart within which such customs should be observed.
>
> It will be your own duty to give ..., by well defined lines of demarcation, those parts of New Zealand in which native customs are to be maintained ... The aboriginal districts will be governed by such methods as are in use among the native New Zealanders. The chiefs or others, according their usages, should be allowed to interpret and to administer their own laws.[344]

Earl Grey thus reinforced the official shared concurrent jurisdiction policy directing Governor Grey to set apart native districts wherein the laws, customs, and usages of Māori were to be maintained, interpreted and enforced by rangatira (chiefs) specifically appointed by the Governor for that purpose.[345]

Enclosed with the New Zealand Government Act 1846 and the Dispatch from Earl Grey was the New Charter 1846 and the Royal Instructions.[346] The Royal Instructions described the concurrent jurisdiction procedures to apply in native districts, including the instruction that courts and magistrates should apply tikanga Māori laws, customs and usages both inside and outside the native districts. The Royal Instructions then envisaged a shared concurrent jurisdiction legal system as noted in Chapter 14, which stated:

> S. 2 'Within such districts (as may be declared) the laws, customs, and usages of the aboriginal inhabitants, so far as they are not repugnant to the general principles of humanity, shall for the present be maintained.'
>
> S. 3 'Chiefs and others appointed shall interpret and carry into execution such laws ... in all cases in which the aboriginal inhabitants themselves are exclusively concerned.'

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[341] Right Hon. Earl Grey / Governor Grey, 23 December 1846, *GBPP* (Vol. 5, 1846-1847) at 520-528. In 1852, Earl Grey subsequently commented in the Parliamentary Debates on the extermination of Aborigines and the humanitarian injunctions for such actions. 'The power of making war on the natives ... use to be carried on in a very haphazard way, and events which, if they now took place, would fill the columns of public newspapers for a month - no, he would not say for a month, but for five years.' Hence the influences of the humanitarian discourse resulting in the Imperial injunction for native districts. See *BPP*, (Vol. 21, 22 June 1852) at 1165.

[342] Earl Grey (1802-1894) was Secretary of State for the Colonies from 1846 to 1852. Sir Henry George, in British Colonial Policy, described Grey as 'singularly unhappy with his management of the Colonies.'

[343] New Zealand Government Act 1846 (U.K) 9 & 10 Vic. c.103.

[344] *GBPP* (5, 1846 -47) at 70-1.

[345] 'Royal Instructions', *GBPP* (c. XIV 1847) at 87.

[346] 'New Zealand Charter and Instructions,' in *GBPP,* (Vol. 5, [1846-1847] at 528-533.

S. 4 'Any person not being an aboriginal native, and being within any such district, shall during his continuance therein, respect and observe such native laws, customs, and usages as aforesaid...

S. 5 'The jurisdiction of the Courts and magistrates ... shall extend over the said aboriginal districts, subject only to the duty ... of taking notice of and giving effect to the laws, customs and usages of such aboriginal inhabitants.'[347]

This chapter provided the Governor with discretionary powers which appeared to envisage a fully fledged shared concurrent jurisdiction legal system where tikanga Māori would not only apply between Māori in the designated native districts, but also to Pākehā and others within those districts. However, Additional Instructions subsequently repealed this latter requirement in 1848.[348] In addition, a further Imperial Act suspended the entire New Zealand Government Act 1846, and the Charter[349] because Governor Grey warned that there would be an armed Māori uprising.[350] It is worth noting that the correspondence approving Grey's decision and the importance of the Treaty of Waitangi in the House of Commons by Gladstone who stated 'as far as this country was concerned, there was not a more strictly and rigorously binding Treaty in existence.'[351]

The official Charters, Royal Instructions, Despatches to Governors, the New Zealand Government Act 1846, the New Zealand Constitution Act 1852, and the Treaty of Waitangi then proposed a hybrid pattern for the shared governance jurisdiction of the government of the colony of New Zealand where the Pākehā settlers would govern settlers, and Māori would govern Māori. Included in this early governmental experiment was the explicit establishment of native districts with mana whakahaere tōtika - inherent, concurrent, territorial, subject matter and personal jurisdiction and authority according to tikanga Māori within such districts.

The political power of s. 71, New Zealand Constitution Act 1852 was exercisable by the Sovereign on the advice of a United Kingdom Secretary of State. The provision for delegation to the Governor was pursuant to s. 79, and delegation in fact occurred at least once by Governor Gore-Browne in 1858.[352] But s. 79 was repealed by the Statute Law Revision Act 1892, which meant that the New Zealand Prime-Minister could have requested that a British Secretary of State advise the Sovereign to exercise the power. There was no such request however, so the mana of s.71 was not exercised.[353]

[347] Chapter 14, 'Draft Instructions' to 1846 Constitution, CO 881/1, XXXIII, at the Public Records Office, London
[348] 'Ordinances of New Zealand' [1841-1849] Prefixed by Acts of Parliament, Charters and Royal Instructions (Printed for the Colonial Government, Wellington, 1850) at 67-68.
[349] An Act to Suspend the New Zealand Government Act 1846, Charter and Instructions 1848 (U.K) Vict. 11, c.5.
[350] Grey reasoned accurately that a Māori uprising would occur because many would be excluded from the franchise and the Crown assumption of ownership over Māori 'wastelands' - land not used by Māori. Grey / Earl Grey, Secretary of State for the Colonies, 3 May 1847, Colonial Office 209/52, at 247-63, Public Record Office, London.
[351] *GBPP* (U.K), (Vol. 86, 1848) at 327-342.
[352] By Letter Patent, 14 November 1857. See *New Zealand Gazette*, (11 February 1858) at 20.
[353] Brookfield, F.M *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) at 117.

Wilful Blindness and Selective Amnesia

The responses to the Constitution Act 1852 and s. 71 of the Act varied.[354] The political climate of the early 1850s was less humanitarian than that of the 1840s as the focus shifted from native welfare towards settler self-government and development. The Constitution seemed to recognise some of the humanitarian principles behind the Treaty of Waitangi by superficially allowing Māori a place in the future government of the colony.[355] At the time, Earl Grey stated that the whole spirit of s. 71 was to put Māori on the same footing as settlers as completely as possible. However, Orange asserted that s. 71 was seen as a temporary acknowledgment of the special situation of the Māori, but the ultimate aim was still amalgamation.[356] In England, the Aborigines Protection Society favoured an equality to be gained by establishing a policy of complete amalgamation.[357] Accordingly, the Society criticised s. 71 because native districts with native laws and customs would have hindered the absorption of British authority and amalgamation placing Māori outside the benevolent protection of British law.[358] Sir William Molesworth[359] detested the s. 71 provisions because they seemed to strike at the political unity of the colony. While the Bill passed through the House of Commons in England, Molesworth asserted:

> It appeared from this Bill that, first; New Zealand was to be divided into two parts, an English part, and a native part. Within the English pale, English laws were to be enforced; without the pale, in the native part, laws and customs were to be maintained by the Governor-in-Chief of New Zealand ... [native districts would create] a nest of Colonies within a Colony' with conflicting codes of law - a cumbrous mass of legal absurdity ... six independent provincial codes, one general New Zealand code, one native code of laws and customs, and, finally, the Acts of the Imperial Parliament.[360]

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[354] For a comprehensive discussion on the various responses to the Constitution Act 1852, see chapter 17: 'The Constitution Act 1852', and Chapter 18: 'The Aftermath of the Act: Political Frustration,' in McLintock, A.H, *Crown Colony Government in* New Zealand (Government Printer, Wellington, 1958). See also Rutherford, J *Sir George Grey* (Cassel & Co. Ltd, Auckland, 1961).

[355] Theoretically, no distinction was drawn between the two races with regard to the franchise. The qualification was to be male, over the age of 21, having possession of either a freehold estate with an annual value of £50, or a leasehold estate with an annual value of £10 in a town, or the occupation of a dwelling with an annual value of £10 or £5 in the country. Furthermore, an annual sum of £7,000 was set aside for native purposes, in recognition of the inevitable exclusion from representation of some Māori at a time when Māori were substantial contributors to the Colonial revenue, any enactment of the central legislature which related specifically to Māori had to be reserved for Crown assent, and the defining, if necessary, of native districts where Māori laws, customs and usages would prevail under s. 71.

[356] Orange, C *The Treaty of Waitangi* (Bridget Williams Books Ltd, Wellington, 1987) at 138.

[357] *Aborigines' Friend* IV (June/July 1852); *Aborigines' Friend* II (April 1850) at 410-12.

358 McLintock, A.H, *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) at 36; and Orange, C *The Treaty of Waitangi* (Bridget Williams Books Ltd, Wellington, 1987) at 138.

[359] Sir William Molesworth was Secretary of State for the Colonies from 21 July - 17 November 1855.

[360] *GBPD*, (Vol. 121) at 922, as cited in McLintock, A.H, *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) at 337. Lord Wodehouse also commented on the structural difficulties of a Constitution with six different codes of law, passed by six local legislatures, a seventh code enacted by the General Assembly, and the continued existence of remnants of native usages in some parts of the Colony. See *GBPP,* (Vol, 1851) at 1144.

In New Zealand, s. 71 with its shared jurisdiction implications was inconsistent with the principle of settler self-government thus generating settler disapproval and administrative resistance.[361] A further reason for the settler hostility was because the Governor could act without the advice of his Ministers and continued to control Māori Affairs, which was unacceptable to the settlers and local colonial leadership.

Unlike Earl Grey, however, Governor Grey was not at all anxious to see Māori progress along lines dictated by their own needs and guided by their tikanga laws and traditions.[362] Amalgamation was paramount. Governor Grey's personal ascendancy over Māori might not have been so inimical in its effects had he made it his policy to incorporate certain tikanga customs. However, Grey (particularly in his second term as Governor) rejected tikanga Māori customs and usages on the grounds that they had become obsolete and useless.[363] Despite evidence of continued restlessness and defiance among Māori, Governor Grey's egotism, self-deception, and paternalistic view of the Māori led him to believe that they would be secured to the Governor by a small Civil List vote, until the spread of settlement had encompassed them, hence his impatience with tikanga Māori customs and 'barbarism.' Grey left the colony without having declared any s. 71 native districts.

Māori rangatira on the other hand, were conscious of the shift in power and jurisdiction, both from Māori to Crown sovereignty and Imperial to increasingly settler monocultural control that had taken place since the Constitution's inception. Māori were also well aware that they had little, virtually no substantial representation, in either the General Assembly or the Provincial Councils[364] until the four Māori seats were established pursuant to the Māori Representation Act 1867.[365] Prior to the establishment of a British colony in New Zealand, Māori rangatira had little need to contemplate supra-tribal political unity or institutions besides the Declaration of Independence 1835.[366] But the Constitution Act 1852 fundamentally altered the balance of power by accelerating the disintegration of the tribal cultural, environmental, social and political way of life. Events such as these showed and

[361] For a comprehensive and brief discussion of the settlers' reception of the Constitution (including newspaper reports) and their demands for responsible government, see Tyrrell, A, *The Reception of the 1852 Constitution Act in New Zealand, And the Settlers' Demands for the Introduction of Responsible Government to the End of 1854* (Hocken Library, University of Otago, 1957).

[362] McLintock, A.H, *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) at 336.

[363] *GBPP,* (1847-8) at 55, Grey / Earl Grey, 15 December 1847. Grey asserted 'It would be to their own advantage to adopt our laws and tribunals.'

[364] Parsonson, A, 'The Challenge to Mana Māori' in Rice, G.W (ed.) *The Oxford History of New Zealand* (2nd Ed.) (Oxford University Press, Australia, 1992) at 184.

[365] Interestingly, the reason for the four Māori seats was not to assist Māori development but because the Stafford Government wished to capture Māori support for its pacification program. The exact form of the representation, four seats, three in the North Island and one in the South Island, and its successful passage through the Assembly was determined largely by the fact that it preserved the distribution of seats between the North and South Islands which would otherwise have been unsettled by the grant of increased representation to the West Coast goldfields. This important feature for Māori thus stumbled into being. See Renwick, W.L, 'Self-Government and Protection: A Study of Stephen's Two Cardinal Points of Policy in their Bearing Upon Constitutional Development in New Zealand in the Years 1837-1867,' (M.A Thesis, Victoria University of Wellington, 1961) at 449-52; Jackson, W, & Wood, G, 'The New Zealand Parliament and Māori Representation' in *Historical Studies: Australia and New Zealand,* (Vol. 11, Issue 43, 1964) at 384; and *NZPD,* (1867, Vol. II) at 494.

[366] The original copy of the Declaration of Independence is held by National Archives in Wellington. 34 chiefs first signed the Declaration on 28 October 1835. The last name was added on 22 July 1839 making a total of 52 chiefs. See Appendix 2.

continue to highlight the need for eternal vigilance over the actions of the powerful even when they express good intentions.

Theoretically then, the Constitution Act 1852 recognised Māori jurisdiction rights and responsibilities pursuant to s. 71 and it made no enfranchisement distinction on the grounds of race, and a few Māori enrolled and voted.[367] On the other hand, Māori political rights were simply overtaken by new self-government principles and Māori were de facto excluded from any political power within Government. There were many protests over the Constitution that were not sustained due to little support in England and because the Constitution seemed to recognise Māori rights to some extent and at a superficial level.

Grey's Reasons for Refusing s. 71 Native Districts

Gorst suggested that one reason why Governor Grey refused to implement s. 71 was because he did not have the resources to apply this policy throughout the North Island. Gorst further noted that if Governor Grey lacked resources to pay for the introduction of his own institutions, he could not use those non-existent resources to support tribal institutions of which he disapproved and which would impede his own future plans.[368] Given that the political context had changed, the government still had to resource its own monitoring of this situation so that money as well as mana would have been needed to establish s. 71 native districts successfully. However, in 1852 Governor Grey also forwarded an optimistic report to Earl Grey:

> [The two races] already form one harmonious community connected together by commercial and agricultural pursuits, resorting to the same courts of justice, standing mutually and indifferently to each other in relation of landlord and tenant; and thus insensibly forming one people.[369]

Governor Grey reinforced his hegemonic policies by justifying his refusal of native districts based on funding and this mistaken view of the success of amalgamation. Furthermore, the notion that British sovereignty and English law extended to the whole of New Zealand in 1852 was politically absurd. Although they were British subjects legally, Māori lived de facto outside the scope of British law and jurisdiction, which was seldom publicly acknowledged,[370] but the Queen's writ did not run beyond the limits of European settlement. Even as late as 1860, Governor Gore Browne stated that 'English law has always prevailed in the English settlements, but remains a dead letter beyond them.' Belich estimated that the area beyond English law at the time to be approximately 80% of the North Island.[371]

Nevertheless, it seemed that the intention of the Imperial Parliament was that s. 71 should serve only a transitional function until amalgamation goals were achieved and British

[367] At Wellington, there were 35 Māori on the roll in 1855 and in one electorate, Māori voted. See *New Zealand Spectator*, (24 February 1856).
[368] Gorst, J, *The Māori King or, the Story of Our Quarrel with the Natives of New Zealand* (MacMillan & Co., London, 1864) at 197-201.
[369] *GBPP* (1854, Grey / Earl Grey, 7 February 1852) at 71.
[370] See for example, Richmond, C.W, 11 September 1860: *NZPD* (1858-60) at 478-9; Cf with Nugent, Report 30 June 1854: MA 4/1.
[371] Belich, J, *Making Peoples: A History of the New Zealanders* (Penguin, Auckland, 1996) at 229.

sovereignty matured throughout the land.[372] But Governor Grey refused even legally binding obligations while still expecting total amalgamationist success for Māori. It was no surprise that Grey's pursuit of amalgamation revealed the same weaknesses, which had marred it as a policy from the founding of the Colony. While it was used to deny the preservation of tikanga Māori laws and institutions in a system of native districts, it was not pursued effectively enough to include them adequately in the general government of the Colony either. Māori were increasingly a subject people, while the government's settler subjects actively acquired cheap Māori land and natural resources.

The optimistic and hegemonic assumptions and the overall policy of amalgamation were a dismal failure, which further polarised relations between the two peoples. Moreover, insofar as all the existing laws and institutions were concerned, Māori were subjected to laws and institutions they neither fully understood nor consented to in one crucial matter - the ownership and disposal of their lands and resources including over the coastal marine estate.[373] Following the New Zealand Wars in the Waikato, Māori were even denied protection of the law, recognition of their customs within the law, and any role in the making of new laws. To cite some examples, the Native Lands Act 1862 individualised Māori land title contrary to tikanga Māori; the New Zealand Settlements Act 1863 provided for the confiscation of 1.2 million acres of prime land in the Waikato; and the Māori Prisoners Act 1880 deemed it unnecessary to try Māori in order to inflict punishment.[374] Inevitably, British authorities failed to meet the needs of Māori and win their firm allegiance. They were then confronted with supra-tribal political movement as Māori rangatira sought to resolve their political challenges in their own way – the Kīngitanga.

G. Māori Quest for Shared Jurisdiction

Wiremu Tamihana - King-Maker 1857

The Ngati Haua rangatira and visionary Wiremu Tamihana Tarapipipi Te Waharoa unsuccessfully attempted to secure shared governance jurisdiction through Māori representation in Government and to obtain the Governor's mandate for a Council of Chiefs to operate under s. 71, Constitution Act 1852. However, Māori were left out of the machinery of Government, untouched by the promised law and order of Government, and were later outnumbered in their own land. Māori inevitably turned to nationalism with Tamihana being

[372] Brookfield, F.M 'The New Zealand Constitution: The Search for Legitimacy' in Kawharu, I.H, *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 13.
[373] Miller, H, *Race Conflict in New Zealand 1814 - 1865* (Blackwood & Janet Paul, Auckland, 1960) at XXV.
[374] For an excellent summary of oppressive laws that discriminated against Māori, see Kelsey, J 'Legal Imperialism and the Colonisation of Aotearoa' in Spoonley, P *Tauiwi: Racism and Ethnicity* (Dunmore Press, Palmerston North, 1984) at 32-43; Sorrenson, M.P.K 'Land Purchase Methods and Their Effect on Māori Population, 1865-1901' in *Journal of the Polynesian Society,* (Vol. 14, No. 3, 1956) at 183-199; Williams, D 'The Use of Law in the Process of Colonisation – A Historical and Comparative Study with Particular Reference to Tanzania (Mainland) and New Zealand' (Ph.D Thesis, University of Dar-es-Salaam, 1983); and Williams, D, *Te Kooti Tango Whenua: The Native Land Court 1864 – 1909* (Huia, Wellington, 1999).

given no other option but to support the election of Te Wherowhero as the first Māori King in 1858.[375]

Kīngitanga 1858

The Kīngitanga[376] was conceived on the premise of a complementary bicultural relationship with shared mana whakahaere jurisdiction with the New Zealand Crown. The Queen's law upheld by the Governor would stand alongside the King's law, with both sides owing allegiance to God in a mutually beneficial relationship,[377] thus potentially establishing a hybrid legal system.

King Potatau Te Wherowhero was an elderly man when he was anointed to lead the Kīngitanga in 1858. His reign was short-lived when he died in 1860. Potatau was succeeded by his son Tawhiao Matutaera. The New Zealand Government on the other hand became impatient with the Kīngitanga halting land sales. The final solution was the introduction of a confiscation policy (raupatu) through war for Kīngitanga lands Māori refused to alienate.

To these ends, during the late 1850s and early 1860s, Governor George Grey pursued a double policy of war and peace simultaneously. An invasion of the Waikato had been mooted as early as April 1861 by Frederick Whitaker, the Attorney-General, to Governor Gore Browne. Whitaker and his partner Thomas Russell, Minister of Defence, also founded the Bank of New Zealand. Both politician entrepreneurs had plans for agricultural investment in the Waikato even though these lands were owned by Māori at the time under the mana of the Kīngitanga which prevented alienation. Russell and Whitaker moreover, were responsible for formulating the policy of confiscation of large areas of Māori land. As Cabinet Ministers, they secured a loan through their own bank of £3 million in 1863 for 'defence purposes' and stood to profit from the promotion of an invasion of the Waikato.[378]

Still, the Kīngitanga could have been accommodated under some form of association with the New Zealand government, particularly from rights derived under Article II of the Treaty. Section 71, Constitution Act 1852 might have also been used as a measure of shared jurisdiction for the King Country, which came under the de facto jurisdiction of the Māori King. Wiremu Tamihana envisaged parallel governance with the King ruling over native districts

[375] See Jones, P, *King Potatau: An Account of the Life of Potatau Te Wherowhero the First Māori King* (Polynesian Society, Wellington, 1959); and Stokes, E *Wiremu Tamihana Te Waharoa: A Study of His Life and Times* (Geography Department, University of Waikato, 2000).

[376] For a comprehensive discussion of the Kīngitanga and its origins, see John Gorst Resident Magistrate, *AJHR*, (E no 9 sec iii, 1862) at 8; *Te Paki o Matariki*, (17 May 1881); Cowan, J, *The Māori Yesterday and Today* (Whitcombe and Tombs Ltd, Christchurch, 1930); Jones, P, *King Potatau: An Account of the Life of Potatau Te Wherowhero the First Māori King* (Polynesian Society, Wellington, 1959); King, M, *Te Puea: A Biography,* (Hodder & Stoughton, Auckland, 1977); Mahuta, R, 'The Kingitanga,' in King, M, *Te Ao Hurihuri: Aspects of Maoritanga,* (Reed, Auckland, 1992); Ballara, A, *The King Movements First One Hundred Years,* (Auckland University Press, Auckland, 1996); Mahuta, R 'Waikato: A Case Study of Tribal Settlement' (Address given at the Conference, 'Indigenous Peoples: Land, Resources, Autonomy,' Vancouver, 19-24 March, 1996); and Kirkwood, C, *Tawhiao – King or Prophet* (Turongo House, Hamilton, 2000).

[377] See Te Waharoa, W.T, 'The Election of the Māori King, 1858' in McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971) at 125-134 and Gorst, J, *The Māori King or, the Story of Our Quarrel with the Natives of New Zealand* (MacMillan & Co., London, 1864).

[378] Refer to Miller, H, *Race Conflict in New Zealand 1814-1865* (Blackwood and Janet Paul, Auckland, 1966) at 71.

pursuant to s. 71, Constitution Act 1852, and the Governor over Crown lands.[379] Gorst condensed his understanding of the Kīngitanga when he opined:

> It was clear that the [Māori] ... did mean to maintain their separate nationality, and have a Chief of their own selection, who should protect them from any possible encroachment of their rights, and uphold such customs as they were disinclined to relinquish.[380]

However, constitutional amendment pursuant to s. 71 and preferably by the Imperial Parliament would have been necessary to establish de jure the Kīngitanga. Predictably, this measure was unacceptable to the new New Zealand settler government and native districts were rejected. Instead, the Imperial Parliament continued to provide for the colony a constitution, which lacked effective provision to secure the special place of the tangata whenua in the colonial government.

Kohimārama Conference 1860

To prevent the war at Waitara from spreading, Governor Gore Browne and Donald McLean met with an assembly of chiefs from most districts at Kohimārama, Auckland, in 1860. The central theme reiterated by the chiefs was that they wanted to remain in allegiance to the Crown and to engage with the European order, but they did not want to do so on terms of subordination and contempt for their culture and values. Rather, they wanted to be involved as responsible and well-intentioned parties in the machinery of state with shared jurisdiction in shaping of laws and institutions appropriate to New Zealand. But the Colonial officials could not overcome their ethnocentric and deep-seated racist views that Māori were inferior.'[381]

Ngāti Maniapoto Exclusive Inherent Territorial Jurisdiction over Te Rohe Pōtae

The next section will discuss extensively the battles over mana whakahaere tōtika of the land and the marine estate within the lower Tainui tribal areas. It is important to remember the historic and political context at the time was the aftermath of the Waikato Wars, the bitter mamae (afflictions) of the raupatu land confiscations and the politics involved on both sides to assert mana whakahaere tōtika – who had political power and authority. Although some Pākehā were executed for breaching the territorial jurisdiction of the Kīngitanga aukati geo-political boundary, for the purposes of this report, these discussions highlight the need for shared concurrent mana whakahaere tōtika over the marine estate. The section is heavily weighted to Waikato and Tainui whenua but it is still a useful historical case study for mana whakahaere tōtika shared jurisdiction over the whenua and moana – land and the ocean.

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[379] See also Walker, R 'The Treaty of Waitangi as the Focus of Māori Protest,' in Kawharu, I.H *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 271; and Gorst, J, *The Māori King or, the Story of Our Quarrel with the Natives of New Zealand* (MacMillan & Co., London, 1864) at 266.

[380] Above, (Gorst) at 87.

381 Ward, A, *Show of Justice: Racial Amalgamation in the Nineteenth Century* (Auckland University. Press, 1973) at 118. See also Cox, L Kotahitanga: The Search for Māori Political Unity (Oxford University Press, Auckland, 1993) at 66-80.

Following the Waikato Wars campaign (1863-1864) and the Battle of Orakau in April 1864, the Kīngitanga withdrew south of the Puniu River. The Puniu became the geo-political boundary for the European confiscation line (raupatu) of Waikato land and a political border between King Tawhiao, the Kīngitanga and Ngāti Maniapoto on one side, and Pākehā and Queen Victoria on the other side. According to Kīngitanga historian Carmen Kirkwood, the Puniu River was even accorded Government recognition as a geopolitical boundary with territorial jurisdiction under the Kīngitanga, which included rangatiratanga and mana whakahaere tōtika - shared governance jurisdiction. Pākehā on the other hand, were under Queen Victoria with assumed sovereignty. Kirkwood recorded:

> Tawhiao, ko tenei taha o Te Puniu, nga take katoa o tenei taha o Te Puniu, ko te Kawanatanga te rangatira. Na, kei tena taha o Te Puniu, nga take katoa kei tena taha o Te Puniu, ko koe, Tawhiao, tuturu te rangatira. Ko koe te Rangatira [Translation in the original source] Tawhiao, on this side of Te Puniu (River), all matters affecting this side of Te Puniu, the Government is responsible. Now, on that side of Te Puniu, all matters pertaining to that side of Te Puniu, you, Tawhiao, are totally in control. You are the chief.[382]

Speaking to Pākehā at Kihikihi in 1879, the Ngati Maniapoto rangatira, Rewi Manga Maniapoto, asserted:

> Noku tenei kainga i nga ra o Potatau. Ko taku kainga tenei me te whare. Noku tenei wahi. [This was my place in the days of Potatau. This was my home and my house. This spot is mine.][383]

Kihikihi was the site of Rewi Maniapoto's whare rūnanga or Council House, Hui-te-Rangiora where he held his 'Runanga o Kihikihi', the local King Movement Council under the mana of Potatau Te Wherowhero.[384] Through this rūnanga, Rewi and the other members exercised their rangatiratanga and mana whakahaere tōtika – shared governance jurisdiction - regulating the affairs of the surrounding district. Unfortunately Hui-te-Rangiora was destroyed by the British soldiers during the Waikato Wars campaign in 1864.

Maniapoto and Waikato throughout this period remained united and generally supportive of King Tawhiao and the Kīngitanga as representative of Māori autonomy and governance jurisdiction.

At the outset of the Waikato War campaign, King Tawhiao declared an aukati or 'boundary' at the Mangatawhiri Stream. Tawhiao issued an ultimatum that if the British Imperial troops

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[382] Kirkwood, C., *Tawhiao: King or Prophet*, (MAI Systems, Huntly, 2000) at 72. At a meeting between Sir Donald McLean, then Native Minister, and King Tawhiao at Kaipiha (near Pirongia) 26 May 1876, the question of the return of some Waikato burial sites was raised. A record of that meeting gives McLean's response to Tawhiao as follows: 'The Government are prepared to recognise your authority (mana) over your land (to whenua tuturu)' in *AJHR* (1876, G. 4) at 6.

[383] 'Te Kupu a Manga: The Words of Manga' in *Te Waka Māori o Niu Tireni*, (1 February 1879) at 288. Translation in the original source.

[384] See *Te Whetu o te Tau*, (1 September 1858) at 11.

crossed the Mangatawhiri Stream, it was an act of war. These aukati or puru were essentially tikanga declarations by Tawhiao and Ngāti Maniapoto to preserve their rangatiratanga by imposing a notional boundary line or frontier across which unauthorised passage was restricted or prohibited.

The confiscation lines, which included the Puniu River, were now important symbols of the new aukati to halt and defend against any further advance of the Colonial and Imperial forces but also to preserve Māori autonomy and governance jurisdiction. Subsequently, the aukati declared around Te Rohe Pōtae were to halt the encroachment of Pākehā settlement, roads and railway lines, the Native Land Court, and 'nga kaihoro whenua' - land swallowers - land purchase agents. In 1868, Hare Reweti was advised by Manuwhiri, the King's father-in-law and 'Prime Minister:' 'The aukatis are to remain as heretofore, strictly guarded and kept tapu.'[385]

Speaking to the Native Minister, John Bryce, in December 1883 at Kihikihi, Rewi recorded that he fixed the boundaries of the aukati and Wahanui erected posts (pou) marking off that district to be tapu against Pākehā.[386] Pou were frequently erected to mark the boundary zones between groups and were generally declared tapu. Taonui described the aukati at that same meeting as 'a great policy of ours,'[387] and as late as 1883, was re-erecting the aukati posts.[388] A consequence of the aukati declaration sealed by the erection of tapu pou was no Pākehā were permitted to enter Te Rohe Pōtae by penalty of death.

Consequently, Ngāti Maniapoto sentinels guarded the aukati in the northern boundary of Te Rohe Pōtae. Tom Roa recalled a conversation between his kaumatua Reti Roa and Henare Tauaitirangi on the sentinels:

> …haereere ai e rātou te aukati mai i Te Pūniu ki Whatiwhatihoe, mai i Whatiwhatihoe i Te Pūniu, ko ētehi wāhi, mā ētehi atu whānau, tukuna ai e āna pāpā, ngā whānaunga me ā rātou taonga hokohoko, kia haere ki Arekahānara ki Te Awamutu, ki whea rā, engari, kāore te Pākehā me ngā kūpapa, i whakaae kia uru mai ki roto i Te Rohe Pōtae.me ngā kūpapa, i whakaae kia uru mai ki roto i Te Rohe Pōtae. [… they would walk the line from Pūniu to Whatiwhatihoe, from Whatiwhatihoe to the Pūniu, back and forth and other families would guard parts of the line and they would permit some people to go to Alexandra, to Te Awamutu and to other places, but Pākehā and kūpapa were not allowed to come into Te Rohe Pōtae.][389]

Pākehā who breached the aukati tikanga were generally warned well ahead of time before sanctions were enforced. One of the more well-known incidents was the execution of the Wesleyan Methodist missionary John Whitely. Tohe Rauputu recorded the following account:

> Nā ko tētehi i mōhio ai tātou, i hinga mai rā i Pukearuhe a te minitā rā a Reverend Whitely. E kī ana te kōrero, nā Te Rerenga i pūhia rātou i runga i ō rātou nei hoihō, haere ana. E ai kī ētehi, kāo, he tangata kē, i karangatia atu te iwi i roto i a Te Rerenga

[385] *Daily Southern Cross*, (25 January 1868) at 5
[386] *AJHR* (1886 Session I, G-08) at 1-2.
[387] Above.
[388] Wilkinson telegram to Bryce 15 March 1883 in (MA 23/5 ANZ Wellington).
[389] Ngā Kōrero Tuku Iho, (Hui 6, 2010) at 247.

> mā, e hoki, e hoki engari kīhai rā i rongo, ā, ko te reo karanga pea tēnā mō te kai. Ka tau ana hoki ngā tīnana, kua mutu te stretch i te kata-kata. Ka karanga atu, e hoki i kōna, kīhai rā i rongo mō te hiahia, e hiahia ana, haere mai i roto i te aukati ki te āwhina rā i ētehi o rātou e noho nei i roto … ko te mutunga atu, kua pūhia. [Translation in the original source] That was Reverend Whitely shot at Pukearuhe and it was stated that it was Te Rerenga who shot him on their horses. … Te Rerenga told him "Return, go back," but they did not heed the warning. They told him "Return, go back." He did not heed the warning but Whitely; wanted to come into the Aukati to assist some of the people within the Aukati areas ... In the end he was shot.[390]

Another incident was the execution of William Moffatt, in 1880 by Ngatai. The late Sir Archie Taiaroa recorded:

> Haere atu ana ki roto o Whanganui, anā ten ngā rangatira, anā, e whakarite i tērā wā, tērā wā me kī, te rohe e aukatihia e kī ake kaua e haere mai ngā Pākehā ki roto ki konei, ā, pērā hoki i roto Taumarunui nei ana tō mātou tupuna a Ngātai … kī ake kaua e haria mai ngā Pākehā ki konei ka haere mai ka kī atu ahu kaua hoki mai i konei ka haere engari ka hoki mai te wā, ka hoki mai, patua kia mate ana koirā pea te āhuatanga o te aukati e kōrerohia nei, arā, i konei, nō reira e kī ana ngā mea kāore i te whakarongo … [As far distant as the Whanganui districts to the south, chiefs enforced the boundaries of Te Rohe Pōtae. Pākehā were forbidden to enter; that was the case in Taumarunui. Our ancestor Ngātai ... said "Don't bring Pākehā here," but they came anyway. He said "Go. Go away and don't come back." The Pākehā were sent [away] but they came back, and the Pākehā ... was killed. That is what an aukati means; no one allowed to come in. That was the mana, that was the strength of the word of the chiefs. They said, "Do not enter. If you do there is price, you come in and you pay the price].[391]

Ngatai recorded the incident at a meeting with John Ballance, the Native Minister at Kihikihi in 1885:

> The reason he was killed was because that word had gone forth from us as King people… I sent my man called Te Kati to warn him not to come, but he paid no attention to my message, and persisted in coming on … I sent him a letter by my messenger telling him to return from that place as there was trouble in this district … he was turned back on one day. He persisted in coming on the next day and was killed.[392]

Ngatai also described the boundaries of this aukati as commencing at Utapu on the Wanganui River, thence to Moerangi, between Taupo and Tuhua.[393]

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[390] Ngā Kōrero Tuku Iho, (Hui 5, 2010) at 168-169.
[391] Above, at 267.
[392] Notes of an inquiry made by Hon. Native Minister at Kihikihi, on December 19, 1883, *AJHR* (1886 Session I, G-08) at 2.
[393] Above.

Others who were executed for breaching the aukati were Richard Todd, a surveyor who was executed on Pirongia by Nukuwhenua and John Lyon, a farm hand, who was executed near the Puniu River by Kiharoa, both in 1870. In 1873, Pukurutu executed Timothy Sullivan across the aukati near Cambridge.

For the Kīngitanga and Ngāti Maniapoto, the aukati was not an isolationist policy but a rangatiratanga policy - highlighting the mana and tapu of tikanga Māori, Māori jurisdiction, the assertion of Māori autonomy over an area, who could cross their borders and whose law predominated. Some Pākehā visitors were permitted into the Rohe Pōtae but under the mana and jurisdiction of an influential chief. William Searancke, the Resident Magistrate of Waikato, was one example who was permitted to attend a hui at Hangatiki in 1869 after Rewi Maniapoto intervened for him.[394]

The aukati moreover, only applied to Pākehā entering the Rohe Pōtae not Māori leaving it. Māori resumed trade with Pākehā across the aukati as recorded in newspaper reported 1875:

> The natives of Te Kopua are now selling excellent oats at Alexandra from 5s, to 5s. 6d. per bushel … The Te Kuiti natives are continually arriving with wheat, &c. for sale. A large quantity of provisions and seed came down last week for Tawhiao at his new settlement, Hikurangi.[395]

By the late 1860s, the various aukati around the Rohe Pōtae territory were referred to by Wahanui and Rewi as a 'porotaka' - an encircling boundary where mana Māori dominated under the auspices of King Tawhiao. Many Pākehā even viewed the area as King Tawhiao's territory, hence the King Country.[396] The aukati was as much about ensuring that that the territory remained tapu, restricted and secure to Māori as an area where tikanga Māori was law, where Māori exercised mana whakahaere jurisdictional authority for Māori within and Pākehā who sought to enter the territory. Beyond the raupatu confiscation line behind the aukati then, the Rohe Pōtae area remained a largely autonomous territory[397] if not a de facto s. 71, Constitution Act 1852 'Native District' where Māori expressed exclusive, territorial, personal and subject matter jurisdiction under the mana of the Kīngitanga.[398]

Shared Concurrent Jurisdiction

Amid peace making negotiations and diplomacy with Government representatives, Rewi, Wahanui and other Ngāti Maniapoto leaders, pressed for their demands to protect their mana whenua, mana tangata and mana whakahaere over their lands and people, while united under the mantle of King Tawhiao which he asserted to John Sheehan, the Native Minister, in

[394] *Nelson Examiner and New Zealand Chronicle*, (5 May 1869) at 3.
[395] *Daily Southern Cross*, (8 July 1875) at 6.
[396] See *New Zealand Herald*, (5 September 1866) at 3.
[397] For the boundaries of the 'Rohe Pōtae,' see the petition of the Maniapoto, Raukawa, Tuwharetoa, and Whanganui Tribes,' *AJHR* (1883, J-1) at 1–4.
[398] In 1871, some 167 nervous Waikato settlers petitioned the Government to establish their own 'aukati' (this was the term they actually used). They noted that while Māori were able to come across, 'spy' on them, and observe their weaknesses, they in return were not able to cross over into the King Country. The petitioners wanted a boundary fixed prohibiting any Māori from crossing without the 'penalty of the pain of death' and any European from engaging in trade across the aukati without 'severe penalty'. See *AJHR* (1871, A-9).

1879 which was in effect rangatiratanga and mana whakahaere tōtika - exclusive, inherent, territorial, personal and subject matter jurisdiction:

> Ko tau tikanga kei a koe; ko taku kei au. [Your affairs are your own; my affairs are my own.][399]

In 1882, Rewi was recorded as referring to his vision for the Rohe Pōtae:

> … of making the whole of the territory a reserve under my own, that is, the Māori mana … Nothing will move me during my lifetime to alter my opinions in relation to the land question … which means my holding intact all our Māori territory.[400]

Rewi stated that all his references to surveys and Native Lands Courts were to fulfil the project he always had in view:

> The reservation of the whole of the King Country, to prevent dishonourable Māoris leasing or selling, and to prevent the inroads of Europeans under any authority, but that of Māori mana.[401]

To this end, Rewi described the boundaries of what he considered to be the Māori reservation (Native District under s. 71, Constitution Act 1852?) with exclusive, territorial, personal and subject matter jurisdiction in 1879:

> Kia whakahokia ki a ia ake ano nga whenua katoa i riro i te rau o te patu, me nga whenua i hokona, e takoto katoa ana i roto i te rohe o mua o tona iwi; ara, haere atu i Aotea mau ki Pirongia, mau atu ki Waipa, i te wahi tata ki te huinga o te awa o Waipa ki te awa o Mangapiko, haere atu te Awamutu, Rangiaowhia, ka piki i Pukekura, ka whiti i te awa o Waikato, haere i Taupo, ka whiti i te awa o Ongaruhe, haere tonu ki te moana ki Parininihi.. [the restoration to himself of all confiscated or purchased lands lying within his original tribal boundary, i.e., a line from Aotea to Pirongia, then to Waipa, near the junction of the Mangapiko and Waipa rivers, through the Awamutu and Rangiaowhia, over Pukekura ranges, across the Waikato river, through Taupo, across the Ongaruhe river to the sea at Parininihi (White Cliffs).] [402]

Rewi was not acting alone here but seemingly had the support of other leaders. Among the leaders present at the meeting were Taonui, Hauauru, Tupotahi, Te Heuheu Tukino, Kingi Herekiekie, Te Rerenga Wetere, Teanganohi, and Mapu. Rewi is recorded as describing the names of places and creeks on his boundary in very minute detail. He ended at Taupo. The Ngāti Tuwharetoa leaders Te Heuheu and Kingi took up their boundary where Rewi stopped. Other chiefs also described their boundaries from Ruapehu and Tongariro mountains through

[399] *Te Waka Māori o Niu Tireni*, (1 February 1879) at 272. Translation in the original.
[400] *New Zealand Herald*, (8 April 1882) at 5.
[401] Above.
[402] *Te Waka Māori o Niu Tireni*, (1 February 1879) at 287. Translation in the original source.

to Mokau. It was reported that the chiefs agreed unanimously amongst them that Rewi should be head arranging chief.[403]

Rewi wanted the boundaries surveyed and the rightful owners acknowledged with a view that the land would be permanently inalienable Māori property. In a letter to Governor Robinson in 1879, Rewi stated:

> He mea naku me aku hoa rangatira … Kia kaua te Maori me te Pakeha noa iho e whakararuraru ki taua takiwa kia puta ai he whakahaere ma tatou mo te pai kia tai a ai nga mea nunui e takoto mai nei i mua i o tatou aroaro. [I and my rangatiras say … Let no Maoris nor Europeans generally come and make confusion relative to the space within the proposed boundary. So that what we may do or have to say may go smoothly along for good, without anything interfering, and so that the great things may be arrived at which are contemplated to be done.][404]

Rewi maintained that Europeans would enjoy equal privileges but Māori law would prevail over both Māori and European within the territory and the lawgivers would be Māori, which is a type of concurrent, territorial, subject matter and personal jurisdiction. Rewi also wanted to be able to apply justice to his people who committed theft across the border, which is personal jurisdiction:

> Ko taku whakaaro, ki te mea ka mau etahi o nga kai-tahae, me ata here marire, kaua e whakawakia tonutia iho; ka tuku mai ai i tetahi karere ki a au, ki nga whānaunga ranei, kia ahei ai ratou te whakahoki tonu iho i nga taonga i taha-etia, ki te utu hoki i tetahi whaina taimaha mo te hara. [I would suggest that when any of these thieves are taken by you that they should be locked up, instead of being dealt with at once, and a messenger sent to me or their relatives, in order that they should at once make restitution of the goods stolen and pay a heavy fine.][405]

Rewi thought this would be greater punishment than sending them to the gaol, reflecting a general Māori aversion to the idea prison. Europeans, on the other hand, viewed the aukati as somewhat of a refuge for 'criminals', the refuge of Te Kooti Arikirangi Te Turuki being an example.[406]

Rewi's primary objective was for all lands within the boundary to be governed by tikanga Māori and to be permanently inalienable Māori territory. Rewi was prepared to concede the lands that had been 'sold' to Europeans.[407] However, Rewi wanted the Government to prevent Māori from selling or even be tempted to sell and also for the Government to be bound not to purchase the lands within the Rohe Pōtae boundaries. Rewi asserted: 'Kaua e tukua kia whakararua ahau i runga i tenei whenua e puritia nei a ahau.' [Do not allow my possession of this land to be disturbed.][408] All around Ngāti Maniapoto were encroaching

[403] *New Zealand Herald*, (19 May 1879) at 5.
[404] *Auckland Star*, (20 June 1879) at 2 Translation in the original source.
[405] *Te Waka Māori o Niu Tirangi*, (17 April 1877) at 100. Translation in the original source.
[406] Te Kooti's Exploits a Canard, *Auckland Star*, (3 August 1872) at 2.
[407] *New Zealand Herald*, (23 February 1882) at 5.
[408] *Te Waka Māori o Niu Tirani,* (17 April 1877) at 98. Translation in the original source.

settlement pressures. At a meeting in May 1882, Rewi again stated that there was no wish on his part to sell or lease land at Mokau, or Taupo, or elsewhere confirming his position that the King country should be a territorial reservation.

Furthermore, Rewi and other Māori rangatira were not prepared to entertain a railway route through their land until other matters were settled, in particular, the recognition of their Māori territory where their rangatiratanga and mana whakahaere jurisdiction prevailed. A Ngāti Maniapoto's quest for a Māori territory with rangatiratanga and mana whakahaere jurisdiction was not unrealistic to them at the time given He Whakaputanga o te Rangatiratanga o Niu Tireni - the Declaration of Independence of the United Tribes of New Zealand 1835 which Potatau Te Wherowhero signed, the common law doctrine of aboriginal title, the Treaty of Waitangi 1840 which a number of Maniapoto rangatira signed and s. 71, Constitution Act 1852 which provided for Native Districts with territorial jurisdiction. Furthermore, Sir George Grey offered a proposal to King Tawhiao at the meeting at Hikurangi in May 1878 where he recommended:

> E tu ana koe i to mana ka pitiria atu e te Kawanatanga ko koe ano he kaiwhakahaere mo te Takiwa, ka awhinatia koe e te Kawanatanga me nga Rangatira o te Takiwa hei whakahaere kia tau ai te pai me te Rangimarie ki nga iwi e rua i te motu nei ka titiro tonu te Kawanatanga ki a koe e kore e titiro ki tetehi taha, ki tetehi taha mau ano te kupu kia reti ka reti, kia hoko ka hoko i roto o to Takiwa. Ka hoata e te Kawanatanga he oranga mou me nga Rangatira ki te whakahaere i to Takiwa. [You will stand in your authority, to which the Government will add that you are to be the administrator within your district. The Government will assist you and the chiefs of your district to so administer affairs that peace and quietness will alight on the two races of this island. The Government will always look to you; they will not look to one side or to the other. It is for you to say lease (land), and it will be leased, sell, and sales will take place within your district. The Government will give you and your chiefs allowance for the administration of your district.][409]

Tawhiao however would not accept the proposal because it did not include the restoration of Waikato's confiscated lands and Rewi and the other chiefs remained in alliance with the Kīngitanga. As Rewi said to Bryce in February 1882: 'At this time those lands are in Tawhiao's hands, and the word respecting them is for him to utter.'[410]

1883 Petition – Exclusive Territorial Jurisdiction includes the Marine Estate

Rewi asserted in 1882 that he wanted English law to recognise his territory as a reserve under mana Māori that would aid in keeping out the land speculators and other undesirable Pākehā influences. In April 1883, Rewi, along with Te Ni and Te Kohika, reiterated the same sentiments to Grey in seeking his support for a reserve for the wider alliance of Ngāti Maniapoto, Ngāti Raukawa, Ngāti Tuwharetoa and Whanganui:

[409] *Huia Tangata Kotahi*, (24 February 1894) at 3.
[410] *New Zealand Herald*, (27 February 1882) at 2.

> E hoa, he kupu atu tenei naku kia koe mo te takiwa whenua e rahuitia ana e te iwi nui tonu, e Maniapoto, e Raukawa, e Tuwharetoa, e Whanganui, e tino whakatuturu ana hei nohonga mo nga tane mo nga wahine mo nga tamariki me nga uri whakatupu o tua atu … me tuku ki te Paremata mana e whakamana tenei rahui. [Friend, respecting the land which is kept by the great bulk of the people by Maniapoto, by Raukawa, by Tuwharetoa, by Whanganui. It is completely being kept sacred for an abiding place for the men, the women, the children and for future descendants … Give it to Parliament, it is for them to authorise this reserve.][411]

Rewi added:

> Kua tu nga pou o tenei porotaka kua huaina te ingoa ko te Ki Tapu a te Iwi kia kaua e poka te Māori te Pākehā. [All the boundary marks of this surround are erected. It is called the sacred word of the people. Let it not be broken by Māori or Pākehā.][412]

Rewi also reiterated his opposition to surveyors and the Native Land Court:

> Tuatahi ko te ruri, turarua ko te Kooti, tuatoru ko nga mea katoa i roto i enei e rua, me mutu rawa. [Firstly, the survey, secondly the Court, thirdly the things which come out of those two, put an end to entirely.][413]

Rewi also reminded Grey that they were not young and to not delay:

> Engari kia oti tonu i tenei Paremata kia tau ai to kupu i konei kia aroha ki te iwi" [But let it be done this Parliament which is to settle (fulfil) your word which says be sympathetic with the people.] [414]

Subsequently in June 1883, Ngāti Maniapoto submitted their petition reflecting much of Rewi's sentiments. The petition also included Ngāti Raukawa, Tuwharetoa, and the Whanganui tribes and was an attempt to secure the future of this wider 'Rohe Pōtae' alliance of neighbouring iwi, by partly appealing to the Treaty of Waitangi:

> Kua tino tirohia hoki e matou te aronga o te mahinga a nga ture i hanga nei e koutou, i te tuatahi tae mai ana ki o tenei ra, e ahu katoa ana te aronga o aua ture ki te tango i nga painga i whakatuturatia kia matou e nga wahi tuarua tuatoru o te Tiriti o Waitangi, i tino whakapumautia ai te tino rangatiratanga, me te kore ano hoki e whakararurarua ta matou noho i runga i o matou whenua. [We have carefully watched the tendency of the laws which you have enacted from the beginning up to the present day they all tend to deprive us of the privileges secured to us by the second and third articles of

[411] Letter from Rewi Maniapoto, Te Ni, and Te Kohika to Grey 23 April 1883, *Grey letters*, (GNZ MA 197 Auckland Public Library. Translation in the original source).
[412] Above.
[413] Above.
[414] Above.

> the Treaty of Waitangi, which confirmed to us the exclusive and undisturbed possession of our lands.][415]

The petitioners hoped to secure to them their lands and mana whakahaere jurisdictional control in the face of the proposed opening of their district to roads, the railway and the Native Land Court. The petitioners were critical of the operation of the Native Land Court, in particular, the associated lawyers and the land speculators whom they described as 'kaihoro whenua', land swallowers.[416]

While fully alive to the advantages of having the country opened up to European settlement, the petitioners philosophically noted:

> E hara i te mea e kuare ana matou ki nga painga e puta mai ana i roto i te oti o nga Rori o nga Rerewe, me era atu mahi pai a te Pākehā, kei te tino mohio matou, engari, ko o matou whenua te mea pai ake i enei katoa. [We are not oblivious of the advantages to be derived from roads, railways, and other desirable works of the Europeans. We are fully alive to these advantages, but our lands are preferable to them all.][417]

The petitioners then requested Parliament 'to pass a law securing their lands to them and their descendants for ever, making them absolutely inalienable by sale.'[418]

The petitioners wished to be allowed to fix the boundaries of their tribes, hapū, and the proportionate claims of each individual, to be recognised as legal in Pākehā law which Pākehā then would respect.[419] The petitioners then articulated the tribal boundaries in some detail due in part to Taonui's earlier boundary work:

> Koia tenei te rohe timata i Kawhia, ka rere mai ki Whitiura, tapahi tonu mai i runga o Pirongia, ka heke iho ki runga o Pukehoua, ki te puau o Mangauika, haere i roto o Waipa, te puau o Puniu, haere i roto o Puniu, te puau o Wairaka haere tonu, Mangakaretu, haere i uta, Mangere, ka makere ki roto o Waikato, haere tonu, te puau o Mangakino haere tonu i roto o Waikato, te puau o Waipapa, haere i uta, te Parakiri, rere tonu Whangamata, Taporaroa, ka makere ki roto o Taupo, te au o Waikato, i waenganui o Taupo, ki Motuoapa, te Tokakopuru, Ngutunui, te Kopiha, te Whakamoenga, te Piaka, te Matau, rere tonu Hirihiri, Tauranga, rere tonu i roto o Tauranga te matapuna, ka tapahi i runga o Kaimanawa, te matapuna o Rangitikei, haere i roto o Rangitikei, te Akeake, haere i te rohe o Ruamatua, te matapuna o Moeawhango haere i te rohe o Rangipo, Waipahihi, ka makere ki Waikato ka haere i te au o Waikato, Nukuhaupe, ka kati ki Paretetaitonga, ka huri ki tua o Paretetaitonga, te Kohatu, Mahuia, te Eerenga o Toakoru, te Takutai, Piopiotea, te Ruharuha, Hautawa, te Hunua, Manganui, te Murumuru, te Iringa o te Whiu, te Makahiroi, Pukehou, Huirau, ka makere ki roto o Whanganui, Paparoa, haere i roto o te awa o Paparoa, te Maanga

[415] *AJHR* (1883 J-1. Translation in the original source).
[416] Above.
[417] Above.
[418] Above.
[419] Above.

a Whatihua, rere tonu i roto o Paparoa, Makahikatoa rere tonu, ka piki ite Upoko o Purangi, te Euakerikeri, to Puta o te Hapi, rere tonu te Arawaere, te matapuna o Pikopiko te Tarua te Kaikoara, te Patunga o Hikairo, te Kiekie, ka makere ki Ohura rere tonu te Whauwhau, Kokopu, Oheao, haere i roto i Oheao, te Motumaire, piki tonu i te hiwi o te Motumaire, ka heke ki Taungarakau, rere tonu te puau o te Waitanga, haere tonu, te Rerepahupahu, haere, Opuhukoura, te Hunua, te Rotowhara, te Matai, Waitara te Matawai o Waipingao, ka puta ki te puaha, e ruatekau maero ki te Moana nui, rere atu i waenga moana, ki te taha hauraro, ka huri mai ano ki Kawhia ki te timatanga.

[Commencing at Kawhia, from thence to Whitiura, thence over Pirongia, to Pukehoua, thence to the mouth of the Mangauika, following up Waipa to the mouth of the Puniu, along the Puniu to the mouth of Wairaka, along Wairaka to Mangakaretu, from thence to Mangere, thence to the Waikato, following the Waikato to the mouth of Mangakino, thence still following the Waikato to Waipapa, thence to Parakiri, thence to Whangamata, thence to Taporaroa, thence to Lake Taupo, following the course of Waikato in the centre of Lake Taupo to Motu-o-Apa, thence to Tokakopuru, thence to Ngutunui, thence to Kopiha, thence to Whakamoenga, thence to Eiaka, thence to Matau, thence to Te Hirihiri, thence to Tauranga, following up Tauranga to its source, thence to the summit of Kaimanawa, thence to the source of Rangitikei, following down to Te Akeake, thence along, the boundary of Ruamatua to the source of the Moawhango, following the boundary of Rangipo to Waipahihi, from thence into Waikato, following Waikato to Nukuhaupe, thence to Paretetaitonga, thence to Te Kohatu, thence to Mahuia, thence to Te Rerenga-o-Toakoru, thence to Takutai, thence to Piopiotea, thence to Te Ruharuha, thence to Te Hautawa, thence to Te Hunua, Manganui, Te Mumuru, Te Iringa-o-te-Whiu, Te Makahiroi, Pukehou, and Huirau, thence into Whanganui, thence to Te Paparoa, along Paparoa Stream to Maangaa-whatihua, thence to Paparoa, thence to Makahikatoa, thence over Te Upoko-o-Purangi to Te Euakerikeri, thence to Puta-o-Hapi, Te Arawaere, thence to the source of Pikopiko, thence to Te Tarua te Kaikoara, Te Patunga-o-Hikairo, Te Kiekie, Ohura, Te Whauwhau, Kokopu, Oheao, thence over the Motumaire Edge into Taungarakau, along Taungarakau to the mouth of Waitanga, following Waitanga to Te Rerepahupahu, following Rerepahupahu to Opuhukoura to Te Hunua, thence to Te Rotowhara, Matai, Waitara, Waipingao, following Waipingao out to the coast, thence twenty miles out to sea, and then taking a northerly course twenty miles at sea to Kawhia, the starting-point.][420]

Importantly for the purposes of this report, the tribal boundaries extended extensively around the land but also along the marine and coastal area twenty miles out to sea hence the tribal jurisdiction extended out to the ocean at least twenty miles for these groups.

Finally, the petitioners reiterated their anti-Native Land Court stance but did not preclude Pākehā settlement:

E hara i te mea he hiahia no matou ki te pupuru i nga whenua o roto i te whakahaerenga rohe kua tuhia iho nei ki tenei Pitihana kia puru ki te Pākehā, ki nga

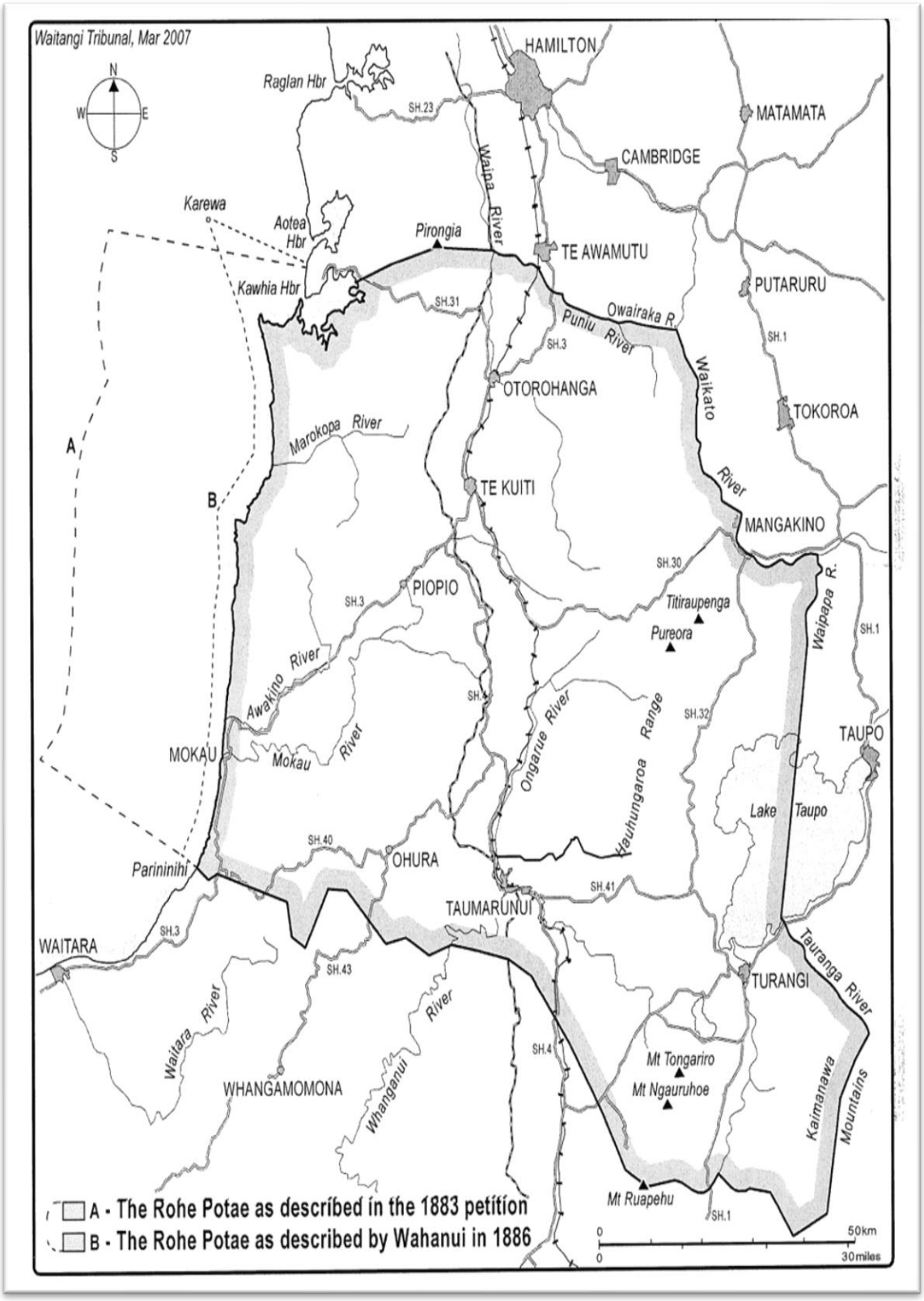
[420] Above.

> mahi reti, ki nga rori ranei kia kaua e mahia ki roto; i nga mahi ranei ate iwi nui kia kaua e mahia; engari he hiahia kia kore atu nga mahinga a nga Kooti Whenua ia ratou e mahi nei. [There is no desire on our part to keep the lands within the boundaries described in this petition locked up from Europeans, or to prevent leasing, or roads from being made therein, or other public works being constructed, but it is our desire that the present practices that are being carried on at the Land Courts should be abolished.][421]

The petition was signed by Wahanui, Taonui, Rewi Maniapoto and 412 others. Wahanui subsequently sent a letter to the editor of the *Korimako Newspaper* where he claimed that there had been wide consultation around this petition. He further explained that it was their great desire that the Māori people would survive and that their land be returned.[422]

[421] Above.
[422] *Te Korimako,* (15 August 1883).

Map 1: Te Rohe Pōtae Inquiry District Overview Map showing the original 1883 Rohe Pōtae Boundaries



Map 2: Original 1883 Te Rohe Pōtae Petition Boundaries - coastal marine area 20 miles into ocean[423]

[423] Waitangi Tribunal, 'Errata for the Rohe Pōtae/King Country Inquiry Boundary Discussion Paper,' (Wai 898 #6.22, Waitangi Tribunal, January 2007) at 4.

In 1885, in speaking to a Parliamentary Select Committee, in the context of wanting jurisdiction powers for a Native Committee to manage affairs in the Rohe Pōtae, Wahanui explained that he had previously stated to Mr. Bryce that what he wanted from the petition was that Government would allow them to have the administration (jurisdiction) of the whole of the lands in the Rohe Pōtae district. Wahanui told Bryce on that occasion that when his petition reached the House, he wished him to bring forward a 'measure vesting the whole authority in me.'[424] By me, Wahanui meant the people for the chief was the embodiment of the people.

Wahanui then commented on his disapproval of Pākehā administering their lands.

> Ki te mea ka whakaranua te wai tai ki te wai Māori, ka kawa te wai. Wai hoki ka tupu te raruraru i te Pākehā ki te mea ka tohe tonu te Pākehā ki te whakahaere i a matou whenua. [If you mix salt water with freshwater, the water will be disagreeable. Likewise there will be trouble with the Pākehā if the Pākehā persists in arguing to administer our lands.][425]

In August 1883, Wahanui commented more on the intent of the petition while also expressing concern with parts of the Native Land Amendment Bill and the Native Committees Bill which Bryce considered would satisfy the petitioners. Wahanui was adamant that lawyers and land agents were only troublesome and approved that part of the Bill which excluded them from their land claims. [426] However, Wahanui wanted some words in the bills to address their request for the delineation of their boundary to secure the land within those boundaries.[427]

Wahanui also considered that the Native Committee Bill did not fulfil what they wanted in the petition - to manage their own affairs, and, after they had settled land claims, then the Government would be asked to send some person vested with power to give effect to their arrangements. In this respect Wahanui opined:

> Ko ta matou kupu tenei e papatupu tonu ana enei whenua waihoki me nga tangata. No konei matou i mea ai kia matou ano te ritenga o matou whenua kia whakakorea rawatia atu ano hoki nga Kooti Whenua. [Our lands, are still under our customs, and so are the people therefore we say, leave the management of our lands' to us and abolish the Land Court altogether.][428]

Wahanui, Rewi, Taonui and the other rangatira then were seeking legal acknowledgement by the crown of tribal rangatiratanga, mana motuhake, mana whakahaere and exclusive jurisdiction over their territory including the marine and coastal estate to at least twenty miles out to sea.

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[424] Above.
[425] *New Zealand Herald*, (23 July 1883) at 5
[426] *Te Korimako,* (15 September 1883) at 5. Translation in *New Zealand Herald,* (28 August 1883) 5.
[427] Above.
[428] Above.

The Government's response in the Native Affairs Committee[429] was they considered that the 'complaints and fears expressed were too well-founded, and that the apparent desires of the petitioners were reasonable'[430] thereby recommending the first part of the petition. However, the Native Affairs Committee would not extend its recommendation to the boundary, declaring that, 'the Committee cannot pronounce upon the allegations respecting boundaries or tribal rights.'[431]

Kāwhia Komiti: Rūnanga for the Whenua?

Wahanui and others also asked for a rūnanga for their whenua so that they might investigate and adjudicate on their own titles. Bryce responded by offering them a Native Committee pursuant to the Native Committees Act 1883, despite earlier expressed reservations against Native Committees. Native Committees were formed which could sit as a court of arbitration and make awards in any dispute between Māori usually resident in the district, where the cause of dispute arose within the district, and the matter did not exceed twenty pounds in value. The committees were also given power to investigate matters relating to title to land and to report to the Native Land Court but the report however was not binding.[432]

The Committee was known as the Kawhia Native Committee. Marr noted that the Crown would not entertain such names such as the Rohe Pōtae or the King Country Committee.[433] Marr suggested the Kawhia name was to emphasise the part of the area that was under 'Government control.' The Committees gazetted district boundary generally followed the external boundary outlined in the 1883 petition, although Ngāti Hikairo's boundary was added to it.[434] The members chose John Ormsby to be the first chairman.

The committee was one of the more active Native Committees. However, its members were from the outset dissatisfied with the powers awarded to them by the Act. The chairman, John Ormsby noted in his opening address of the first sitting of the committee:

> He titiro noku he tino iti rawa te kaha e homai ana ki te Komiti i roto i te Ture mo nga Komiti Māori. E mea ana au me whakanui te mana o te Komiti. kia kaua e waiho ki runga anake ki te pai o nga tangata katoa ma ratou te totohe ka tae mai ai ta ratou totohe ki mua o te Komiti. [It appears to be that the power given to the Committee under this law for Native Committees is little. I say that the power and authority of the Committee should be increased so that it is not left to the people to argue, but that those arguments could come before the Committee.][435]

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[429] Report of the Native Affairs Committe 3rd August 1883. http://www.waitangi-tribunal.govt.nz/reports/view.asp?reportid=ad61afe4-9943-41f1-8872-7435b1ab83b8.
[430] Above.
[431] Report of the Native Affairs Committe 3rd August 1883. http://www.waitangi-tribunal.govt.nz/reports/view.asp?reportid=ad61afe4-9943-41f1-8872-7435b1ab83b8. (Accessed 2018).
[432] For a good discussion of 'Native committees', see O'Malley, V. *Agents of Autonomy: Māori Committees in the Nineteenth Century*, (Wellington: Huia, 1998).
[433] Marr C. 'Te Rohe Potāe Political Engagement 1864-1886,' (Prepared for the Waitangi Tribunal, 2011) at 471.
[434] *NZ Gazette* (24 January 1884) at 111.
[435] Kāwhia Committee Minute Book, (Ormsby family papers ATL Ref. MSY-5008) at 2.

While giving evidence before the Native Affairs Committee on the Native Land Disposition Bill in August 1885, Wahanui commented on what he envisaged in the 'runanga whenua' land committee for their territory:

> I want our own Committee to have full power to administer the lands and the whole of the administration should be vested in the Committee … that was the request contained in my petition that we should have a special Committee of our own …"[436]

Wahanui was also clear that the committees were there to serve the people:

> I think the principle of Native Committees is a good one, and that it will work satisfactorily provided that it be arranged this way the seven people who are elected to the Committee must clearly understand that their only power is to carry out the wishes of the owners of the land. They can only carry out those wishes when the owners have said what is to be done with the block. The owners must be able to say, "Do this," or "Do that."[437]

For Wahanui, the Committee then was to facilitate not adjudicate and was to have full mana whakahaere – jurisdiction and authority to adjudicate on matters including over the marine and coastal areas.

When John Ballance met with Ngāti Maniapoto leaders in Kihikihi in early 1885, Ormsby took the opportunity to request more power and jurisdiction for the committee which he claimed: 'was only a shadow when we came to take hold of it to work it—it was not substantial.'[438] Ormsby asked that the Committees have power to enable them to force disputants to bring their cases before the Committee and that the Committee be placed in the position of the Native Land Court.[439] Ormsby further proposed that each hapū appoint its own Committee, and then the Committee representing each hapū could manage or decide whether their land should be rented or sold.[440] Ormsby's requests were rejected.

Nga Puhi Deputation 1882

Earlier in 1882, a deputation of northern chiefs led by Hirini Taiwhanga,[441] travelled to England to lay their Treaty of Waitangi grievances before Queen Victoria. Included within their petition, Taiwhanga pointed out that s. 71, Constitution Act 1852 could have been interpreted as allowing provision for Māori custom and shared jurisdiction.[442] However, they were not met by Queen Victoria but by Lord Kimberley, the Secretary of State for the Colonies.

[436] *AJHR* (1885 Session I, I-02b) 5.
[437] Above, at 9.
[438] Notes of meetings *AJHR* (1885 G-1) 14.
[439] Above, at 15.
[440] Above.
[441] See his obituary in the *Evening Post* (28 November 1890) and Orange, C, *The Turbulent Years 1870 - 1900 - The Māori Biography from the Dictionary of New Zealand Biography* (Vol. 2, Bridget Williams Books, Wellington, 1994) at 120 - 24.
[442] Archives of the Māori Affairs Department, (23/1, Native Office 82/307); Above, (Orange) at 212.

Kimberley denied any responsibility for alleged Treaty of Waitangi breaches on the part of the British Crown or Government, which he noted, had held no right to interfere in New Zealand's internal affairs since the 1860s. Consequently, the Nga Puhi delegation failed to get Royal Assent to a Commission of Inquiry into their grievances.

Waikato Deputation 1884

In 1884, King Tawhiao similarly led a Waikato-Tainui deputation to England to petition Queen Victoria regarding Treaty grievances between Māori and the Crown. The petition sought the Queen's confirmation of her words given at Waitangi, an independent commissioner from England to investigate Māori grievances, a Māori Parliament with shared jurisdiction, and an independent Commission of Inquiry into the land confiscations to determine either compensation or restitution. Furthermore, King Tawhiao pointed out that s. 71, Constitution Act 1852 could be interpreted as allowing provision for tikanga Māori custom and shared jurisdiction.[443] Thus, it was a possible scheme for separate Māori self-government with shared jurisdiction.[444] The new Secretary of State for the Colonies, Lord Derby, however refused an audience with the Queen but personally received the delegation. Derby admitted that control over internal affairs had been handed over to New Zealand many years before and could not be taken back.[445] He further concluded that the petition would be referred back to the New Zealand Government. Consequently, Lord Derby suggested to Governor Jervois that provision could be properly made for the 'Native Territory' by Letters Patent under s. 71, Constitution Act 1852. Lord Derby observed.[446]

> I understand that it is contended, in support of the action taken by the Māori chiefs in making this appear to the Imperial Government, that the powers granted to the Queen by Sec. 71 of the New Zealand Constitution Act, 15 & 16 Vict. Cap. 72, are still in full force, and that Her Majesty may properly be invited by Letters Patent that the laws enacted by the Legislature of the Colony should not extend to the Native Territory, and that the native laws, customs and usages, modified as might be thought desirable, should prevail therein to the exclusion of all other Law.[447]

Stout's Response to Jervois 1885

In response to King Tawhiao's petition, Robert Stout advised Lord Jervois in 1885 that the Native Land Court Act 1880, in dealing with Māori customary ownership of land, now covered the concerns of s.71, Constitution Act 1852.[448] The memorandum stated:

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[443] Orange, C*, The Turbulent Years 1870 - 1900 - The Māori Biography from the Dictionary of New Zealand Biography* (Vol. 2, Bridget Williams Books, Wellington, 1994) at 212; and Kirkwood, C, Tawhiao – King or Prophet (Turongo House, Hamilton, 2000).

[444] Above.

[445] *GBPP*, (1884-85 [C.4413] Derby / Jervois).

[446] For an overview of King Tawhiao's visit to England Kirkwood, C, Tawhiao – King or Prophet (Turongo House, Hamilton, 2000) at 161 – 175.

[447] Derby / Jervois *GBPP* (C-4413, 1885) at 9.

[448] Memorandum, 12 March 1885, enclosed with Despatch, Jervois to the Secretary of State, 28 March 1885, in *GBPP,* (C4413, 1884-85), referred to in Orange, C, The *Turbulent Years 1870 - 1900 - The Māori Biography from the Dictionary of New Zealand Biography* (Vol. 2, Bridget Williams Books, Wellington, 1994) at 215.

> As to the provisions of section 71 of the Constitution Act 1852, 15 & 16 Vict. cap. 72,. Ministers would remark that it appears from the very terms of the section that the Imperial Parliament contemplated that that section should only be used for a short time and under the then special circumstances of the Colony. The words used in the section are, 'It may be expedient.' 'Should for the present be maintained.' So far as allowing the laws, customs and usages of the Natives in all their relations to and dealings with each other to be maintained, Ministers would point out that this has been the policy of all the Native Land Acts. The Courts that have to deal with native land, and it is the land that to the Natives seems the most important, decide according to Native customs and usages. Native Land Courts Act, 1880, section 24; see also sections 5 and 6 of the Native Lands Frauds Prevention Act, 1881, and section 6 of the Native Land Laws Amendment Act, 1883.[449]

Interestingly, the memorandum also suggested:

> Regarding the proclamation of Native Districts, the county of Waipa is practically a Native District [Rohe Pōtae with shared jurisdiction], and if Natives desired such a form of local government as the Counties Act affords, there would be no difficulty in granting their request by the Colonial Parliament. What, however, the Petitioners desire is really the setting up of a Parliament in certain parts of the North Island which would not be under the control of the General Assembly of New Zealand. Seeing that in the Legislative Council and the House of Representatives the Natives are represented by very able Chiefs, and that they have practically no local affairs to look after that cannot be done by their committees, local bodies recognised by the Government, Ministers do not deem it necessary to point out the unreasonableness and absurdity of such a request.[450]

Stout thus firmly held the view that s. 71, Constitution Act 1852 was intended to provide only a short-term expedient measure, which was made redundant by the Native Land Acts 1865 and amendments. Respectfully, Stout erred about the relationship of the Native Land Acts to s. 71 because the matter of Māori customary title to land was the subject of specific provisions in ss. 72 and 73, New Zealand Constitution Act 1852. These sections set it apart from the general preservation of Māori laws, customs and usages under s. 71. There was, therefore, no basis for reading down that section so that it should not be used to preserve a limited form of autonomy for Māori in the native districts contemplated by s.71.[451]

King Committees 1886

In response, from 1886, the Kīngitanga established King Committees that operated at various places within the Kīngitanga territory within Te Rohe Pōtae[452] in what appeared to be an

[449] Memorandum, Stout / Jervois *GBP,P* (C-4413, 1885) at 11.
[450] Above.
451 Brookfield, F.M, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) at 118.
452 See Orange, C, *The Treaty of Waitangi*, (Allen & Unwin, New Zealand, 1987).

attempted de facto parallel legal system with shared jurisdiction.[453] Kīngitanga Committees operated in opposition to the Government-sponsored committees established pursuant to the Native Committees Act 1883. The Kīngitanga Committees issued summonses, heard cases, opposed surveys and blocked Government works wherever possible. At the same time, the Kīngitanga tried to establish a separate Māori Parliament and Government with shared jurisdiction in Te Rohe Pōtae pursuant (among other authorities) to s. 71, Constitution Act 1852.

Te Kauhanganui 1886

After King Tawhiao's petition to Queen Victoria failed, he remained committed to pursuing Māori rights by establishing a Kauhanganui – 'a Great Council' - as a de facto Parliament[454] for the Waikato, Hauraki and Maniapoto Confederation of Tribes, with shared jurisdiction pursuant to s. 71, Constitution Act 1852. A Kauhanganui Constitution[455] was promulgated in 1894, which included a bicameral legislature, judicial system, Māori dispute tribunals, and other matters relating to marriage and the settlement of Europeans with shared governance jurisdiction within the aukati of Te Rohe Pōtae (King Country). The Kauhanganui met regularly until the 1920s.[456]

Appeal to Ballance 1886

In 1886, King Tawhiao presented a proposal to John Ballance, the Native Minister that suggested the formation of a Legislative Council of Chiefs with shared jurisdiction. Validated by s. 71, Constitution Act 1852, annual gatherings of rangatira, financed from existing Māori taxation and encompassing existing Māori committees with shared governance jurisdiction, were proposed. Despite the assertion that this mechanism would enable the Government to honour the Treaty of Waitangi and the covenant of Kohimārama,[457] Ballance not surprisingly

453 Above, at 218; Ward, A, *Show of Justice: Racial Amalgamation in the Nineteenth Century* (Auckland University Press, 1973) at 306. Included in King Tawhiao's petition to Queen Victoria was the establishment of the King Country as a s. 71 native district and acknowledgement that a Māori government would help retain the lands of other tribes who had also suffered. Derby / Jervois GBPP, (C-4413, 1885) at 7-8.

454 See Orange, C, *The Treaty of Waitangi*, (Allen & Unwin, New Zealand, 1987) at 211-213; and Ward, A, *Show of Justice: Racial Amalgamation in the Nineteenth Century* (Auckland University Press, 1973) at 292-3, 306.

455 See Rawhiti, T. 'King Tawhiao's Constitution 1894' in McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971) at 165-8.

456 Cox, L, *Kotahitanga: The Search for Māori Political Unity* (Oxford University Press, Auckland, 1993) at 58-9. It is interesting to note that the Kauhanganui was re-established in 2000 as the new governance structure for a section of Tainui in their post-Treaty of Waitangi raupatu settlement phase.

457 In July 1860, a large gathering of chiefs was summoned to Auckland primarily to allay alarm over the war at Waitara. During the month-long meeting known as the Kohimārama conference, some policy questions were aired. Although the discussion was inconclusive, the results of the meeting were encouraging. In the Kohimārama kawenata (covenant) participants pledged to do nothing inconsistent with Queen Victoria's authority. Māori chiefs, however, wanted to engage with the European order, and wanted to be involved as responsible and well-intentioned parties with share jurisdiction in the machinery of the state and the shaping of laws and institutions appropriate to their situation. See Oliver, S, 'Tuhaere, Paora? - 1892' in Orange, C, *The Turbulent Years 1870 - 1900 - The Māori Biography from the Dictionary of New Zealand Biography* (Vol. 2, Bridget Williams Books, Wellington, 1994).

declined to act upon it, maintaining that the Government was paternalistically best able to judge what was good for Māori, and that most chiefs preferred the maintenance of the Native Land Court.

Te Kotahitanga 1892

Some of the tribes outside of the Kīngitanga formed Te Kotahitanga, a political federation otherwise known as Paremata Māori - Māori Parliament with shared governance jurisdiction.[458] Te Kotahitanga held its first assembly in 1892 at Waipatu, Hawke's Bay. The four main issues on the agenda of this historic meeting were the unification of the tribes, examination of the Treaty of Waitangi to ensure that no trouble should arise between the two peoples of New Zealand because of the Kotahitanga movement, and the examination of the Constitution Act 1852 to discover whether there was any clause in that law that enabled Māori to establish a Council with shared jurisdiction among themselves. The movement resolved that by virtue of the Treaty of Waitangi 1840 and s. 71, Constitution Act 1852; it was lawful for them to proceed with their own Parliament with shared mana governance jurisdiction.

Native Rights Bill 1893

Subsequently in 1893, the northern section of Te Kotahitanga succeeded in electing its candidate, Hone Heke Rankin,[459] into Parliament. In 1894, Rankin introduced into the House of Representatives a Native Rights Bill seeking devolution of power and shared jurisdiction to the Māori Parliament.[460] The rationale for the Bill was He Whakaputanga o te Rangatiratanga o Niu Tireni/ the Declaration of Independence 1835, the Treaty of Waitangi 1840 guaranteeing rangatiratanga, and s. 71, Constitution Act 1852. But the Bill was thwarted by the Pākehā members walking out of the House of Representatives during the debate, which was adjourned for want of quorum. Rankin combined with the other Māori members of Parliament and tried to introduce a Native Rights Bill four times to get legislative sanction for a Māori Parliament with shared jurisdiction but each time his Bill was dismissed.[461] Three times, it was counted out without a quorum, the fourth time it was lost on the vote.[462]

At the turn of the century, the Māori rangatira of Te Kotahitanga chose to pursue advancement and reform within the legal framework of state institutions rather than

[458] Heke, H, 'The Māori Parliament Movement' in McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971) at 162-4; and Ward, A, *Show of Justice: Racial Amalgamation in the Nineteenth Century* (Auckland University Press, 1973) at 306.

[459] In 1892, Hone Heke may have accompanied a Nga Puhi contingent to Waipatu to consider the formation of a Māori Federation. They claimed the right to establish self-rule under section 71 of the Constitution Act 1852. Orange, C *The Treaty of Waitangi* (Bridget Williams Books Ltd, Wellington, 1987) at 67 - 70.

[460] See Heke, H 'Bill for a Māori Parliament' in McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971) at 164-5.

[461] Sorrenson, M.P.K 'Māori and Pākehā' in Rice, G.W (ed.) *The Oxford History of New Zealand* (2nd Ed.) (Oxford University Press, Auckland, 1992) at 167.

[462] Simpson, T *Te Riri Pākehā: The White Man's Anger* (Hodder & Stoughton Ltd, Auckland, 1979) at 233.

intensifying the separatist tendencies of the Kīngitanga; hence, in 1900 Apirana Ngata and Sir Peter Buck persuaded Te Kotahitanga to disperse.[463]

Subsequent Legislation and Case Law

The Native Districts Regulations Act 1858 and the Native Circuit Courts Act 1858 were repealed in 1891.[464] The Māori Councils Act 1900 subsequently provided for a limited degree of self-government for Māori communities but little came of it in the long term.[465] There was, however, an exception to the recognition of Māori custom in relation to the succession to land titles in *Willoughby v Panapa Waihopai.*[466] Referring to the ascertainment of ownership according to Māori custom by the Native Land Court, Chapman J remarked:

> Its Judges have acted on the assumption that they might invoke Native custom to determine the succession to the freehold lands of Māoris. That is to say, that Court has applied the same rules of succession to the lands of Māoris which happened to be held under title derived from the Crown as it habitually applied to lands not so held … A body of custom has been recognised and created in that Court which represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism to a state in which property may be owned in severalty, or in the shape approaching severalty represented by tenancy in common. Many of the customs set up by that Court must have been founded with but slight regard for the ideas, which prevailed in savage times.[467]

The concept of tenure is fundamental to English land law but has little relevance to Māori communal property concepts which theoretically meant that Māori title could have no legal existence apart from statute. The Native Land Court Judges did not always apply the application of Māori custom as Chapman J mentioned. Nor was British law in its entirety. Examples include the exclusion of spouses and the recognition of customary marriages and adoptions for succession purposes.[468] Yet Māori land title could be subject to Māori customary rights and could also be unappropriated which was highlighted by the Privy

[463] Ward, A *Show of Justice: Racial Amalgamation in the Nineteenth Century* (Auckland University. Press, 1973) at 311. Ngata and Te Rangihiroa persuaded the Kotahitanga to disperse on the grounds that the humanitarian notions of the rule of law and racial amalgamation had an important ameliorating effect on government. For example, in the 1870s and 1880s numbers of young men engaged with some success in the European milieu and were assisting their communities towards the same end by promoting village schools and engaging in commercial enterprise. In addition, they secured from Prime Minister Richard Seddon a cessation of land purchasing and legislation creating Village Councils and Land Boards, which at last gave Māori some significant control of their land and of local community problems of health and welfare. See Schwimmer, E, 'The Māori Village' in Pocock, J (ed) *The Māori and New Zealand Politics* (Blackwood and Janet Paul Ltd, Auckland, 1965) at 72 - 80.

[464] Above, n. 95 – 100.

[465] See the summary in Martin, R, 'The Liberal Experiment,' above, (Pocock) at 53.

[466] (1910) 29 NZLR 1123.

[467] Above.

[468] Above, at 135.

Council's 1921 decision in *Amodu Tijani v The Secretary Southern Nigeria.*[469] Viscount Haldane remarked on 'native title':

> … in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates…[470]

Viscount Haldane thus reinforced the hybrid nature of the legal systems of the British Empire in relation to property,[471] which theoretically provided some political space for shared jurisdiction in some areas including Indigenous tribal territories that included marine and coastal areas.

Summary

Māori then made numerous attempts to recognise shared governance jurisdiction over lands, forests, fisheries and other treasures including the marine and coastal areas through acknowledging nga kawenata - the covenants – entered into in He Whakaputanga o te Rangatiratanga o Niu Tireni/ the Declaration of Independence 1835, the Treaty of Waitangi 1840, the Kohimārama Kawenata 1860, petitions, appeals, litigation, direct negotiations and to establish native districts with shared governance jurisdiction pursuant to s. 71, Constitution Act 1852. Petitions to London and the Kohimārama Kawenata, were automatically referred to Ministers of the Crown in Wellington and were ignored, and the 1883 Rohe Pōtae Tribal Petition to Government was similarly ignored as were the promises in He Whakaputanga o te Rangatiratanga o Niu Tireni/ the Declaration of Independence 1835 and the Treaty of Waitangi 1840. The attempts to establish native districts with shared jurisdiction under s. 71, Constitution Act 1852 by the Kīngitanga, and Kotahitanga Movements as well as Ngati Maniapoto within the Rohe Pōtae Native District reserve were similarly ignored. The Government and settlers had no intention of granting shared governance jurisdiction and were reluctant to establish a parallel hybrid legal system for Māori except perhaps with Māori customary rights to property. However, there remained de facto recognition of King Tawhiao's mana whakahaere and Ngati Maniapoto's rangatiratanga over Te Rohe Pōtae - the King Country – until construction of the railroad began in the mid-1880s.

[469] [1921] 2 AC 399 at 402.
[470] Above.
[471] It is worth mentioning that Viscount Haldane's view was also endorsed by the New Zealand Court of Appeal in *Te Rūnanga o te Ika Whenua v Attorney- General* [1990] 2 NZLR 641.

Still, within fifty years of the assumed cession of sovereignty with the Treaty of Waitangi in 1840, there had been immense constitutional, political, economic, social and even environmental changes in New Zealand. Māori had not been consulted in these processes; they had been innocent bystanders as the settlers agitated for and achieved 'self-government,' then overtly delayed then denied the existence of Māori custom and law in the official discourse of the new and subsequent Colonial Governments. Native districts envisaged within s. 71, Constitution Act 1852 were never implemented and the earlier appointments of Native Magistrates were gradually revoked, while regulations were passed to specifically suppress native customs in cases where compensation was sought by means of such customs.[472] Moreover, the Government rejected allegations of injustice and claimed that s. 71, Constitution Act 1852 was outmoded since it authorised the establishment of native districts only where custom existed, not introduced forms of law and shared governance jurisdiction, which the Kīngitanga and Kotahitanga movements, among others, strived to establish.[473] Māori continued to refer to He Whakaputanga o te Rangatiratanga o Niu Tireni/ the Declaration of Independence 1835, the Treaty of Waitangi 1840 and s. 71, Constitution Act 1852 up to the turn of the century for protecting rangatiratanga and re-establishing shared governance jurisdiction. [474] This denial of tikanga Māori, tino rangatiratanga and mana whakahaere tōtika - governance jurisdiction - along with policies aimed at hastening amalgamation persisted well into the twentieth century.

H. Denial of Aboriginal Title & Te Tiriti o Waitangi Rights

James Mackay, civil commissioner for Hauraki and judge of the Compensation and Native Land Court, referred to the Thames Sea Beach Bill in 1869:

> I believe the general custom with the Native Lands Purchase Department respecting lands between high and low water mark, has been to consider that when the Native Title is extinguished over the main land, then any rights which the Natives had over the tidal lands have ceased. As long as the Native title is not extinguished over the main land, the Natives consider – or, at least the Natives have enjoyed all rights over the tidal flats. I am not aware of any cases having arisen in which the Government have required to make use of tidal lands previous to the extinguishment of the Native title over the main land.[475]

[472] See for example *AJHR* (1858), Stafford / Gore Browne, 6 May 1857.

[473] Ward, A *Show of Justice: Racial Amalgamation in the Nineteenth Century* (Auckland University Press, 1973) at 292.

[474] See for example *The Jubilee Te Tiupiri* (Vol. 1, No. 23, 7 June 1898), Vol. 1, No. 24, 14 June 1898) at 8, Vol. 2, No. 49, 23 February 1899) at 1, Vol. 2, No. 52, 6 April 1899) at 5; *Te Korimako* (No. 66, 22 Aug 1887) at 6, No. 67, 20 Sept. 1887) at 4, No. 68, 15 Oct. 1887) at 9; *Te Waka Māori o Niu Tireni* (Vol. 13b, No. 2, 13 Feb. 1877), Vol. 1, No. 29, 19 April 1879) at 399; *Huia Tangata Kotahi* (Vol. 1, No. 2, 23 Feb. 1893) at 4, No. 24, 25 Nov. 1893) at 5; *Te Paki o Matariki* (No. 67, 20 Sept. 1895) at 3; and *Te Pipiwhaurauroa* (No 59, Jan. 1903) at 10. From approximately 1903 until 1986, s. 71, Constitution Act 1852 seems to have disappeared from the legal and political discussions of both government and Māori. Perhaps Māori were disheartened by the failure to implement s. 71. Interestingly, s. 71 was not repealed until 1986 pursuant to the Constitution Act 1986 with little opposition from Māori.

[475] *AJHR* (1869 F-7) at 6.

Furthermore, Donald McLean, Native Minister, stated in Parliament in 1874:

> For the information of the House, that land below high water mark was granted to the Superintendent under the Public Reserves Act of 1854 and was also leased under the authority of the Act. In regard to all territories ceded by Māoris to the Crown, it has been held that when the lands were ceded, all the rights connected with them were also ceded such as rivers, streams and whatever was on the surface of the land or under the surface. Almost all the deeds of cession contained a clause to that effect, and all of the conditions of the deeds had been adhered to strictly by the colony. There had been no breach of the Treaty of Waitangi and every Government of New Zealand has carefully preserved the rights of the Natives.[476]

Crown officials then assumed that when a block of land was purchased by the Crown, Māori alienated all rights to freshwater as well as the marine and coastal environment with the sale hence Crown rights to the marine and coastal estate were allegedly based on particular transactions that extinguished aboriginal title to the marine and coastal estate along with any claimed Māori jurisdiction rights and responsibilities.

In terms of case law regarding the doctrine of aboriginal title property rights and the Treaty of Waitangi rights, the judiciary's approach was more conservative after 1870. In the 1870 *Kauaeranga Decision*[477] of Native Land Court, Chief Judge Fenton rejected the previous Land Court practice of granting titles to parcels of land below the high-water mark instead granting to Māori a substantial exclusive right of fishery in the Thames area. Chief Judge Fenton commented:

> [He could not] contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of the foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership … when I consider how readily they may prove such and how impossible it is to contradict them if they only agree amongst themselves.[478]

Chief Judge Fenton was unwilling to allow property rights in the foreshore and seabed due to wider public interests of the Colony but he did acknowledge some Māori personal and subject matter jurisdiction responsibilities over the fishery.

In *Re The Lundon and Whitaker Claims Act 1871,*[479] the Court of Appeal reasserted that 'the Crown was bound, both by the common law of England and by its solemn engagements, to a full recognition of native proprietary right.'[480] The Court stated 'whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it'[481] which was the strongest judicial recognition of Māori customary title and implied shared jurisdiction

[476] *New Zealand Parliamentary Debates,* (16, 1874) at 853.
[477] (1870) reprinted in *VUWLR* (Vol. 14, 1984) at 227.
[478] Above.
[479] (1871) 2 N.Z (C.A) 41.
[480] Above.
[481] *Re 'The Lundon and Whitaker Claims Act 1871* (1871) 2 N.Z (C.A) 41, 49. The finding echoed Chapman J's earlier ratio in *R v Symonds* (1847) NZPCC 387.

at the time. Māori customary law was part of the New Zealand common law in the sense that the 'internal' content of property rights protected by aboriginal title were governed by the tikanga Māori customary rules.[482]

However, in the infamous 1877 *Wi Parata v Bishop of Wellington*[483] decision, the tide turned when Prendergast C.J denied that Māori had 'any kind of civil government' or any 'settled system of law.' Prendergast CJ denied Māori tribes any residual or even original sovereign status and jurisdiction which reinforced Crown assumed sovereignty at a time when it was being challenged by a number of tribes in the North Island who remained de facto 'domestic nations' with original jurisdiction and authority – especially Ngāti Maniapoto and the other tribes within Te Rohe Pōtae as noted above, and Ngāi Tūhoe in the Urewera region. Prendergast C.J then ruled that the 1840 Treaty of Waitangi was a 'simple nullity'[484] when he held:

> The existence of the pact known as the Treaty of Waitangi entered into by Captain Hobson on the part of Her Majesty with certain natives at the Bay of islands, and adhered to by some other natives of the Northern Island, is perfectly consistent with what has been stated: So far indeed as that instrument purported to cede the sovereignty – a matter with which we are not here directly concerned – it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so called treaty merely affirms the rights and obligations which, *jure gentium,* vested in and devolved upon the Crown under the circumstances of the case.[485]

Furthermore, Prendergast C.J ruled that the Courts had no jurisdiction to entertain any claims based on a supposed aboriginal title. Referring to traditional Māori custom and usage based on tikanga Māori in s. 4, Native Rights Act 1865, he concluded:

> Had any body of law or custom capable of the 'Ancient Custom and Usage of the Māori people', as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. ... no such body of law existed.[486]

Prendergast C.J thus advanced the circular proposition that traditional Māori custom did not exist because it was not recognised by the legal system in statutes while any statutory recognition of traditional Māori custom could be disregarded because traditional Māori custom did not exist![487]

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[482] Boast, R 'Treaty Rights or Aboriginal Rights?' in *New Zealand Law Journal* (1990) 32 at 33.

[483] *Wi Parata v Bishop of Wellington* (1877) 3 N.Z Jur. (N.S) S.C 79. See Williams, DV., 'Te Tiriti o Waitangi – Unique Relationship Between the Crown and Tangata Whenua?' in Kawharu, IH, (Ed), *Waitangi: Māori and Pākehā Perspectives,* (Oxford University Press, Auckland, 1990).

[484] Above, at 78.

[485] *Wi Parata v Bishop of Wellington* (1877) 3 N.Z Jur. (N.S) S.C 78.

[486] Above, at 79.

[487] For an excellent brief article tracing the demise of Māori custom, see Frame, A 'Colonising Attitudes Towards Māori Custom' in *New Zealand Law Journal* (17 March 1981) at 109.

He added, 'in the case of primitive barbarians, the Supreme executive Government must acquit itself, as best it may, of its obligations to respect native proprietary rights, and of necessity must be sole arbiter of its own justice.'[488] Consequently, any Treaty of Waitangi rights, shared governance jurisdiction and traditional Māori aboriginal property rights were distorted and were rapidly marginalised within the New Zealand legal system. Prendergast C.J firmly ushered in the establishment of a monocultural legal system that took minimal cognisance of traditional tikanga Māori norms and customs, and any alleged the Treaty of Waitangi rights were deemed a legal nullity which legal position lasted for just under a century.

In a similar manner, the Canadian judiciary in the 1928 case *R v. Syliboy*[489] decided against Chief Gabriel Syliboy in which the Mi'kmaqs were described as 'savages incapable of contracting with the Crown' when the Mi'kmaq Treaty was signed in 1752 between the Mi'kmaqs of Nova Scotia and Governor Hopson. Indeed, Patterson J held:

> The Indians were never regarded as an independent power. … The savages' rights of sovereignty even of ownership were never recognised. … In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual – an agreement that, as we have seen, was very shortly after broken.[490]

Chief Judge Macdonald and Judge Puckey of the Native Land Court subsequently followed *Kauaeranga*[491] in the *Parumoana* decision[492] dealing with certain areas of mudflats in Porirua that Ngati Toarangatira had jurisdiction over according to tikanga Māori. The Court held that 'the present applicants are entitled not to the land but to a right of fishery.'[493] Ironically, this right continued to be exercised by Ngati Toarangatira until 1860 when following the decision of the Supreme Court, Ngati Toarangatira received legal advice that the original grant had been made without jurisdiction and was deemed to have lapsed.[494]

Prendergast C.J additionally refused to accept that Māori marriage – subject matter jurisdiction - according to tikanga Māori customary law had any legal validity in the eyes of the New Zealand Courts in *Rira Peti v Ngaraihi Te Paku.*[495]

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[488] *Wi Parata v Bishop of Wellington* (1877) 3 N.Z Jur. (N.S) S.C 77-80. For a contemporary analysis of this case and how history repeated itself with the now repealed Foreshore and Seabed Act 2004, see Williams, D, 'Wi Parata is Dead, Long Live Wi Parata,' in Erueti, A and Charters, C (eds.) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) at 31-58.

[489] *R v. Syliboy* [1929] 1 D.L.R 307 (N.S.C.C).

[490] Above, at 313-4. The 1752 Treaty was later held to be valid and binding by the Supreme Court of Canada in *Simon v The Queen* [1985] 2 SCR 401. Furthermore, the *Wi Parata* decision was also applied in other parts of the British Empire including South Africa. See Burman, *Cape Policies Towards African Law in Cape Tribal Territories 1872-1883* (Chapter 2); and Rumbles, W, *Africa: Co-Existence of Customary and Received Law* (Te Mātāhauariki Institute, University of Waikato Press, 1999).

[491] (1870) reprinted in *VUWLR* (Vol. 14, 1984) at 227.

[492] (1883) 1 Wellington MB.

[493] Above.

[494] Boast, R, *The Foreshore and Seabed,* (Lexis Nexis 2005) at 63.

[495] (1889) 7 NZLR 235.

Prendergast's approach was idiosyncratic however, and could not be used to typify the approach of the New Zealand legal system as a whole. His remarks were completely at variance with the statutory direction in s. 23, Native Lands Act 1865 that titles were to be investigated according to 'Native custom,' hence the Legislature did believe that such 'legal' customs did exist!

Other Courts also challenged Prendergast's approach. The Judicial Committee of the Privy Council in 1901 rejected Prendergast's denial of traditional tikanga Māori custom in *Nireaha Tamaki v Baker*[496] when their Lordships held:

> It was said ... that there is no customary law of the Māoris of which the Courts of law can take cognisance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court.[497]

In the 1902 *Hohepa Wi Neera v Bishop of Wellington*[498] decision however, the Court upheld *Wi Parata* reasoning that Native Land Acts enacted by the Crown may override customary native title.

The response to the Privy Council's *Nireaha Tamaki v Baker* decision however, was a protest of Bench and Bar in New Zealand. The New Zealand Prime Minister, Sir Joseph Ward, subsequently defended the New Zealand position at the 1911 Imperial Conference in London by highlighting their Lordships' ignorance of local circumstances:

> Our people in New Zealand ... consider that in matters relating to native land [and custom] which come before the Privy Council ... here what is a custom, as far as the native law in New Zealand is concerned, may not in the ordinary sense be fully recognised by the Privy Council when dealing with those laws.[499]

Still, subsequent case law and other attempts since 1901 accepted the Privy Council's views rather than those of Prendergast CJ. For example, Chief Justice Robert Stout in 1905 proposed to codify Māori customary law in relation to land tenure which was noted in the *New Zealand Times* newspaper:

> What his Honour presumed, the Native Court had to do, was to incorporate English law and Māori custom together, and from this conglomerated law find succession, and call it according to Māori custom. It seemed to his Honour that the time had come when there should be some authoritative definition of what Māori custom or usage was. It should not be left to Native Land Court judges to declare what they think Native custom is.[500]

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[496] (1901) NZPCC 371.

[497] *Nireaha Tamaki v Baker* (1901) NZPCC 371, 382.

[498] (1902) 21 NZLR 655.

[499] Sir Joseph Ward *Précis of Proceeding of the Houses of Parliament of Great Britain, Imperial Ministers Conference* (Minutes of Proceedings, London, June 1911).

[500] 'On Māori Customs being Codified' in *New Zealand Times*, (30 August 1905) at 6.

With respect, declaring tribal tikanga is the jurisdiction of the respective whānau, hapū and iwi concerned not the judiciary.

Having spoken with the Chief Justice, Attorney-General John Salmond (later Sir John) in a memo to Cabinet dated 1 September 1905 proposed the idea of the codification of Māori custom in principle.

> His Honor, in an interview with myself upon the matter, expressed the opinion that steps should be taken by the government to have what constituted Māori custom and usage codified and enacted by the legislature.[501]

It would appear that Cabinet was not too interested however, in codifying Māori custom, the response being a memo to Justice and Native Affairs that 'where land was clothed in European title, Native Custom was to be abolished.'

However, in the 1908 decision of the High Court in *Public Trustee v Loasby,*[502] Cooper J instituted a three tier tikanga Māori customary law test when deciding whether to adopt a rule of Māori customary law. The first tier was whether the custom existed as a matter of fact, whether 'such custom exists as a general custom of that particular class of the inhabitants of this Dominion who constitute the Māori race.'[503] The next tier was whether the custom was contrary to statute. The last tier was whether the custom was 'reasonable, taking the whole of the circumstances into consideration.' [504]

Following this precedent, the continued vitality of tikanga Māori customary law was affirmed in s. 91, Native Land Act 1909 which was drafted by Salmond with the assistance of Apirana Ngata. The Act declared that:

> Every title to and interest in customary land shall be determined according to the ancient custom and usage of the Māori people so far as the same can be ascertained.[505]

The recognition of Māori custom in relation to succession to land titles was recognised further in *Willoughby v Panapa Waihopai.*[506] Referring to the ascertainment of ownership according to tikanga Māori custom by the Native Land Court, Chapman J remarked:

> Its Judges have acted on the assumption that they might invoke Native custom to determine the succession to the freehold lands of Māoris. … A body of custom has been recognised and created in that Court which represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism to a state in which property may be owned in severalty, or in the shape approaching severalty represented by tenancy in common. Many of the customs set up by that Court

[501] National Archives, (MA 1, 1906/285).
[502] (1908) 27 NZLR 801.
[503] Above, at 806.
[504] Above.
[505] Native Land Act 1909, s. 91.
[506] (1910) 29 NZLR 1123.

must have been founded with but slight regard for the ideas which prevailed in savage times.[507]

The protracted battles over exclusive, concurrent and extinguished jurisdiction over lands and the marine coastal estate by virtue of the doctrine of aboriginal title, the Treaty of Waitangi and tikanga Māori, continued unabated for long periods as noted above. The English Laws Act 1858 however, provided:

> The laws of England as existing on the 14th day of January 1840, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force (from that day and thereafter).[508]

The limitation on the application of English law has been held to include the situation where the same would be inconsistent with tikanga Māori.[509] For that reason, the doctrine of the no one owning the ocean may not be applicable.[510] In addition, tikanga Māori custom has now been recognised as part of the New Zealand common law.[511]

Still in the early decades of the 20th century, even the Solicitor-General, Sir John Salmond, when appointed to argue the case for the Crown's putative interest in Lake Rotorua, advised the Attorney-General in 1914:

> The Prime Minister... has instructed me to appear before the Native Land Court to contest the claims of the Natives on the ground that the only rights possessed by the Natives over the larger lakes of this country are rights of fishery (which would not enable a freehold order to be issued) and not rights of ownership as are now claimed ... It is to be observed in the first place that the question relates not merely to Lake Rotorua but to all rivers, lakes, *foreshores and tidal waters in the Dominion* ... I think it exceedingly doubtful whether any such contention as that which I am now instructed to raise before the Native Land Court could be maintained ... it may be anticipated that the Court will hold that by native custom the Natives own not merely the land but the water of this country and freehold titles will be issued accordingly [emphasis added].[512]

The concept of tenure is fundamental to English land law but has little relevance to Māori communal property concepts which theoretically meant that Māori title could have no legal existence apart from statute. But the Crown's alleged acquisition of sovereignty over New Zealand through the Treaty of Waitangi in 1840 did not bring with it any legal confiscation of pre-existing tribal property rights and governance jurisdiction responsibilities. It acquired the imperium right to govern without displacing the tribes' private rights of land ownership or

[507] Above.
[508] Section 1. See also s. 2, English Laws Act 1908.
[509] *Baldick v Jackson* (1910) 30 NZLR 343 (HC).
[510] *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 at para 67; and *Paki v Attorney-General (No 1)* [2012] NZSC 50, [2012] 3 NZLR 277 at para 18.
[511] See Chief Justice Elias in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at para 73.
[512] Salmond to Attorney-General, 1 August 1914, 'Opinions Relating to Lands Department 1913-15,' cited in Alex Frame, *Salmond: Southern Jurist*, (Victoria University Press, Wellington, 1995) at 119.

dominium.[513] The Treaty of Waitangi merely affirmed this legal position. Moreover, the content of this tribal property right was according to traditional tikanga Māori. Yet Native Land Court Judges did not always tikanga Māori custom for aboriginal rights and the Treaty of Waitangi after the turn of the century.

In the 20th century, Boast observed that the most significant case law developments on the marine and coastal area were in Northland in the Māori Land Court decisions of Judge Acheson who granted title below the high water mark the most significant being the Ngakorokoro mudflats on the Hokianga Harbour in 1941.[514] Judge Acheson in the Māori Appellate Court had no issue in finding that the Māori Land Court had jurisdiction to investigate the title to the foreshore and seabed just as much as dry land.

However, in 1957, an application was made by Māori for title to Ninety Mile beach to be investigated by the Māori Land Court. The Court predictably made an order issuing titles to the foreshore and seabed between Te Aupouri and Te Rarawa.[515] The Te Rarawa people claimed:

> The land is customary land having been at one time completely under the control and jurisdiction of a Māori – Tohe.[516]

Tohe was the eponymous ancestor of the Te Rarawa people centuries ago. The Te Rarawa people were seeking de jure jurisdictional control and management of toheroa (a large shellfish delicacy) and an order vesting the beaches in trustees. Chief Judge Morison acknowledged tribal jurisdiction when he concluded:

- That the beaches were within the tribal territory of Te Rarawa and Te Aupouri.
- That the tribes had kaingas and burial grounds scattered along their respective portions to the exclusion of others.
- That the land itself was a major source of food supply for these tribes.
- That the Māoris caught various fish in the sea off the beach.
- That for various reasons from time to time rahuis [restrictions] were imposed upon various parts of the beach and the sea itself.
- That the beach was generally used by members of these tribes.[517]

Tribal ownership and jurisdiction over the Ninety-Mile coastal and marine area then were a matter of fact – de facto – for these tribes. Judge Morison accordingly concluded:

> The Court is of the opinion that these tribes were the owners of the territories over which they were able to exercise exclusive dominion or control [jurisdiction]. The two parts of this land were immediately before the Treaty of Waitangi within the territories over which Te Aupouri and Te Rarawa respectively exercised exclusive

[513] McHugh, P, *The Māori Magna Carta: New Zealand and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 96.
[514] See *Ngakorokoro,* in Auckland Māori Appellate Court Minute Book, (1942) at 137.
[515] In *Re the Ninety-Mile Beach,* in Northern Minute Books, (No 85, 1957) at 126.
[516] Above.
[517] Above.

> dominion and control [jurisdiction] and the Court therefore determines that they were owned and occupied by these tribes respectively, according to their customs and usages.[518]

The *Ninety Mile Beach*[519] decision however, was appealed to the Court of Appeal based on certain assumptions about aboriginal title that were questionable at the time. The Crown assumed the position that it 'owned' the foreshore by prerogative right in New Zealand just as it did in England. The Solicitor-General argued:

> On the assumption of sovereignty by Her Majesty Queen Victoria, the foreshore of the lands of New Zealand … became and has ever since remained vested in the Crown, and that the Māori Land Court … has not and never did have jurisdiction to investigate title to land below high-water mark.[520]

North J disagreed remarking that while this argument had 'an attractive simplicity,' it was nevertheless 'not well founded'[521] when he concluded:

> I doubt the validity of these submissions even prior to 1862, and the acceptance of either contention would involve a serious infringement of the spirit of the Treaty of Waitangi and would in effect amount to depriving the Maoris of their customary rights over the foreshore by a side wind rather than by an express enactment.[522]

The Court of Appeal did however find an alternative basis for extinguishment of aboriginal title by assuming that the Native Land Court must have investigated the title to the various blocks of land along the coast adjoining the beach, which was incorrect. Nonetheless, North J held:

> The case stated by the Māori Land Court does not supply any information whether the whole of the land extending along the length of the Ninety Mile Beach above high-water mark has been investigated, but as the first Māori Land Court was constituted rather more than 100 years ago and it was recorded more than 50 years ago that the Native customary [aboriginal] title to land in New Zealand had for the most part been extinguished, it would seem to me that the probabilities all are that it has.[523]

The Court of Appeal having wrongly assumed that the Native Land Court must have sat everywhere, then turned to the consequences of such an investigation:

> I am of the opinion that once an application for investigation of title to land having the sea as one of its boundaries was terminated, the Māori customary [aboriginal] title

[518] Above.
[519] [1963] NZLR 461 (CA).
[520] Above, at 467.
[521] Above at 468.
[522] Above at 477-478.
[523] Above.

> was then wholly extinguished. … If … the Court thought it right to fix the boundary at high water mark, then the ownership of the land between high water mark and low water mark likewise remained with the Crown, freed and discharged from the obligations which the Crown had undertaken when legislation was enacted giving effect to the promise contained within the Treaty of Waitangi.[524]

The situation was the law regarding aboriginal title and jurisdiction extinguishment and Crown assumption of ownership of the foreshore and seabed leading up to the tide turning again in the 1970s.[525]

Tides Turns 1970s

Some positive change occurred in the 1970s confrontation period with the rise of counter-hegemonic Māori ethno-politics. During the 1970s, the civil rights movements in the USA had an impact on Māori claims based on alleged Treaty of Waitangi breaches that began to take on a new profile politically particularly with the great Land March, Bastion Point and the Raglan Golf Course protests.[526]

The new Labour Government elected in 1972 reacted by reforming Māori affairs in numerous ways the most notable being the establishment of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 with jurisdiction to hear alleged claims based on breaches of the Treaty of Waitangi. The Tribunal's jurisdiction did not extend to historic claims back to 1840 until 1985, which opened the floodgates.

In terms of aboriginal rights in New Zealand during this period, the common law evolved in a manner that directly recognises aboriginal rights. In *Te Weehi v Regional Officer,*[527] the judiciary consented to recognise the mana (authority) of local tribes over sea fisheries according to their customary law. The guarantees of the Treaty of Waitangi were also indirectly recognised in *Te Rūnanga o Te Ika Whenua Inc. Society v Attorney General.*[528] Cooke P stated that unless special circumstances existed, aboriginal title should not be extinguished without Māori consent.[529] It makes sense that this standard should apply to all aboriginal rights including over the marine and coastal areas.

The marine and coastal area of New Zealand however, has been an area of considerable historic disagreement, debate and displacement of Māori from their coastal taonga rights and mana whakahaere responsibilities. Boast asserted that the issue of ownership of the

[524] Above.

[525] The foreshore and seabed law and policy shifted again and again starting with the seminal 2003 Court of Appeal decision *Ngati Apa v Attorney-General* [2003] NZCA 643.

[526] The rise of counter-hegemonic Māori ethno-politics occurred in the 1970s confrontation period with Māori groups challenging the illegitimate actions of the New Zealand State under Te Tiriti o Waitangi/the Treaty of Waitangi. Such groups included Ngā Tamatoa, Matakite and Te Matekite o Aotearoa who were involved in the great land march on Parliament in 1975; the Bastion Point Action Committee 506-day occupation of disputed Crown land at Orakei; the Waitangi Action Committee, the He Taua Group and others. See generally, Walker, R, *Ka Whawhai Tonu Matou: Our Struggle Without End* (Penguin Books, Auckland, 1990).

[527] (1986) 6 NZAR 114 (H.C).

[528] [1994] 2 NZLR 20.

[529] Above, at 24.

foreshore and seabed for example is not new and has been 'troublesome through the country's legal history.'[530] Boast added that the law relating to the foreshore and seabed is so complex and even baffling because it is made up of an unsatisfactory mix of common law principles and a number of disparate statutes.[531]

The Crown's position in relation to dry land is that all land was Māori customary land under the doctrine of aboriginal title. The Crown's position in relation to the marine and coastal estate however, was different. Māori claimed dry land but the marine and coastal estate including the sea was not, and, there was little evidence the Crown alleged, that Māori 'owned' the marine and coastal area.

The situation was the law regarding aboriginal title and jurisdiction extinguishment through Crown assumption of ownership of the foreshore and seabed particularly from *Ninety Mile Beach*[532] in 1963 leading up to the tide turning again in the seminal 2003 Court of Appeal decision of *Ngati Apa v Attorney-General.*[533] In *Ngati Apa v Attorney-General,* the Court of Appeal held that the Crown did not extinguish Māori customary (aboriginal) title claims to the foreshore and seabed,[534] and it affirmed the Māori Land Court's jurisdiction to investigate Māori claims in the foreshore and seabed.[535] The effect was that Māori could pursue their customary aboriginal title claims and shared jurisdiction to the foreshore and seabed.

The *Ngati Apa* decision also opened up the possibility of Māori acquiring freehold titles in the foreshore and seabed,[536] which meant they could potentially exclude others from their freehold titles (this being a right associated with Māori freehold land under Te Ture Whenua Māori 1993) and even the sale of the land to others. The prospect of exclusive interests possessed by Māori in the foreshore and seabed, while not clear,[537] was too much for the government of the day, which effectively overrode the decision. The tide went out again given the decision was overturned by the hastily enacted Foreshore and Seabed Act 2004 - a statutory scheme for recognition of non-exclusive rights and that remains in place today.[538]

The approach of the New Zealand Government then to Māori rights and responsibilities in the coastal marine estate may be viewed in terms of a 'right to culture,' 'right to property,' 'tino

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[530] Boast, R, *The Foreshore and Seabed,* (Lexis Nexis 2005) at 10.
[531] Above.
[532] [1963] NZLR 461 (CA).
[533] [2003] NZCA 643.
[534] Above, at 13, 88 and 183.
535 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).
[536] See *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) [*Ngati Apa*]. This was the Māori Land Court's original mandate. That is to convert lands 'owned by Natives under their customs or usages' into a Crown granted fee simple title. In other words, the Native Land Legislation saw Māori customary title as translating readily into a right of ownership.
[537] See Elias CJ's judgment in *Ngati Apa*, above at 45, which notes that freehold was not necessarily the outcome of an inquiry because the Māori Land Court may now make a declaration of status of customary land without making a vesting order changing the status of customary land to Māori freehold land. At [45]. Justice Gault, at [121] noted that few customary interests in the foreshore and seabed would be capable of supporting a vesting order and an estate in fee simple. But Boast noted that this 'may well have been overstating the position". Contrast Richard Boast, *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 97, noting that this 'may well have been overstating the position.'
[538] Foreshore and Seabed Act 2004 (repealed) and Marine and Coastal Area (Takutai Moana) Act 2011, which repealed the Foreshore and Seabed Act 2004. Note that under the Takutai Moana Act 2011, s. 83, it is possible to acquire ownership of sub-surface minerals excepting 'Crown Mineral' under the Crown Minerals Act 1991.

rangatiratanga' and/or 'mana whakahaere tōtika' model. The proposition in New Zealand is that Indigenous rights reforms are largely directed at the recognition of a right to culture and right to property (in some instances) models, with little recognition of a right to tino rangatiratanga and mana whakahaere tōtika – shared governance jurisdiction models.[539] It is hoped that the new approach to co-governance structures that acknowledge the Māori constitutional partnership in the Treaty of Waitangi 1840 and that effectively incorporate mātauranga and tikanga Māori within an EBM context will shift the discourse further to the tino rangatira and mana whakahaere tōtika models of shared governance jurisdiction.

Māori have generally argued for tino rangatiratanga – exclusive political authority - and mana whakahaere tōtika - governance jurisdiction - over natural resources in both senses of political authority and proprietary rights, as noted above, in that they seek virtually all rights in relation to the resource. In other words, tino rangatiratanga and mana whakahaere tōtika subsume proprietary rights.[540] Tino rangatiratanga and mana whakahaere tōtika are moreover, at the heart of Te Tiriti o Waitangi and the growing 'principles of the Treaty of Waitangi jurisprudence', which are explored below in more detail.

Ownership is not the typical means by which Māori describe their rights to the coastal marine estate. However, it is the right to use, exclude and exploit the marine coastal estate that is the heart of the matter.[541] Property is sometimes referred to as a bundle of rights. As Paul McHugh opined: 'the essence of property was not the physical thing itself but the rights in relation to the thing; rights which other members of the particular society were bound to observe.'[542] In the 1999 High Court of Australia decision of *Yanner v Eaton*,[543] the Court observed:

> The word 'property' is often used to refer to something that belongs to another. But ... 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly

[539] On this debate, see Engle, K, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, Durham, 2010). Karen Engle has critiqued Indigenous rights movements for giving up 'strong self-determination claims' in favour of the right to culture category. See also Jung, C, *The Moral Force of Indigenous Politics* (Cambridge University Press, New York, 2008); and Erueti, A, 'UN Declaration on the Rights of Indigenous Peoples: A Mixed-Model Interpretative Approach,' (SJD Thesis, University of Toronto, 2016).

[540] The Tribunal held that 'te tino rangatiratanga was *more than ownership:* it encompassed the autonomy of hapu to arrange and manage their own affairs in partnership with the Crown.' Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 100.

[541] Generally, property includes the following rights: the right to use or enjoy the property, the right to exclude others, and the right to sell or give away. See, *Milirrpum v Nabalco* (1971) 17 FLR 141, 171 (Blackburn J). See also Kevin Gray, 'Property in Thin Air,' in *Cambridge Law Journal*, (Vol. 50, 1991) at 252.

[542] McHugh, P, *The Māori Magna Carta* (Oxford University Press, Auckland, 1991) at 73. This notion of a bundle of rights is the conception applied in thinking about the content of 'native title' in Australia as opposed to a 'right in land' approach, which presupposes an underlying title to which are attached pendant rights. See *Western Australia v Ward* [2002] HCA 28, (2002) 191 ALR 1. For the development of the 'bundle of rights' approach, see O'Connor, P, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking" *Monash University Law Review* (Vol. 36, 2011) 50 at 54–56.

[543] *Yanner v Eaton* [1999] HCA 53, (1999) 201 CLR 351 at 365-366.

exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'. [544]

As noted above, the prospect of exclusive Māori property interests in the foreshore and seabed, while not clear, was too much for the government of the day, who overrode the decision by hastily enacting the controversial Foreshore and Seabed Act 2004.

Foreshore and Seabed Act 2004

The Foreshore and Seabed Act 2004 (now repealed) extinguished Māori common law aboriginal title rights in the foreshore and seabed and replaced them with full Crown title, which Moana Jackson declared was in effect a confiscation that clearly breaches Articles II and III, Treaty of Waitangi and standard common law rules.[545] There was however, some recognition of limited customary rights in the legislation but the onus was high. Māori claimant groups had to establish that their rights and title in the foreshore and seabed existed prior to 1840 and continue uninterrupted up to the present day. Section 39, Foreshore and Seabed Act 2004 stated:

> Determination of applications for ancestral connection orders:
>
> > The Māori Land Court may make an ancestral connection order only if it is satisfied that the order will apply to an established and identifiable group of Māori –
> > a) whose members are whānaunga; and
> > b) that has had since 1840, and continues to have, an ancestral connection to the area of the public foreshore and seabed specified in the application.

A customary rights order was defined in the s. 5 as a public foreshore and seabed customary rights order made by either the Māori Land Court under s. 50; or the High Court under s. 74. Section 50 stated:

> Determination of applications for customary rights orders
> (1) The Māori Land Court may make a customary rights order, but only if it is satisfied that, in accordance with the provisions of section 51,—
> (a) the order applies to a whānau, hapū, or iwi; and
> (b) the activity, use, or practice for which the applicant seeks a customary rights order—
> (i) is, and has been since 1840, integral to tikanga Māori; [emphasis added] and
> (ii) has been carried on, exercised, or followed in accordance with tikanga Māori in a substantially uninterrupted manner since 1840, in the area of the public foreshore and seabed specified in the application; and
> (iii) continues to be carried on, exercised, or followed in the same area of the public foreshore and seabed in accordance with tikanga Māori; and

[544] Above.
[545] Jackson, M 'An Analysis of the Foreshore and Seabed Bill' (Māori Law Commission, Wellington, May 2004) at 1.

(iv) is not prohibited by any enactment or rule of law; and

(c) the right to carry on, exercise, or follow the activity, use, or practice has not been extinguished as a matter of law

Section 51 added:

> Basis on which customary rights orders determined by Māori Land Court
> (1) For the purpose of section 50(1)(b)(ii), an activity, use, or practice has not been carried on, exercised, or followed in a substantially uninterrupted manner if it has been or is prevented from being carried on, exercised, or followed by another activity authorised by or under an enactment or rule of law.

Under these sections, Māori groups could apply to the Māori Land Court for a customary rights order to recognise a particular activity, use or practice carried out in an area of the coastal marine area. These were non-territorial customary title rights that related to an activity and not ownership.

Applying an English common law approach to New Zealand over the marine and coastal estate is not appropriate for our country, which is an Island state. We depend on our coastal marine estate. Elias CJ affirmed in *Attorney-General v Ngāti Apa*[546] that the common law in New Zealand is different to other common law countries when noted:

> But from the beginning of the common law of New Zealand as applied in the Courts, it differed from the common law of England because it reflected local circumstances.[547]

Chief Justice Elias continued:

> Any prerogative of the Crown as to property in the foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage recognising property in the foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been lawfully extinguished. The existence and extent of any such property interest is determined by application of tikanga.[548]

The common law of New Zealand is not the same as the common law of England or Canada, the USA or Australia for that matter, because it reflects local circumstances. Two such local circumstances that make the New Zealand legal system distinct and unique are He Whakaputanga o Te Rangatiratanga o Niu Tireni, The Declaration of Independence 1835, and Te Tiriti o Waitangi/the Treaty of Waitangi 1840, and the affirmation therein of mātauranga and tikanga Māori customary law and shared governance jurisdiction.

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[546] [2003] 3 NZLR 577.
[547] Above, at 652, para. 17.
[548] Above, at 660, para. 49.

The next section will now explore this notion of mana whakahaere tōtika – shared governance jurisdiction – in more detail within an international law and human rights context.

I. Mana Whakahaere Tōtika - Governance Jurisdiction, International Law and Self-Determination

Mana whakahaere tōtika can be translated as, inter alia, Māori governance jurisdiction[549] which describes the right, relationship and responsibility of Māori to govern themselves, to make decisions for the future, and to exercise a full range of political and legal authority with people, land, and resources [550] including the coastal marine resources. [551] Māori rangatiratanga, mana motuhake, self-determination, self-governance and autonomy are synonymous with, and include elements of, mana whakahaere tōtika - jurisdiction.

A significant dimension to any Treaty and aboriginal rights claims in New Zealand, Canada, Australia and elsewhere will be human rights law. In over-throwing the doctrine of *terra nullius* in Australia, Justice Brennan in *Mabo (No.2)*,[552] noted the need to ensure that the common law kept abreast with developments in international law human rights law especially nondiscrimination principles. Similarly, international human rights bodies have relied on the principle of equality to recognize Indigenous rights to land.[553] The New Zealand Supreme Court has also noted the significance of these international developments in cases relating to Māori customary rights.[554] The recognition of the right to ownership of land follows from the right to equality in that Indigenous rights to land – even though *sui generis* (special) given their basis in Indigenous rights land tenure – ought to be accorded the same status and respect as non-Indigenous peoples' property.[555]

In international law, the status of Indigenous self-governance exists in this field of human rights and is referred to as an integral aspect of the wider human right of self-determination. In the Western tradition, ideas of human rights can be traced back to the Greek philosophers Aristotle, Socrates and Plato who were concerned with the position of the individual in

[549] Some references on historic Māori governance jurisdiction models include Cox, L, *Kotahitanga*: *The Search for Māori Political Unity* (Oxford University Press, Auckland, 1993); O'Malley, V, *Agents of Autonomy: Māori Committees in the Nineteenth Century* (Huia, Wellington, 1998), Joseph, R, *The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852* (Te Mātāhauariki Research Institute, University of Waikato, 1998); Hill, R, *State Authority, Indigenous Autonomy: Crown-Māori Relations in New Zealand/Aotearoa 1900-1950* (Victoria University Press, Wellington, 2004); 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, Wellington, 2014) and Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake,* (Wai 2417, Waitangi Tribunal Report, 2015).

[550] Menczer, M, 'Strategies on Implementing Self-Government' (Unpublished Research Paper, Canada, March 29, 2012).

[551] See Penikett, T, *Six Definitions of Aboriginal Self-Government and the Unique Haida Model,* (Action Canada, B.C, September 2012) and Holling, C, Meffe, G, 'Command and Control and the Pathology of Natural Resource Management' in *Conservation Biology* (Vol. 10, 1996) at 328-337.

[552] *Mabo v Queensland,* (1992) 175 C.L.R 1, 41-2

[553] The Awas Tingni community's Indigenous tenure was deserving of the same equal protection as non-Indigenous tenures. See I/A HR Court, *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua,* Series C (No. 79) (2001) (Awas Tingni).

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

[555] Note also the right to culture in s 20, New Zealand Bill of Rights Act 1990.

relation to the functioning of civil society. All believed to some degree that a higher good existed against which all human conduct could be measured and their writings laid the foundation for the development of the notions of natural and immutable laws, which form part of Roman law. The Greek philosophers understood that certain rights and obligations attached to individuals because they were human but these rights and duties were confined to only some classes of people as they have been in modern Western history. Still, from these origins the concept has evolved and extended to more categories of 'people.'

Cicero, Gaius and Justinian argued that there were laws which, by virtue of universal reason, were applicable to all people. These ideas of natural law subsequently assumed a theological dimension when early Christian philosophers, such as St. Augustine and St. Thomas Aquinas, maintained that natural law was that part of God's law, which could be discovered through the application of human reason. Man-made laws could thus be tested against natural law and, if found wanting, could be regarded as unjust, illegitimate and void. People were not, therefore, obliged to obey laws that offended against the natural law.

The development of human rights, as the term is known today, originated within the context of the nation-state as people attempted to impose legal restraints upon the power of the rulers to govern.[556] Among the first domestic documents referred to as a human rights instrument is the Magna Carta in 1215. His nobles forced this law on King John of England and it contains principles concerning the right to due process through a fair trial and is still evident in modern human rights instruments. Among the many themes of natural law is the idea that all human beings are endowed with unique identity, an idea which Christianity emphasised and continues to emphasise with the tenet that the human being is important in the sight of God.

After the Renaissance, secular scholars severed the theistic element from natural law. Hence, major developments in the domestic protection of human rights occurred during the 17th and 18th centuries with the emergence of revolutionary democracy in England, America and France. John Locke argued that all individuals were endowed by nature with the inherent rights to life, liberty and property and his natural rights theory exercised a profound influence over political thinking on the American Declaration of Independence 1776 and the French Declaration of the Rights of Man and of Citizens 1790.

The English 'Glorious Revolution' of 1688 and the Bill of Rights 1689 that confirmed the subsequent constitutional settlement of 1689 placed the Crown under the authority of Parliament and gave voice to concerns which would today be placed within the category of human rights. These included the requirements that neither excessive bail be required nor excessive fines imposed, nor cruel and unusual punishment inflicted and that jurors ought to be duly empanelled and returned. Even today, the Bill of Rights 1689 is referred to in human rights litigation.[557]

While the English Revolution had been concerned with bringing monarchical absolutism under Parliamentary control, over 100 years later the American Revolution aimed at severing colonial rule. In today's human rights language, this might be an exercise of self-

[556] For a good discussion of these human rights issues specific to New Zealand, see New Zealand, *New Zealand Handbook of International Human Rights* (Ministry of Foreign Affairs and Trade, Wellington, 1998).
[557] See for example, *Fitzgerald v Muldoon* (1976) 2 NZLR 616 at 617 per Sir Richard Wild CJ and *Ministry of Transport v Noort* [1992] 3 NZLR 260, at 277 per Cooke P.

determination by which American colonies reconstituted themselves as independent nation-states. The Declaration of Independence 1776 was inspired by theories of the social contract and natural rights in its espousal of the equality of all people and their possession of 'inalienable rights' when it stated:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty and the pursuit of Happiness …[558]

The Bill of Rights 1791 substantiated these views by describing rights that are constitutionally protected by the United States of America. It consists, in fact, of a number of constitutional amendments that are well known outside of the United States itself. These include the First Amendment, which protects freedom of religion, freedom of the press, freedom of expression and the right of assembly, and the Fifth Amendment, which establishes the privilege against self-incrimination and due process of law.

Inspired by the American experience, the French revolutionaries demolished an autocratic system of government and tried to establish a more democratic order. The French Revolution of 1789 represents another variation on the theme of revolutionary democracy. Here, the revolutionaries overthrew the absolutist monarchy and replaced it with representative government. Again, the French Revolution was influenced by the ideas of the social contract and natural rights. The rights protected by the post-revolutionary settlement were contained in the Declaration of the Rights of Man and the Citizen 1789, which refers to man's 'natural and imprescriptible rights' such as freedom of opinion, the right to property, the presumption of innocence and a number of other fundamental freedoms. The Declaration clearly is a libertarian document, which affirms that liberty is being able to do anything that does not harm others, thus the exercise of the natural rights of every man has no bounds other than those that ensure other members of society enjoy these same rights. The fact that the French revolutionary government subsequently violated these rights during the Terror serves as a useful reminder that the statement of human rights in a constitutional document does not guarantee their application in the hearts and attitudes of people.

Clearly, the American Declaration of Independence, the United States Bill of Rights, and French Declaration bear some of the features of modern human rights documents. Their tone and content foreshadow the Universal Declaration of Human Rights adopted almost 200 years later. Indeed, the contours of the Canadian Constitution Act and Charter of Fundamental Rights and Freedoms 1982 and the New Zealand Bill of Rights Act 1990 share features of these 18th century documents.

The domestic development of human rights did not cease with the emergence of Western constitutional democracy. What are now referred to as civil and political rights had their origins in the constitutional revolutions, which shaped the mechanisms of governance of these western states. Various other nation-states adopted their own bills of rights as they became independent from their colonial rulers or revolutionised their systems of governance.

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[558] The American Declaration of Independence and Constitution 1776 (including the Bill of Rights) are conveniently set out in Foner, E & Garraty, J (eds) *The Reader's Companion to American History* (Houghton-Miflin, Boston, 1991) at 1189.

Developments in the early 20th century began to demonstrate concern not just with civil and political rights but also with economic, social and cultural rights. Mexico was the first nation-state to incorporate protection of such rights into their constitution but with the Russian Revolution of 1917 and its aftermath, economic, social and cultural rights began to assume greater importance.

Before World War II, neither the international community nor international law was much concerned with the question of human rights in any systematic way. The Treaty of Westphalia 1684 illustrated concern with the question of freedom of religion, and number of Treaties during the 19th and 20th centuries dealt with the abolition of slavery. These were the Treaty of Washington 1862, the Brussels Conferences 1867 and 1890 and the Berlin Conference 1885. A number of Treaties were also adopted to deal with the protection of individuals during times of armed conflict, especially the Geneva Conventions of 1864 and 1906 and The Hague Conventions of 1899 and 1907. The creation of what became known as the International Committee of the Red Cross as the body to supervise the implementation of the Geneva Convention 1864 may be seen as the first international institution having a human rights dimension.

After World War I, further Treaties were adopted under the auspices of the League of Nations, the predecessor of the present UN, to protect ethnic, religious and linguistic minorities. Generally speaking, they provided minorities with equality before the law, freedom of religion and the right to maintain their own educational establishments. Minorities could thus bring alleged violations before the League of Nations, commencing a process which, very occasionally, led to the Permanent Court of International Justice. But the obligations assumed under the various peace Treaties dwindled with the failure of the League itself. The 'Native Inhabitants' clause in the Covenant of the League of Nations was also devised as a means to protect the proposed right of self-determination for Indigenous peoples.

The International Labour Organisation's (ILO) role in the evolution of international human rights must not be overlooked. The creation of the ILO under the Treaty of Versailles 1919 marked the emergence of precursors of economic, social and cultural rights on the world stage, given the ILO's broad concern with social justice, including regulation of the hours of work, the provision of adequate wages, social security and the prevention of unemployment. Although the ILO's constitution eschews the term 'human rights' it in effect confirms economic, social and cultural rights at the international level.[559]

During this same period, President Woodrow Wilson of the United States popularised the term self-determination and laid the foundations for the modern international legal right, particularly given his focus on a right to democratic government. Wilson, however, preferred the term self-government to self-determination[560] and he prophetically stated in 1918:

> National aspirations must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril. … All well-defined aspirations shall be accorded the utmost satisfaction that can be accorded them

[559] For a good succinct summary of international human rights law in New Zealand, see Hunt, P & Bedggood, M 'The International Dimension of Human Rights Law in New Zealand' in *Rights and Freedoms: International Human Rights Law* (New Zealand, 1999) at 37 – 69.

[560] See Whelan, A, 'Wilsonian Self-determination and the Versailles Settlement' in *ICLQ* (Vol. 43, 1999) at 100.

> without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world.[561]

Wilson also promoted the concept of 'internal' self-determination – "the conviction that the only legitimate basis for government is the consent of the governed,"[562] which provided the ultimate justification for decolonisation. Wilson added that 'self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of democratic entitlement.'[563]

The real impetus, however, for the development of international human rights law, including self-determination, came with World War II. The various totalitarian regimes which came to power in the 1920s and 1930s adopted practices that led to the gross violation of human rights and the denial of life and freedom to millions of people. Testimonies and images of the victims of Nazi and other regimes' policies of genocide and extermination provided the moral impetus to place human rights at the forefront of the post-war settlement. It was against this backdrop that the United Nations Declaration of Human Rights was adopted in 1948.

Towards the end of World War II the United States, the United Kingdom, the Soviet Union and China released the proposals they had drafted for the establishment of a United Nations Organisation but the original proposals did not include any substantial material on human rights.[564] The rights of nation-states took precedence over individual's rights in this draft and the issue of colonial possessions was not raised. New Zealand was among an outspoken group of nation-states that called for stronger language on human rights based not only on the moral necessity of protecting such rights but on a widely held conviction that a regime which did not protect human rights, such as Nazi Germany, was likely to lead to international instability. There was also a resistance to domination by a small group of powerful nation-states and a desire for a representative organisation that reflected the diverse range of member countries. In his opening statement at the San Francisco Conference in 1945, the New Zealand Prime Minister, Peter Fraser, declared:

> Unless in the future we have the moral rectitude and determination to stand by our engagements and our principles then the procedures laid down in this new Organisation will avail us nothing; the suffering and the sacrifices our peoples have endured will avail us nothing; and the countless lives of those who have died in this struggle for security and freedom will have been sacrificed in vain. This is a moment in time, which will not recur in our lives, and it may never recur again. The world may well be bound for all time by what we, who are here today, make of our heavy and onerous responsibility here and now. It is my deep fear that if this fleeting moment is not captured the world will again relapse into another period of disillusionment, despair and doom. This must not happen.[565]

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[561] Hannum, H 'Rethinking Self-determination' in *Virginia Journal of International Law* (Vol. 34, 1993) at 3.
[562] Above.
[563] Above.
[564] This proposal was collectively known as the Dumbarton Oaks Draft.
[565] New Zealand, *New Zealand Handbook of International Human Rights* (Ministry of Foreign Affairs and Trade, Wellington, 1998) at 15.

The final version of the United Nations Charter (the Charter) amplified this sentiment, opening with the words, 'We the peoples of the United Nations … reaffirm faith in fundamental human rights.' No nation-state voted against the adoption of the Declaration although a handful abstained.[566] The Charter obligates nation-states to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.[567] In relation to specific international human rights instruments, it is clear that self-determination has undergone significant evolution, since the principle was expressly referred to in the Charter.[568] Article 1 provided in part:

> The Purposes of the United Nations are: ... 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other measures to strengthen world peace.

However, the Charter did not explain what was meant by the term 'human rights' and more importantly, at the time of its adoption, it was intended that the UN Charter recognise a right to self-determination in limited circumstances. Specifically, self-determination was to be expressly recognised for those colonised peoples in the Non-Self-Governing Territories[569] and Trust Territories referred to in the Charter.[570]

The real breakthrough for international human rights came in 1948 when the UN adopted the Universal Declaration of Human Rights (sometimes referred to as the International Bill of Rights), which outlined the human rights and fundamental freedoms to which all individuals are entitled. The Universal Declaration is often referred to as the touchstone of human rights in the modern world and can certainly be regarded as an authoritative interpretation of the references to human rights in the UN Charter. The Declaration includes what the Charter omits – it sets out in some detail the meaning of the Charter's phrase 'human rights and fundamental freedoms' by enumerating classic civil, political, social, cultural and economic rights. The text of the Declaration has great moral force and has had a profound influence on the world. One of its architects, Eleanor Roosevelt, suggested the Declaration might become 'the Magna Carta of all mankind.'[571] Many of its provisions have since become accepted as binding in international law.

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[566] The abstaining nation-states were South Africa, Saudi Arabia and the socialist bloc of the USSR, Ukraine, Byelorussia, Czechoslovakia, Poland and Yugoslavia.

[567] Charter of the United Nations*,* Art 1, para. 2

[568] Charter of the United Nations*,* Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993. Signed at San Francisco on June 26, 1945; entered into force on October 24, 1945. Signed by Canada on June 26, 1945 and ratified on November 9, 1945. The Charter was signed and ratified by New Zealand that same year. For an article-by-article commentary on the Charter, see Cot, J. -P. & Pellet, A. (eds.), The Charter of the United Nations (Éditions Economica, Paris, 1985).

[569] Hannum, H, 'Rethinking Self-determination,' in *Virginia Journal of International Law* (Vol. 34, 1993) at 40, where it was noted that 105 territories have been designated by the U.N. General Assembly as non-self-governing and that 18 remained in that category as of late 1993.

[570] Articles 73 & 76.

[571] U.N. General Assembly, 3rd Session, 180th Plenary Meeting (1948) at 862.

In 1960, the Declaration on Independence to Colonial Peoples[572] addressed specifically the issue of colonisation and self-determination with the unanimous adoption of Resolution 1514 (XV). Para. 2 of the 1960 Declaration provided:

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

However, it is generally viewed that the 1960 Declaration was not intended to extend to peoples in independent states. The 1960 Declaration only referred specifically to taking immediate steps in 'Trust and Non-Self-Governing Territories or any other territories which have not yet attained independence.'[573] Belgium unsuccessfully maintained that since all native (Indigenous) peoples with a 'backward culture' were protected under the post-World War I League of Nations, they should have been protected under the UN.

Human rights protecting minorities and individuals against discrimination within nation-states were developed with the adoption of the United Nations Declaration in 1963 and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1965.[574] In 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[575] and the International Covenant on Civil and Political Rights (ICCPR)[576] both provided in identical terms for the right to self-determination as a human right.[577] Article 1 of both Covenants provides that:

1. All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having a responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote

[572] Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N.G.A. Resolution 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684, adopted on 14 December 1960.
[573] Para. 5.
[574] The Convention was signed by Canada and New Zealand in 1966 and ratified by Canada in 1970 and New Zealand in 1972. Australia ratified the Convention in 1975.
[575] *International Covenant on Economic, Social and Cultural Rights,* G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16), 49, U.N. Doc. A/6319 (1966); Can. T.S. 1976 No. 46. Adopted by the General Assembly on 16 December 1966 and entered into force on 3 January 1976. The Convention was ratified by Australia on 10 December 1975, Canada on 19 May 1976 and New Zealand on 28 March 1979.
[576] *International Covenant on Civil and Political Rights* (1966), G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). Adopted by the U.N. General Assembly on 16 December 1966 and entered into force 23 March 1976. The Convention was ratified by Canada on 19 August 1976, New Zealand in 1978 and Australia on 13 November 1980.
[577] On self-determination being a human right, see Thornberry, P. 'The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism' in Tomuschat, I (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Boston, 1993) at 111.

> the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Although the International Covenants did not include any restrictions, some authors indicate that it is only for the liberation of colonial peoples. Others indicate that the right to self-determination extends beyond colonial peoples and is universal.[578] By 1970 it was increasingly evident in the Declaration on Friendly Relations[579] that the right to self-determination, in both its internal and external aspects,[580] was not intended to be limited to colonial peoples. Rather, in view of its overall scope, the 1970 Declaration is believed to recognise self-determination as a universal right. Under the heading entitled 'principle of equal rights and self-determination of peoples,' the 1970 Declaration provided:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Moreover, the above paragraph was qualified by the following:

> Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory[581] without distinction as to race, creed or colour.

In 1975, the right to self-determination was expressed in broad terms in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act).[582] In 1990, the

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[578] Hannum, H 'Rethinking Self-determination' in *Virginia Journal of International Law* (Vol. 34, 1993) at 19; Rosas, A. 'Internal Self-Determination' in Tomuschat, I (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Boston, 1993); and Thornberry, P. 'Self-Determination, Minorities, Human Rights: A Review of International Instruments', in *Int'l & Comp. L. Q.* (Vol. 38, 1989) 867 at 878.

[579] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971). Reprinted in *I.L.M*. (Vol. 9, 1970) 1292.

[580] Above.

[581] This requirement of 'representing the whole people belonging to the territory' was reiterated at the World Conference on Human Rights in 1992 in Vienna. See *Vienna Declaration and Programme of Action: Note by the Secretariat,* World Conference on Human Rights, U.N. Doc. A/CONF.157/23, (1993), para. 2, at 4.

[582] *Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act),* signed by 35 states (including Canada, New Zealand and the United States) on August 1, 1975. Reprinted in *I.L.M*. (Vol. 14, 1975) 1295. Principle VIII refers to the 'principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.' However, this Act, despite its political importance, is considered to be legally non-binding. Hannum, H, *Autonomy, Sovereignty and Self-Determination,* (Philadelphia, University of Pennsylvania Press, 1990) at 28.

Charter of Paris[583] reaffirmed the commitment of states to the Principles in the Helsinki Final Act, including the right to self-determination.

At the regional level, Article 20(1) of The African Charter of Human and Peoples' Rights states:

> All peoples have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.[584]

UNDRIP 2007 and Self-Determination

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[585] has been heralded as a 'landmark' achievement for Indigenous peoples.[586] With UNDRIP's adoption by the UN General Assembly in 2007 by 143 states, international Indigenous rights has become a significant field in international law. UNDRIP also reflects the current priorities of the international community for Indigenous peoples as well as the current direction of customary internal law in respect to basic Indigenous human rights and minimal international standards for recognising and realising these rights.

To these ends, UNDRIP opens with general statements regarding the rights of Indigenous peoples that are recognised in international human rights law and then focuses on self-determination, which Anaya noted is:

> … a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies.'[587]

UNDRIP explores more fully the right of Indigenous peoples to self-determination and reflects the growing acknowledgement that Indigenous peoples' self-determination and self-government are basic human rights.[588] Although other international treaties, standards and policies on Indigenous rights exist, notably International Labour Organization Convention No

[583] *Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity,* 21 November 1990, reprinted in (1991) 30 I.L.M. 190. The Charter is a document of the Conference on Security and Co-operation in Europe (CSCE) and is considered to be legally non-binding. The CSCE is now called the Organization on Security and Co-operation in Europe (OSCE).

[584] Article 20(1) *The African Charter on Human and Peoples' Rights, 1981.* Cited in Brownlie, I, *Basic Documents on Human Rights* (Clarendon Press, Oxford, 1992) at 551.

[585] United Nations Declaration on the Rights of Indigenous Peoples 2007.

[586] Charters, C, 'The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples,' in *New Zealand Yearbook of International Law,* (Vol. 4, 2007) at 121; and Charters, C and Stavenhagen, R, *Making the Declaration Work* (IWGIA, 2009).

[587] Anaya, J, *Indigenous Peoples in International Law* (2nd Ed, Oxford University Press, Oxford, 2004) at 98.

[588] See Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Cree and Cree Territory into a Sovereign Quebec* (Grand Council of the Crees, Nemaska, Quebec, 1995) at 49. See also the discussion on the *Draft Declaration on the Rights of Indigenous Peoples* at chapter 4.

169,[589] no other international instrument provides such robust protections for groups within states. In this respect, Article 3, UNDRIP provides:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[590]

Article 3 restates the language in Article 1, International Covenant on Civil and Political Rights 1966 (ICCPR) and International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR), but with reference to Indigenous peoples. Despite the continuing controversy over the meaning of self-determination, as noted above, and whether it can apply to 'peoples' outside of the colonial context, Indigenous peoples succeeded in having it included in UNDRIP, albeit conditioned by states' rights to territorial integrity.[591] Furthermore, UNDRIP also includes the right to self-government;[592] historical redress;[593] the right to free, prior and informed consent (FPIC);[594] and the right to the recognition, observance and enforcement of treaties,[595] which may be viewed as the self-determination framework.

In addition to these breakthrough rights, there are many others that apply classic human rights to the circumstances of Indigenous peoples globally including the right to religion,[596] property,[597] and the right to practise and revitalize their cultural traditions and customs.[598] For example, the human right to property – which is normally directed at the right of individual ownership – is adapted to provide Indigenous peoples the collective right to the lands, territories and resources, which they have traditionally owned, occupied, otherwise used, or acquired.[599]

Indigenous peoples globally then share in a common struggle for the recognition and realisation of their rights including this right to self-determination through self-government and the right to representation through their own governance institutions. Articles 3-6 and 46 of UNDRIP refer to Indigenous peoples having the right to internal self-determination without threatening the territorial integrity of the nation-state and subject to individual and collective international human rights and good governance principles.

The right of self-determination however, is a highly contested evolving concept, as noted above, and will mean different things to different people depending on numerous factors but with power sharing – shared jurisdiction - as a salient point. A central issue is the recognition

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[589] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991). See also, Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) [ILO Convention No. 107].
[590] UNDRIP, Art 3.
[591] Art 46(3).
[592] Art 4.
[593] Art 5.
[594] At Art 10, 19 and 32.
[595] At Art 31.
[596] At Art 12.
[597] At Art 26.
[598] At Art 11.
[599] Art 26.

of the human right to self-determination through self-government, which ought to be, as a minimum, the power and authority - shared jurisdiction - of Indigenous peoples to govern themselves according to universal human rights and good governance principles.

Still, there is some debate about whether Indigenous self-determination is an endpoint or a means to an end. The endpoint argument tends to be based on the proposition that Indigeneity confers privileges akin to sovereignty in law, which embraces a higher order principle that endorses the right of Indigenous peoples to be self-directing and self-managing, regardless of other considerations. The means-to-an-end argument, on the other hand, recognises Indigenous self-determination as a way of achieving desired outcomes. Whatever the opinion, our view is that self-determination is more about achieving results in law and in fact that are relevant and beneficial in modern times. Articles 3-6, 18-20, 25, 26, 29, 32, 37, 38 and 46 of UNDRIP provide a basis for proclaiming self-determination as a right and responsibility, and for justifying self-determination as a vehicle for ongoing Indigenous development into the 21st century.

It is worth examining each of these UNDRIP articles to ascertain the latest scope, depth and breadth of this Indigenous human right to self-determination in public international law as well as to explore the opportunity for co-governed share jurisdiction in the implementation of EBM over the coastal marine environment in Aotearoa New Zealand. To these ends, Article 4 of UNDRIP states:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5:

> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 18:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20:

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 25:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 29:

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 32:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water and other resources
3. States shall provide effective mechanisms for just and fair redress for any such activities and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 37:

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States of their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

Article 38:

> States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 46:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.

The right of self-determination then is and will continue to be a highly contested evolving concept with shared jurisdiction power being a salient point. UNDRIP also offers supranational standards to guide states and Indigenous peoples in their quest to establish fair terms of co-existence and co-governance. And these standards can also be used by international bodies to evaluate and monitor New Zealand's compliance with international law Indigenous rights.

Still, given that international law has been more responsive to the developing and influential transnational discourse concerned with achieving peace and human rights,[600] the human rights discourse has conceptualised and contextualised the nation-state as an instrument rather than master of humankind. This discourse further seeks to define international norms not by mere assessment of nation-state conduct but rather by the articulation of the expectations and values of human beings. Moreover, this discourse expands the competency of international law over spheres previously reserved to the asserted sovereign prerogative of nation-states, which is a fundamental shift in policy and state practice.

The Declaration of Human Rights 1948 and other human rights instruments including UNDRIP have therefore established a universal platform for the fundamental human rights of all individuals. In addition, the human rights discourse has provided a means for Indigenous peoples to strengthen their marginalised positions within the nation-state. Having identified some of the international instruments that provide legal status for self-determination and, implicitly, self-governance and shared jurisdiction, it is important to acknowledge that there is strong debate regarding the scope of this right.

Internal Self-Determination

The focus on decolonisation ensured that the broad principle of self-determination was, in its application, fashioned into a narrower right of self-determination and independence for colonised peoples. The International Court of Justice in the 1975 *Western Sahara* decision expressed this view broadly as the 'freely expressed will of peoples.'[601] This view has an external and internal component – namely, peoples under colonial domination have the right to choose their external form, including the right to independence from the colonial state; the people within any state have the right as a whole to determine their own form of government and this is seen as a continuing right. Cassesse stressed:

> … [the] essence of self-determination lies not in the final shape in which self-determination is achieved … but in the method of reaching decisions based on the need to pay regard to the freely expressed will of peoples.[602]

International law then has provided little guidance regarding any preferred result of the exercise of internal or external self-determination. However, the range of possible options has included a number of options that may include independent statehood for the people concerned.[603]

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[600] See Claude, R & Weston, B (eds.) *Human Rights in the World Community: Issues and Action* (University of Pennsylvania Press, Philadelphia, 1992); Lutz, E, Hannum, H & Burk, K (eds.) *New Directions in Human Rights* (University of Pennsylvania Press, Philadelphia, 1989); Van Dyke, V *Human Rights, Ethnicity and Discrimination* (Greenwood Press, Connecticut, 1985); Dworkin, R *Law's Empire* (Belknap Press, Cambridge, Massachusetts, 1986).

[601] *Western Sahara Advisory Opinion*, 1975 ICJ Representative 12 (Oct 16). See Cassese, A, *The International Law of Self-determination* (Cambridge University Press, 1998) at 128.

[602] Cassese, A, *The International Law of Self-determination* (Cambridge University Press, 1998) at 359.

[603] Iorns, CJ 'International Standards and State Obligations Concerning Indigenous Peoples' Self-Determination and Cultural Survival' (Unpublished Paper for Te Mātāhauariki Institute, Laws and Institutions for a Bicultural Aotearoa/New Zealand, University of Waikato Programme, 1998) at 5.

Indigenous Peoples within separate states argued after both World Wars that their inherent right to self-determination be recognised by nation-states. Predictably, national self-determination for Indigenous peoples was rejected because, inter alia, of the feared violation of territorial integrity of the relevant states as a possible result of the exercise of the right of self-determination by Indigenous peoples within those states. Following World War I the 'Native Inhabitants' clause in the Covenant of the League of Nations was devised as the means to protect the thesis that the proposed right of self-determination be applied to Indigenous peoples.[604] This thesis was, however, defeated on the basis that states feared it would destroy the territorial integrity of the then present states and, thus, undermine state sovereignty. The international legal right of self-determination was explicitly declared to be inapplicable to Indigenous peoples and other minorities within states. Instead, the inclusion of explicit minority protections was held to be sufficient to remedy the problems that all minorities, including Indigenous peoples, faced.[605] The result was confirmed in 1984 by the Inter-American Commission on Human Rights (IACHR) of the Organisation of American States (OAS) regarding the Miskito Indians in Nicaragua. The IACHR denied that international law recognised the right of separate self-determination for Indigenous peoples on the basis that this would violate the territorial integrity of present states.[606]

Nation-states today still reject the notion that Indigenous peoples have the international legal right to self-determination because of fear of violation of territorial integrity and state sovereignty through secession. Indeed, this rejection of the right of self-determination has been manifested in the denial by states that Indigenous peoples are even included as 'peoples.' Any inclusion of Indigenous peoples as 'peoples' is countered by nation-states rejecting any implications that the inclusion might have, particularly in relation to international legal rights or the right of self-determination.[607]

Indigenous peoples inevitably and continually reject such conditions, arguing that they have an inherent right to control their own destiny and that states must recognise this in positive law. Anaya noted how one could distinguish between the substantive aspects of the general principle of self-determination and its application to individual cases where the standards have not been met. The narrower application that international law has currently concerned itself with has concerned what Anaya termed 'remedial prescriptions' for only certain situations of deviation from the relevant standards.'[608] Remedial prescriptions that undo colonisation have produced what states accept as the international legal right of self-determination. The rules about who may take advantage of the right (for example, who is considered to be a 'people') as well as the external and internal aspects of the process and result of the exercise are important as products of this particular remedy.

Hence, the international community can expand its understanding of the *right* for self-determination to apply the general *principle* of self-determination to a wider range of situations than classical colonialism, fashioning a new set of remedial standards for different

[604] Iorns, CJ 'Indigenous Peoples and Self-determination: Challenging State Sovereignty' in *Case Western Reserve Journal of International Law* (Vol. 24, 1992) 199 at 250-2.
[605] See for example, Article 27, International Covenant on Civil and Political Rights 1966.
[606] Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OAS Doc., OEA/Ser.L/V/II.62. Doc. 26 (1984).
[607] See for example, Article 1(3) of ILO Convention 169 on Indigenous and Tribal Peoples.
[608] Anaya, J, *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996) at 83.

situations. Thus, in some situations, such remedies need not include secession and the formation of new states.[609]

Some states have publicly agreed that the principle of self-determination can apply to Indigenous peoples but they emphasise that it cannot take priority over other principles of international law, such as the territorial integrity of present states and they explicitly limit the remedies entailed by the application of the general principle to what have traditionally been called the internal aspects of self-determination.[610] It is, however, significant that relevant states appear to accept that Indigenous peoples, collectively and individually:

> … [are] entitled to be full and equal participants in the creation of the institutions of government under which they live and, further, to live within a governing institutional order in which they are perpetually in control of their own destinies.[611]

Many states expressly refer to the *concept* of self-determination as applying to Indigenous peoples, as has the UN Human Rights Committee.[612] Furthermore, the rights of Indigenous peoples that have been recognised in the international sphere are based on and have been informed by the various aspects of the *principle* of self-determination. Such changes have led governments and others to attempt to define the requirements of self-determination in relation to Indigenous peoples. Madame Erica-Irene Daes, Chairperson of the UN Working Group on Indigenous peoples, argued that the principle of self-determination required the various parties in the nation-state to negotiate and undergo a process of 'belated state-building' in order to achieve the self-determination of Indigenous peoples.[613] Daes added:

> This would be a process through which indigenous peoples are able to join with all other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.[614]

Daes further elaborated on a 'new contemporary category' of the right of self-determination, as applied to Indigenous peoples:

> … [means] that the existing State has the duty to accommodate the aspirations of Indigenous peoples through institutional reforms designed to share power democratically. It also means that Indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and to exercise the

[609] Above, at 84.
[610] See for example, the inclusion of a right of self-determination for Indigenous peoples in the Declaration on the Rights of Indigenous Peoples 2007.
[611] Anaya, J, *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996) at 87.
[612] Above, at 86-7.
[613] Daes, E.I 'Some Considerations on the Rights of Indigenous Peoples to Self-Determination' in *Transnational Law & Contemporary Problems* (Vol. 3, 1993) at 1, 9.
[614] Above.

> right of self-determination by this means and other peaceful ways, to the extent possible.[615]

In drafting the UNDRIP, nation-states agreed with Daes' interpretation of self-determination as applied to Indigenous peoples. However, they have not accepted Daes' further suggestion that the application of self-determination should not be limited solely to internal aspects, but could encompass external remedies in certain circumstances, for example, situations that violate a state's territorial integrity.[616] Daes continued:

> The right of self-determination of indigenous peoples should ordinarily be interpreted as the right to negotiate freely their status and representation in the State in which they live.[617]

Anaya adopted this standard set by Daes of 'belated state building' as the relevant remedy for redress for the denial of Indigenous peoples' self-determination, emphasising that such processes of political change 'are to be developed in accordance with the aspirations of Indigenous peoples themselves.'[618]

The modern concept of self-determination is therefore concerned with the legitimacy of the institutions of the government of a people, including their initial constitution and their ongoing functioning. Indeed, Anaya identified the general norm of self-determination as 'a standard of governmental legitimacy based on the core concepts of human freedom and equality'[619] against which institutions of government can, and, indeed, ought to be monitored. The principle of self-determination is sufficiently broad to apply normatively to the global range of models of governance. Anaya argued that:

> … [despite] divergence in models of governmental legitimacy, there is an identifiable nexus of opinion and behaviour about the minimum conditions for the constitution and functioning of legitimate government.[620]

The international community again acknowledged Indigenous self-determination and sustainable development at the World Summit in Johannesburg in 2002 - which aligns with shared Māori governance jurisdiction within an EBM context over the marine estate – when they concluded:

> We reaffirm the vital role of the Indigenous peoples in sustainable development…. [and] recognise that sustainable development requires a long-term perspective and broad-

[615] Daes, E.I *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples* UN Doc. E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993) at 5.
[616] Iorns, CJ 'International Standards and State Obligations Concerning Indigenous Peoples' Self-Determination and Cultural Survival' (Unpublished Paper for Te Mātāhauariki Institute, Laws and Institutions for a Bicultural Aotearoa/New Zealand, University of Waikato Programme, 1998) at 21-3.
[617] Daes, E.I 'Some Considerations on the Rights of Indigenous Peoples to Self-Determination' in *Transnational Law & Contemporary Problems* (Vol. 3, 1993) at 5.
[618] Anaya, J, *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996) at 87.
[619] Anaya, J 'A Contemporary Definition of the International Norm of Self-determination' in *TCLP* (Vol. 3, 1993) 131 at 143.
[620] Anaya, J, *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996) at 77.

based participation in policy formulation, decision-making and implementation at *all levels* [emphasis added]. [621]

Right to Development

The Waitangi Tribunal, in its 1988 *Report on the Muriwhenua Fisheries Claim,* discussed the concept of a right to development in international law and specific principles concerning Indigenous Peoples' development. The Tribunal noted that 'all peoples have a right to development [which is] an emerging concept in international law following the UN Declaration on the Right to Development 1986,' and referred to its possible application to Indigenous peoples. [622] In the *Ngai Tahu Sea Fisheries Resource Report,* [623] the Tribunal adopted the public international legal right to development. In the *Te Whanganui-a-Orotu Report*[624] and the *Kiwi Marketing Report,*[625] counsel argued that the Crown breached New Zealand's obligations under the International Covenant on Civil and Political Rights 1996 (ICCPR) in respect of the right of Māori to enjoy their culture and the right to self-determination at international law. Moreover, the Tribunal enunciated the importance of international law on Indigenous peoples' rights in the *Taranaki Report*. Referring to Māori autonomy the Tribunal stated that:

> Māori autonomy is pivotal to the Treaty and to the partnership concept it entails. ... The international term for 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as First Peoples, and their rights to manage their own policy, resources, and affairs, within the minimum parameters necessary for the proper operation of the State.[626]

The work of the Tribunal has been accepted at the highest levels of the judiciary, including its decisions on some international law issues. A significant decision in this area was in 1997 in *The Taranaki Fish and Game Council v McRitchie*.[627] Becroft J adopted the approach of the Waitangi Tribunal, quoting at length the Tribunal's discussion of the emerging right to development in international human rights law in its *Muriwhenua Fishing Report.*[628] Based on the Tribunal's finding on the right to development, Becroft J allowed the defendant's fishing methods and extended the right to include fish species introduced since the Treaty.

In a Treaty of Waitangi settlement context, the Waitangi Tribunal has played a pivotal role. The Tribunal's research has deconstructed the grand narrative of domination by the state. Armed with Tribunal reports that validate their claims, groups such as Ngāi Tahu, Muriwhenua, Ngāti Whātua, Ngāti Tūwharetoa, Taranaki, Pouākani, Ngāti Maniapoto and others have been

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[621] Johannesburg Declaration on Sustainable Development A/CONF.199/20 at 25-26.

[622] Waitangi Tribunal *Report on the Muriwhenua Fishing Resource Claim* (G.P Publications, Wellington, 1988) at 235.

[623] Waitangi Tribunal, *Ngai Tahu Sea Fisheries Resource Report* (G.P Publications, Wellington, 1992) at 253, 259.

[624] Waitangi Tribunal, *Te Whanganui-a-Orotu Report* (G.P Publications, Wellington, 1995) at 161.

[625] Waitangi Tribunal, *Kiwi Marketing Report* (G.P Publications, Wellington, 1995) at 3.

[626] Waitangi Tribunal *The Taranaki Report Kaupapa Tuatahi* (G.P Publications, Wellington, 1996) at 5.

[627] *The Taranaki Fish and Game Council v McRitchie,* Wanganui District Court, unreported, 27 February 1997, ORN: 5083006813-14, per Becroft J (overturned by the High Court, 1998).

[628] Above, at 38 for Becroft J's discussion on the Waitangi Tribunal *Report on the Muriwhenua Fishing Resource Claim* (G.P Publications, Wellington, 1988).

able to claim the moral high ground based on sound and reliable research in negotiations with the Crown. Sir Robert Mahuta of Waikato-Tainui emphasised the impact of the Waitangi Tribunal and the judiciary upon the Waikato-Tainui settlement when he asserted:

> Without the claim to the Waitangi Tribunal, there would not have been a basis for the judgement of the Court of Appeal. Without the Court of Appeal, there would not have been the pressure on the government to negotiate. Without the negotiations, there would not have been a settlement.[629]

Once the Tribunal has established claimants' aboriginal and Treaty rights, they have been a persuasive component of the politics of embarrassment and as a level to influence government policy. In effect, the Tribunal has transformed non-justiciable rights into justiciable aboriginal and Treaty rights by applying, inter alia, international customary norms and provisions in its decision-making. In this context, it has been a potent influence on New Zealand jurisprudence for the recognition and incorporation of Māori as distinct peoples in the fabric of the New Zealand state[630] and for the recognition of Indigenous and human rights to self-determination and even shared Māori governance jurisdiction.

The nexus between human rights and development is best expressed in the Declaration on the Right to Development 1986, which states in Article 1:

> The right to development is an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

The other key instrument of course is UNDRIP 2007 particularly Article 3 right to self-determination as noted above which states:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[631]

While the full implications of a universal and inalienable right to development have yet to be ironed out, there is a clear connection between good governance, human rights, participatory development and development for all.[632] However, the extent to which economic, social and political activity can be said to represent real progress towards authentic power sharing, shared governance jurisdiction and Indigenous internal self-determination is debatable.

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[629] Mahuta, R 'Waikato: A Case Study of Tribal Settlement' (Address given at the Conference, 'Indigenous Peoples: Land, Resources, Autonomy,' Vancouver, 19-24 March, 1996) at 12.

[630] Havemann, P & Turner, K 'The Waitangi Tribunal: Theorising its Place in the Redesign of the New Zealand State' in *Australian Journal of Law & Society* (Vol. 10, 1994) at 165-93.

[631] UNDRIP, Art 3.

[632] See the United Nations Development Programme (UNDP) *Integrating Human Rights with Sustainable Human Development* (UNDP, Geneva, 1995).

Right to Choose

Cassesse argued that the principle of self-determination includes:

> The method by which States must reach decisions concerning peoples … [is] heeding their freely expressed will. In contrast, the principle neither points to the various specific areas in which self-determination should apply, nor to the final goal of self-determination (internal self-government, independent statehood, association with or integration into another State).[633]

Sanders acknowledged that most indigenous groups seek to wield greater control over matters such as natural resources, environmental preservation of their homelands, education, use of language, and bureaucratic administration or self-governance, in order to ensure their group's cultural preservation and integrity.[634] Durie aligned self-determination with Māori ownership and active control over the future. Māori self-determination aligns with at least two facets – the way in which control and authority is distributed within Māori society and the way in which Māori and the Crown share power.[635]

The Declaration on Friendly Relations 1970[636] recognised that the right to self-determination, in both its internal and external aspects,[637] was a universal right. Principle VIII of the Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act) provides:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

Cobo defined Indigenous Peoples' self-determination in his 1986 Report:

> In essence, it constitutes the exercise of free choice by indigenous peoples who must, to a large extent, create the specific content of this principle, in both its internal and external expressions.[638]

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[633] Cassesse, A *Self-determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) at 320.

[634] Sanders, D 'The U.N. Working Group on Indigenous Populations' in *Human Rights Quarterly* (Vol. 11, 1989) 406 at 429. See also Torres, R 'The Rights of Indigenous Peoples' in *Yale Journal International Law* (Vol. 16, 1991) at 142; and Stavenhagen, R 'Challenging the Nation-State in Latin America' in *Journal of International Law* (Vol. 45, 1992) at 436.

[635] Durie, M *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 46.

[636] UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971). Reprinted in *I.L.M*. (Vol. 9, 1970) 1292.

[637] Above.

[638] U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations,* U.N. Doc. E/CN.4/Sub.2/1986/7, Add. 4 (J. Cobo, Special Rapporteur), at paras. 579 & 580.

Williams, moreover, emphasised the right of Indigenous Peoples to self-determination, which, he noted, 'means choosing how to be governed'[639] while Juviler affirmed:

> The collective right to self-determination as spelled out in the International Human Rights Covenants ... means the right to the free choice of political status and economic, social, and cultural development.[640]

Cassesse concluded that self-determination includes the basic idea that a 'group must be able to exercise its own choice with regard to its political future.'[641] Sullivan concluded that self-determination primarily involves the right to be independent.[642] Sen asserted that development as freedom includes the freedom to choose[643] and Higgins declared that self-determination is the right to choose the form of their political and economic future.[644] Daes added:

> The right to self-determination is best viewed as entitling a people to choose its political allegiance, to influence the political order under which it lives, and to preserve its cultural, ethnic, historical, or territorial identity.[645]

Daes, moreover, highlighted the right of Indigenous Peoples to negotiate freely their political status:

> I believe that the right of self-determination should ordinarily be interpreted as the right of these [indigenous] peoples to negotiate freely their political status and representation in the States in which they live.[646]

Similarly, Walt van Praag declared:

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[639] Williams, S *International Legal Effects of Secession by Quebec* (York University Centre for Public Law and Public Policy, North York, Ontario, 1992) at 7.
[640] Juviler, P *Contested Ground: Rights to Self-Determination and the Experience of the Former Soviet Union* (Vol. 3, 1993) 71 at 72.
[641] Cassesse, D 'Rethinking Self-Determination: A Critical Analysis of Current International Law Theories,' in *Syracuse Int'l L. & Com.* (Vol. 18, 1992) 21, at 24.
[642] Sullivan, A 'Self-determination and Redistributive Justice: The New Zealand Māori' in *He Pukenga Kōrero* (Ngahuru (Autumn) Vol. 3, No. 2, 1998) at 57.
[643] Sen, A *Development As Freedom* (Knopf, New York, 1999).
[644] Higgins, R *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) at 118.
[645] Daes, E-I. 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' in *Transnat'l L. & Contemp. Probs.* (Vol. 3, 1993) 1 at 4-5.
[646] Above, at 9.

> The right to self-determination is thus more of a procedural than a substantive right: it guarantees a people the opportunity to make a choice and implement it. It does not prescribe what that choice should be.[647]

Even the European Parliament[648] adopted a resolution concerning Indigenous peoples that highlighted their 'right to choose' in determining the 'right to determine their own destiny by choosing their institutions and political status.'[649]

The nexus of self-determination and development therefore ought to convey a right to greater freedom and control, or authentic power sharing, within the political, legal, social, economic and cultural decision-making structures and institutions that affect the modern development of Indigenous peoples from Parliament right down to the local body and tribal levels.[650] Solomon even asserted that self-determination involves changing mainstream government structures to accommodate Māori aspirations and conveys a right for Māori to exercise greater control and self-governance over their own affairs in a manner that recognises and incorporates Māori customary values, laws and institutions adapted to suit the circumstances of today.[651]

It seems, therefore, that many Indigenous peoples globally are seeking clear and unequivocal confirmation of their right to self-determination, which includes a right to choose their governance structures, principles and processes through the laws and institutions of their community at least in the areas of political, economic, social, cultural and environmental development. Indigenous self-government through contemporary Treaty settlements is a means to this end. The power to choose, however, is the key. One is inclined to ask what self-determination options are available for Indigenous peoples to choose to govern themselves to actualise their self-determination rights and responsibilities to economic, social, political, cultural and environmental development?

Self-Government

Under international law, the status of Indigenous self-government also exists in the field of human rights. More specifically, self-government is perceived as an integral aspect of the wider human right to self-determination. The concept of self-determination has been held by Cassidy to involve the right of peoples 'freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.'[652] In the

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[647] Walt van Praag, M. 'The Position of UNPO in the International Legal Order' in Brōlmann, C; Lefeber, R and Zieck, M. (eds.), *Peoples and Minorities in International Law* (Kluwer Academic Publishers, Boston, 1993) at 319.
[648] The European Parliament is described in Shaw, M. *International Law,* (3rd ed.) (Grotius Publications, Cambridge, 1994) at 765. The European Parliament is one of the institutions of the European Community, the other institutions being the Council of Ministers, the Commission and the Court of Justice.
[649] *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples,* Eur. Parl. Doc. (PV 58) 2, (1994) at 3, para. 2.
[650] Solomon, M 'The Context for Māori' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 63.
[651] Above.
[652] Cassidy, F (ed) *Aboriginal Self-Determination* (Co-published Lantzville, B.C; Halifax, Nova Scotia; Oolichan Books; The Institute for Research on Public Policy, 1991) at 191.

1991 UN Report on Indigenous Autonomy and Self-Government,[653] it was noted that Indigenous peoples have 'the right to self-determination, including the right of autonomy, self-government, and self-identification.'[654] One recommendation from this report included:

> Indigenous peoples have the right to self-determination as provided for in the International Covenants on Human Rights and public international law and as a consequence of their continued existence as distinct peoples. … An integral part of this is the inherent and fundamental right to autonomy and self-government.[655]

Self-government then can be described as one aspect of self-determination and it follows that self-government assumes implicit legal status at international law.[656] Durie added that Indigenous peoples assume the status of nationhood when they identify themselves as the original inhabitants of a land who wish to preserve their cultural heritage towards some form of self-government based on the principle of self-determination.[657]

As with standards relating to cultural integrity, the international standards relating to indigenous self-government are clear in terms of general principles but much less so on specific duties. Some international decision-making bodies have found it necessary in some cases to uphold the cultural integrity of particular Indigenous Peoples by suggesting autonomy and self-government arrangements. The norms relating to self-government continue along these lines but focus on what is required for political self-determination.

In terms of general principles, Anaya noted that the principles of political participation under democracy (including decentralisation) and cultural pluralism have resulted in acceptance of the general principle that Indigenous peoples are entitled to 'spheres of governmental or administrative autonomy for Indigenous communities' as well as 'effective participation of those communities in all decisions affecting them that are appropriated by the larger institutions of government.'[658] The right of Indigenous peoples as groups to full and effective participation in the national political order is a comparatively easily accepted standard, following on from general democratic rights of individuals to participate as modified in accordance with the right of the group as a whole to integrity which is provided for in ILO Convention 169, which is considered representative of customary international law.

While statements of a right of Indigenous peoples to participation as groups in the national political order is accepted comparatively easily, nation-states 'increasingly have expressed agreement that Indigenous peoples are entitled to maintain and develop their traditional institutions and to otherwise enjoy autonomous spheres of governmental authority appropriate to their circumstances.'[659] This is consistent with the decisions of the Human

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[653] UN Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government* (E/CN.4/1992/42, Nuuk, Greenland, September 24 – 28, 1991).
[654] Above.
[655] Above.
[656] Shortall, S.A 'Aboriginal Self-Government in Aotearoa/New Zealand: A View Through the Canadian Lens' (Unpublished LLM Thesis, University of Calgary, Edmonton, 1996) at 69 – 70.
[657] Durie, M 'Tino Rangatiratanga: Māori Self-Determination,' in *He Pukenga Korero* (Spring, Vol. 1, No. 1, 1995) at 48.
658 Anaya, J, *Indigenous Peoples in International Law,* (2nd Ed, Oxford University Press, Oxford, 2004) at 110.
659 Above, at 111.

Rights Committee and the Inter-American Commission on Human Rights (IACHR), suggesting that autonomy may be required in order to uphold cultural integrity, depending on the circumstances. Thus, autonomy and self-government may or may not be seen as a right of the people concerned but it is seen at least as an appropriate remedial measure, in some circumstances, to achieve self-determination, both constitutive and ongoing. Anaya concluded on self-government:

> International law does not require or allow for any one particular form of structural accommodation for all indigenous peoples – indeed, the very fact of diversity of indigenous cultures and their surrounding circumstances belies a single formula. The underlying objective of self-government, however, is that allowing indigenous peoples to achieve meaningful self-government through political institutions that reflect their specific cultural patterns and that permit them to be genuinely associated with all decisions affecting them on a continuous basis. Constitutive self-determination, furthermore, requires that such political institutions in no case be imposed upon indigenous peoples but rather be the outcome of procedures that defer to their preferences among justifiable options.[660]

What Relevance does International UN Instruments have for New Zealand?

As a UN Declaration, the orthodox position of UNDRIP is similar to the Treaty of Waitangi historically, it is soft law and non-binding on states unless it is incorporated into domestic legislation. [661] The doctrine of Parliamentary sovereignty also limits any effect that international instruments may have on domestic matters.[662] Some states have incorporated UNDRIP into national constitutions such as Bolivia, Ecuador and the Congo in Africa.[663]

Some case law in New Zealand is also incorporating and referencing public international law including UNDRIP such as the 2012 Supreme Court decision of *Takamore v Clarke.* [664] A common law principle of statutory interpretation also recognises that Parliament is presumed not to legislate intentionally in breach of its international law obligations,[665] which includes use of administrative law principles for example to treat unincorporated international obligations as considerations for a decision maker and the presumption of consistency to import the rights and principles articulated in UNDRIP. In addition, the 2014 World Conference on Indigenous Peoples further provided:

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[660] Above.

[661] See Brownlie, I, *Principles of International Law,* (7th Ed., Oxford University Press, Oxford, 2008) at 4.

[662] See the International Law Association, 'The Hague Conference Rights of Indigenous Peoples Interim Report,' (2010) online at: www.ila.org/.../9E2AEDE9-BB41-42BA-9999F0359E79F62D (Accessed 2019).

[663] See for example, New Political Constitution of the State Act (Bolivia), s. 1(1), Art. 2.

[664] [2012] NZSC 116 at 12 and 35. Belize has also incorporated UNDRIP into significant case law such as *Cal & Ors v Attorney-General of Belize & Ors,* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct.) at 132.

[665] See Joseph, P, *Constitutional and Administrative Law in New Zealand,* (3rd Ed. Brookers, Wellington, 2007) at 533. See also Durie, E, Joseph, R, Erueti, A, Toki, V, Ruru, J, Jones, C & Hook, R*, 'Ngā Wai o Te Māori: Ngā Tikanga me Ngā Ture Roia: The Waters of the Māori: Māori Law and State Law,'* (Report Prepared for the New Zealand Māori Council, for the Waitangi Tribunal Fresh Water and Geothermal Resources WAI 2358 Inquiry, 23 January 2017).

> We request the Secretary-General, in consultation and cooperation with indigenous peoples, the Inter-Agency Support Group on Indigenous Peoples' Issues and Member States, to begin the development, within existing resources, of a system-wide action plan to ensure a coherent approach to achieving the ends of the Declaration [UNDRIP] and to report to the General Assembly at its seventieth session. Through the Economic and Social Council, on progress made.[666]

A system-wide action plan was subsequently developed to ensure the ends of UNDRIP are achieved. Thus despite the unclear legal nature of UNDRIP, an action plan agreed by states will be implemented to ensure the basic human rights articulated in UNDRIP are achieved.[667] New Zealand will be one of many states that will be required by the international community to adhere to this action plan for implementing UNDRIP.

However, one challenge of many for New Zealand as with other states with comprehensive rights protections is that they can fail to fully implement them or argue that the rights (such as UNDRIP rights) have been fulfilled when the case is not clear. States may prefer majority interests of elites over marginalised groups such as Indigenous peoples[668] as was the case with the Government's response to *Ngati Apa* in enacting the rushed through Foreshore and Seabed Act 2004 and more recently, the 2016 Kermadecs Sanctuary Proposal. Moreover, there may be significant gaps in the domestic Indigenous rights architecture. UNDRIP offers supranational standards to guide states and Indigenous peoples in their quest to establish fair terms of co-existence. And these standards can also be used by international bodies to evaluate and monitor New Zealand's compliance with international law on Indigenous rights and responsibilities such as the proposed UNDRIP action plan noted above.

UNDRIP addresses claims to property as noted above and further in this report. In addition, UNDRIP addresses the public law or political dimension of Indigenous peoples' interests in natural resources including the coastal marine estate. UNDRIP for example endorses the right to self-determination, self-government and free, prior and informed consent (FPIC). The Government dismisses these rights as non-binding 'aspirations.' As a matter of international law, UN General Assembly declarations such as UNDRIP are non-binding. However, the UN Special Rapporteur on the rights of Indigenous peoples and pre-eminent international law scholar, James Anaya, asserted that 'to say simply that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight.'[669] As noted by the UN Office of Legal Affairs, 'in United Nations practice, a 'declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting

[666] A/Res/69/2 at 31.

[667] Iorns, C, 'The Fragile Rights of the Indigenous Pacific Peoples – Navigating International Instruments,' (Unpublished Research Paper, 2018) at 7-8.

[668] A useful example, and one that encouraged many Indigenous advocates in Aotearoa New Zealand to pay greater attention to international human rights, was the government response to *Attorney-General v Ngati Apa* decision which held that Māori might possess exclusive property in New Zealand's coastal waters. See Charters, C and Erueti, A, *Māori Property Rights and the Foreshore and Seabed* (Victoria University Press, 2007).

[669] Report of the UN Special Rapporteur on the rights of Indigenous peoples, James Anaya, to the UN General Assembly (2013) A/68/317.

importance where maximum compliance is expected.'[670] Many of the rights expressed in UNDRIP then – including the right to self-determination -- reflect rights and freedoms included in widely ratified human rights treaties such as, for example, rights to non-discrimination, culture, property and the right to self-determination as set out in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

New Zealand has ratified both UN conventions. Indeed, several rights in UNDRIP are considered to have the status of customary international law, according to some commentators.[671] Dr Claire Charters for example, asserted that UNDRIP has acquired significant legitimacy as a result of the process by which it was drafted and then adopted.[672] Charters points to the fact that the process followed in its development and adoption was fair and robust. For example, the substance of UNDRIP was debated for over two decades and included states, Indigenous peoples, international institutions, non-governmental organisations and academics amongst others. Charters also argued that the substance of UNDRIP is equally legitimate, responding, in part, to historical discrimination against Indigenous peoples under colonial regimes and international law. Macklem, when reviewing the development of international Indigenous rights, similarly argued that they serve the purpose of remedying international law's denial of their right as peoples to sovereignty. Indeed, Macklem asserted:

> Indigenous communities that manifest historical continuity with societies that occupied and governed territories prior to European contact and colonization … are located in States whose claims of sovereign power possess legal validity because of international law's refusal to recognize these peoples and their ancestors as sovereign actors. What constitutes indigenous peoples as international legal actors, in other words, is the structure and operation of international law itself.[673]

Self-determination is the linchpin but other related rights in the self-determination framework include the right to free, prior and informed consent (FPIC). The right to FPIC is cited several times in UNDRIP. Article 19 for example, specifically addresses the requirement to obtain Indigenous peoples' FPIC before adopting any measure:

> Article 19
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free,

[670] Economic and Social Council *Report of the Commission on Human Rights* (18th Sess, March-April 1962) UN Doc E/3616/Rev 1, para 105.
[671] Weissner, S, 'Indigenous Sovereignty: A Reassessment in the Light of the UN Declaration on the Rights of Indigenous peoples,' *Vanderbilt Journal of Transnational Law,* (Vol. 41, 2008) at 1141.
[672] Charters, C, 'The Legitimacy of Indigenous Peoples' Norms under International Law,' (PhD Thesis, January 2011).
[673] Macklem, P, *The Sovereignty of Human Rights* (Oxford University Press, New York, 2015) at 135.

prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[674]

States were generally opposed to the inclusion of FPIC in UNDRIP, arguing that it provided Indigenous peoples with a right of veto.[675] However, a body of policy, scholarship and jurisprudence has provided greater clarity about the content of the right to FPIC. In particular, the Inter-American Court of Human Rights has given perhaps the most comprehensive authoritative guidance on the content of FPIC. In the 2007 decision of *Saramaka People v. Suriname*,[676] the Court held that Indigenous peoples have the right to say 'no' to activities that have potential to significantly impact them and their territories.[677] The right to FPIC has been further affirmed in several UN human rights treaty body decisions, such as the UN Human Rights Committee, [678] the UN Committee on the Elimination of Racial Discrimination,[679] and the African Commission on Human and Peoples' Rights.[680]

The former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, stressed the need to focus not only on consent, but also on establishing a process that will result in Indigenous peoples' full engagement with a proposed development. The key is ensuring that Indigenous peoples are involved early in the process including in the preparation of regulatory frameworks on relevant areas such as the environment, and natural resource allocation and strategic planning for resource extraction.[681]

The right to FPIC certainly influenced the Waitangi Tribunal in its *Whaia te Mana Motuhake Report*. But the Waitangi Tribunal has also been developing its own conception based on treaty principles of partnership. The 2011 *Wai 262 Waitangi Tribunal Report* noted for example, a spectrum of possibilities in relation to Crown engagement with Māori from consultation to 'full-kaitiaki control' which would vary depending on the degree of impact of a proposal on Māori.[682] This notion thus closely mirrors the ideas of FPIC being developed by international human rights bodies.

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[674] The United Nations General Assembly. *Declaration on the Rights of Indigenous People*, 2007, Article 32.

[675] Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations, 13 September 2007; http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2007/0-13-September-2007.php (the Declaration implies that Indigenous peoples have a right of veto over a democratic legislature and national resource management, in particular Articles 19 and 32(2)).

[676] *Saramaka People v. Suriname*, Judgment of the Inter-American Court of Human Rights, 28 November 2007. Ser c No. 172, at para. 129-134.

[677] The Court ruled that, regarding large-scale development or investment projects that would have a *major impact* within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions. *Saramaka People v. Suriname*, above.

[678] See *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009.

[679] General Recommendation No. 23: Indigenous Peoples: 18/08/97.

[680] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya,* 276/03, Judgment of November 2009, see http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf. (Accessed February 2020).

[681] Anaya, J, 'Extractive Industries and Indigenous Peoples, Report of the Special Rapporteur on the Rights of Indigenous Peoples,' (Report to the Human Rights Council A/HRC/24/41, 2013) para 49-51.

[682] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Legislation Direct, Wellington, 2011) at 680-689.

UNDRIP further advances rights to property (land and natural resources) and culture in Articles 26 and 27:

> Article 26
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.

> Article 27
>
> States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, *including those which were traditionally owned or otherwise occupied or used*. Indigenous peoples shall have the right to participate in this process [emphasis added].

UNDRIP is not the first international instrument to recognise Indigenous people's property. The International Labour Organisation (ILO) established ILO Convention 107, which was subsequently revised in the 1980s. Both ILO treaties require states to recognise Indigenous peoples' rights of 'ownership and possession' to the lands they 'traditionally occupy.'[683]

Significantly, international instruments are directed at according rights of 'ownership' to Indigenous peoples in relation to those lands occupied and used under traditional tenure.[684] However, with ownership comes the all-important right to control access to traditional lands and natural resources including the coastal marine estate. The objective is to provide Indigenous property with the fullest form of protection available. The recognition of the right to ownership of land follows from the right to equality in that Indigenous rights to land – even

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[683] *Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) [*Convention (No 107)*]; *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries,* 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).

[684] Art 26(2), Indigenous peoples have the right to *own*, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership [emphasis added].

though *sui generis* given their basis in Indigenous rights land tenure – ought to be accorded the same status and respect as non-Indigenous peoples property.[685]

There is moreover, recognition that retention of property is an important means of maintaining and strengthening Indigenous people's political institutions and identities.[686] The right to ownership of natural resources enables Māori to build a base to develop their mana whakahaere tōtika political authority and culture. The right to property thus, as with all the rights in the UNDRIP, is connected to and should be read in conjunction with the key right to self-determination. The point in the case of aboriginal rights to the coastal marine estate in Aotearoa New Zealand is that Māori as prior occupants possessed right to tino rangatiratanga over their natural resources and because property is recognised and respected in New Zealand law, to deny the coastal marine estate to Māori would be to discriminate against them.

Furthermore, the protection of Indigenous peoples' land rights has frequently been emphasised by UN human rights treaty bodies. [687] The UN Human Rights Committee comments on states' reports and in its decisions in relation to petitions made under the ICCPR and has repeatedly endorsed Indigenous peoples right to property.[688] The Committee on the

[685] The Awas Tingni community's Indigenous tenure was deserving of the same equal protection as non-Indigenous tenures. See I/A HR Court, Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua, Series C (No. 79) (2001) (Awas Tingni).

[686] *Convinced* that control by Indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

[687] See, also, *Case of the Indigenous Community Sawhoyamaxa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006); and *Case of the Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 125 (17 June 2005). See, UN Human Rights Committee 'CCPR General Comment 23 Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5 para 7.

[688] For example, the HRC has recognised Indigenous peoples' non-traditional economic cultural rights, see *Lansmann et al v Finland No 1* Communication No 511/1992 (Views adopted 26 October 1994) UN Doc CCPR/C/52/D/511/1992, UN General Assembly 'Report of the Human Rights Committee Vol II', 50th Session Supp No 40 UN Doc A/50/40 at pp 66-76; and *Apirana Mahuika et al v New Zealand* Communication No 547/1993 (Views adopted 27 October 2000), UNGA 'Report of the Human Rights Committee Vol II' 56th Session Supp No 40 UN Doc A/56/40. In the *Lubicon Lake* communication, Chief Ominayak, on behalf of his Band, alleged that the Canadian government allowed the Alberta provincial government to expropriate its territory for the benefit of private corporate interests. Report of the Human Rights Committee *Lubicon Lake Band v Canada,* Communication No 167/1984 (26 March 1990) UN Doc Supp No 40 A/45/40, at 1 para 2.3. UN Human Rights Committee (UNHRC), *Lubicon Lake Band v Canada* Communication No 167/1984 (26 March 1990), UN Doc Supp No 40 (A/45/40); UNHRC *Länsman et al v Finland* Communication No 511/1992 (1992) UN Doc CCPR/C/52/D/511/1992 para 9.2–9.3 (land-related reindeer herding protected by art 27 ICCPR); UNHRC 'Concluding Observations on Mexico's Fourth Periodic Report' (27 July 1999) UN Doc CCPR/C/79/Add.109 para 19; UNHRC 'Concluding Observations on Chile's Fourth Periodic Report' (30 March 1999) UN Doc CCPR/C/79/Add.1094, para 22; UNHRC 'Concluding Observations of the Human Rights Committee: Republic of Guatemala' (27 August 2001) UN Doc CCPR/CO/72/GTM; UN Committee on the Elimination of Racial Discrimination (CERD), 'General Recommendation XXIII: Indigenous Peoples' (18 August 1997) UN Doc A/52/18, annex V; CERD 'Decision 1(53): Australia' (11 August 1998) UN Doc A/53/18; CERD 'Concluding Observations on United States of America' (14 August 2001) UN Doc A/56/18 paras 380–407; CERD 'Concluding Observations: Argentina' UN Doc CERD/C/65/CO/1 (August 2004), para 16; CERD 'Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: Suriname' UN Doc CERD/C/64/CO/9 (2004); CERD 'Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination:

Elimination of Racial Discrimination's (CERD Committee) interpretation of freedom from racial discrimination as expressed in its General Recommendation 23, calls upon States parties:

> to recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[689]

New Zealand has been criticized by the CERD Committee for its treatment of Indigenous rights under its early warning procedure.[690] The Committee was concerned with the Foreshore and Seabed Act 2004, which removed the ability of Māori to claim proprietary rights in the foreshore and seabed and instead allowed Māori to claim non-exclusive customary rights in the area. According to the Committee, the proposed legislation contained 'discriminatory elements.'[691]

Nevertheless, UNDRIP also recognizes that Indigenous peoples may be displaced from their lands and natural resources. In such cases, a rectification process is called for which includes a right to restitution. Article 27 refers to a mechanism for lands that were formerly possessed and occupied by them.[692] But Article 28 specifically notes the right to redress:

> Article 28
>
> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Suriname,'above; CERD 'Decision 1(66): New Zealand Foreshore and Seabed Act 2004' (11 March 2005) CERD/C/66/NZL/Dec.1; UN Committee on Economic, Social and Cultural Rights (CESCR) 'Concluding Observations: Bolivia' (21 May 2001) UN Doc E/C.12/1/Add.60, CESCR 'Concluding Observations: Ecuador' (7 June 2004) UN Doc E/C.12/1/Add.100; UN Committee on the Elimination of Discrimination Against Women 'Concluding Observations: Australia' UN Doc A/52/38/Rev.1 Part II (12 August 1997) at para 119.

[689] General Recommendation 23.

[690] Charters, C and Erueti, A, (eds), *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Wellington: VUP, 2007).

[691] CERD/C/DEC/NZL/1 (March 2005).

[692] The preamble of UNDRIP also states: 'That Indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.'

The right of Indigenous peoples to their lands, territories and resources that they have been dispossessed of is endorsed by a number of decisions including *Yakye Axe v Paraguay* and *Sawhoyamaxa v Paraguay,*[693] which upheld the Indigenous peoples' rights to lands, territories and resources titled to third parties under Paraguayan law without their knowledge let alone consent.

However, as noted above, the common law doctrine of aboriginal title rights to natural resources is premised on the idea of there being extant rights that can be given effect in law. Thus, if rights have expired (so they are not exercised in fact due to the pressures of colonisation) or have been legally extinguished, the common law cannot recognise these rights. In contrast, International Indigenous rights law recognises extant rights (for example Article 26, UNDRIP) but goes further in recognising the right to restitution in those cases where the rights may have expired or have been extinguished at law pursuant to Article 27 above, which means there is less pressure on Indigenous peoples to show continuity of connection and use although there would still be a requirement to show that the aboriginal rights holder is extant.

The New Zealand Government however, persists in advancing a right to culture model in relation to Māori rights and responsibilities to the coastal marine estate, rejecting both political authority or tino rangatiratanga in the resource and proprietary rights. As noted earlier, aboriginal rights law and legal practice support Māori proprietary rights to natural resources and the Treaty of Waitangi recognised the continuing right to political authority and governance jurisdiction over natural resources. International Indigenous rights law similarly recognises both the right of Indigenous peoples to own their traditional lands and coastal marine estate as well as to exercise self-determination over those natural resources. In fact, the rights set out in UNDRIP are influenced by the types of normative arguments and legal practice that emanate from New Zealand and the other Anglo-common law nations.[694]

Summary

So far, this report has explored a number of key themes including the application of EBM over the coastal marine estate particularly in the context of recognising the importance of co-governance structures that acknowledge the Māori constitutional partnership in the Treaty of Waitangi and that effectively incorporate mātauranga and tikanga Māori including mana whakahaere tōtika shared governance jurisdiction models over the coastal marine estate. The report briefly explored McNeil's spectrum of jurisdiction authority to provide a framework for mana whakahaere tōtika – governance jurisdiction - moreover, outlines somewhat extensively the cultural, legal and political sources for shared governance jurisdiction over

[693] *Case of the Indigenous Community Sawhoyamaxa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006); and *Case of the Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 125 (17 June 2005).
[694] See Kingsbury, B, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law,' in *NYUJIntl Law & Pol,* (Vol. 34, 2001) at 189.; and Erueti, A, 'Comparing Domestic Principles of Demarcation with Emerging Principles of International Law,' in *Arizona Journal of International and Comparative Law*, (Vol. 23, No. 3, 2006) at 543.

natural resources namely, mātauranga and tikanga Māori, the common law doctrine of aboriginal title, the Declaration of Independence 1835, the Treaty of Waitangi 1840, specific legislative provisions such as 71, New Zealand Constitution Act 1852, and compelling historic de facto examples of mana whakahaere tōtika shared jurisdiction such as the Kīngitanga, Te Kotahitanga political movements, and Ngati Maniapoto within Te Rohe Pōtae for over 20 years exercising extensive exclusive territorial jurisdiction.

The report then switched to exploring public international law discourses couched as human rights and the rights of Indigenous peoples to self-determination, self-government, development, the right to choices, free prior and informed consent, and International Indigenous rights law recognition of extant rights and the right to restitution in those cases where the rights may have expired or have been extinguished at law.

Each of these themes are key to providing a platform for better understanding EBM and its effective implementation over the marine estate of New Zealand while simultaneously reconciling mana whakahaere tōtika shared co-governance jurisdiction, mātauranga and tikanga rights and responsibilities within this EBM context.

The next section will explore in some detail the contemporary application of the key New Zealand statutes that deal with the marine estate for testing this EBM context while recognising co-governance structures that acknowledge the Māori constitutional partnership in the Treaty of Waitangi and that effectively incorporate mātauranga and tikanga Māori including possible mana whakahaere tōtika shared governance jurisdiction models over the coastal marine estate.

We will start with the Resource Management Act 1991 and the Treaty of Waitangi principles to illustrate how Māori have attempted to reconcile, adopt and adapt tikanga Māori and mainstream environmental law to suit their rangatiratanga and mana whakahaere tōtika aspirations within an ecosystem-based management context.

J. RMA and Māori Interests – Right to Culture Model

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

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

The final part of this environmental law reform was the enactment of the Resource Management Act 1991 (RMA) which is the current principal legislation for regulating the use

of New Zealand's physical environment as noted above. Prior to the enactment of the RMA, the historic colonialism policies and practices of the Crown rarely acknowledged that it had a Treaty of Waitangi-based duty to exercise stewardship over the environment, to include Māori in decision-making, nor did it pay any heed to the impact of environmental change on Māori. Consequently, Māori were pushed into the social, political and economic margins.

The enactment of the RMA was an omnibus measure designed to bring together under a single rationalised and integrated system the dozens of often single-issue and even contradictory statutes relating to the environment that existed at the time. Local Authorities would drive the new RMA system by applying the high-level principles set out in Part 2 RMA (set out below)[695] to environmental management using locally derived District and Regional Plans that would provide for the allocation of the resources of the District or Region in accordance with the principles of the RMA and priorities set by the relevant Councils.

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

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

The enactment of the RMA in 1991 then ushered in a new era of environmental sustainability and acknowledgement of Māori interests in the environment as noted in s 5, RMA whose statutory purpose is to 'promote the sustainable management of natural and physical resources.'[696] Sustainable management is defined in the RMA as:

> … managing the 'use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while' sustaining potentiality of resources to meet future needs, safeguarding the life-supporting capacity of the ecosystems, avoiding, remedying and mitigating adverse effects on the environment. [697]

Along with the purpose in s 5, there are three other (although not exclusive) key Māori sections – Part 2, RMA, ss 6, 7, and 8 – that form the completion of this compulsory and integral component of the RMA. Accordingly, all decision makers must 'recognise and provide for … the relationship of Māori and their culture and traditions with their ancestral lands,

[695] Resource Management Act 1991, s 6, 7 and 8 for example. Refer also to Stirling, R, 'Resource Management Act 1991 Legal Analysis Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018). See also Joseph, R, Rakena, M, Jones, M, Sterling, R & Rakena, C, '*The Treaty, Tikanga Maori, Ecosystem-based Management, Mainstream Law and Power Sharing for Environmental Integrity in Aotearoa-New Zealand – Possible Ways Forward*,' (Te Mata Hautū Taketake – the Maori and Indigenous Governance Centre, Te Piringa-Faculty of Law, University of Waikato, November 2018).
[696] RMA 1991, s 5(1).
[697] RMA 1991, s 5(2).

water, sites, wāhi tapu [sacred sites], and other taonga [treasures]' in s. 6(e),[698] have 'particular regard' to 'kaitiakitanga' [guardianship by the tangata whenua (local Māori community)] in s. 7(a),[699] and to 'take into account the principles of the Treaty of Waitangi' in s. 8.[700]

All planning and decision-making then under the RMA are subject to these sections within the purpose of the RMA which includes any recommendations made by Local Authorities under s. 171 (recommendations of local authorities).[701] The 2001 Judicial Committee of the Privy Council decision of *McGuire v Hastings District Council*[702] indicated that these sections – ss. 6, 7 and 8, RMA - override directions of later sections of the RMA including those of s. 171 when they are in conflict.[703] Moreover, these sections, though not exclusively tikanga Māori per se, do contain critical elements to enable the upholding of tikanga Māori customs, laws and institutions. In recent case law, the strength of the ss. 6(e), 7(a) and 8, RMA provisions protecting Māori interests were required to be borne in mind at every stage of the planning process in the 2014 Environment Court decision of *Ngāti Makino Heritage Trust v Bay of Plenty Regional Council.* [704] The Court concluded:

> [19] We acknowledge that *McGuire v Hastings District Council* emphasised the provisions of Part 2 of the Act, sections 6, 7 and 8 - in particular the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga be recognised and provided for, and particular regard be given to kaitiakitanga and the principles of the Treaty of Waitangi.[705]

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

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

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[698] RMA, s 6(e).

[699] RMA, s 7(a).

[700] RMA 1991, s 8.

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

[702] Above.

[703] Above.

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

[705] Above, at [19]; upholding *McGuire v Hastings District Council*, at 567.

Te Tiriti o Waitangi/the Treaty of Waitangi 1840

As noted above, Te Tiriti o Waitangi - The Treaty of Waitangi (the Treaty) is New Zealand's founding constitutional document[706] that was signed on 6 February 1840 at Waitangi in the Bay of Islands by representatives of the British Crown and approximately 500 Māori rangatira (chiefs) – including women - representing many, though not all, of the hapū (tribes) of Aotearoa New Zealand.

Lieutenant-Governor William Hobson was tasked with securing British sovereignty over New Zealand and he relied on the advice and support of the British Resident, James Busby, among others, to assist him in the task.[707] Sorrenson noted that Hobson and Busby possibly knew of similar agreements to the Treaty of Waitangi since both had been briefed at the Colonial Office in London before the Treaty was drafted.[708] A Treaty language and policy already existed so Hobson had some precedent and instructions to follow for the Treaty to be drafted over a few days. The CMS Anglican missionary Henry Williams and his son Edward then translated the English draft into Māori overnight on 4th February. About 500 Māori debated the document for a day and a night on the 5th, and it was signed by 40 rangatira on 6th February and was then taken around the country for other rangatira to sign.[709]

Importantly, Sorrenson mention that a significant difference between the Treaty of Waitangi and other treaties concluded by the British was the inclusion of a Māori version – Te Tiriti o Waitangi - which has been a point of much political and legal debate.[710] There are a number of discrepancies between the two versions such that the Treaty has not been honoured in many ways. There are ongoing processes for settling disputes between Māori and the Crown over alleged Treaty breaches primarily through the Waitangi Tribunal. Whatever the debate on was lost in translation however, both Treaty versions guaranteed to Māori as a minimum the peaceful protection of their lands, forests, fisheries and other treasures including the marine estate.

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[706] The Waitangi Tribunal suggested that the Treaty of Waitangi must be seen as a 'basic constitutional document' in Waitangi Tribunal, *Ngāi Tahu Report* (WAI 27, Brooker and Friend Ltd, Wellington, 1991) at 224. The Judicial Committee of the Privy Council commented that the Treaty is of the 'greatest constitutional importance to New Zealand' in *New Zealand Māori Council v Attorney-General* [1994] [1992] 1 NZLR 513 per Lord Wolf at 516. The High Court held that the Treaty is 'part of the fabric of New Zealand society' in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210 (HC). See also *New Zealand Māori Council v Attorney-General*, [1987] 1 NZLR 641 at 642. The late Lord Cooke of Thorndon, speaking extra-judicially, concluded that the 'Treaty is simply the most important document in New Zealand's history' in Cooke, R, 'Introduction' in *New Zealand University Law Review* (Vol. 14, No. 1, June 1990) at 1.

[707] See generally Orange, C, *The Treaty of Waitangi* (Allen & Unwin Press & Port Nicholson Press, Wellington, 1987) and Colenso, W, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Government Printer, Wellington, 1890).

[708] Sorrenson, M.P.K 'Treaties in British Colonial Policy: Precedents for Waitangi' in Renwick, W (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) at 15 – 29.

[709] Above.

[710] In 1865, the House of Representatives debated and carried a motion to table a copy of the 'original' Treaty and a literal translation of this into English. The Hon. James Fitzgerald, Native Minister, reminded the House that if the document was signed in its Māori version, the English version was irrelevant as to its binding effect. Carleton added: 'In the Māori copy, chiefs were guaranteed chieftainship over their land … The Governor was under a misapprehension in thinking this had been yielded.' *NZPD* (1864-66) at 292. For a good discussion of the differences in translation of Te Tiriti o Waitangi – The Treaty of Waitangi and its implications, see Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989).

Today, the Treaty of Waitangi is considered the founding constitutional document of New Zealand society. One of New Zealand's greatest jurists, Lord Cooke of Thorndon, speaking extra-judicially concluded that the Treaty of Waitangi 1840 is simply the 'most important document in New Zealand's history.'[711] The Judicial Committee of the Privy Council added that 'the Treaty records an agreement executed by the Crown and Māori, which over 150 years later is of greatest constitutional importance to New Zealand'[712] that provides Māori the opportunity to walk in both worlds.[713] Unfortunately, the legal status and political significance of the Treaty has ebbed and flowed through time from being a 'sacred compact'[714] to a 'simple nullity',[715] from a 'fraud'[716] to the 'Māori Magna Carta,'[717] from being part of the 'fabric of New Zealand society'[718] to an 'agreement of greatest constitutional importance to New Zealand.'[719]

The enactment of the Treaty of Waitangi Act 1975 and establishment of the Waitangi Tribunal as well as the incorporation of Treaty of Waitangi obligations in legislation has led to a large amount of material explaining what is required of the Crown to honour the Treaty of Waitangi

This section will now focus on the Treaty of Waitangi principles and what they mean in practice particularly regarding mana whakahaere shared jurisdiction over the marine estate.

Treaty of Waitangi Principles

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

> There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation to have resort to extrinsic material.[720]

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

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

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

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

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

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

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

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

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

[720] *Huakina Development Trust v Waikato Valley Authority* [1987] NZHC 130; [1987] 2 NZLR 188. See also *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 178, 184 where Gallen and Goddard JJ stated: 'We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the

To this end, the High Court was of the opinion that the Treaty was relevant despite the fact it was not part of legislation at the time. By identifying the Treaty as 'part of the fabric of New Zealand society,' Chilwell J also came close to regarding the Treaty as a constitutional document that could, in effect, influence all legislation. It was a major departure from the earlier views that a Treaty was a 'simple nullity' or that a Treaty of cession, such as the Treaty of Waitangi, could only be enforced in the Courts if it had been incorporated into municipal law.[721]

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

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

Although there has been controversy over the interpretation of the two texts of the Treaty of Waitangi, the Courts and the Waitangi Tribunal have referred to the '*principles'* of the Treaty. The 1987 Court of Appeal decision of *New Zealand Māori Council v Attorney-General*[722] is the foundational legal decision outlining the principles of the treaty of Waitangi. The Court of Appeal elicited the Treaty principles for the two Treaty versions utilising Waitangi Tribunal jurisprudence[723] which principles form the foundation of Crown duties today.

The key Treaty of Waitangi principles summarised include, inter alia:[724]

- Duty to act in good faith and in partnership;[725]
- The Government has the right to govern in exchange for the exercise of rangatiratanga (control and authority) over resources as listed in Article 2 without unreasonable and undue 'shackles.'[726]
- The Government must be able to make informed decisions;
- Reciprocity;
- Protection of Māori interests, taonga and development – the duty of the Crown is not just passive but extended to active protection of Māori people in the use of their lands and waters 'to the fullest extent practicable';[727]
- To remedy past Treaty of Waitangi grievances;[728] and

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statute. We also take the view that the familial organisation of one of the people's party to the treaty must be seen as one of the taonga, the preservation of which is contemplated.'

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

[722] [1987] 1 NZLR 641 (CA), sometimes referred to as the 'SOE Case.'

[723] Above, at 663.

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

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

[726] Above, at 665–666, 716.

[727] Above, at 664.

[728] Above, at 664–665.

- Right to development.

The following Treaty of Waitangi principles are relevant to the issue of shared governance jurisdiction over the marine estate within an EBM context:

1. The Principle of partnership;
2. The Principle of tino rangatiratanga;
3. The Principle of the Crown's right to govern;
4. The Principle of active protection;
5. The Principle of equity;
6. The Principle of reciprocity; and
7. The Principle of options

Each of these principles will now be addressed.

Principle of Partnership

The principle of partnership was first addressed in the 1985 *Manukau Report*, which stated that 'it is in the nature of an interest in partnership, the precise terms which have yet to be worked out.'[729] The jurisprudence followed the 1985 report, which included the New Zealand Māori Council litigation where Justice Cooke concluded that 'the Treaty of Waitangi signified a partnership between the two races' and each partner has to act towards the other 'with the utmost good faith which is the characteristic obligation of partnership.'[730]

Subsequent Waitangi Tribunal Reports followed Justice Cooke's partnership conclusion.[731] Partnership includes Crown consultation with the Māori Treaty partner on 'major' issues and to obtain the 'full, free and informed consent of the correct rights holders in any transaction for their land.'[732]

In more recent times, there has been a shift from the partnership position - at least within the Waitangi Tribunal - with significant findings by the 2014 Waitangi Tribunal *Te Paparahi o te Raki Report* that northern Māori neither ceded sovereignty[733] nor was such a cession in the contemplation of an ordinary reading of He Whakaputanga o te Rangatiratanga o Nu Tireni – the Declaration of Independence 1835.[734] Both the Treaty of Waitangi 1840 and He Whakaputanga o te Rangatiratanga o Nu Tireni – The Declaration of Independence 1835 should be read together for a proper understanding of the context and preamble of Te Tiriti o Waitangi as noted by Lord Cooke of Thorndon who observed: 'In law, context is

[729] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim,* (Wai 8, Waitangi Tribunal, 1985) at 70.
[730] *New Zealand Māori Council v Attorney-General,* [1987] 1 NZLR 641, 662 (CA).
[731] Waitangi Tribunal, *Ngai Tahu Report,* (Waitangi Tribunal, 1991) at 242-243.
[732] *Ngai Tahu Māori Trust Board v Director General of Conservation,* [1995] 3 NZLR 553 (CA) at 560, 663.
[733] Waitangi Tribunal, *He Whakaputanga me te Tiriti,* (Wai 1040, Waitangi Tribunal, 2014) at xxii.
[734] Above.

everything.'[735] However, the Crown did acquire a right to govern in New Zealand under the Treaty of Waitangi.

The Waitangi Tribunal considered the 1987 *New Zealand Māori Council v Attorney-General,*[736] decision in the Orakei Report of that same year. The Tribunal stated that there were two essential elements; the first was the Treaty signified a partnership between the races:

> The second is the obligation which arises from, indeed is inherent is, this relationship for each partner to act towards each other as Cooke P puts it at 370, 'with the utmost good faith which is the characteristic obligation of partnership.'[737]

In the WAI 262 Report, the Tribunal set out key principles, which highlight the Crown's Treaty obligation in the context of taonga Māori. The key principles for the purposes of shared jurisdiction are, inter alia, partnership and wise policy:

> Partnership
>
> On the Crown's part, there must be a willingness to share a substantive measure of responsibility and control with its Treaty partner. In essence, the Crown must share enough control so that Māori own the vision, while at the same time ensuring its own logistical and financial support, and also research expertise, remain central to the effort.[738]
>
> Wise policy
>
> The state owes to Māori two kawanatanga duties: transparent policies forged in the partnership to which we have referred; and implementation of programmes that are focused and highly functional.[739]

Both of these principles of partnership - a willingness to share a substantive measure of responsibility and control - and wise policy – transparent and implementation of focused and functional programmes - are obviously critical for instituting co-governance structures that acknowledge the Māori constitutional Treaty partnership and that effectively incorporate mātauranga and tikanga Māori for effective EBM over the marine estate.

Principle of Tino Rangatiratanga

Under Article II, Treaty of Waitangi 1840, the Crown explicitly guaranteed to Māori the ability to exercise their tino rangatiratanga over ngā taonga katoa. Professor Hugh Kawharu's translation of the tino rangatiratanga principle acknowledges and protects the 'unqualified

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

[736] *New Zealand Māori Council v Attorney-General,* [1987] 1 NZLR 641, 662 (CA).

[737] Waitangi Tribunal, *Orakei Report,* (Wai 9, Waitangi Tribunal, 1897) at 207.

[738] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, Legislation Direct, Wellington, 2011) at 450.

[739] Above, at 451-452.

exercise of chieftainship and confirms guarantees to Māori their property and other rights.'[740] Inherent in the tino rangatiratanga principle of Māori autonomy is the recognition of the active protection of Māori customary laws and institutions – tikanga Māori – and the right for Māori to determine their own decision-makers and land entitlements.[741]

The sovereignty debate aside, Māori would not have even entered into the Treaty of Waitangi in 1840 if, as a minimum, their tino rangatiratanga was not guaranteed to them hence it was of fundamental importance as the 1985 Waitangi Tribunal *Turangi Township Report* opined:

> The principle that the cession by Māori of sovereignty to the Crown was in exchange for the protection by the Crown of Māori rangatiratanga is fundamental to the compact or accord embodied in the Treaty and is of paramount importance.[742]

The tino rangatiratanga principle necessary limits the Crown's absolute authority to govern unfettered,[743] and supports the principle of active protection which obliges the Crown to not only recognise Māori interests specified in the Treaty of Waitangi - such as the marine estate – but to actively protect them.[744] The tino rangatiratanga principle then obliges the Crown to share jurisdiction with Māori including over the co-governance of the marine estate especially within an EBM context.

Principle of the Right of the Crown to Govern

Article I, Treaty of Waitangi 1840, is accepted in New Zealand jurisprudence as granting the Crown the right to govern which right cannot be hampered by 'unreasonable restrictions'[745] which is the sound approach for the government of the country. However, Māori retained the right to their territories and resources. Where decisions made by the Crown affect such Māori rights, there is a duty to act in the interests of Māori. These duties are to actively protect and give effect to property rights, management rights and self-regulation (jurisdiction) of Māori. The Crown's role extends to protection of tikanga Māori and other taonga (treasures) including mātauranga Māori (knowledge systems). The right to govern moreover links with the partnership duties of consultation established from the SOE Case.[746] The right of the government to govern is also critical for instituting co-governance structures that acknowledge the Māori constitutional Treaty partnership and to effectively incorporate mātauranga and tikanga Māori for effective EBM over the marine estate.

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[740] Kawharu, I.H, 'Treaty of Waitangi – Kawharu Translation,' (2011), Online at the Waitangi Tribunal – Te Rōpū Whakamana i te Tiriti o Waitangi: http://www.waitangitribunal.govt.nz/treaty/kawharutranslation.asp%3E. (Accessed May 2020).

[741] See Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui,* (Wai 785, Waitangi Tribunal, 2008) at 4.

[742] Waitangi Tribunal, *Turangi Township Report,* (Wai 84, Waitangi Tribunal, 1995) at 284.

[743] Waitangi Tribunal, *Te Whanganui a Tara Me Ona Takiwa: Report of the Wellington District,* (Wai 145, Waitangi Tribunal, 2003) at 74.

[744] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim,* (Wai 8, Waitangi Tribunal, 1985) at 69.

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

[746] Above, at 683.

Principle of Active Protection:

It well established that the New Zealand Crown owes a duty of active protection of Māori under the Treaty of Waitangi 1840 which duty includes protection of Māori rights, interests and responsibilities arising from the plain meaning of the Treaty. Accordingly, the Crown is required to actively protect the marine estate under Article II, Treaty of Waitangi.

The 1987 Court of Appeal decision of *New Zealand Māori Council v Attorney-General*[747] is relevant for considering the principle of active protection when the Court held:

> The duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands *and waters* to the fullest extent practicable [emphasis added].[748]

The Courts reference to the active protection of Māori to their *waters* includes the coastal marine estate.

In 1987, the Waitangi Tribunal released the *Te Reo Māori Report*, which considered the Treaty principle of active protection, and in particular, the use the word 'guarantee.' The Tribunal emphasised that 'guarantee' denotes an active executive sense rather than a passive permissive sense when it held:

> By these definitions therefore, the word (guarantee) means more than merely leaving the Māori people unhindered in their enjoyment of their language and culture. It requires active steps to be taken to ensure that the Māori people have and retain the full exclusive and undisturbed possession of their language and culture.[749]

The Tribunal continued:

> The situation could be different if the Treaty merely required the Crown to permit to the Māori people the full, exclusive and undisturbed possession of the Taonga. Having so permitted, it could be argued that a policy of benign neglect amounted to compliance. 'The word guarantee imposes an obligation to take active steps within the power of the guarantor, if it appears that the Māori people do not have or are losing, the full, exclusive and undisturbed possession of the Taonga.'[750]

Although the report referred to te reo Māori, the principle of active protection also applies within a marine estate context. Accordingly, the Crown has an obligation to 'actively protect' rather than to merely 'protect' the marine estate and the mana whakahaere responsibilities of Māori groups over the marine estate.

[747] Above, at 664.
[748] Above.
[749] Waitangi Tribunal, *Te Reo Māori Report,* (Wai 11, Waitangi Tribunal, 1987) at 20.
[750] Above, at 23.

The Waitangi Tribunal broadly applied this principle to 'ngā taonga katoa' including te reo, Māori culture and the like. For example, the guarantee of active protection of taonga was referred to in the 1987 *Muriwhenua Fishing Report*:

> Te tino rangatiratanga o ratou taonga katoa' tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority [jurisdiction] or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.[751]

Furthermore, the Tribunal determined in the 1985 *Manukau Report*:

> The Treaty of Waitangi obliges the Crown not only to recognise the Māori interests but actively to protect them.[752]

In addition, the 2003 *Foreshore and Seabed* Waitangi Tribunal referred to the Crown's duty of 'active protection' of Māori rangatiratanga over the marine and coastal area and concluded that Māori rangatiratanga included a duty:

> To actively protect and give effect to property rights, management rights, Māori self-regulation [jurisdiction], tikanga Māori, and the claimants relationship with their taonga; in other words, te tino rangatiratanga.[753]

The Waitangi Tribunal further observed that the forms of jurisdiction authority encapsulated in rangatiratanga and therefore protected under the Treaty, in this respect over the marine and coastal area, included:

> A spiritual dimension: By karakia, rahui, naming of places and rituals [subject jurisdiction], tangata whenua created and maintained whakapapa and spiritual links with the foreshore and sea;
>
> A physical dimension: Mana and authority [exclusive general jurisdiction] was held by tribes, and the failure to respect that in the access and use of the takutai moana could result in sanctions;

[751] Waitangi Tribunal, *Muriwhenua Fishing Report,* (Wai 22, Waitangi Tribunal, 1987) at 179-181 for a discussion on the concept of taonga.
[752] Waitangi Tribunal, *Manukau Report,* (Wai 8, 1985) at 70.
[753] Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy,* (Wai 1071, Legislation Direct, Wellington, 2004) at 28.

> A dimension of reciprocal guardianship: Māori exercised kaitiakitanga [territorial jurisdiction] over the takutai moana and cared for it as a taonga to ensure its survival for future generations;
>
> A dimension of use: Tribes had rights to use [personal jurisdiction] the takutai moana and carry out practices as they saw fit;
>
> Manaakitanga: Sharing through manaaki and authority (mana) [subject jurisdiction] are applied concurrently;
>
> Manuhiri from across the seas: Māori granted certain use rights [concurrent jurisdiction] as part of the relationship established between the peoples before 1840.[754]

Moreover, the 2015 *Mana Motuhake Report* concluded:

> Active protection requires honourable conduct by, and fair processes from, the Crown. Crown conduct that aims or serves to undermine tino rangatiratanga cannot be consistent with the principle of active protection.[755]

The Treaty principle of active protection then is critical for instituting co-governance structures that acknowledge the Māori constitutional Treaty partnership and to effectively incorporate mātauranga and tikanga Māori for effective EBM over the marine estate.

Principle of Equity

The obligation arising from kawanatanga, partnership, reciprocity and active protection require the Crown to act fairly to both settlers (Pākehā) and Māori – the interests of Pākehā settlers could not be priorities to the disadvantage of Māori.[756] Where Māori have been disadvantaged, the principle of equity – in conjunction with the principles of active protection and redress – requires that active measures be taken to restore the balance.[757]

A further condition of the principle of equity is the Crown's duty to act with fairness and justice to all citizens. Article 3 of the Treaty confirms that Māori have all of the rights and privileges of British subjects.[758] The Tribunal found that this Article not only guarantees Māori freedom from discrimination but also obliges the Crown to positively promote equity.[759]

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[754] Above, at 25-26, 130.

[755] Waitangi Tribunal, *Whaia Te Mana Motuhake: In Pursuit of Mana Motuhake,* (Wai 2417, Waitangi Tribunal, 2015) at 30.

[756] Waitangi Tribunal, *The Napier Hospital and Health Services Report,* (Wai 692, Legislation Direct, Wellington, 2008) at 61-64.

[757] Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui Report,* (Wai 785, Legislation Direct, Wellington, 2008) at 5.

[758] Treaty of Waitangi Act 1975, sch. 1, Art 3.

[759] Waitangi Tribunal, *The Napier Hospital and Health Services Report,* (Wai 692, Legislation Direct, Wellington, 2008) at 48 and 62. See also Waitangi Tribunal, *He Maunga Rongo Report,* (Wai 1200, Legislation Direct, Wellington, 2008) at 428.

It is through Article 3 that Māori, along with other citizens, are placed under the protection of the Crown and are therefore assured equitable treatment from the Crown to ensure fairness and justice with other citizens.

This equity principle was articulated in the Tribunal's 2018 pre-publication report *Te Mana Whatu Ahuru Report on Te Rohe Pōtae Claims* where the Tribunal concluded:

> The Crown could not favour settlers over Māori at an individual level, and nor could it favour settler interests over the interests of Māori communities.[760]

In addition, the Tribunal found that the principle of equity obliges the Crown to 'meet the basic standard of good government,' by acting in accordance with its own laws and ensuring that Māori rights and privileges as citizens have the protection of the law in practice.[761]

Consequently, in the Rohe Pōtae Inquiry, the Tribunal directed that the Crown 'should be accountable for its actions in relation to Māori and subject to independent scrutiny.[762]

When considering the recent 2019 *Health Services and Delivery Hauora Report*, the Tribunal added:

> The principle of equity is closely linked to the principle of active protection. Alongside the active protection of tino rangatiratanga is the Crown's obligation, when exercising its kawanatanga, to protect actively the rights and interests of Māori as citizens, at its core, the principle of equity broadly guarantees freedom from discrimination, whether this discrimination is conscious or unconscious. Like active protection, for the Crown to satisfy its obligations under equity, it must not only reasonably ensure Māori do not suffer inequity but also actively inform itself of the occurrence of inequity.[763]

In the 2017 *Urewera Report*, the Tribunal concluded that the principle of equity applies regardless of the cause of the disparity.[764]

Referring to health, the Tribunal found in the 2001 *Napier Hospital and Health Services Report* that equity of health outcomes is 'one of the expected benefits of the citizenship granted by the Treaty.' It also concluded that achieving this long-term goal would be dependent on a broad range of state policies and services.[765]

The Tribunal further held that when considering the equity principle, equity of service might differ from equity of health outcomes. A policy or a service that establishes equal standards of treatment or care across the whole population may still result in inequitable outcomes for

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[760] Waitangi Tribunal, *Te Mana Whatu Ahuru – Pre-Publication Report,* (Wai 898, Parts 1 and 2, Legislation Direct, Wellington, 2018) at 185.
[761] Above, at 428-429.
[762] Above, at 189.
[763] Waitangi Tribunal, *The Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry,* (Wai 2757, Legislation Direct, Wellington, 2019) at34.
[764] Waitangi Tribunal, *Te Urewera Report,* (Wai 894, Vol. 8, Legislation Direct, Wellington, 2017) at 3773.
[765] Waitangi Tribunal, *The Napier Hospital and Health Services Report,* (Wai 692, Legislation Direct, Wellington, 2008) at 62-64.

Māori, if for example; other barriers such as cost, geography and racism prevent Māori from accessing services, treatment or care.[766]

Consequently, the Treaty principles of equity and active protection require the Crown to make every reasonable effort to eliminate barriers to service that may contribute to inequitable health outcomes which may require additional resources, proportionate to address the inequities that exist. The Tribunal accordingly found that failing to remove such barriers would be inconsistent with the principle of equity.[767]

As discussed extensively above, the expectation of rangatira when they signed the Treaty of Waitangi in 1830 included retaining tino rangatiratanga and mana whakahaere tōtika – shared governance authority and jurisdiction - but the Crown was determined to crush any element of shared governance by ruthlessly crushing any semblance of robust Māori governance through invasive war and unjust discriminatory policies, laws and institutions such as the Native Land Court under the guise of, inter alia, civilisation and benevolent assimilation.

Such discriminatory policies, laws, institutions and practices deliberately dismantled effective Māori corporate governance as articulated succinctly by William Lee Rees in 1891 who opined:

> When the colony was founded the Natives were already far advanced towards corporative existence. Every tribe was a quasi-corporation. It needed only to reduce to law that old system of representative action practiced by the chiefs, and the very safest and easiest mode of corporate dealing could have been obtained. So simple a plan was treated with contempt. The tribal existence was dissolved into its component parts. The work which we have, with so much care, been doing amongst ourselves for centuries, namely the binding together of individuals in corporations, we deliberately undid in our government of the Māoris. Happily, there is yet an opportunity to retrace our steps, to get back into the old paths.[768]

The effective co-governance of the marine estate within an EBM context that acknowledges the Māori constitutional Treaty partnership and that effectively incorporates mātauranga and tikanga Māori is an tremendous opportunity for New Zealand to retrace our steps to make every reasonable effort to eliminate systemic, institutional, collective and personal barriers that may contribute to inequitable cultural, political, environmental, social and even economic outcomes and to address the inequities that exist in society.

Principle of Reciprocity

The principle of reciprocity is considered to be the 'essential bargain' or 'solemn exchange' agreed to in the Treaty of Waitangi 1840. The *Wai 262 Report* concluded:

> The kawanatanga principle requires the exercise of good and responsible government by the Crown, in exchange for Māori acknowledging the Crown's right to govern. This requires the Crown to formulate good, wise and efficient policy. … the Crown must

[766] Above, at 62.
[767] Above.
[768] William Lee Rees 1836-1912: *AJHR,* (1891 G4) at xviii.

> commit to working with Māori in ways that go beyond, say a few consultation hui and a reference group. Only in this way can it be ensured that the policy is not only wise but the right one. This is an essential step; it would be a travesty to pour resources into a policy doomed to failure by its very lack of Māori support and ownership.[769]

This Treaty principle of reciprocity is critical for effectively implementing EBM over the coastal marine estate. The dramatic degradation and destruction of New Zealand's terrestrial and marine ecosystems encourages New Zealanders to radically amend current resource management policy, practices, laws and institutions to be more collaborative and cohesive which requires a shared vision by all including government, Māori and key stakeholders. For effective collaborative and participatory management that considers all values and involves all interested parties from agencies and iwi to industries, whānau, hapū and local communities necessitates good will, patience and reciprocity.

Principle of Options

The Tribunal has also identified the principle of options, which broadly determines that as Treaty partners; Māori have the right to 'choose their social and cultural path.'[770] Such a right derives from the Treaty's guarantee to Māori of both tino rangatiratanga and the rights and privileges of British citizenship. The principle of options then follows on from the principles of partnership, active protection and equity and protects Māori in their right to continue their way of life according to their mātauranga and tikanga Māori traditions and worldviews while participating in British and now New Zealand society and culture as they wish.[771]

Consequently, its modern application requires that the Crown must adequately protect the availability and viability of Kaupapa Māori solutions in the social sector as well as so-called mainstream services in such a way that Māori are not disadvantaged by their choice.[772]

In a health context, the Crown has a duty to enable Māori to have available the options of Māori or mainstream providers as they wish, and that either or both of these pathways are ensured equitable protection by the Treaty. Both pathways should be sufficiently supported by the Crown meaning that each option offers a genuine, well-supported choice for Māori.[773]

The principle of options moreover, is jointly sustained by the principles of active protection, partnership and equity. The Tribunal affirmed in the 2008 *Napier Hospital Report* that

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[769] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, Legislation Direct, Wellington, 2011) at 451.

[770] Waitangi Tribunal, *The Napier Hospital and Health Services Report,* (Wai 692, Legislation Direct, Wellington, 2008) at 65.

[771] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim,* (Wai 22, Legislation Direct, Wellington, 1988) at 195; Waitangi Tribunal, *The Ngai Tahu Fisheries Report,* (Wai 27, Legislation Direct, Wellington, 1992) at 274; Waitangi Tribunal, *The Napier Hospital and Health Services Report,* (Wai 692, Legislation Direct, Wellington, 2008) at 65 and Waitangi Tribunal, *The Tarawera Forest Report,* (Wai 411, Legislation Direct, Wellington, 2003) at 28.

[772] Waitangi Tribunal, *Matua Rautia Report on the Kohanga Reo Claim,* (Wai 2336, Legislation Direct, Wellington, 2012) at 68.

[773] Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island, (*Wai 785, Legislation Direct, Wellington, 2007) at 6.

ensuring the accommodation and incorporation of tikanga Māori in mainstream health services flows from the principle of active protection.[774]

In a political context and as noted above, part of the international law right to self-determination includes the basic idea that a group must be able to exercise its own choice with regard to its political future - their 'right to choose' in determining their own destiny by choosing their institutions and political status which aligns with this Treaty principle of options.

The principle of options then is relevant for co-governance and co-design structures that acknowledge the Māori constitutional partnership and that effectively incorporate tikanga and mātauranga Māori for implementing EBM over the coastal marine estate in Aotearoa New Zealand.

A further seminal common law development impacting on the Treaty of Waitangi principles was the recent 2017 Supreme Court decision of *Proprietors of Wakatu v Attorney-General.*[775] Although not a Treaty claim per se, the decision was a claim about the rights of Māori land owners to hold the Crown to account in circumstances where the Crown agreed to act on their behalf in fulfilling the terms of an early land purchase contract in New Zealand. The Supreme Court determined that the Crown had a legal fiduciary duty to Māori owners to act on their behalf in fulfilling the terms of the purchase contract and that it failed to act in their best interests as any trustee of property or land is required to do.

The Crown argued that it did not have such a legal fiduciary duty in relation to the Māori landowners and that it was acting in its Governmental capacity. And in that capacity, the Government was acting in a manner similar to the rationale of Prendergast CJ in the infamous 1877 *Wi Parata v Bishop of Wellington*[776] decision of the Supreme Court where he held that 'the Crown is the sole arbiter of its own justice' when acting in its Governmental capacity. The Crown therefore had no legal duties that applied to itself and it could acquit itself. The Supreme Court disagreed on the basis that the Crown was acting on behalf of Māori landowners in relation to their land and was then acting as a trustee with concomitant fiduciary duties. The decision will increase the scope of Treaty claims by Māori landowners and alleged Crown breaches of fiduciary duties although the full implications of the decision are still evolving.

Summary

Each of the above Treaty of Waitangi principles – the principles of partnership, tino rangatiratanga, the Crown right to govern, active protection, equity, reciprocity and the right to options - are important and relevant for instituting Māori governance and mana whakahaere tōtika – shared governance jurisdiction – over the marine estate providing a platform for implementing effective co-governed EBM in an Aotearoa New Zealand context.

[774] Waitangi Tribunal, *The Napier Hospital and Health Services Report,* (Wai 692, Legislation Direct, Wellington, 2008) at 44, 57, 65 and 175.

[775] [2017] NZSC 17 (Supreme Court of New Zealand).

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

The next section will evaluate the application in policy and law in practice of these Treaty of Waitangi principles within an EBM context that recognises appropriately the co-governance and co-design structures that acknowledges the Māori constitutional partnership and that effectively incorporates tikanga and mātauranga Māori. The first of these laws to be analysed is the Resource Management Act 1991.

K. Treaty of Waitangi Principles and the Resource Management Act 1991

All persons exercising functions and powers then under the RMA as cited in s. 8 'shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).'[777] The word 'shall' introduces a compulsory element for consideration within decision-making of Part 2 provisions in the RMA, and as such, affect[s] the discretion [of the decision-maker].'[778] The compulsion to take into account the Treaty was supported by the 2014 Supreme Court decision of *Environmental Defence Society Inc. v New Zealand King Salmon Co Ltd.*[779] The decision emphasised the obligatory requirement of s 8, RMA, for decision-makers which also encapsulates s 6(e) and s 7(a), RMA at the same time[780] and has both procedural and substantive implications.[781]

An important Treaty principle noted above is the right of the Crown 'to govern', which means Parliament can make laws and decisions for the community.[782] The right to govern then does not permit unreasonable restrictions on the right of a duly elected government to follow its chosen policy.[783] However, this Treaty of Waitangi right to govern was in exchange for the protection of the exercise of rangatiratanga (control and authority) over resources as listed in Article 2 of the Treaty.[784] Furthermore, the Treaty principles make it clear that this right to govern is a 'duty to act reasonably and in good faith as a partnership between Pākehā (non-Māori) and Māori.'[785]

Another key Treaty principle is the active duty to protect Māori interests, which includes protecting taonga (all that is treasured), and to identify the full history and evidence of taonga[786] under s 6(e), RMA.[787] The duty to protect Māori interests then is a relationship of tangata whenua with the natural resources[788] that obliges an assessment of any impact on Māori interests in the resources.[789]

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[777] RMA, s. 8.
[778] *Haddon v Auckland Regional Council*, [1994] NZRMA 49 at 60–61.
[779] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 (New Zealand Supreme Court of New Zealand) at 619.
[780] Above, at 619. See also *Hokio Trusts v Manawatu-Wanganui Regional Council* [2017] NZHC 1355 (New Zealand High Court) at [35–36].
[781] *Sustainable Matatā v Bay of Plenty Regional Council*, [2015] NZEnvC 90 at 210.
[782] *New Zealand Māori Council v Attorney-General*, [1987] 1 NZLR 641 at 716.
[783] Above, at 665–666.
[784] *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*, [2017] NZEnvcC 73, at 107.
[785] *New Zealand Māori Council v Attorney-General*, [1987] 1 NZLR 641 at 642.
[786] *Sustainable Matatā v Bay of Plenty Regional Council*, [2015] NZEnvC 90
[787] *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 (New Zealand Environment Court) at 466.
[788] *Ngāti Ruahine v Bay of Plenty Regional Council*, [2012] NZHC 2407 at 72–74.
[789] *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*, [2017] NZEnvcC 73, at 107.

Consultation is another important Treaty principle where the Government, inter alia, 'must make sure that it was [is] informed in making decisions relating to the Treaty.'[790] Furthermore, when drafting district and regional plans, councils must give effect to the Part 2, RMA operational mechanisms by consulting with tangata whenua and by taking into account the iwi's own planning documents – iwi management plans – in preparing those plans.

Substantively, consultation requires being fully informed by having full and timely information[791] and being informed:

> … sufficiently as to the full implications for the hapū of what exactly was proposed, or of how to give effect to some of the hapū's customary practices, early enough in the decision-making process.[792]

Procedurally, consultation requires a procedurally active inquiry. Consultation then is not merely passing on information for the iwi/hapū 'to deal with' - a passive action - but is a high test or an active inquiry with Treaty partners.[793] Consultation as a Treaty principle requires the fulfilment of both the substantive and procedural elements. All Local Authorities and even a public listed company 'cannot purport that it has no obligation to consider tangata whenua issues or to consult with the relevant parties'[794] which inaction is 'hurtful and disrespecting of rangatiratanga.'[795] Performing consultation in such an active manner would indicate that the Crown and Local Authorities are fulfilling their duty to act reasonably and in good faith.

The Treaty principle of remedying past grievances is another important principle negotiated by the national government but it is not a responsibility of local authorities and hence does not come within the scope of s 8, RMA.[796] Section 8 does not grant power to remedy Treaty claims, however, as noted in the 2012 Environment Court decision of *Norris v Northland Regional Council*[797]:

> A hapū or iwi's history, traditions and relationship with a site, how it was acquired or lost by the iwi or hapū, and the kaitiaki role the iwi or hapū play in relation to a site, are matters that we assume may be canvassed in support of a Treaty claim and can also be explored in the RMA process.[798]

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

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

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

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

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

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

[795] At [27].

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

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

[798] Above.

settlements. Shared jurisdiction with Māori groups can and should be an option for local authorities.

To carry the point further, the High Court recently in its 2017 decision of *Attorney-General v The Trustees of the Motiti Rohe Moana Trust and New Zealand Māori Council*[799] afforded regional councils and the Minister of Conservation authority to:

> … exercise functions in respect of the coastal marine area to manage the effects of fishing not directly related to the biological sustainability of the aquatic environment as a resource for fishing needs, but only to the extent strictly necessary to manage those effects … [and] a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for Māori interests under the Fisheries Act 1996.[800]

The Department of Conservation is responsible for the New Zealand Coastal Policy Statement, the Ministry for Primary Industries is responsible for administration and protection of fisheries, and regional authorities deal with freshwater, land, air and coastal waters. This devolution of powers to regional authorities then may indicate the government's recognition that local authorities may be better placed to address complex, ecosystem-based challenges such as poor terrestrial management that results in loss of biodiversity and poor ecosystem health across land, freshwater and coastal boundaries. The High Court decision may also open an opportunity for the Government and its agencies to share or even transfer its powers with local Māori authorities where relevant and appropriate such as ss. 33, 36B and 188, RMA (discussed briefly below).[801]

A further seminal common law development impacting on Treaty principles was the recent 2017 Supreme Court decision of *Proprietors of Wakatu v Attorney-General.*[802] Although not a Treaty claim per se, the decision was a claim about the rights of Māori land owners to hold the Crown to account in circumstances where the Crown agreed to act on their behalf in fulfilling the terms of an early land purchase contract in New Zealand. The Supreme Court determined that the Crown had a legal fiduciary duty to Māori owners to act on their behalf in fulfilling the terms of the purchase contract and that it failed to act in their best interests as any trustee of property or land is required to do.

The Crown argued that it did not have such a legal fiduciary duty in relation to the Māori landowners and that it was acting in its Governmental capacity. And in that capacity, the Government was acting in a manner similar to the rationale of Prendergast CJ in the infamous 1877 *Wi Parata v Bishop of Wellington*[803] decision of the Supreme Court where he held that 'the Crown is the sole arbiter of its own justice' when acting in its Governmental capacity. The Crown therefore had no legal duties that applied to itself and it could acquit itself. The Supreme Court disagreed on the basis that the Crown was acting on behalf of Māori landowners in relation to their land and was then acting as a trustee with concomitant

[799] *Attorney-General v The Trustees of the Motiti Rohe Moana Trust and New Zealand Māori Council* [2017] NZHC 1429.
[800] Above.
[801] Refer to Appendix 3 for the texts of ss. 33, 36B and 188, RMA.
[802] [2017] NZSC 17 (Supreme Court of New Zealand).
[803] *Wi Parata v Bishop of Wellington,* (1877) 3 NZ Jur (NS) 72 (SC

fiduciary duties. The decision will increase the scope of Treaty claims by Māori landowners and alleged Crown breaches of fiduciary duties although the full implications of the decision are still evolving.

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

RMA Contradictory Objectives

Ironically, the main overriding political intent of the RMA has been to reduce regulation of land and water resources in order to expand agricultural exports and to increase value in the global economy.[804] Such a contradiction has actually weakened the interpretation and application of the legislation enabling primary production without sufficiently protecting ecosystems, or associated Māori and other cultural values, on which it depends.[805]

Regional and territorial councils also have legislated responsibilities under the Local Government Act 2002 (LGA) to provide for democratic and effective Local Government that recognises the diversity of New Zealand communities.[806] A 'quadruple bottom line' approach to local resource management is supposed to ensure attention to cultural wellbeing alongside economic, social and environmental well-being which policy reflects responses to the historic marginalisation of Māori from central and local government planning and legislation.[807]

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

Elusive Balancing Acts

Effectively the Part 2 RMA Māori provisions are a balancing exercise that are ultimately subordinate to the RMA's purpose. The incorporation of Māori values to fit the Crown's agenda to expand agricultural exports and to increase the nation's competitive value in the global economy means that in practice, Māori perspectives are a 'consideration' to be

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

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

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

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

weighed alongside other considerations, rather than a fundamental feature of the planning system.[808]

Recent case law highlights this challenge in *Hokio Trust v Manawatu-Wanganui Regional Council*[809] that was an appeal against an Environment Court decision dismissing an appeal from Independent Commissioners for the Manawatu-Wanganui Regional Council granting a resource consents for restoration activities at Lake Horowhenua. The appeal concerned the treatment of evidence by the Environment Court which was claimed to breach s. 8, RMA provisions of 'taking into account' the principles of the Treaty of Waitangi.

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

The High Court held that the Environment Court had taken the correct approach in giving equal priority to all of the parties' evidence, and in directing its evaluation of the proposal to determining whether the aim to improve the ecological and cultural health of the ecosystem of Lake Horowhenua was achieved in line with the sustainable management purpose of the RMA.[810]

The Environment Court held that the weight of expert evidence supported a conclusion that the proposed activities would have no adverse effects that were more than minor.[811] In applying the correct legal test, the Environment Court fulfilled its procedural obligations under s. 8, RMA.[812] The High Court concluded that the correct approach regarding s. 8, RMA is that 'the Environment Court is not properly concerned with giving effect to the Treaty, but taking into account the principles of the Treaty.'[813]

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

Further limitations for Māori involvement in the application of ss. 6(e), 7(a) and 8, RMA, include the absence of compulsion to accord weight to Māori rights and interests and to provide meaningful outcomes for Māori and the lack of incentives to trigger s. 33 RMA

[808] White, P, 'The New Zealand Māori Council claim to the Waitangi Tribunal and Water Management in New Zealand,' in *New Zealand Science Review,* (Vol. 69, 2012)
[809] [2017] NZHC 1081.
[810] Above, at 59.
[811] Above, at 74.
[812] Above, at 63.
[813] Above, at 75-76.

transfer of powers to Māori authorities[814] – which it appears has not been implemented.[815] Furthermore, s. 36B RMA joint management agreements have seldom been used and Māori authorities have similarly not triggered the s. 188,[816] RMA provision that enables iwi to be heritage management authorities. Other limitations include the lack of capacity building and funding initiatives and the lack of central government direction given there is currently no consistent direction for Māori to engage in marine and coastal areas or across all environmental management using Māori and EBM frameworks and systems. Accordingly, critics argue that current New Zealand legislation cannot provide for an authentic shared bicultural partnership to natural resource governance and management or even an opportunity for Māori to manage resources in a manner consistent with mātauranga and tikanga Māori cultural practices and EBM.[817]

The current legislative framework recognition of key tikanga Māori cultural concepts and values under the RMA and other statutes is still important. However, the balance often tips against Māori interests. Furthermore, the Treaty of Waitangi partnership and Māori concepts are often adopted and adapted from Māori traditional forms and foundations based on mātauranga and tikanga Māori, which means that Māori concepts in legislation are often 'lost in translation' by being wrenched out of cultural context and are in effect redefined within the legal system.[818] The cultural and political contexts are crucial to understanding the cultural concept and its appropriate application in resource management as noted earlier by Lord Cooke of Thorndon who observed: 'In law, context is everything.'[819]

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

Despite good intentions and cultural sensitivities, the incorporation of mātauranga and tikanga Māori comes with its own challenges and limitations. Legislative incorporation requires interpretation of mātauranga and tikanga Māori that is mātauranga and tikanga Māori consistent and in cultural context. Such an approach was articulated in the 2002 Environment Court decision of *Ngāti Hokopu ki Hokowhitu v Whakatāne District Council,*[820] where the Court concluded that 'the meaning and sense of a Māori value should primarily be given by Māori.'[821]

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[814] Refer to Appendix 3 for the text of s. 36B, RMA.

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

[816] Refer to Appendix 3 for the text of s. 188, RMA.

[817] Above.

[818] See Joseph, R, 'Legal Challenges at the interface of Māori Custom and State regulatory systems: Wāhi Tapu,' in *Yearbook of New Zealand Jurisprudence,* (Vol. 14, No. 13-14, 2010-2011) at 160-193.

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

[820] (2002) ELRNZ 111 (EnvC) at 46.

[821] Above, at 46 and 53.

The Court added that 'assessments should be made within the Māori world from where they came.'[822] The Court reflected on the requirement to consider the relationships of Māori with the natural environment and the need to consider evidence in the form of facts and concluded:

> Since section 6(e), RMA does refer to Māori culture and traditions; we have to be careful not to impose inappropriate 'Western concepts.' The appellants expressed concerns about that in various ways. Implicit in much of the appellants' evidence is the idea that each culture can only be explained in its own terms. This depends on the relativistic notion that classifications in any one language or culture are not determined by how the world does not come quietly wrapped up in facts. Facts are the consequences of ways in which we represent the world.[823]

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

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

Recently, the Environmental Defence Society even noted:

> Māori matters are not simply things the system has to address or 'do', akin to legislative design or consenting mechanisms. They need to pervade all tiers of the system – norms, system architecture and mechanisms – so that Māori perspectives are fully integrated, not treated as an add-on, afterthought, or a group of matters placed in opposition to (or as grudging concessions to) a dominant Western paradigm. To treat them as a separate theme would deny their potential for synergies with other matters and partition Māori issues from their broader systemic context. That said, and for the same reasons, they must receive particularly close attention within themes. [824]

These mātauranga and tikanga Māori interests then reflect a right to culture model in that they are not aimed at granting political authority to Māori but rather focus on stewardship, the 'relationship' of Māori with their environment, and effective participation in decision-making that may impact on them.[825] As a result of these provisions, when a local council

[822] Above.
[823] Above.
[824] Severinsen, G and Peart, R, *Reform of the Resource Management System - The Next Generation* (Environmental Defence Society (EDS) Working Paper 1, 2018) at 23.
[825] Resource Management Act 1991, s 6, 7 and 8.

draws up development plans or grants resource consents to carry out some activity, it must first consider the implications of the plan and consent on the tangata whenua's tikanga customary law as it relates to kaitiakitanga for example.[826]

However, these interests do not appear to be advancing the interests of Māori. As the Waitangi Tribunal has stated many times, iwi and hapū feel side-lined by the RMA consent process.[827] Part of the challenge lies with the weak statutory directions to 'take into account' the principles of the Treaty, as noted above, and the fact that Māori groups are one of many stakeholders and Māori interests are one of several other competing interests including the overall commitment to sustainable development. Additionally, s. 36A, RMA[828] explicitly states that neither an applicant nor a local authority has a duty to consult any person (including Māori).

The RMA was amended in 2005 to strengthen the role for Māori by creating an obligation to consult with tangata whenua in the preparation of a proposed policy statement or plan if Māori may be affected by the policy or plan. A further amendment provided for public authorities and iwi to enter into 'joint management agreements' (JMAs) where decisions made have the legal effect of a decision of the local authority under s.36B, RMA.[829] However, JMAs have only been used on a few occasions. In addition, local authorities now must have regard to iwi management plans in the preparation of their own plans and policy statements. Regional policy statements must set out the resource management issues of significance to the region's iwi authorities. There is also provision under the RMA for local authorities to transfer functions to iwi authorities in s. 33, RMA as noted earlier, after following a requirement of special consultation under the Local Government Act 2002. Both JMAs under s. 36B and s. 33, RMA transfer of functions to iwi authorities are potentially promising shared power and jurisdiction options for Māori. But like s. 71, New Zealand Constitution Act 1852 discussed extensively above, both sections 33 and 36B, RMA, have been ignored. These points are analysed in more detail later in the report.

Despite the recognition of the principles of the Treaty and mātauranga and tikanga Māori in the RMA and other legislation, the introduction of enhanced enabling consultation requirements, and Māori participation and provision for the consideration of iwi

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[826] Rakena, M & Rakena, C, 'Tikanga Māori and the Marine Estate: Literature Review - Draft,' (Draft MIGC Report, University of Waikato, November 2018).

[827] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, Legislation Direct, Wellington, 2011). See also, Ruru, J, 'Indigenous restitution in settling water claims: The developing cultural and commercial redress opportunities in Aotearoa,' in *New Zealand Pacific Rim Law & Policy Journal,* (Vol. 22, No. 2, March 2013) at 311-342. Ruru noted in 2013 that: 'Since the enactment of the RMA in 1991, there have been about twenty instances where Māori, as objectors, have appealed council decisions that approved resource consents to take water, discharge wastewater into water, or dam water.'

[828] Refer to Appendix 3 for the text of s. 36A, RMA

[829] See ss. 2 and 36B, Resource Management Act 1991. See for example the agreement between Taupo District Council and Ngāti Tuwharetoa at http://www.taupodc.govt.nz/our-council/policies-plans-and-bylaws/joint-management-agreements/Documents/Joint-Management-Agreement.pdf (Accessed August 2018). Some iwi have entered into joint management agreements. Ngāti Porou recently entered into such an agreement with the Gisborne District Council in relation to the Waiapu River. The purpose of the JMA is 'to provide a mechanism for Ngā Hapū o Ngāti Porou to share in RMA decision-making … within the Waiapu Catchment.' The 'broader aspiration of Ngāti Porou hapū is to move to a transfer of powers under s. 33, Resource Management Act 1991, within five years.' See www.gdc.govt.nz/assets/Uploads/15-346-X1-Appendix-reduced.pdf (Accessed August 2018).

management plans, the current RMA regime has not empowered iwi. A major challenge, for example, has been the weak impact of iwi management plans. Regional or district plans are not required to be consistent with iwi management plans. There is no requirement to consider iwi management plans when determining whether to grant resource consents. The RMA is also silent as to the purpose and content of iwi management plans. Consequently, iwi management plans tend to be uneven in style and content. Furthermore, iwi management plan quality depends on the extent to which iwi have the resources 'to get legal and technical advice, consult on and develop the plan, and to engage in RMA processes,'[830] as one Te Tau Ihu informant noted:

> We are under resourced so we have pittance of a settlement, and now in that tiny settlement, we are supposed to provide an environmental plan and comment on annual plans, 10-year plans, water plans and coastal marine plans! Well if Iwi hired people with that kind of expertise, our settlement money would be gone in just a few weeks.[831]

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

> … how time consuming - and protracted - the processes can be. Indeed … for some claimant groups, and for those members who shoulder the responsibility, the task of staying abreast … so that taonga can be protected is relentless. … All the claimants we heard from were volunteers for their hapū. The sheer size of the files that they had assembled about particular projects to which they had objected provided some indication of the extent of the work required of them, which was done in their own time.[832]

Another Te Tau Ihu informant asserted:

> Legally, we rely on the Treaty and RMA to enforce our legal rights. However, we don't have much resources to meet our needs. We use a representative from our trust to work with Local Council and science organisations to ensure our interests are protected in the marine coastal space. In the past, Māori didn't have a say and as Council's seemed to have it all, they did not take Māori seriously. Council are now getting better, as more power sharing is happening. Iwi are able to protect a lot more.[833]

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

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[830] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, Legislation Direct, Wellington, 2011) at 254.

[831] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

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

[833] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

> At no stage did MPI [the Ministry for Primary Industries] do any consultation on behalf of Iwi when we were doing our settlements, and whenever we applied for anything in the marine space, we never got assistance from MPI that a certain foreign company gets, so not only are we disappointed that the Treaty obligations were overlooked, but he's gone straight to put resources from MPI into assisting a foreign owned company. That makes absolutely no sense to us.[834]

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

> We've always had a voice on the council and the efficiency of that relationship varies but we don't have to fight for it like other organisations. Do they get it wrong? Sure. Do they need to be educated on that? Sure and we should do that. However, it's become inefficient. Why? Because we put a provision in the settlement Act about RMA stuff, and if you interpret that literally, they are doing their job by sending us every stupid consent that has no real significance for us. So we've got to redefine the things and say more precisely exactly, what we want to see.[835]

The Waitangi Tribunal has even called upon the Ministry for the Environment to 'step up with funding and expertise, to ensure that [Māori] are not prevented from exercising their proper role by a lack of resources or technical skills'[836] which a Te Tau Ihu informant agreed with when she stated:

> We simply don't have the capacity or expertise to manage all the complex Government processes so there should be some provision within Government to provide resources for Iwi to feed into the planning and resource management processes because at the moment, we have to do it all ourselves out of our settlement. And the settlement wasn't for carrying out obligations of the Government so there's some confusion there. The settlements were for Article 2, but the resource work is an Article 3 issue. Therefore, it should be the responsibility of the Government to resource that, and that's been overlooked.[837]

Resource Management Act 1991 with Local Government Act 2002

The Resource Management Act 1999 (RMA) has been discussed in detail above but it embodies a consolidation of over 50 statutes devolving the planning and management of resources to local government. The RMA and the Local Government Act 2002 (LGA) on paper actually have quite a lot scope for shared co-governance and concurrent jurisdiction with Māori but the challenge is implementation. Both statutes define what powers local government have over the management of resources, and how they could and should engage with Māori.

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[834] Above.
[835] Above.
[836] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, Legislation Direct, Wellington, 2011) at 283.
[837] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

The provisions in the RMA and the LGA effectively devolved jurisdiction from national to local government to manage New Zealand's resources. Yet through colonial assimilation policies, Māori as tangata whenua and Treaty of Waitangi partners have largely been excluded and marginalised from these sites of power. Although the RMA and LGA provide some considerations for Māori that local government must take into account when making decisions, overall as noted above, these provisions render little jurisdiction (if any) for Māori to make decisions on the management of resources. There is no legislative obligation on decision-makers to accord weight to Māori provisions because they are only required to 'take into account' or 'consider' them which means that Māori rights as tangata whenua and Treaty partners are often outweighed by other factors and considerations. In addition, decision makers often lack an in-depth understanding of Māori worldviews and tikanga ethics, which often results in the misappropriation, and degradation of tikanga Māori concepts.

Local government concerns the governing of the territorial or regional areas regarding the powers, responsibilities, and duties devolved from central government. The purpose of the LGA is to provide for a democratic and effective local government that recognises the diversity of New Zealand communities.[838] The LGA does this by providing a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them, [839] defining the purpose of local government, [840] promoting the accountability of local authorities to their communities,[841] and enabling local authorities to play a broad role in meeting the current and future needs of their communities.[842]

Section 10(1), LGA provides that the purpose of local government is to enable democratic local decision-making and action by, and on behalf of, communities;[843] and to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.[844] In a manner similar to the RMA and as noted above, Māori provisions will often be balanced and weighed against other priorities and considerations of local government hence Māori are subjected to the tyranny of the majority.

Still the LGA sets out how local authorities should conduct themselves, with provisions in the LGA providing for Māori participation and Māori interests in local government. Section 4, LGA refers to the principles of the Treaty of Waitangi:

> In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes.[845]

[838] Local Government Act 2002, s 3.
[839] Section 3(b).
[840] Section 10(1).
[841] Section 3(c).
[842] Section 3(d).
[843] Section 10(1)(a).
[844] Section 10(1)(b).
[845] Section 4.

Part 2, LGA pertains to the role and powers of local authorities and for the first time recognises the relationship of Māori and their culture,[846] and Māori cultural values.[847] Part 6, LGA refers to planning, decision-making, and consultation measures. Although s 4, LGA refers to the principles of the Treaty of Waitangi, there is ambiguity in terms of the status of the Treaty of Waitangi and how it applies to local government. The wording 'to recognise and respect the Crown's responsibility' infers that the Treaty relationship is shared between Māori and the Crown; and furthermore, that local government is fulfilling the Crown's obligations by providing for Māori participation in local authority decision-making processes pursuant to Part 2 and Part 6, LGA which is re-enforced by the fact that the LGA governance principles fail to refer to the Treaty principles.[848]

In comparison, s 8, RMA requires decision makers to 'take into account' the principles of the Treaty of Waitangi as part of the overall purposes and as governing principles of the RMA when making decisions which is more compelling than the LGA where decision makers are required to take the Treaty principles into account but the LGA governance principles fail to recognise the Treaty. Unfortunately, the Treaty is but one consideration weighed against other factors, rather than a fundamental part of the planning system which consideration is almost always certainly outweighed when decision makers consider that the perceived benefits to the community outweigh Māori interests. As Love noted, there is uncertainty in what 'must take into account' means or what weighting should be afforded to the Treaty.[849] Coupled with s. 4, LGA, as long as decision makers consider the principles of the Treaty, they have sole jurisdiction in deciding the extent or limits of its reach.

Kaitiakitanga and Recognition of Māori Taonga

As noted above, s. 7(a), RMA requires decision makers to have 'particular regard' to kaitiakitanga.[850] Although the LGA does not explicitly refer to kaitiakitanga, it does provide some scope for Māori jurisdiction in s. 77:

> **77 Requirements in relation to decisions**
>
> (1) A local authority must, in the course of the decision-making process,—
>
> (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
>
> (b) assess the options in terms of their advantages and disadvantages; and
>
> (c) if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.

[846]Local Government Act 2002, s 6(e).

[847]*Friends and Community of Ngawha Inc v Minister of Corrections* (2002) 9 ELrNZ, [2003] NZRMA 272 (CA).

[848]Local Government Act 2002, Part 4 & s. 39.

[849] Love, T, 'Incorporating Māori Approaches to Ecosystem Management in Marine Management,' in *Māori Law Review,* (July 2018).

[850] Resource Management Act 1991, s 2.

Although these LGA provisions provide recognition of tikanga Māori, they fail to articulate how decision makers should interpret, recognise and provide for such recognition. Often Māori concepts are misinterpreted or redefined where Māori kaitiaki and Treaty of Waitangi partners are often marginalised as illustrated in the 2012 *Wakatu Inc v Tasman District Council*[851] decision where tangata whenua appealed against the decision of the Tasman District Council who granted a resource consent for the transfer of ground water from an aquifer connected to the Motueka River.

The tangata whenua maintained that the transport and use of the water outside of their rohe would desecrate the mauri of the river, and thus limit their ability to exercise kaitiakitanga jurisdiction over their taonga. The Court upheld the council's decision concluding that the impact on the mauri of the river did not mean that water extraction should be prevented. Furthermore, because the biophysical effects of the proposed activity was imperceptible, the Court held that the impact on mauri and the ability of the tangata whenua to exercise kaitiakitanga could be achieved by appropriate conditions of consent.[852] The Court ignored kaitiaki evidence but questioned whether the transportation of the water from the river would have any adverse physical effects and concluded that since there was no evidence of physical effects on the river; the mauri would not be adversely affected.[853]

In determining questions of fact in relation to tikanga Māori, the Court adopted the test in *McIntyre v Christchurch City Council*[854]:

(i) There needs to be material of probative value, that is tendered logically to show the existence of facts consistent with the finding;[855]

(ii) The evidence must satisfy the Court of the facts on the balance of probabilities and having regard to the gravity of the question; and

(iii) The heart of a finding of fact is that the Court needs to feel persuaded that it is correct. [856]

Toni Love discussed the challenge of defining tikanga Māori through litigation in Court when he commented:

> The difficulty with such propositions is that metaphysical concepts do not fit well within this objective framework, which depends on the presence of physical facts that can be quantified by science in order to render them more or less probative. This difficulty is exemplified in the authority relied on by the Court, which emphasises physical facts when assessing metaphysical beliefs… . As such, beliefs of effects of a proposal not supported by traditionally accepted evidence could not equate to *adverse* effects on the

[851] *Wakatu Inc v Tasman District Council* [2012] NZRMA 363 at para 70.

[852] Above, at 70-119.

[853] Above.

[854] *McIntyre v Christchurch City Council* [1996] NZRMA 289 at 307.

[855] Articulated in *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 at 671.

[856] *McIntyre v Christchurch City Council* [1996] NZRMA 289 at 307.

> environment and should not influence the Court's judgement of whether or not the activity represents sustainable management of natural and physical resources.[857]

The evidence of tangata whenua kaitiaki is also subjected to stringent testing in litigation. The Court noted that when considering tikanga Māori concepts such as mauri, the Court 'must be mindful of issues such as hearsay, opinion evidence, and the extent to which a witness is qualified in matters of fact and/or expert opinion.'[858] Durie warned:

> There is danger in assigning a Pākehā term to a Māori concept, as it isolates that concept from the Māori worldview of which it is born from.[859]

Practicing kaitiakitanga and other tikanga Māori concepts are illustrative of tribal mana whakahaere tōtika rights and responsibilities but a major challenge as noted above is how and who defines what tikanga Māori concepts mean in practice and how they apply generally. Such a challenge highlights again the need for Māori to have more jurisdictional authority to decide local tikanga and what impacts activities have on tikanga rather than the other way around.

The next section will explore s. 33, RMA, which is potentially the most important legislative provision in the RMA and LGA for local authorities to share co-governing authority and concurrent jurisdiction with Māori authorities.

Section 33, RMA – Transfer of Jurisdiction Powers to Iwi

An analysis of the RMA and LGA provides that s 33 RMA is the most direct section capable of providing Māori with concurrent jurisdiction over land and the marine and coastal areas because it empowers local authorities to transfer one or more of its functions, powers or duties to iwi authorities.[860] Section 33, RMA states:

> **33 Transfer of powers**
> (1) A local authority may transfer any 1 or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority in accordance with this section.
>
> (2) For the purposes of this section, public authority includes—

[857] Love, T, 'Incorporating Māori Approaches to Ecosystem Management in Marine Management,' in *Māori Law Review,* (July 2018).
[858] *Wakatu Inc v Tasman District Council* [2012] NZRMA 363 at 25.
[859] Durie, M, *Te Mana, Te Kawanatanga – The Politics of Māori Self-Determination* (Oxford University Press, Melbourne, 1998).
[860] Resource Management Act, s 33(1)(2)(b).

(a) a local authority; and
(b) an iwi authority; and
(c) *[Repealed]*
(d) a government department; and
(e) a statutory authority; and
(f) a joint committee set up for the purposes of section 80; and
(g) a local board.

(3) *[Repealed]*

(4) A local authority shall not transfer any of its functions, powers, or duties under this section unless—

(a) it has used the special consultative procedure set out in section 83 of the Local Government Act 2002; and

(b) before using that special consultative procedure it serves notice on the Minister of its proposal to transfer the function, power, or duty; and

(c) both authorities agree that the transfer is desirable on all of the following grounds:

(i) the authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty:

(ii) efficiency:

(iii) technical or special capability or expertise.

(5) *[Repealed]*

(6) A transfer of functions, powers, or duties under this section shall be made by agreement between the authorities concerned and, on such terms, and conditions as are agreed.

(7) A public authority to which any function, power, or duty is transferred under this section may accept such transfer, unless expressly forbidden to do so by the terms of any Act by or under which it is constituted; and upon any such transfer, its functions, powers, and duties shall be deemed to be extended in such manner as may be necessary to enable it to undertake, exercise, and perform the function, power, or duty.

(8) A local authority which has transferred any function, power, or duty under this section may change or revoke the transfer at any time by notice to the transferee.

(9) A public authority to which any function, power, or duty has been transferred under this section, may relinquish the transfer in accordance with the transfer agreement.

The corresponding provision in s.83, Local Government Act 2002, states:

83 Special consultative procedure

(1) Where this Act or any other enactment requires a local authority to use or adopt the special consultative procedure, that local authority must—

(a) prepare and adopt—

(i) a statement of proposal; and

(ii) if the local authority considers on reasonable grounds that it is necessary to enable public understanding of the proposal, a summary of the information contained in the statement of proposal (which summary must comply with section 83AA); and

(b) ensure that the following is publicly available:

(i) the statement of proposal; and

(ii) a description of how the local authority will provide persons interested in the proposal with an opportunity to present their views to the local authority in accordance with section 82(1)(d); and

(iii) a statement of the period within which views on the proposal may be provided to the local authority (the period being not less than 1 month from the date the statement is issued); and

(c) make the summary of the information contained in the statement of proposal prepared in accordance with paragraph (a)(ii) (or the statement of proposal, if a summary is not prepared) as widely available as is reasonably practicable as a basis for consultation; and

(d) provide an opportunity for persons to present their views to the local authority in a manner that enables spoken (or New Zealand sign language) interaction between the person and the local authority, or any representatives to whom an appropriate delegation has been made in accordance with Schedule 7; and

(e) ensure that any person who wishes to present his or her views to the local authority or its representatives as described in paragraph (d)—

(i) is given a reasonable opportunity to do so; and

(ii) is informed about how and when he or she may take up that opportunity.

(2) For the purpose of, but without limiting, subsection (1)(d), a local authority may allow any person to present his or her views to the local authority by way of audio link or audio-visual link.

(3) This section does not prevent a local authority from requesting or considering, before making a decision, comment or advice from an officer of the local authority or any other person in respect of the proposal or any views on the proposal, or both.

Iwi authorities have never enjoyed such shared governance jurisdictional rights and responsibilities being devolved to them because, it appears, local government in New Zealand lacks the political will to transfer such jurisdiction powers to Māori. An examination of the literature spanning across over 20 years highlights that the single biggest obstacle to transferring s. 33, RMA jurisdiction authority to iwi authorities was the lack of political will by local councils. Other obstacles may have included:

- Council fears of relinquishing power;
- Lack of political expediency to share power with iwi;
- Lack of formal processes for local authorities to follow;
- Lack of clarity as to what and who constitutes an ‘iwi authority;’

- Concerns over iwi resource capability; and
- Council fears and concerns of electorate community views.[861]

Iwi and Central Government appeared to share an understanding of the potential for the Treaty partnership responsibilities to be better achieved in certain circumstances through greater levels of jurisdiction transfers to iwi. However, this counts for little if central government devolves those powers to Regional and Local Governments without the same disposition.[862]

McCrossin articulated that there was a 'genuine intention by central government for s 33 to provide Māori with a greater voice in the management of their resources.'[863] But McCrossin added, the primary reason for the lack of uptake was the council's fear of relinquishing power to Māori, and unfamiliarity surrounding Māori culture.[864] McCrossin also referred to the idea of 'institutional bricolage' to explain the gap between the creation of s 33 and the lack of its implementation. Cleaver defined institutional bricolage as a process where people consciously and unconsciously draw on existing social and cultural arrangements to shape institutions to changing situations.'[865] The fact that both ss. 33 and 36 (discussed next), RMA have been heavily underutilised suggests that 'there has been some form of failure in the design of these mechanisms and/or institutional capacity to implement them.[866] McCrossin observed:

> It is clear that institutional design alone is often inadequate to create tools to manage natural resources effectively.[867]

Sehring defined institutional bricolage as:

> … an approach to institutional change that is situated between path dependency and the development of new, alternative paths, which are never completely new but a recombination of existing institutional elements and concepts. [868]

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[861] See Godfery, M, 'Māori and Local Government,' in Drage, J and Cheyne, C, *Local Government in New Zealand: Challenges and Choices* (Dunmore Publishing Ltd, 2016); Bargh, M, 'Māori Wards and Advisory Boards, in Drage J and Cheyne, C, *Local Government in New Zealand: Challenges and Choices* (Dunmore Publishing Ltd, 2016) at 80.

[862] Rennie, H, Thomson, J and Tutua Nathan, T, *Factors Facilitating and Inhibiting section 33 transfers to Iwi,* (University of Waikato & Electric Energy, Hamilton, 2000) at 34.

[863] McCrossin, N, 'Intention and Implementation: Piecing Together Provisions for Māori in the Resource Management Act 1991,' (Master of Arts, Thesis, University of Otago, 2010) at 118.

[864] Above, at 119.

[865] Cleaver, F, 'Reinventing Institutions: Bricolage and the Social Embeddedness of Natural Resource Management,' in *The European Journal of Development Research,* (Vol. 14, No. 2, 2002) at 11-30. Bricolage is something constructed or created from a diverse range of things. For the purposes of this report on shared mana whakahaere tōtika, s. 33, RMA was created from 2 diverse cultures and worldviews. The challenge then is implementation due to different cultural priorities, laws, and institutions, a lack of knowledge, and perhaps fear.

[866] Above, at 50.

[867] Above.

[868] Sehring, J, 'Path Dependencies and Institutional Bricolage in Post-Soviet Water Governance,' in *Water Alternatives*, (Vol. 2, No. 12, 2009) at 61-81, at 64.

Cleaver introduced three fundamental characteristics of institutional bricolage:

> Firstly, the bricoleurs possess complex identities and a wide range of norms; secondly, there is extensive cultural borrowing and adaptation of institutions to suit multiple purposes; and thirdly, there is a prevalence of common social principles which are able to foster both cooperation and conflict between different sets of stakeholders.[869]

Sehring distinguished between intentional and unintentional bricolage and suggested that 'in order to create effective resource management mechanisms, greater awareness is required of the interplay between the two.[870]

McCrossin explained that the creation of partnership agreements outside of the RMA through Treaty of Waitangi settlements for example, between Māori and local authorities are examples of intentional institutional bricolage because they require a cross-exchange of ideas, and a discussion of potential pathways forward between both Māori and local authorities. Such partnership agreements also demonstrate that Māori and local authorities are capable of creating Treaty of Waitangi partnership agreements.

In contrast, McCrossin concluded that s. 33 RMA is an example of unintentional bricolage. She explained that although the architects of the RMA intended for these provisions to empower Māori in the management of resources, their intent was not transferred to local authorities who were expected to implement them. Such unintentional bricolage causes the current impasse where local authorities are unwilling to implement s 33 due to a lack of guidance and support by Central Government, and Central Government is not wanting to invest resources and energy into promoting something that has had such limited uptake.[871]

Consequently, Outram noted in 2017 that there has been no transfer of powers to iwi authorities under s. 33, RMA to date.[872] Outram did however record that between 2000-2017, there have been five approaches from iwi to local authorities for s. 33 transfers but only one was a formal approach with the Tauranga City Council which was declined for 3 reasons:

1. The group was a hapū not a recognised iwi authority;
2. Council was not satisfied that the hapū was sufficiently resourced to undertake the responsibilities transferred; and
3. The proposal would have needed to be formally proposed to the community for full public consultation and submission, and it was suspected that such a formal proposal was unlikely to succeed.[873]

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[869] Cleaver, F, 'Reinventing Institutions: Bricolage and the Social Embeddedness of Natural Resource Management,' in *The European Journal of Development Research,* (Vol. 14, No. 2, 2002) at 11-30.

[870] Sehring, J, 'Path Dependencies and Institutional Bricolage in Post-Soviet Water Governance,' in *Water Alternatives*, (Vol. 2, No. 12, 2009) at 61-81.

[871] Above.

[872] Outram A, 'Post-Colonialism, Indigenous Power and Resource Management: Does s 33 of the Resource Management Act 1991 have its intended effect for iwi authorities?' (Masters Dissertation, Lincoln University, 2017).

[873] Above.

Outram concluded that the main reasons why s. 33, RMA was not implemented by councils was because iwi are focussed on settling Treaty of Waitangi claims through direct negotiations with central government, as well as due to a lack of formal process for local and iwi authorities to follow notwithstanding s. 83, Local Government Act 2002, a lack of capacity for iwi authorities to undertake transferred functions, and a lack of clarity as to what defines an iwi authority.[874] Outram added that these barriers were not only experienced by iwi as there have been no s. 33, RMA transfers to public authorities either outside of local authorities. Outram further noted that out of the 30 alternative arrangements to share functions, powers or duties with local authorities under s. 33, RMA, 13 of these arrangements are with iwi authorities.[875]

For a brief but critically important update, in July 2020, Ngāti Tuwharetoa became the first iwi to utilise a s. 33 RMA transfer through direct negotiations with the Waikato Regional Council. Under s. 33, RMA, the Waikato Regional Council transferred water quality monitoring to the Tuwharetoa Māori Trust Board which was formally approved on 31 July 2020. The s. 33 provision will transfer summer bathing beaches, regional rivers, rainfall and groundwater quality monitoring within the Lake Taupo catchment to the Tuwharetoa Māori Trust Board, which is the first time an iwi authority has assumed local government functions for resource management responsibilities which, although modest, is the start of authentic shared local governance jurisdiction.[876] Watch this space!

In a similar manner, a further RMA segment that provides for shared governance jurisdiction is ss. 187-189, RMA, particularly a s. 188 Heritage Protection Authority. Section 188 states:

> **188 Application to become heritage protection authority**
> (1) Any body corporate having an interest in the protection of any place may apply to the Minister in the prescribed form for approval as a heritage protection authority for the purpose of protecting that place.
> (2) For the purpose of this section, and sections 189 and 191, place includes any feature or area, and the whole or part of any structure.
> (3) The Minister may make such inquiry into the application and request such information as he or she considers necessary.
> (4) The Minister may, by notice in the *Gazette*, approve an applicant under subsection (1) as a heritage protection authority for the purpose of protecting the place and on such terms and conditions (including provision of a bond) as are specified in the notice.
> (5) The Minister shall not issue a notice under subsection (4) unless he or she is satisfied that—

[874] Above.
[875] Above.
[876] See 'Ngāti Tuwharetoa set to become first iwi to utilise a section 33 transfer with Waikato Regional Council,' Waikato Regional Council Media Statement, ((31 July 2020), online at https://tuwharetoa.co.nz/ngati-tuwharetoa-set-to-become-first-iwi-to-utilise-a-section-33-transfer-with-waikato-regional-council (Accessed September 2020).

(a) the approval of the applicant as a heritage protection authority is appropriate for the protection of the place that is the subject of the application; and

(b) the applicant is likely to satisfactorily carry out all the responsibilities (including financial responsibilities) of a heritage protection authority under this Act.

(6) Where the Minister is satisfied that—

(a) a heritage protection authority is unlikely to continue to satisfactorily protect the place for which approval as a heritage protection authority was given; or

(b) a heritage protection authority is unlikely to satisfactorily carry out any responsibility as a heritage protection authority under this Act,—

the Minister shall, by notice in the *Gazette*, revoke an approval given under subsection (4).

(7) Upon—

(a) the revocation of the approval of a body corporate under subsection (6); or

(b) the dissolution of any body corporate approved as a heritage protection authority under subsection (4)—

all functions, powers, and duties of the body corporate under this Act in relation to any heritage order, or requirement for a heritage order, shall be deemed to be transferred to the Minister under section 192.

The RMA provides statutory provisions for shared governance jurisdiction of all or part of a natural resource – including an area of the coastal marine estate - to be delegated to an iwi authority pursuant to s. 33 or managed under a heritage protection order pursuant to s. 188 above. Ngāti Pikiao in Te Arawa, among others, unsuccessfully attempted to implement these provisions with the Kaituna River in 1999[877] but as noted above, the Tuwharetoa Māori Trust Board is the first iwi authority to successfully implement s. 33, RMA in 2020 – almost 30 years after the RMA was enacted.

Section 36B, RMA has provided another avenue for sharing co-governing power and concurrent jurisdiction and as steppingstone to s.33, RMA.

Section 36B, RMA – Joint Management Agreements

With the lack of implementation of s. 33, RMA transfers to iwi authorities, s. 36B, RMA was added in 2005 as a steppingstone to s 33, RMA.[878] Section 36B states:

36B Power to make joint management agreement

(1) A local authority that wants to make a joint management agreement must—

[877] *Te Rūnanga o Ngāti Pikiao v Minister for the Environment,* (Unreported Judgment, High Court, Wellington, 15 June 1999, CP113/96).

[878] Local Government New Zealand, *Local Authorities and Māori: Case Studies of Local Arrangements* (Local Government New Zealand, 2011).

(a) notify the Minister that it wants to do so; and
(b) satisfy itself—
(i) that each public authority, iwi authority, and group that represents hapū for the purposes of this Act that, in each case, is a party to the joint management agreement—
(A) represents the relevant community of interest; and
(B) has the technical or special capability or expertise to perform or exercise the function, power, or duty jointly with the local authority; and
(ii) that a joint management agreement is an efficient method of performing or exercising the function, power, or duty; and
(c) include in the joint management agreement details of—
(i) the resources that will be required for the administration of the agreement; and
(ii) how the administrative costs of the joint management agreement will be met.

(2) A local authority that complies with subsection (1) may make a joint management agreement.

Section 36B allows for the creation of joint management agreements (JMAs) between a local authority and iwi authority which enables parties to jointly perform the local authority's functions in relation to a natural or physical resource. Prior to initiating agreement, local authorities must first be satisfied that all parties to the agreement represent the relevant community of interest,[879] and that the other party has the technical capacity or expertise to perform such duty, power or function jointly with the local authority.[880] Either party may terminate the JMA by giving the other party 20 working days' notice.[881]

The first s. 36B joint management agreement (JMA) was created in 2009 between Taupo District Council and the Tūwharetoa Māori Trust Board. Although the JMA does not transfer the sole jurisdiction authority to Māori and is limited in scope (the jurisdiction is limited to multiply owned Māori land, and applicants must opt for process), this JMA is significant in that it is the first example where an iwi authority has an equal share of decision-making power and jurisdiction with a local council over the management of specific resources. There are currently a number of JMA's under the RMA with both iwi and local government responding positively to such arrangements.

Coates on the other hand, identified that the barriers to s. 36B, RMA, mirror those identified in s 33, RMA.[882] Coates referred to s. 36B, RMA as a progressive provision in that it 'recognises the dual heritage of New Zealand, and the status of Māori as tangata whenua,'[883] and

[879]Resource Management Act, s 36B(1)(b).
[880]Above, s 36B(1)(i)(B).
[881]Above, s 36E.
[882] Coates, N, 'Joint Management Agreements in New Zealand: Simply Empty Promises?' in *Journal of South Pacific Law,* (Vol. 13, No. 1, 2009) at 32–39.
[883] Above, at 33.

provides a real opportunity for restoring tino rangatiratanga, and repairing relationships between Māori and local government. However, Coates concluded that the biggest inhibiter to utilising s. 36B, JMA's under the RMA is the matter of political will:

> The single greatest inhibiting factor preventing these agreements appeared to lie in the people rather than the legislation.[884]

Coates moreover, highlighted potential challenges that could prevent the execution of JMA's. One potential barrier is the fear by officials that JMA's would be unpopular among voters, which would limit potential uptake by local authorities.[885] Coates identified other potential barriers though as including:

a) The requirement that JM agreements must be 'efficient,' meaning these types of agreements may only be economically efficient if iwi contribute both costs and resources, which is a significant barrier if iwi are not economically viable.
b) The 'opt out' clause which disadvantages Māori, where if there is a conflict between Māori and Local Councils and the agreement is cancelled, then the powers and functions revert back to Councils.
c) Perceived conflicts of interest, where if iwi are decision makers, then they are expected to be unbiased in their decisions, which is ironically problematic if iwi have a direct interest in the matter.[886]

Coates concluded that in order for a s. 36 JMA to be possible, the relationship between iwi and local councils must be established based on trust and confidence, the JMA partnership must have the political backing from the voting community, and most importantly, the local council must have the political will to proceed with the Treaty partnership.[887]

Nevertheless, Coates added that the JMA between Taupo District Council and the Tūwharetoa Māori Trust Board could serve to inspire future JMA's with other iwi and councils, and if s. 36, JMA's prove successful among iwi and local councils, then s. 36, RMA may be a good stepping stone for s. 33, RMA transfer of authority to iwi authorities. The CEO of the Tūwharetoa Māori Trust Board mentioned to our researchers in late 2019 that they are close to completing the first s. 33, RMA agreement with the Taupo District Council perhaps in 2020.[888] Watch this space.

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[884] Above, at 34.
[885] Above.
[886] Above.
[887] Above.
[888] As discussed above, see the agreement between Taupo District Council and Ngāti Tuwharetoa at http://www.taupodc.govt.nz/our-council/policies-plans-and-bylaws/joint-management-agreements/Documents/Joint-Management-Agreement.pdf (Accessed August 2018). Ngāti Porou also entered into a JMA agreement with the Gisborne District Council in relation to the Waiapu River. The purpose of the JMA is 'to provide a mechanism for Ngā Hapū o Ngāti Porou to share in RMA decision-making … within the Waiapu Catchment.' The 'broader aspiration of Ngāti Porou hapū however is to move to a transfer of powers under s. 33, Resource Management Act 1991, within five years.' See www.gdc.govt.nz/assets/Uploads/15-346-X1-Appendix-reduced.pdf (Accessed August 2018). Refer also to the discussion below on the recent enactment of

In comparison to s 33, RMA, s 36B, RMA seems to be more palatable for councils and the public who simply fear the idea of sharing concurrent jurisdiction and power with Māori. And in some respects, s. 36B, RMA reflects the idea of the Treaty of Waitangi partnership in that both iwi authorities and councils share equally in decision-making and they provide Māori with the opportunity of communicating their interests and concerns. If relationships in the s. 36B JMA remain positive, then as noted above, it may usher in and provide a path forward for a s. 33, RMA transfer of authority to Māori. An increasing number of JMA's between iwi and councils suggests that 36B is a positive step towards building meaningful relationships between councils and Iwi. The test however is to observe what jurisdiction power is actually shared with Māori, as well as progressing to a s. 33, RMA transfer of jurisdiction.

The above factors however, show that the RMA and LGA do not fully acknowledge Māori as equal Treaty of Waitangi partners, and perhaps, that local government is not bound by the Treaty. Indeed, April Bennett summarized the last 40 years of Crown-Māori Treaty of Waitangi relationships when she concluded:

> If the past 40 years demonstrate anything, it is that change is possible, but it is hard won. In the colonisation process, the Crown usurped control and authority over the environment from Māori, and transferred important aspects of that control to local authorities. Those authorities now hold onto that power with a firm grip, and, along with the Crown, are highly resistant to any change that might loosen that grip. So while there may have been improvements in the space where Māori and local government meet in relation to the environment, those improvements tend to be constructed in a way that does not seriously threaten the control and authority of councils.[889]

The Waitangi Tribunal has also been heavily critical of the RMA in its 2011 *Ko Aotearoa Tenei Report* when it observed:

> It is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed. It is equally disappointing that Māori are being made to expend the potential of their Treaty settlement packages or customary rights claims to achieve outcomes the Resource Management Law Reform project (now two decades ago) promised would be delivered anyway. As we have pointed out, the Crown accepts that the transfer of exclusive or shared decision making power should not depend upon proof of customary title or historical wrongs. It follows that what must be proven is the existence of a kaitiaki relationship with the taonga in question. That ought to be enough. The RMA regime should make this clear. [890]

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the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 which has far reaching implications for Maori resource management and shared governance jurisdiction with local government.

[889] Bennett, A, 'Change and Inertia: 40 Years of Māori Struggle to Protect the Environment,' in Bell, R et al, *The Treaty on the Ground – Where we are Headed and Why it Matters,* (Massey University Press, Auckland, 2017) at 202.

[890] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, Legislation Direct, Wellington, 2011) at 279.

The Waitangi Tribunal at the time further called for the RMA to be reformed to provide for 'enhanced iwi management plans.'[891] Engagement in these plans at the request of kaitiaki would be compulsory and in those plans, s. 33 control and s. 36B partnership opportunities would be identified for formal negotiations with councils.[892] The plans would also identify s. 188 Heritage Protection Authority opportunities in respect of iconic areas for the iwi.[893] The plans would moreover, set out the iwi's general resource management priorities in respect of taonga and resources within the tribal rohe (territory).[894] Following negotiations and mediation if necessary, matters could then be referred to the Environment Court for a final determination.[895] Watch this space too.

The next sections will continue with exploring the themes of sharing co-governance power and concurrent jurisdiction authority with Māori through modern Treaty of Waitangi settlements and other agreements within the commercial and customary fisheries sectors, as well as marine protected areas.

L. Tikanga Māori, Jurisdiction, Commercial and Customary Fisheries, & Aquaculture

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

> During the colonial settlement of New Zealand, Māori viewed the signing of the Treaty of 1840 as a way to preserve their autonomy and retain control of their land and sea. … Soon after the Treaty was signed, Government actions and legislation began to erode Māori rights until most, if not all, that were guaranteed by the Treaty were alienated from them.[896]

Since 1866, the Crown regulated fishing in New Zealand. Despite a number of different management regimes, all of them failed to acknowledge mātauranga and tikanga Māori over fisheries, and to respect Māori fishing rights including any right to participate in the control

[891] Above, at 281.
[892] Above.
[893] Above.
[894] Above.
[895] Above.
[896] Bess, R and Rallapudi, R, 'Spatial Conflicts in New Zealand Fisheries: The Rights of Fishers and Protection of the Marine Environment,' in *Marine Policy* (Vol. 31, 2007) 719 at 721–722. Refer also to Toki, V, 'The Māori Fisheries Settlement Process – A Critique,' (Unpublished Draft MIGC Report, University of Waikato, September 2018). The authors acknowledge here that much of the material for these sections is taken from our earlier report: Joseph, R, Rakena, M, Jones, M, Sterling, R & Rakena, C, '*The Treaty, Tikanga Maori, Ecosystem-based Management, Mainstream Law and Power Sharing for Environmental Integrity in Aotearoa-New Zealand – Possible Ways Forward*,' (Te Mata Hautū Taketake – the Maori and Indigenous Governance Centre, Te Piringa-Faculty of Law, University of Waikato, November 2018).

and management of the fisheries.[897] And the few Māori fisheries provisions in force were fundamentally limited by the following views:

1. that Māori interests should be accommodated by reserving particular fishing grounds for Māori,
2. that Māori fishing had no commercial component and grounds reserved must be for personal needs,
3. that Māori participation in the commercial fishing industry should be on no other terms than those provided for all citizens,
4. that no allowances should be made for Māori fishing methods, gear or rules for resource management, and
5. that the recognition of fishing should be an act of state; only parliament should authorise the reservation of fishing grounds; there should be no provision for the courts to recognise rights on proof of customary entitlement.[898]

The introduction of the Quota Management System[899] (QMS) during the neoliberalism period in the 1980s granted private property rights through the Fisheries Amendment Act 1986[900] but it also breached Article 2, Treaty of Waitangi of 'full, exclusive and undisturbed possession of [Māori] fisheries.'

The QMS was erroneously based on the assumption that Māori had no proprietary right to fisheries and the ownership of the resource resided entirely with the Crown and was therefore the Crown's to distribute.[901] Such an approach was in fundamental conflict with the guarantees to Māori in the Treaty[902] as well as with mātauranga and tikanga Māori.

Bess and Rallapudi added:

> The 1986 [Fisheries] Act made no reference to Māori having customary or Treaty-based fishing rights. Many Māori objected to the QMS, as it was seen to force their severance from the ocean, raid their sea resources and sell their right to participate in fisheries while others were allowed access to their fishing grounds. [903]

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[897] Munro, J, 'The Treaty of Waitangi and the Sealord Deal,' in *Victoria University of Wellington Law Review,* (Vol. 24, 1994) 389 at 399. See also Waitangi Tribunal, *The Ngāi Tahu Report,* (Government Printer, Wellington, 1991) at 295.

[898] Waitangi Tribunal, *Muriwhenua Report* (Government Printer, Wellington, 1988) at 222.

[899] Refer s. 2 and Part IV, Fisheries Act 1996 for full definition.

[900] Furthermore, s. 88(2), Fisheries Act 1983, states: 'Nothing in this Act shall affect any Māori fishing rights.'

[901] Waitangi Tribunal, *Ngāi Tahu Report*, (Government Printer, Wellington, 1991) at 133.

[902] Many Māori feel that there is a 'fundamental incongruity' between Māori values and the QMS: 'They draw uncomfortable parallels with the history of Māori tribal lands where … conferment of individual ownership was a major part of a process of alienation. ITQ's run contrary to the concept of communal kaitiaki guardianship (not ownership) of and access to the fish resource.' See *Ministry of Agriculture and Fisheries Management Planning ITQ Implications Study - Second Report* (Community Issues) FMP Series No 20, 48) as cited in Munro, J, 'The Treaty of Waitangi and the Sealord Deal,' in *Victoria University of Wellington Law Review,* (Vol. 24, 1994) 389 at 421-422.

[903] Bess, R and Rallapudi, R, 'Spatial Conflicts in New Zealand Fisheries: The Rights of Fishers and Protection of the Marine Environment,' in *Marine Policy* (Vol. 31, 2007) 719 at 721–722.

Subsequently, Māori obtained by way of interim relief from the 1990 High Court and Court of Appeal decision *Te Rūnanga o Muriwhenua Inc v Attorney- General*,[904] a declaration that the Crown should not to take further steps to bring fisheries within the QMS, which prompted the Crown to negotiate a Treaty settlement with Māori. Bess and Rallapudi continued:

> In 1987, the High Court declared an injunction against further ITQ [individual transferable quota] allocations. Māori and the Crown entered into negotiations on how Māori fisheries might be given effect in light of tino rangatiratanga. While implementation of the QMS prompted Treaty-based claims to large areas of fisheries, it proved to be an effective means of resolving these claims through the transfer of existing ITQ holdings and new holdings on the introduction of further species into the QMS. The Crown also enacted legislation to provide for and recognise the exercise of customary fishing rights.[905]

The first step was an interim arrangement, effected by the Māori Fisheries Act 1989 (MFA) for the recognition of Māori commercial fishing rights. The MFA provided to the Māori Fisheries Commission or Te Ohu Kai Moana (TOKM),[906] a proportion of quota holdings or the equivalent value in cash ($10 million at the time) as compensation for commercial fishing claims and TOKM was tasked with promoting Māori involvement in the business and activity of fishing.

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

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

In return, Māori agreed:

a) that the Settlement would extinguish all commercial fishing rights and interests;

[904] *Te Rūnanga o Muriwhenua Inc v Attorney- General* [1990] 2 NZLR 641.
[905] Bess, R and Rallapudi, R, 'Spatial Conflicts in New Zealand Fisheries: The Rights of Fishers and Protection of the Marine Environment,' in *Marine Policy* (Vol. 31, 2007) 719 at 721–722.
[906] Established pursuant to the Māori Fisheries Act 1989.

b) that the Settlement settled all Māori commercial fishing rights and interests; [907]
c) they would 'endorse' the Quota Management System;
d) to accept regulations for customary fishing; [908]
e) to stop litigation relating to Māori commercial fisheries;
f) to support the implementing legislation to give effect to the Settlement; and
g) the Waitangi Tribunal should be stripped of its powers to consider commercial fisheries matters.[909]

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

The 1992 Treaty settlement also established the new post-settlement governance entity, TOKM with legislative directions [910] to establish a framework for the allocation of the settlement assets to iwi.[911] The initial Settlement Asset allocation process comprised of two stages, the pre-settlement assets (PRESA) and post settlement assets (POSA). The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 empowered TOKM to allocate PRESA and POSA to 'iwi.'[912] PRESA were those assets secured by the 1989 interim settlement that was affected by the Māori Fisheries Act 1989 and held by TOKM. On 6 January 1993, PRESA consisted of quota, shares in Moana Pacific Fisheries Ltd and cash with an estimated value, in April 2003, of approximately $350 million.

[907] Section 9, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
[908] Above, s. 10.
[909] The settlement was given formal effect by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, which separates commercial from customary fishing rights.
[910] Māori Fisheries Act 2004.
[911] Iwi is defined as 'tribe, race, people' in Ryan, P M, *Dictionary of Modern Māori*, (Pearson, New Zealand, 1997) at 76. Judge Eddie Durie, on the other hand, defined iwi in more depth: 'There were several hundred hapu, most of them free and independent. In terms of structure [or form] they were remarkably fluid, constantly changing, dividing as numbers increased, or fusing if, due to war or famine, numbers were reduced. … It was characteristic of these hapu to be self-managing, but to federate in varying combinations for specific purposes [or function], from war to entertaining, or fishing to long distance travel.' Durie, E, 'Will the Settlers Settle? Cultural Conciliation and Law' in *Otago Law Review*, (Vol. 8, 1996) 449 at 450.

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

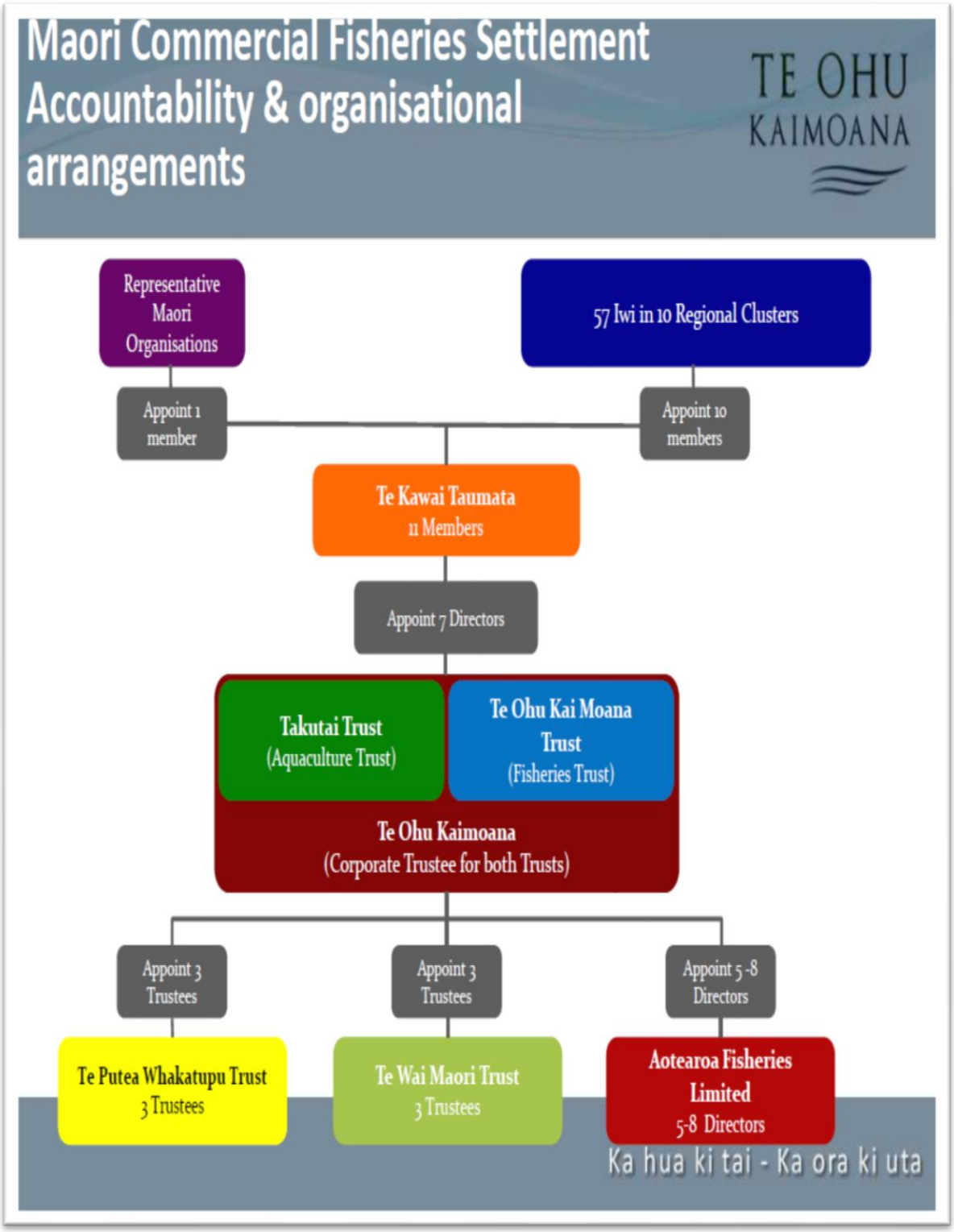

Diagram 6: TOKM Organisational Structures[913]

[913] See Te Ohu Kaimoana, 'Māori Customary Fishing Rights in the Modern New Zealand Context,' (Unpublished Presentation, Torres Strait, Australia, 8 April 2014) at 19. See also Te Ohu Kaimoana Governance Structure online at: https://teohu.maori.nz/governance-structure/ (Accessed November 2018).

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

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

In recent times, Māori own approximately 27% of all quota by volume with an ITQ estimated value of approximately $1 billion.[914] Although financial returns from ownership have fallen as a percentage of quota value since 2004, reflecting generally falling interest rates in New Zealand over that period, the Māori fishing asset returns approximately $60 million annually.[915]

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

[914] Te Ohu Kaimoana 'Building on the Fisheries Settlement' < https://teohu.māori.nz/wp-content/uploads/2018/06/Building_on_the_Settlement_TOKM.pdf (Accessed September 2018).
[915] Above.

Table 2: Māori Fisheries Act 2004, Schedule 3: Iwi (listed by groups of iwi) and notional iwi populations

ss 5, 10

Name of iwi and group	Notional iwi population	Percentage of total notional iwi population	Number of members required on register of iwi members to meet requirements of section 14(d)
A TAITOKERAU			
Ngāti Whatua	13 113	1.931	3 000
Te Rarawa	11 998	1.767	2 800
Te Aupouri	8 168	1.203	2 100
Ngāti Kahu	7 244	1.067	1 900
Ngāti Kuri	4 841	0.713	1 400
Ngāti Wai	4 115	0.606	1 300
Ngapuhi/Ngāti Kahu ki Whaingaroa	2 040	0.300	800
Ngāi Takoto	509	0.075	200
	52 028	**7.662**	
B NGAPUHI			
Ngapuhi	107 242	15.791	21 400
	107 242	**15.791**	
C TAINUI			
Waikato	46 526	6.851	9 300
Ngāti Maniapoto	30 857	4.543	6 100
Iwi of Hauraki[1]	13 622	2.006	3 100
Ngāti Raukawa (ki Waikato)	9 051	1.333	2 300
	100 056	**14.733**	
D TE ARAWA WAKA			
Te Arawa[2]	40 533	5.968	8 100
Ngāti Tuwharetoa	34 226	5.040	6 800
	74 759	**11.008**	
E MATAATUA			
Tuhoe	29 726	4.377	5 900
Ngāti Awa	13 252	1.951	3 000
Ngāiterangi	10 451	1.539	2 500
Whakatohea	10 107	1.488	2 500
Ngāti Ranginui	6 631	0.976	1 700
Ngāi Tai	2 266	0.334	900
Ngāti Manawa	1 567	0.231	600

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

I TE MOANA O RAUKAWA

Name of iwi and group	Notional iwi population	Percentage of total notional iwi population	Number of members required on register of iwi members to meet requirements of section 14(d)
Ngāti Raukawa (ki te Tonga)	19 698	2.900	3 900
Ngāti Toa Rangatira	5 202	0.766	1 500
Te Atiawa (Wellington)	1 761	0.259	760
Te Atiawa (Te Tau Ihu)	1 965	0.289	800
Ngāti Kuia	1 266	0.186	500
Rangitane (Te Tau Ihu)	1 258	0.185	500
Ngāti Koata	885	0.130	400
Ngāti Rarua	805	0.119	400
Ngāti Apa ki te Waipounamu	649	0.096	300
Ngāti Tama (Te Tau Ihu)	628	0.092	300
Atiawa ki Whakarongotai	493	0.073	200
	34 610	**5.095**	
J WAIPOUNAMU/REKOHU			
Ngāi Tahu	41 496	6.110	8 200
Ngāti Mutunga (Chathams)	1 132	0.167	500
Moriori	601	0.088	300
	43 229	**6.365**	
Total notional iwi population	**679 154**		

Notes—Iwi of Hauraki and Te Arawa

(1)

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

The iwi of Hauraki are:

Ngāti Hako

Ngāti Hei

Ngāti Maru

Ngāti Paoa

Patukirikiri

Ngāti Porou ki Harataunga, ki Mataroa

Ngāti Pukenga ki Waiau

Ngāti Rahiri Tumutumu
Ngāi Tai
Ngāti Tamatera
Ngāti Tara Tokanui
Ngāti Whānaunga.
(2)
The iwi of Te Arawa, whose notional population is set out in column 2 of this schedule, must be treated as one iwi for the purposes of Part 3.
The iwi of Te Arawa are:
Ngāti Makino
Ngāti Pikiao
Ngāti Rangiteaorere
Ngāti Rangitihi
Ngāti Rangiwewehi
Ngāti Tahu/Ngāti Whaoa
Tapuika
Tarawhai
Tuhourangi
Te Ure o Uenuku-Kopako/Ngāti Whakaue
Waitaha.

In a similar manner, TOKM needed to clarify the organisations that represent each iwi. TOKM's proposal for Māori governance entities[916] was that it would not allocate commercial fisheries assets until Iwi:

- have a constitution that meets the standards set out in the Māori Fisheries Act 2004 and received the approval of TOKM;
- have met all the structural requirements as set out in the Māori Fisheries Act 2004 and received approval of TOKM;
- have a register of members that is equal to, or exceeds the number of members required of that respective Iwi as set in the Māori Fisheries Act 2004 and received approval of TOKM; and
- have obtained coastline agreements and where appropriate harbour and freshwater agreements with all affected Iwi which have been approved by TOKM in accordance with the Māori Fisheries Act 2004.[917]

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

916 As reflected in Te Ohu Kaimoana Governance Structure online at: https://teohu.maori.nz/governance-structure/ (Accessed November 2018); and the Māori Fisheries Act 2004.
917 Above, at 115.

Table 3: Māori Fisheries Act 2004, Schedule 4 Organisations that are recognised iwi organisations (as at the commencement of this Act)

ss 5, 27

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

Name of iwi and group	Organisation
Te Whānau a Apanui	Te Rūnanga o Te Whānau
G TAKITIMU	
Ngāti Kahungunu	Ngāti Kahungunu Iwi Incorporated
Te Aitanga a Mahaki	Te Aitanga a Mahaki Trust
Rongowhakaata	Rongowhakaata Charitable Trust
Ngāi Tamanuhiri	Ngāi Tamanuhiri Whanui Charitable Trust
H HAUAURU	
Te Atiawa (Taranaki)	Te Atiawa Iwi Authority Incorporated
Te Atihaunui a Paparangi	Whanganui River Māori Trust Board
Taranaki	Te Rūnanga o Taranaki Iwi Incorporated
Ngāti Ruanui	Te Rūnanga o Ngāti Ruanui Trust
Rangitane (North Island)	Te Rūnanganui o Rangitane Incorporated
Nga Rauru	Nga Rauru Iwi Authority Society Incorporated
Nga Ruahine	Nga Ruahine Iwi Authority
Ngāti Apa (North Island)	Te Rūnanga o Ngāti Apa Society Incorporated
Muaupoko	Muaupoko Tribal Authority Incorporated
Ngāti Mutunga (Taranaki)	Ngāti Mutunga Iwi Authority Incorporated
Ngāti Tama (Taranaki)	Te Rūnanga o Ngāti Tama
Ngāti Hauiti	Te Rūnanga o Ngāti Hauiti
Ngāti Maru (Taranaki)	Ngāti Maru Pukehou Trust
I TE MOANA O RAUKAWA	
Ngāti Raukawa (ki te Tonga)	Te Rūnanga o Raukawa Incorporated
Ngāti Toa Rangatira	Te Rūnanga o Toa Rangatira Incorporated
Te Atiawa (Te Tau Ihu)	Te Atiawa Manawhenua ki te Tau Ihu Trust
Ngāti Kuia	Te Rūnanga o Ngāti Kuia Charitable Trust
Rangitane (Te Tau Ihu)	Te Rūnanga a Rangitane o Wairau Incorporated
Ngāti Koata	Ngāti Koata No Rangitoto ki te Tonga Trust
Ngāti Rarua	Ngāti Rarua Iwi Trust
Ngāti Apa ki te Waipounamu	Ngāti Apa ki te Ra To Incorporated
Ngāti Tama (Te Tau Ihu)	Ngāti Tama Manawhenua ki te Tau Ihu Trust
Atiawa ki Whakarongotai	Te Rūnanga o Ati Awa ki Whakarongotai Incorporated
J WAIPOUNAMU/REKOHU	
Ngāi Tahu	Te Rūnanga o Ngāi Tahu
Moriori	Hokotehi Moriori Trust

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

> Legislating was probably the worst thing they could have done because one size doesn't fit all. The whole negotiations settlement process is not working because the Crown wants to deal with one entity when Māori are actually hapū based.[918]

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

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

> Councils are problematic because one Council has adopted a particular process if they have an obligation to consult with iwi (as in the past we have provided cultural impact reports) outlining our cultural sites of significance and the potential impacts. So what one Council has done is set up a process where they invite iwi to bid for the right to provide these reports. The result is iwi bidding against each other - so having a race to the bottom of the barrel, and the one that comes up with the cheapest rate will be able to then have the right to provide a report on behalf of all the rest of us. So, it's an attempt to reduce the Treaty obligations contained in the Local Government Act and in the Treaty itself. To accrue tendering processes as if it was a contract for business. It is not a contract, this is not a commercial relationship, it's an international legal relationship and it's contained in the Local Government Act and in the RMA. How could they think that a tendering process is actually cutting out some of the iwi in their ability to provide reports [which] is bizarre?[919]

A further thought-provoking comment on codifying mātauranga and tikanga Māori in Treaty settlement legislation such as iwi identity and organisational representation in the Māori Fisheries Act 2004, was asserted by Williams J who, speaking extra-judicially, concluded: 'The nature of tikanga is such that to codify it is to kill it!'[920]

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

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[918] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).
[919] Above.
[920] Williams, J, 'The Māori Land Court: A Separate Legal System?' (New Zealand Centre for Public Law, Wellington, 2001) at 4.

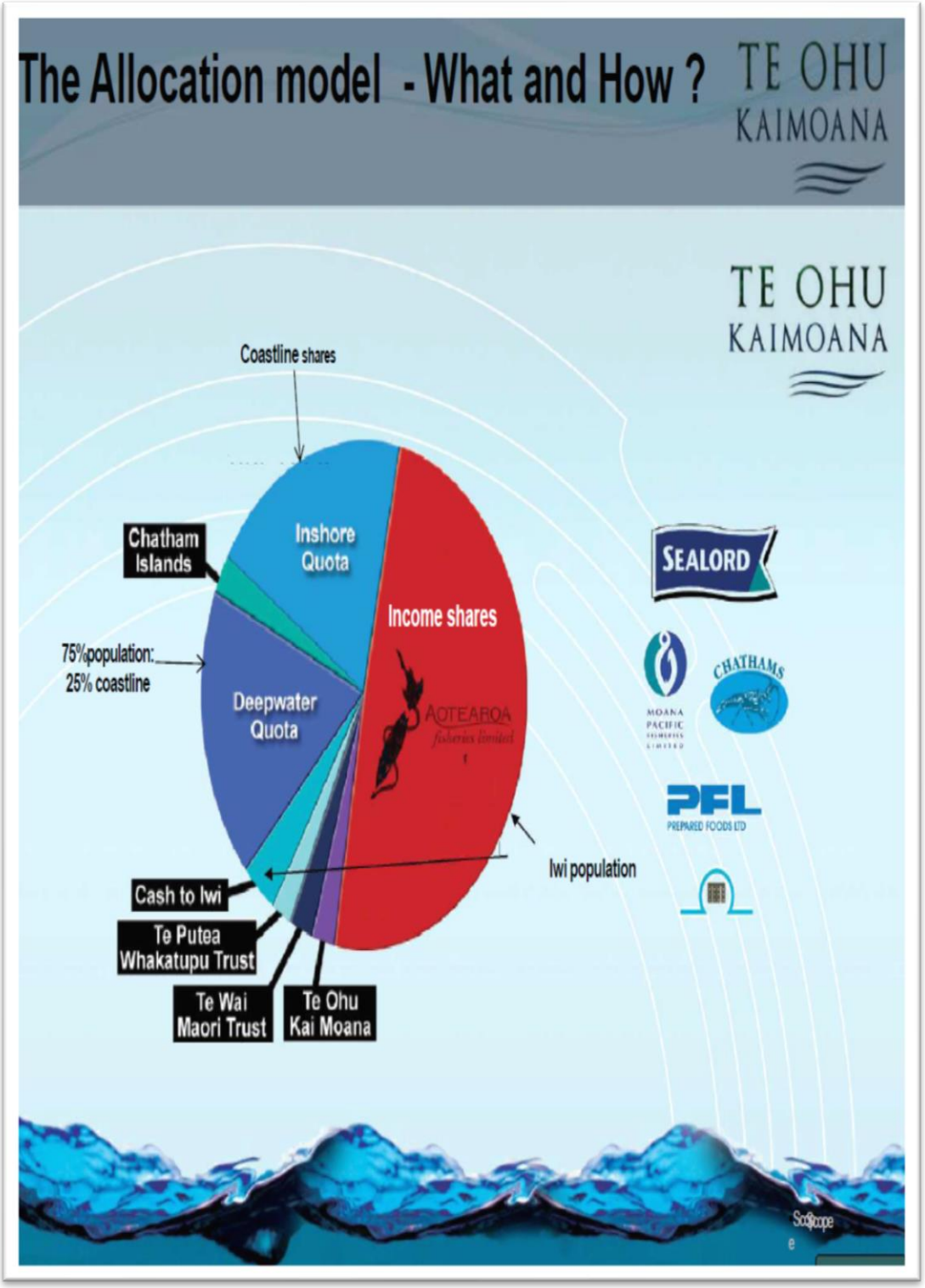
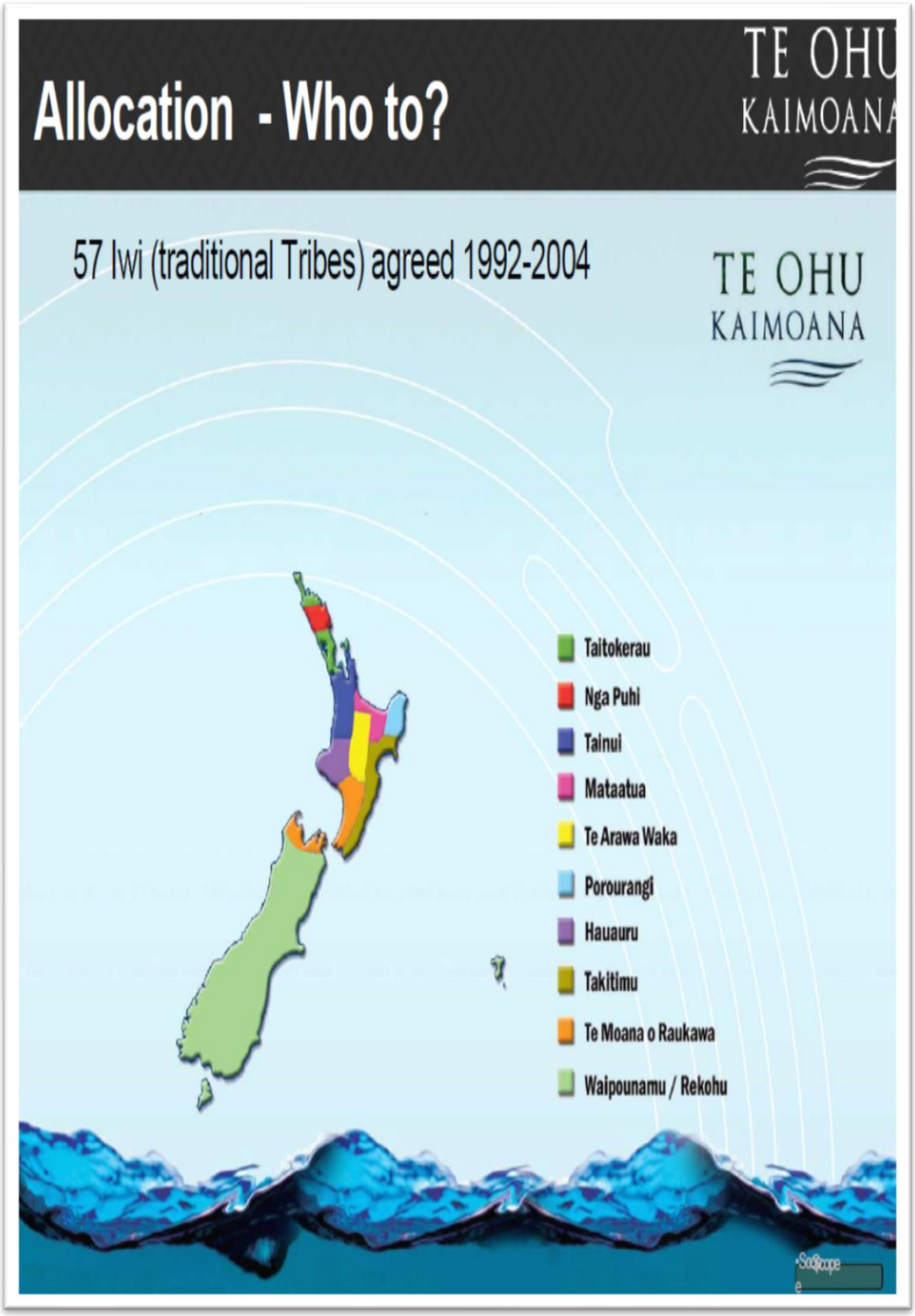


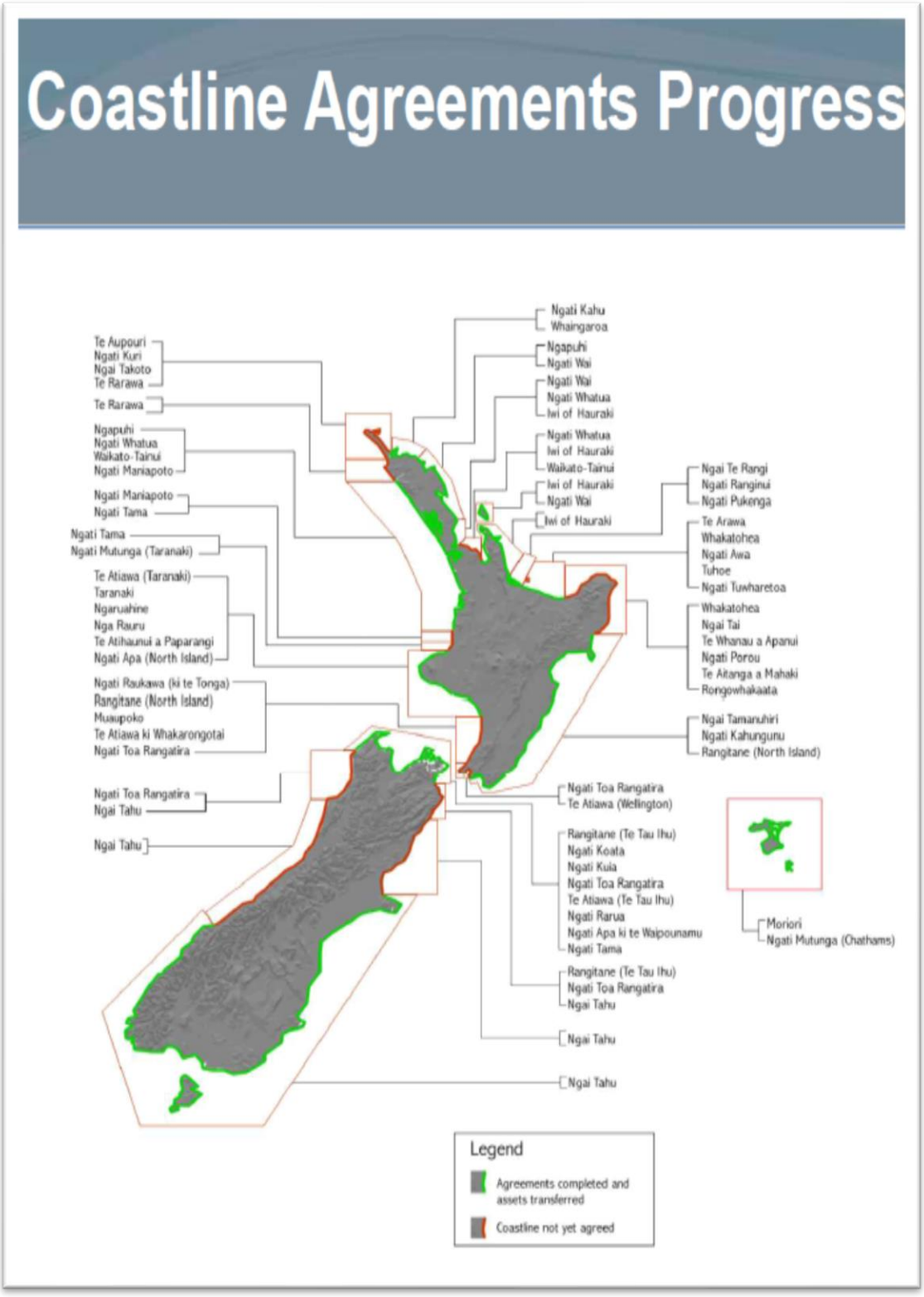
Diagram 7: TOKM Allocation Models based on Tikanga Māori[921]

[921] Te Ohu Kaimoana, 'Māori Customary Fishing Rights in the Modern New Zealand Context,' (Unpublished Presentation, Torres Strait, Australia, 8 April 2014) at 10. See also Te Ohu Kaimoana Governance Structure online at: https://teohu.maori.nz/governance-structure/ (Accessed November 2018).



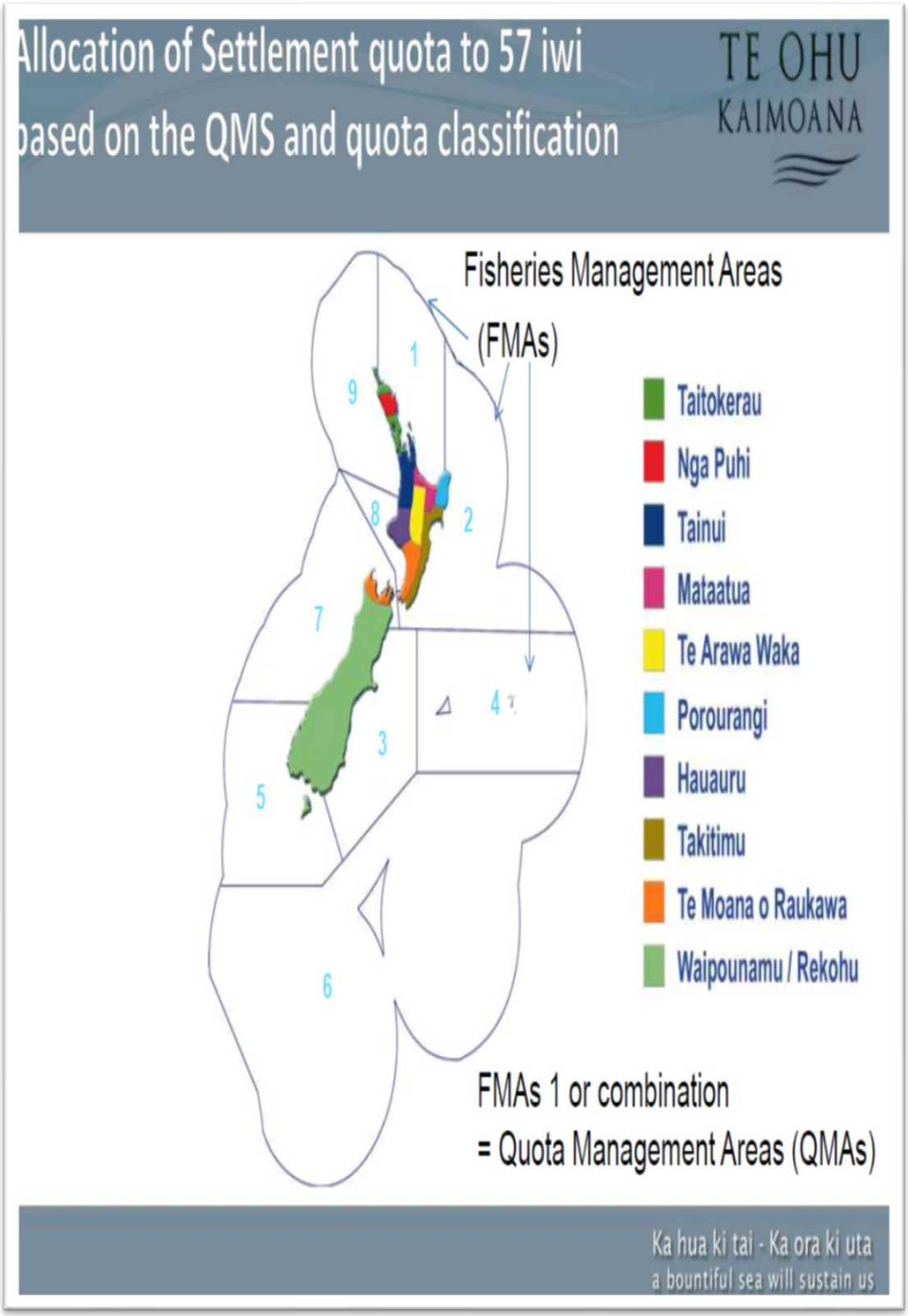
Map 3: Official Tribes and General Boundaries[922]

[922] Above.



Map 4: Iwi Coastal Agreements based on Tikanga Māori[923]

[923] Above, at 16



Map 5: Fisheries Management Areas (FMAs) based on Tikanga Māori[924]

[924] Above, at 11.

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

> The other thing is that the [Fisheries] settlement means that we have a coastline measurement being an important aspect of whatever you share from the settlement even though we have neighbours who have issues just where each boundary starts. That's what you have to be able to defend and to get your tribal perspective on all of that.[925]

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

> It's not necessarily iwi's fault, it's the system that's put us here so we have to. An example is that when we came here we displaced some iwi. We conquered them and we took their land and occupied it to this day. What has happened within the settlement process is that the Crown has said: 'Well all of you have an interest in this particular coastal area.' And what that does is impact on your mana whenua.[926]

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

> There needs to be the opportunity to manage the coastal boundary conflicts with proper resourcing because if you don't get that right, the other bits won't work. Places like Ngāi Tahu are different because they are pretty well defined. Many other areas are a bit similar but it's not been equitable in terms of the overall settlement for people.[927]

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

M. Tikanga Māori, Jurisdiction and Aquaculture

Along a similar development as the Māori commercial fisheries settlement in 1992 and the Māori Fisheries Act 2004, the Māori Commercial Aquaculture Claims Settlement Act 2004 (MCACS Act) was the Crown's response to Māori Treaty claims to aquaculture.[928] The Aquaculture Settlement mirrors the commercial aspects of the Māori Fisheries Settlement. The MCACS Act provided for the full and final settlement of Māori commercial aquaculture interests. Under the new aquaculture legislation, mandated iwi organizations (MIO's) with

[925] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).
[926] Above.
[927] Above.
[928] Refer to Jones, M, 'Aquaculture Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).

accompanying Asset Holding Companies were entitled to receive 20% of all aquaculture space newly created after 1 January 2005, and the equivalent of 20% of existing aquaculture space.

The MCACS Act also established the Māori Commercial Aquaculture Settlement Trust – referred to as the 'Takutai Trust' - which is a subsidiary of TOKM. The Takutai Trust was established to assist Māori with the aquaculture settlement and to administer the MCACS Act. In 2010, the Takutai Trust even assisted Te Tau Ihu Iwi, Hauraki and Ngāi Tahu in successfully completing their pre-commencement space settlements with the Crown, which resulted in a $97 million Deed of Settlement.

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

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

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

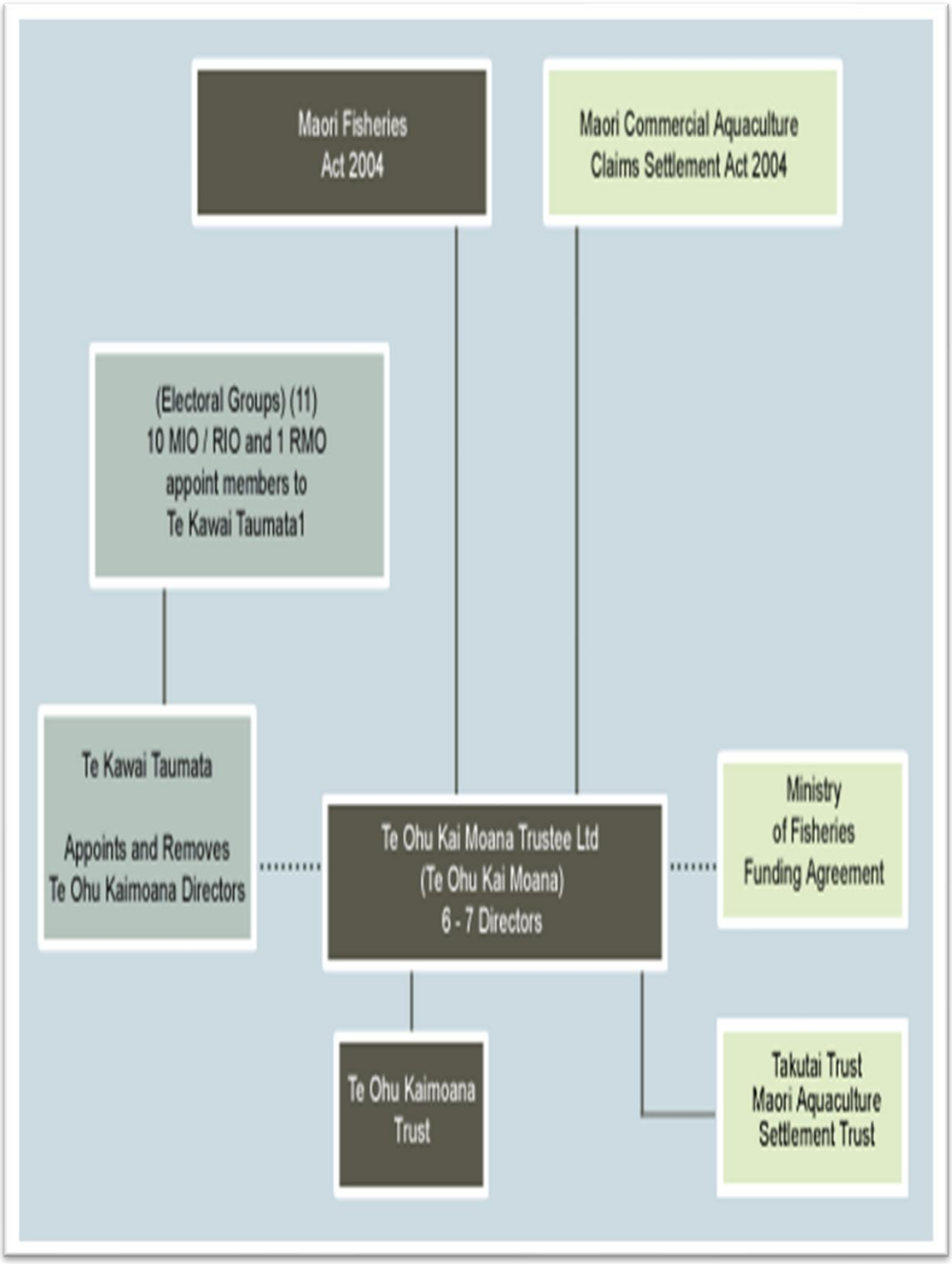


Diagram 8: TOKM Organisational Structures & the Takutai Trust Māori Aquaculture Settlement Trust[929]

[929] Takutai Trust, the Māori Agricultural Settlement Trust online at: http://www.takutai.Māori.nz/about/takutai.htm (Accessed November 2018).

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

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

> It's important that we have the best representatives and advisers advocating for us. You only need to look historically at the best enablers that Māori have had such as Tipene O'Regan, Sir Graham Latimer, Dame Whina Cooper and Matiu Rata. … These leaders changed the face of our country and without them, we probably wouldn't be where we are today. I think the primary focus of our people getting involved in the management of the [fisheries] quota is to take it away from the traditional piece and an assumption that when it comes to the management and governance of our marine economic resource, you don't necessarily have the cultural people involved in that. See, I believe that's a continuum which is social, economic and cultural. It's not a hierarchal thing, it's a flat line and if you understand that, then you start getting your structures and organizations right.[930]

Aquaculture New Zealand even recently reported that 'aquaculture has become the world fastest growing primary industry and the demand for aquaculture products is expected to increase significantly as the world's population grows and wild-catch levels remain relatively static.' [931] Statistics report that aquaculture produces approximately 47% of seafood consumed by humans globally and that production levels have grown at a rate of approximately 6.3% per annum for the past decade.

In 2014, the Ministry for Primary Industries (MPI) reported that the vast majority of New Zealanders felt positive about aquaculture, and that they supported the sustainable growth of the industry. However, it was not only due to the industry's ability generate $500 million revenue of which $338.1 million went towards export earnings. The public support seemed to derive from a much more holistic view of the industry, given it provides regional employment within communities and much support to other industries. The MPI report added that aquaculture is a sustainable solution to feeding the world as the industry estimated aquaculture to be one of the world's most efficient forms of food production and will soon be producing more seafood than wild fisheries.[932]

However, as noted earlier, the four TOKM maps above on TOKM allocation models, traditional tribal boundaries, traditional coastline entitlements, and fisheries management areas that were apparently decided based on mātauranga and tikanga Māori also apply for the Māori Commercial Aquaculture Claims Settlement Act 2004. Hence, each of these areas highlight

[930] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).
[931] Aquaculture New Zealand, 'Research Shows Strong Support,' (Aquaculture New Zealand, 1 August 2018) online at https://www.aquaculture.org.nz/2014/08/20/research-shows-strong-support/ (Accessed November 2018).
[932] Above.

the importance and relevance of mātauranga and tikanga Māori as well as the Treaty of Waitangi partnership in the aquaculture space, which can also operate in an EBM context.

A further challenge of Māori commercial fisheries and aquaculture for instituting EBM is capacity and capability. Whatever governance entity form tribal MIOs choose, they will shape the governance entity that best suits the particular objectives, functions and goals of the group. But the 'perfect governance entity' is no guarantee of perfect governance. Ultimately, such a lofty ideal is achieved (or not) by those individuals with the responsibility to lead; hence good people, indeed, good leaders and followers make the difference.[933] Dr Charles Royal of Ngati Raukawa made an interesting comment on Māori governance structures when he stated:

> Whānau were likened to flax bushes because they renew themselves from within. It is organic as we are. My granduncle used to say that 'We are more organism than organisation.' We get so caught up in all sorts of law structures, regulations, committees, machinery and function that we lose sight that we are organic.[934]

Dr Royal's comments are a gentle reminder about the importance of our people and our tikanga Māori values, which should not be lost in the process of establishing and operating legal entities in our pursuit of internal self-determination. People and the tribal group are more important than institutions and legal structures. Stone, a Māori lawyer at the time who worked extensively on Treaty settlements commented:

> Your legal structure is one aspect of governance … that's only one aspect and I guess it's probably not even the most important one. In my view, the most important aspect is the people who fill the positions within a legal structure. … It's essentially to get the right people, how to get them is another question.[935]

Thus having the human, scientific, institutional, industry as well as financial capacity to govern effectively in the commercial fisheries space is a colossal challenge for many tribal MIOs and IAOs. Due to insufficient resources, many iwi are unable to engage effectively as articulated by Mark Ngata, CEO, of Ngati Porou Seafoods when he opined:

> A huge part of the responsibility of iwi is to respond to government and to make our voices heard. Māori must have the ability to respond but not all iwi are resourced to be able to do so. Therefore, iwi rely heavily on groups such as Moana New Zealand and Te Ohu Kaimoana and iwi groups active in the area, to represent them on these issues. There is always room for improvement and we need to come together as a group. The Kermadecs issue is an example where if iwi come together and take a stand on something, the government will listen.[936]

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[933] Willis, R, 'Good Māori Governance' (Unpublished Paper, 2003) at 2.

[934] Royal, C, 'Speech Notes,' in Te Puni Kokiri, *Proceedings of Whakawhānau: Whānau Development National Hui* (Wellington, 24-25 March 2003) at 47.

[935] Interview with Damian Stone, lawyer, (Wellington, 4 December 2003).

[936] Cited in Ben Matthews, 'Ko Au te Moana, Ko te Moana, Ko Au: Te Rangatiratanga me te Kaitiakitanga o roto i te Rangai Kaimoana Māori: I am the Ocean, the Ocean is Me: Rangatiratanga and Kaitiakitanga in the Māori

Māori tribal MIOs and IAOs then need to build and strengthen leadership, management and governance capacity and capability to effectively co-govern while simultaneously incorporating tikanga and mātauranga Māori within an EBM context over the marine estate.

In terms of shared jurisdiction in Māori commercial fisheries, Te Maire Tau of Ngāi Tahu typically asserted:

> Dominance in property rights brings tino rangatiratanga which then allows Māori to be kaitiaki. To solve the problems long term, we need to buy quota which will give jurisdiction over mahinga kai [food gathering sites] and land and to enhance the iwi or hapū to stop the council from doing things. You can only truly be kaitiaki when you own the whole lot of the land, quota or waterway.[937]

With respect, such an approach is not conducive to co-governance and co-designed structures that acknowledge the Māori constitutional partnership and that effectively incorporate tikanga and mātauranga Māori within an EBM context over the marine estate. Māori must work collaboratively with Government and other key stakeholders for EBM to work. It must be shared mana whakahaere tōtika jurisdiction as originally envisaged in Te Tiriti o Waitangi/the Treaty of Waitangi.

In addition, the corporate focus of Māori fisheries organisations – iwi MIOs and iwi IAOs – although commendable may be a challenge to implementing EBM over the marine estate in the future given the tendency to prioritise corporate economic objectives over environmental, cultural and social objectives. For effective EBM governance over the coastal marine estate to occur, all stakeholder priorities must be considered and balanced – commercial, customary, economic, cultural, environmental, social and political interests and priorities.

But as noted above, for the aquaculture settlement to succeed, it is dependent upon iwi having strong leadership, and maintaining mātauranga and tikanga Māori while also instituting good Māori governance. Striking the elusive balance between political, commercial and economic versus social, environmental and cultural objectives, as articulated in the self-determination discourse of international law in UNDRIP, is required going forward. Unfortunately, the past commercial fisheries challenges over tribal identity and representation, coastal boundaries and leadership as well as general (and somewhat inevitable) iwi corporatisation will continue to present challenges into the future hence a policy of caution is recommended going forward - kia tupato – much care is required!

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

Seafood Sector,' (Master of International Relations and Diplomacy Thesis Dissertation, University of Canterbury, 2018) at 26.

[937] Above, at 28.

N. Tikanga Māori and Customary Fisheries

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

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

> Under the deed of settlement the Crown agreed, among other things, to introduce legislation empowering the making of regulations recognising and providing for customary food gathering and the special relationship between the tangata whenua and places of importance for customary food gathering (including tauranga ika and mahinga mātaitai), to the extent that such food gathering is not commercial in any way nor involves commercial gain or trade: in accordance with the Crown's obligations under the deed to introduce the legislation, the Treaty of Waitangi (Fisheries Claims) Settlement Bill was introduced into Parliament, enacted, and came into force on 23 December 1992.[938]

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

> The object of sections 175 to 185 is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapū either—
>
> (a) as a source of food; or
>
> (b) for spiritual or cultural reasons,—
>
> better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi. [939]

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

[938] Fisheries (Kaimoana Customary Fishing) Regulations 1998, Preamble C and D.
[939] Fisheries Act 1996, s. 174.

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

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

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

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

(i) consult with tangata whenua about; and

(ii) develop policies to help recognise—

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

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

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

(i) are not enforceable in civil proceedings; and

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

except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983.[940]

Furthermore, s.186A, Fisheries Act 1999 offers much more scope for recognising mātauranga and tikanga Māori in customary fisheries.[941]

[940] Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s. 10.
[941] Refer to Appendix 4.

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

> The Minister must provide to any Tangata Tiaki/Kaitiaki such information and assistance as may be necessary for the proper administration of these regulations and do so in accordance with section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. [942]

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

> **16 Iwi planning document**
>
> (1) Any Tangata Kaitiaki/Tiaki may prepare a management plan or strategy for the area/rohe moana for which that Tangata Kaitiaki/Tiaki has authority.
>
> (2) When a plan is prepared by a Tangata Kaitiaki/Tiaki and that plan is agreed to be authorised by the tangata whenua of the area/rohe moana for which the Tangata Kaitiaki/Tiaki was appointed, the plan—
>
> (a) may be treated as a planning document recognised by an iwi authority for the purposes of the Resource Management Act 1991, if it meets the requirements of that Act:
>
> (b) must be taken into account by the Minister for the purposes of section 10(b) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

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

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

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

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

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

> Management of that should actually go down to that level because people on the ground actually don't get a share of the resource.[943]

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

Taiāpure, Mataitai and Non-Commercial Fishing Reserves

As part of non-commercial customary fishing interests, tangata whenua may establish taiāpure, mahinga mataitai reserves and other non-commercial fishing reserves - areas where tangata whenua share some concurrent jurisdiction to manage all non-commercial fishing by making bylaws - following consultation with the local community – i.e. people who own land in the proximity of the proposed mataitai reserve.[944]

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

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

- taiāpure – local fisheries of special significance, that may have additional fishing rules,
- mātaitai reserves – areas closed to commercial fishing, that may have bylaws affecting recreational and customary fishing,
- temporary closures – issued under sections 186A or 186B of the Fisheries Act 1996, and
- customary bylaw areas – currently only in the Waikato-Tainui area.[945]

Section 186, Fisheries Act 1996 recognises the first three customary management models (refer to Appendix 4).

[943] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

[944] The regulations in the North Island are called the Kaimoana Customary Fishing Regulations 1998, Reg 61 and cover non-commercial customary fishing, which means fishing to provide food for hui (meetings) and tangi (funerals), and which does not involve the exchange of money or other form of payment. See also the Taiāpure provisions that are contained within the Fisheries Act 1996, ss. 174-185.

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

Taiāpure

The Māori Fisheries Act 1989 established the taiāpure-local fisheries model in order 'to make better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II, Treaty of Waitangi.'[946] Defined as a coastal fishing area, limited to littoral or estuarine waters, which is of special significance to the local iwi either for fishing or for cultural or spiritual reasons, the purpose of the taiāpure is to give local Māori a greater say in the management and conservation of the area, not to establish a special fishing regime for iwi.[947] A primary objective of taiāpure is to ensure access to abundant and safe kai moana but often more general objectives include to protect the mauri and wairua along the way. [948]

Taiāpure (local fisheries) are 'estuarine or coastal areas that are significant for food, spiritual, or cultural reasons that allow all types of fishing and are managed by local communities.'[949] Taiāpure are often managed in collaboration with local fishing stakeholders (recreational and commercial fishers). Commercial fishing continues but may be subject to taiāpure rules. Taiāpure can only be applied to marine and estuarine environments.[950]

The Fisheries Act 1996 prescribes in ss. 174 and 175 that the Governor-General may declare, subject to s 176, 'any area of New Zealand fisheries waters (estuarine or littoral coastal) to be a taiāpure-local fishery.'[951] Section 174, Fisheries Act 1996 states:

> **Taiāpure-local fisheries and customary fishing**
>
> **174 Object**
>
> The object of sections 175-185 is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapū either—
>
> (a) as a source of food; or
>
> (b) for spiritual or cultural reasons,—
>
> better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi.

Moreover, s 176 sets out the requirements for consideration prior to recommending a taiāpure-local fishery:[952]

> **176 Provisions relating to order under section 175**

[946] Section 54A, Fisheries Act 1983, as inserted by s. 74, Māori Fisheries Act 1989.

[947] Munro, J 'The Treaty of Waitangi and the Sealord Deal' in *Victoria University of Wellington Law Review,* (Vol. 24, 1994) 389, at 421-422.

[948] Above.

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

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

[951] Fisheries Act 1996, s.175.

[952] Above, s. 176.

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

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

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

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

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

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

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

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

The management of the local taiāpure fishery will be through a committee appointed by the Minister (in consultation with the Minister of Māori Affairs) which may be an existing 'body corporate' from the local Māori community.[953] The committee will hold office at the 'pleasure of the Minister.'[954] The power to make regulations is also covered in s. 185, Fisheries Act 1996:[955]

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

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

Once a taiāpure-local fishery proposal has been approved, the Minister appoints a management committee from those nominated by the local Māori community. The committee has the right to recommend the making of regulations to the Minister for the management and conservation of the taiāpure-local fishery. Fishing activities within the taiāpure-local fishery continue unchanged until the committee recommends the making of a

[953] Fisheries Act 1996, s. 184(1)-(3).
[954] Above, s. 184(4).
[955] Above, s. 185.

regulation, and the Minister approves it. Until such time, all fishers must comply with existing regulations.

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

Mātaitai Reserves

Mātaitai reserves are established to 'recognise and provide for traditional fishing through local management. Mātaitai allow customary and recreational fishing but usually do not allow for commercial fishing.[956] Mātaitai may be established in lakes, rivers, estuaries and coastal areas. Bess and Rallapudi referred to the background and application of Mātaitai reserves:

> The 1992 Fisheries Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Act 1992, which legislated the Deed of Settlement, provided for the full and final settlement of Māori fishing claims and confirmed that Māori customary fishing rights had not been extinguished and continued to give rise to obligations on the Crown. These obligations led to enactment of the Fisheries (Kaimoana Customary Fishing) Regulations 1998, which apply to North Island waters and the waters around the Chatham Islands, and the Fisheries (South Island Customary Fishing) Regulations 1999, collectively referred to as the customary regulations. Customary food gathering areas established under these regulations are referred to as mātaitai reserves.[957]

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

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

The Minister will appoint Tāngata Kaitiaki/Tiaki whose purpose is to manage fisheries resources for customary purposes by issuing customary fishing authorisations and have rights to establish bylaws to exercise kaitiakitanga within their rohe moana (territorial waters)[958]

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

[957] Bess, R and Rallapudi, R, 'Spatial Conflicts in New Zealand Fisheries: The Rights of Fishers and Protection of the Marine Environment,' in *Marine Policy* (Vol. 31, 2007) 719 at 722–723.

[958] Ministry of Fisheries, *Mātaitai Reserve* (2009).

These guardians are usually tangata whenua. Mātaitai can be constituted and run entirely by tangata whenua, although in practice, other interest groups often co-manage these areas. The Minister retains limited discretion on approving bylaws for sustainability. Bylaws only apply to customary and recreational fishing, given that commercial fishing is typically banned within the mātaitai reserve itself.[959]

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

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

The current list of mātaitai reserves according to MPI are listed below:

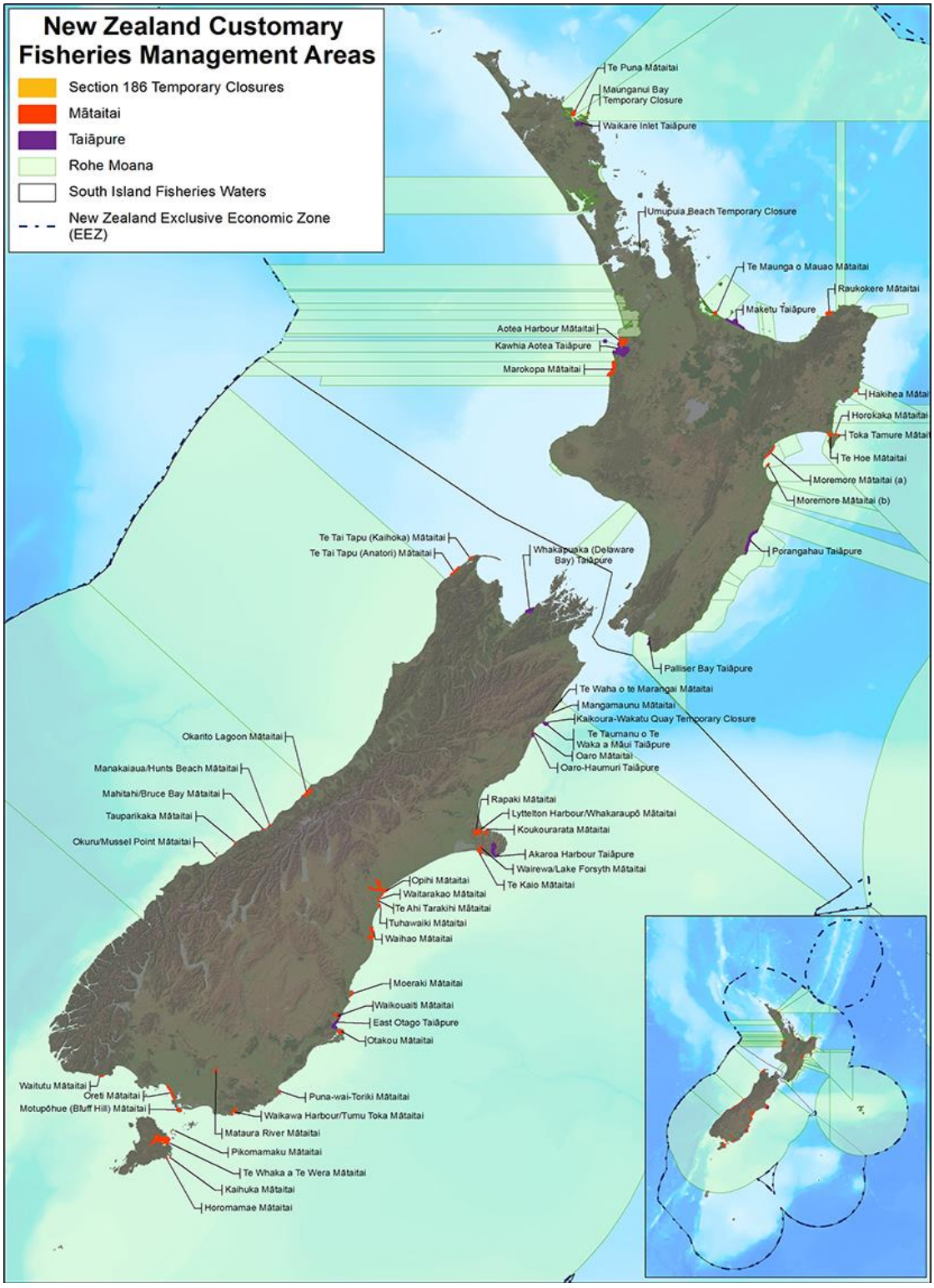
Established Mātaitai Reserves:

1. Rapaki Bay (Lyttelton Harbour), est. 1998. 0.3 km2.
2. Koukourarata (Banks Peninsula), est. 2000. 8 km2.
3. Te Whaka ā te Wera (Rakiura – Stewart Island), est. 2004. 79 km2.
4. Moremore (Hawkes Bay), est. 2005. 22.5 km2.
5. Mataura River (Southland), est. 2005. 10 km of the river.
6. Raukokore (East Cape), est. 2005. 19 km2.
7. Motupohue Mātaitai (Southland) est. 2014. 7.3 km2
8. Mataura Mātaitai (Southland) 0.8 km2 (Freshwater)
9. Opihi Mātaitai (South Canterbury) 23.0 km2 (Marine/Freshwater)
10. Waitarakao Mātaitai 0.9 km2 (Marine/Freshwater)
11. Moremore Mātaitai (a) (Hawkes Bay) est. 2005 11.2 km2
12. Moremore Mātaitai (b) (Hawkes Bay) est. 2005 4.6 km2
13. Raukokere Mātaitai 26.5 km2
14. Puna-wai-Toriki Mātaitai 2.4 km2
15. Aotea Harbour Mātaitai (Waikato) est. 2008.40.1 km2
16. Marokopa Mātaitai (Waikato) est. 2011. 67.9 km2
17. Hakihea Mātaitai (Gisborne) est. 2011. 4.1 km2
18. Moeraki Mātaitai (North Otago) est. 2010. 2.9 km2
19. Waikawa Tumu Toka Mātaitai (Southland/Catlins) 7.1 km2 (Marine/Freshwater)
20. Oreti Mātaitai (Southland) 16.4 km2

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

21. Horomamae Mātaitai 0.2 km2
22. Te Tai Tapu (Anatori) Mātaitai (West Coast, South Island) 14.6 km2
23. Te Tai Tapu (Kaihoka) Mātaitai (West Coast, South Island) 5.1 km2
24. Wairewa Mātaitai 5.7 km2 (Marine/Freshwater)
25. Te Kaio Mātaitai 12.2 km2
26. Pikomamaku Mātaitai (Foveaux Strait). 0.05 km2
27. Te Maunga o Mauao Mātaitai (Tauranga) 6.9 km2
28. Kaihuka Mātaitai 0.1 km2
29. Mahitahi Mātaitai 1.1 km2
30. Tauperikaka Mātaitai 0.6 km2
31. Okuru Mātaitai (West Coast, South Island) 0.2 km2
32. Manakaiaua Mātaitai 0.7 km2
33. Horokaka Mātaitai 4.1 km2 (Mahia Peninsula) est. 2012. 2.9 km2
34. Te Hoe Mātaitai 14.5 km2 (Mahia Peninsula) est. 2012. 2.9 km2
35. Toka Tamure Mātaitai (Mahia Peninsula) est. 2012. 2.9 km2
36. Waihao Wainono Mātaitai 4.7 km2 (Marine/Freshwater)
37. Okarito Mātaitai 19.5 km2 (West Coast, South Island) (Marine/Freshwater)
38. Te Puna Mātaitai (Bay of Islands) est. 2013. 21.9 km2
39. Waitutu Mātaitai (Fiordland) est. 2015 2.1 km2
40. Te Waha o te Marangai Mātaitai 0.02 km2
41. Mangamaunu Mātaitai 0.02 km2
42. Oaro Mātaitai 0.2 km2.[960]

[960] Above.



Map 6: Māori Customary Fisheries Management Areas[961]

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

Temporary Closures

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

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

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

Temporary closures or method restrictions apply to everyone: commercial, recreational and customary fishers.[962] Reserves can only be applied for over traditional fishing grounds and must be areas of special significance to the tangata whenua. Tangata whenua may also establish bylaws for the reserves, which may restrict or prohibit the taking of a particular species within a mātaitai reserve.

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

> **66 Matters to be considered by regional council (plans)**
>
> (1) A regional council must prepare and change any regional plan in accordance with—
>
> (a) its functions under section 30; and
>
> (b) the provisions of Part 2; and
>
> (c) a direction given under section 25A(1); and
>
> (d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
>
> (e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
>
> (ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and
>
> (f) any regulations.

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

(2) In addition to the requirements of section 67(3) and (4), when preparing or changing any regional plan, the regional council shall have regard to—

(a) any proposed regional policy statement in respect of the region; and

(b) the Crown's interests in the coastal marine area; and

(c) any—

(i) management plans and strategies prepared under other Acts; and …

(iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiāpure, mahinga mātaitai, or other non-commercial Māori customary fishing).

Given that the process of establishing a taiāpure, mataitai and temporary closure can involve a recommendation from the local Māori community, they are established to acknowledge the Treaty of Waitangi partnership over customary fisheries and mātauranga and tikanga Māori, and the powers of Tāngata Kaitiaki/Tiaki are extensive, [963] there is scope to integrate mātauranga and tikanga Māori in a more meaningful way perhaps even in an EBM context if Māori so choose which is a degree of co-governance and concurrent jurisdiction.

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

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

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

> Our Iwi has a similar problem to most Iwi where a lot of kaumātua are passing away and we are losing the traditional knowledge that has not transferred to the next generation. So we recognise that we needed to preserve that as quickly as we could. Another challenge our Iwi has is that we are becoming isolated as most of our younger generation move away in search of work so those left behind are few. So that

[963] Sections 54A and 54K(6), Fisheries Act 1983.

knowledge of practicing kaitiakitanga or harvesting that kaimoana slowly disappears because you only have a handful left.

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

> A key focus for our Iwi is succession planning and ensuring the transference of mātauranga and tikanga to the next generation. However, its success is dependent on two things.
>
> > 1. Financial Capacity - In our experience it's been 50/50 because half the time we'll be successful in securing funding, and half the time we're not which ultimately impacts on whether we hold our wānanga that year.
> >
> > 2. Human Capacity - We have only had a few that have been able to run our wānanga, and it is a strain on them. It's the same ones running it, and usually the same ones that are attending.[964]

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

> Some of our whānau who have the knowledge are very reluctant to share that with non-Māori for fear of exploitation and misappropriation. Also, with non-Māori taking the stance of 'we've already got your knowledge so we don't need to engage you anymore.' So our people are weary of bringing in or working alongside outside organisations as they are a little bit suspicious.[965]

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

> I was brought up in a place where if you went down and got kai moana in sugar bags you brought it back and share it with families that couldn't get down to the beach. We don't do that anymore. So those are practices from the past and at the end of the day, it's all about whānau and families. I mean if there are people who have nothing, then you try and give them something, whether it's off the sea or the land, or other forms. We are losing out on that togetherness practice [manaakitanga (hospitality) and mahi tahi (unity)].[966]

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

[964] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).
[965] Above.
[966] Above.

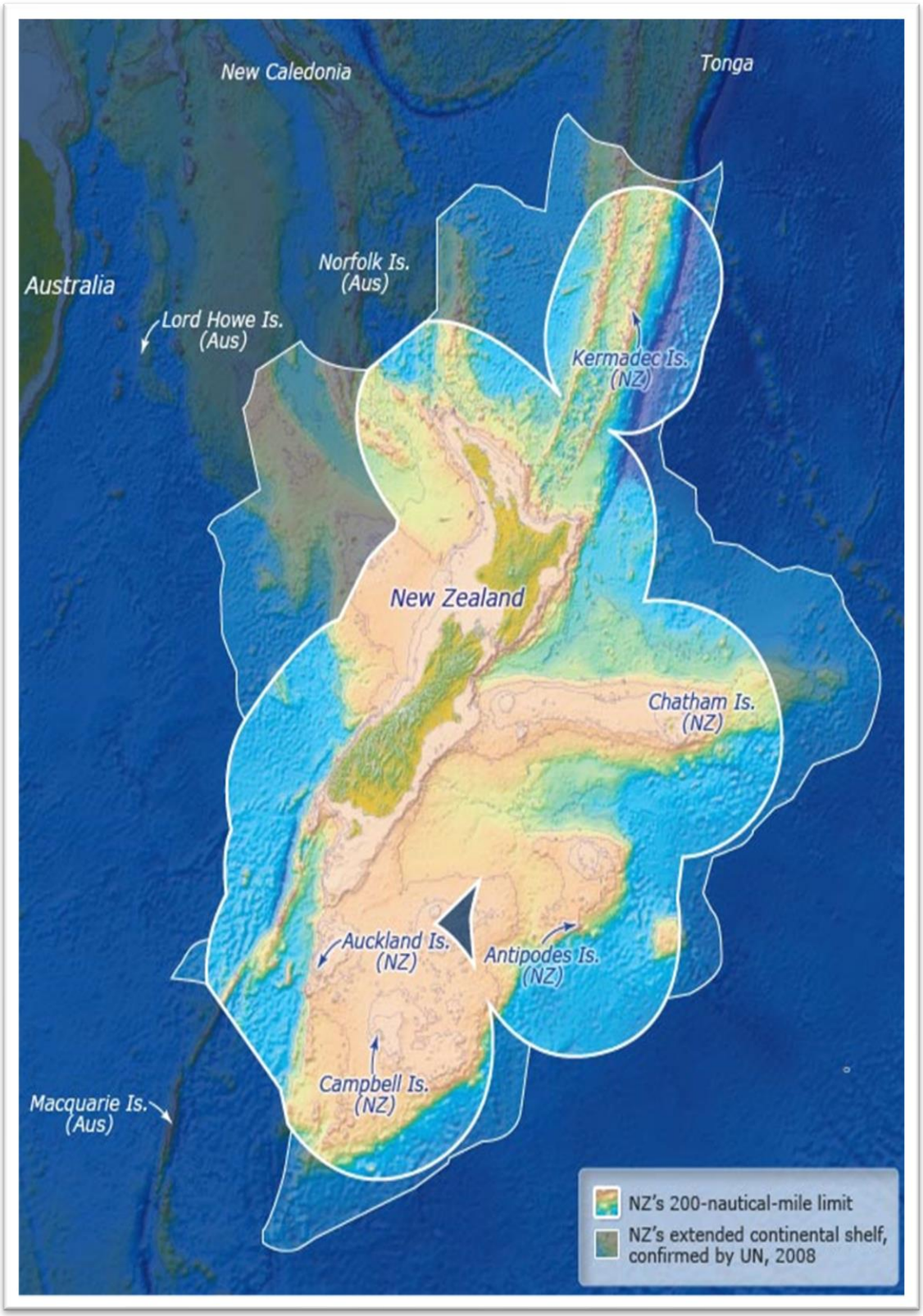
The next section will discuss the Exclusive Economic Zone and Continental Shelf Act 2012 within a mātauranga and tikanga Māori, shared co-governing jurisdiction context, and the similar potential for integration in an EBM context.

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

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act) established an effects-based regime for the regulation of activities and development in the exclusive economic zone (EEZ) and continental shelf of New Zealand.[967] Under the United Nations Convention on the Law of the Sea 1982 (UNCLOS), New Zealand has economic rights to water-column resources including the deep sea fisheries, seafloor and sub-seafloor resources such as oil, gas and metallic minerals.

The aim of the EEZ Act is to promote the sustainable management of natural resources in the EEZ and continental shelf. The EEZ Act also seeks to protect the EEZ and continental shelf from pollution by regulating discharges and dumping. The EEZ is defined in the EEZ Act as the marine space from 12 to 200 nautical miles from the coast of New Zealand. The continental shelf is included within the EEZ as the area that extends beyond 12 nautical miles from the coast to the outer edge of the continental margin.

[967] 'The Statutory Framework for Management of the Exclusive Economic Zone and Continental Shelf - Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012,' in *Environmental and Resource Management Law Online* (Lexis Nexis, September, 2017). Refer also to Iorns, C and Morar, R, 'The Operation of Tikanga Māori within the EEZ and Continental Shelf Act Draft,' (Unpublished Draft MIGC Report for the University of Waikato, University of Victoria, November 2018).



Map 7: New Zealand's Exclusive Economic Zone (EEZ), fourth largest EEZ in the World[968]

[968] New Zealand Multilateral Organisations, from Te Ara the Encyclopedia of New Zealand online at: https://teara.govt.nz/en/map/33830/exclusive-economic-zones (Accessed November 2018).

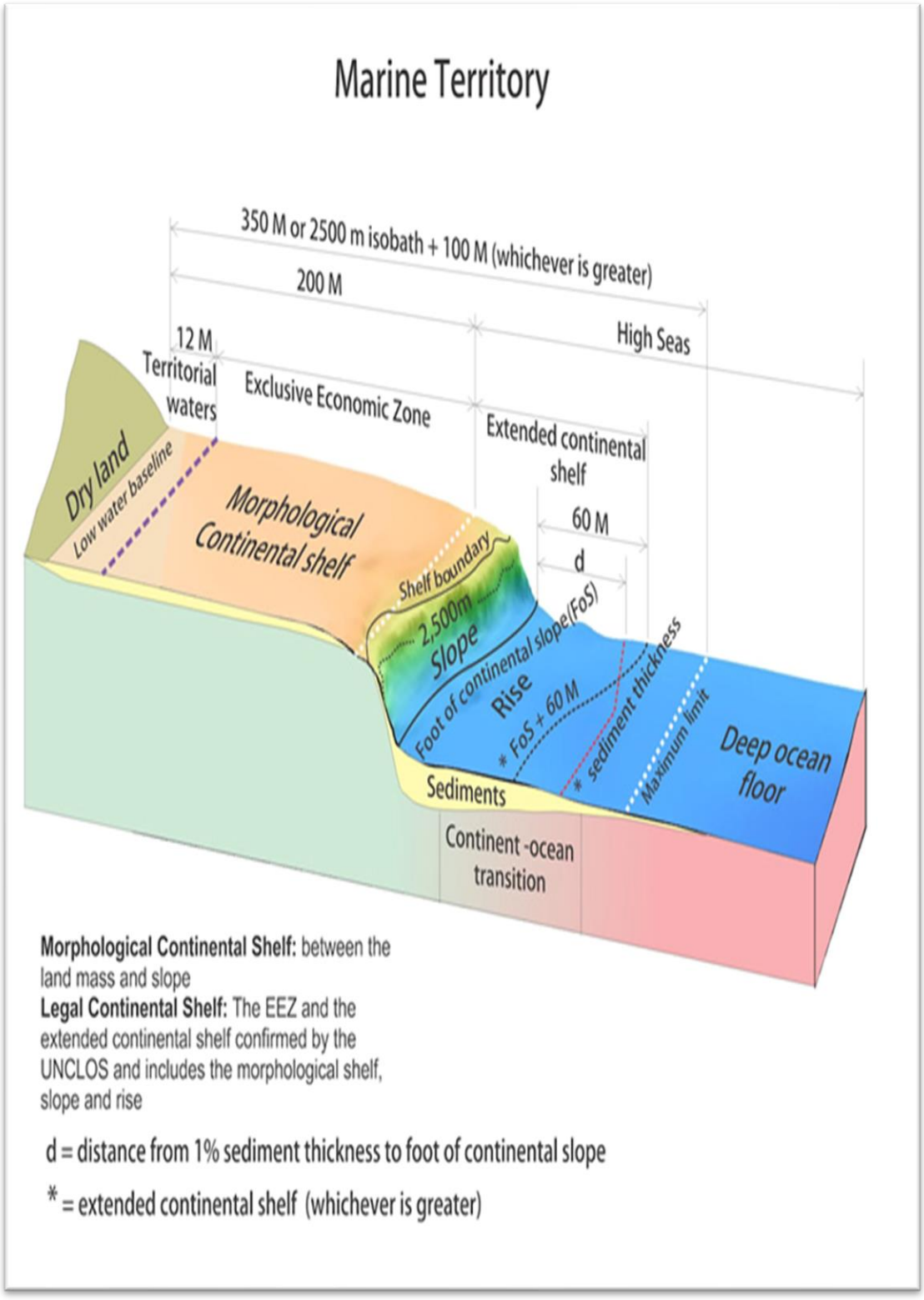
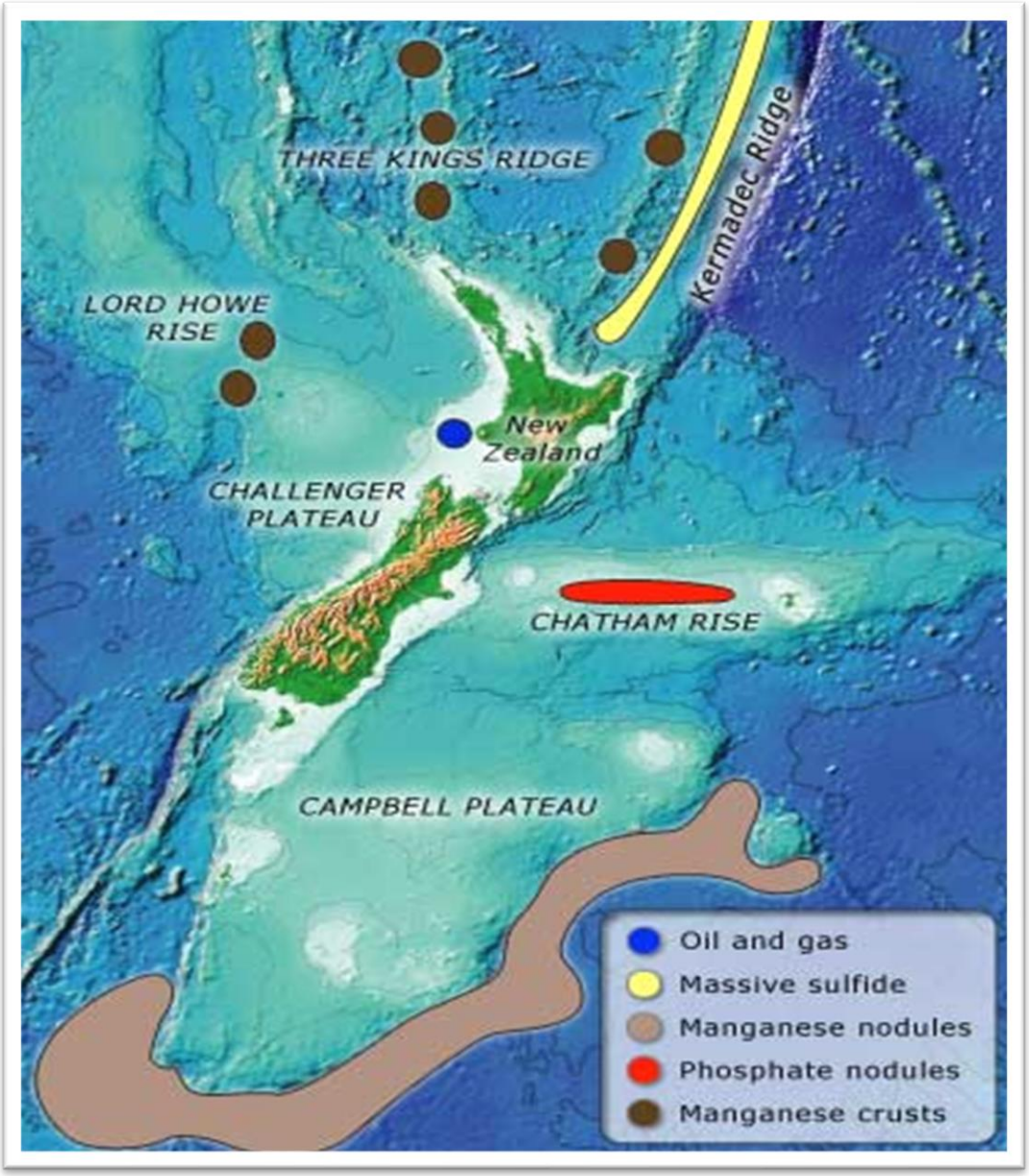


Diagram 9: Continental Shelf Cross Section[969]

[969] New Zealand's Continental Shelf, GNS Science website: https://www.gns.cri.nz/Home/Learning/Science-Topics/Ocean-Floor/Undersea-New-Zealand/NZ-s-Continental-Shelf (Accessed November 2018).

The EEZ regulates activities that relate to the disturbance and exploitation of the seabed including petroleum and mineral exploration for economic development.[970] Within the EEZ framework, there are permitted activities that can proceed subject to relevant conditions. There are also activities that are prohibited under the EEZ Act where no consent can be granted such as dumping certain types of waste and preventing certain organisms from entering New Zealand.



Map 8: Mineral Resources in New Zealand Waters[971]

[970] See Environment Guide website for a summary of the EEZ Act and the area subject to this legislation: (http://www.environmentguide.org.nz/eez (Accessed November 2018).

[971] Law of the Sea, Mineral resources in New Zealand waters from Te Ara the Encyclopaedia of New Zealand online at: https://teara.govt.nz/en/map/6971/mineral-resources-in-new-zealand-waters (Accessed November 2018).

The marine consent process is the decision-making platform for those discretionary activities under the EEZ Act, which is administered by the Environmental Protection Authority (EPA). The EPA is a Crown agent established by the Environmental Protection Authority Act 2011 (EPA Act) which was introduced to replace its predecessor, the Environmental Risk Management Authority (ERMA).[972] The EPA Act provides a legislative framework for the incorporation of the principles of the Treaty of Waitangi into EPA decision-making processes.[973] However, there is no general approach taken by the EPA as to the extent of which the principles are accounted for in each decision-making process.

In July 2017 for example, there were six notified applications for marine consent heard under the EEZ Act.[974] Of the six notified applications, three were for seabed mining and the others were for continued drilling activities with associated structural and discharge effects but they were all declined.[975] The most recent decision by the EPA to grant consent for the South Taranaki seabed mining application was quashed by the High Court appeal in *The Taranaki-Whanganui Conservation Board v The Environmental Protection Authority*.[976]

Treaty Provisions in the EEZ Act

A limitation for Māori of the EEZ Act is that it does not include a broad provision requiring decision makers to give effect to or even to have regard to the principles of the Treaty of Waitangi. Although the following statutory sections are dense, they are important for understanding the limitations of the EEZ Act and the EPA on recognising mātauranga and tikanga Māori as well as having regard for the principles of the Treaty of Waitangi hence the inclusion of the sections here.

Section 12, EEZ Act is an enabling section that provides decision makers with specific mandatory requirements they must comply with in order to give effect to the principles of the Treaty[977] and any applicant who lodges a marine consent application must have regard to the principles. Section 12 states:

> **Treaty of Waitangi**
> In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—

[972] 'How the Environmental Protection Authority incorporates the principles of the Treaty of Waitangi into its regulatory practice,' in *Report for the New Zealand Productivity Commission* (February 2014) at 3.
[973] Environmental Protection Authority Act 2011, ss. 4(a) and 4(b).
[974] Above.
[975] The unsuccessful applications were made by Chatham Rock Phosphate Ltd, OMV New Zealand Ltd and Shell Todd Oil Services Ltd. Trans-Tasman Resources Ltd were unsuccessful in their 2014 application which was subsequently overturned by the EPA decision-making committee following a second application in 2016. The decision was appealed to the High Court by several groups opposed to seabed mining in South Taranaki and was successful in *The Taranaki-Whanganui Conservation Board, and other Appellants v The Environmental Protection Authority* [2018] NZHC 2217.
[976] [2018] NZHC 2217. The decision was quashed on adaptive management grounds while the grounds addressing Māori interests advanced by the appellants were rejected by the Court.
[977] The approach is in line with the general approach of Parliament to not have broad Treaty of Waitangi clauses but to enact specific duties.

(a) section 18 (which relates to the function of the Māori Advisory Committee) provides for the Māori Advisory Committee to advise marine consent authorities so that decisions made under this Act may be informed by a Māori perspective; and
(b) section 32 requires the Minister to establish and use a process that gives iwi adequate time and opportunity to comment on the subject matter of proposed regulations; and
(c) sections 33 and 59, respectively, require the Minister and a marine consent authority to take into account the effects of activities on existing interests; and
(d) section 46 requires the Environmental Protection Authority to notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them.

In decisions to approve or decline an application, decision making committees must assess whether the applicant has met and discharged the above s. 12 obligations. The requirement however is not to assess whether the applicant has had sufficient regard to the principles of the Treaty in general but has paid sufficient regard to the particular requirements adopted by Parliament in s. 12 in order to uphold the principles of the Treaty.

In addition, s. 32, EEZ Act requires the Minister to establish and use a process that gives iwi 'adequate time and opportunity' to comment on the subject matter of the proposed regulations which appears to be an enabling provision for Māori. Section 46, EEZ Act similarly requires the EPA to notify iwi authorities and other groups with an existing interest of consent applications that may affect them. Such legislative provisions however leave open to interpretation what constitutes 'giving iwi adequate time and opportunity to comment' to the decision making committee. Such provisions give the Minister discretionary power to determine the consultation period. The circumstances in which a Minister has provided adequate time and opportunity will differ depending on the scale of the operation proposed by the application. The EPA has a statutory timeframe for processing activities under ss. 20 A – D and 20G, EEZ Act. From the date of public notification, iwi are given 30 working days to make a written submission on the application and 20 working days between the hearing notification and the hearing itself,[978] which timeframes can be a challenge for Māori organisations with limited staff capacity and resources.

The EPA has also provided guidelines for exercising this discretion when determining the adequacy of the consultation period.[979] The purpose of the guidelines is for applicants to check whether the proposed application has any impacts on Māori to determine the correct level of engagement. Māori organisations who have a Treaty interest affected by a proposed application require a medium-high level of engagement, which is described in the EPA guidelines as:

1) Request feedback via emails;

[978] See the EPA website for notification process guidelines for ss. 20 A-D and 20G online at: https://www.epa.govt.nz/assets/Uploads/Images/Content-page-images/Marine-Activities-EEZ/Notified-EEZ-Process-Diagram.jpg (Accessed November 2018).
[979] See also the EPA website on *Māori Engagement Guidelines for Hazardous Substances for Notified Applicants* (2015). Online at: https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf (Accessed November 2018).

2) Post application information on the EPA website;
3) Face-to-face meetings with iwi organisations;
4) Māori Reference Group; and
5) Presentation at TH national hui.[980]

Section 59(2), EEZ Act is the substantive provision that details the mandatory considerations the decision-making committee must take into account when considering an application. Section 59(1) and (2) state:

Marine consent authority's consideration of application

(1) This section and sections 60 and 61 apply when a marine authority is considering an application for a marine consent and submissions on the application.

(2) If the application relates to a section 20 activity… a marine consent authority must take into account -

(b) any effects on the environment or existing interests of allowing the activity, including—

(I) cumulative effects; and

(ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and

(c) the effects on the environment or existing interests of other activities undertaken in the area covered by the application or in its vicinity, including—

(i) the effects of activities that are not regulated under this Act; and

(ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and

(d) the effects on human health that may arise from effects on the environment; and

(e) the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes; and

(f) the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species; and

(g) the economic benefit to New Zealand of allowing the application; and

(h) the efficient use and development of natural resources; and

(i) the nature and effect of other marine management regimes; and

(i) best practice in relation to an industry or activity; and

(j) the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity; and

(k) relevant regulations (other than EEZ policy statements); and

(l) any other applicable law (other than EEZ policy statements); and

(m) any other matter the marine consent authority considers relevant and reasonably necessary to determine the application.

[980] Above.

Under s 59(2)(a) then, the decision-making committee must take into account any effects on 'existing interests.' An 'existing interest' is defined in s.4, EEZ Act interpretation section and includes:

> (a) any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing:
> (b) any activity that may be undertaken under the authority of an existing marine consent granted under section 62:
> (c) any activity that may be undertaken under the authority of an existing resource consent granted under the Resource Management Act 1991:
> (d) the settlement of a historical claim under the Treaty of Waitangi Act 1975:
> (e) the settlement of a contemporary claim under the Treaty of Waitangi as provided for in an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992:
> (f) a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011.[981]

The definition of 'existing interests' is not limited to merely physical and tangible interests but extends to possessions that have spiritual or intrinsic value beyond physical attributes.[982] Metaphysical interests emphasise the role that Māori have as kaitiaki of coastal marine areas that have traditionally been governed by local tikanga.[983] The principle of active protection furthermore requires the Crown to actively protect Māori rights and interests, particularly those protected under the Treaty[984] which interests the courts have found may not be satisfied by consultation alone.[985] In contrast, although customary rights are recognised in the common law, the EEZ statutory regime does not recognise such rights unless prescribed by Parliament.

Section 59(2)(m), EEZ Act above is a catchall provision that provides for the decision-making committee to take into account 'any other matter the marine consent authority considers relevant and reasonably necessary to determine the application.' In 2017, the decision-making committee heard the Trans-Tasman Resources Ltd application for seabed mining and held that Parliament intended for the Treaty principles to be considered under the prescriptions expressed under s. 12, EEZ Act. Hence, the scope of s 59(m), EEZ Act was described as being limited to those considerations that are not accounted for by the EEZ Act. The Treaty of Waitangi principles according to this decision-making committee can only be given effect by compliance with the prescriptions under s. 12, EEZ Act and cannot be bolstered by s. 59(m), EEZ Act.[986]

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[981] Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s. 4.

[982] 'Māori and Environmental Law - Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012' in *Environmental and Resource Management Law Online* (Lexis Nexis, September 2017).

[983] See the Environment Guide website on *Māori and the EEZ Act online at:* http://www.environmentguide.org.nz/eez/Māori-and-the-eez-act (Accessed November 2018).

[984] Glover, K, *The Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal,* (Te Puni Kokiri, Wellington, 2002) at 93.

[985] *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

[986] While the decision of this committee was quashed by the High Court in *The Taranaki-Whanganui Conservation Board v The Environmental Protection Authority* [2018] NZHC 2217, this finding in relation to the scope of s 59(m), EEZ Act was not held to be in error.

The inability of the EEZ Act to give full regard to the Treaty principles then is a significant limitation on shared jurisdiction and on exercising tikanga and mātauranga Māori because the decision-making committee appears to be unable to protect Māori interests that do not fall within s 12, EEZ Act.

Another procedural aspect relevant to the substantive consideration of Māori interests is the ability under s 56(1)(b), EEZ Act for a decision-making committee to 'seek advice from the 'Māori Advisory Committee' established under the EPA Act 'on any matter related to' an application for a consent under the EEZ Act.

Environmental Protection Authority

As noted briefly above, the Environmental Protection Authority (EPA) is the government agency responsible for administering the EEZ Act. Any assessment of the protection of Māori interests under the EEZ Act must also consider the role of Māori within the EPA and its decision-making processes.

There is no other overarching requirement for the EPA to take into account the principles of the Treaty of Waitangi in its decision-making but s. 4, EPA Act requires the EPA to comply with whatever Treaty requirements there are in the statute that it is administering when exercising powers or functions under that Act.[987] Section 4, EPA Act states:

> **Treaty of Waitangi (Te Tiriti o Waitangi)**
>
> In order to recognise and respect the Crown's responsibility to take account of the Treaty of Waitangi –
>
> (a) Section 8 establishes the Māori Advisory Committee to advise the Environmental Protection Authority on policy, process, and decisions of the EPA under an environmental Act; and
> (b) The EPA and any person acting on behalf of the EPA must comply with the requirements of an environmental Act in relation to the Treaty, when exercising powers or functions under that Act.

The Māori Advisory Committee mentioned above in s. 4(a) arose out of criticism of its predecessor – the Environmental Risk Management Authority - for its approach to incorporating Māori perspectives in its decision-making procedures where isolated Māori

[987] Environmental Protection Authority Act 2011, s. 4(b). The EPA operates under its own legislation – the Environmental Protection Authority Act 2011 (EPA Act) - and has its own structures and guidelines for implementing the principles of the Treaty of Waitangi within its operations and regulatory practices. The EPA also has responsibilities for other legislation such as the Hazardous Substances and New Organisms Act 1986 in addition to the EEZ Act.

individuals were expected to respond on behalf of one or more iwi or sometimes on a national level.[988]

The Māori Advisory Committee is officially named Ngā Kaihautū Tikanga Taiao (Ngā Kaihautū) whose primary roles are:[989]

- to provide advice and assistance to the EPA on matters relating to policy, process, and decisions of the EPA under the Acts it administers, including the EEZ Act; and
- to provide advice to a marine consent authority when the committee's advice is sought under s. 56(1)(b), EEZ Act.

Importantly, all of its members are Māori,[990] and the 'advice and assistance' Ngā Kaihautū provides 'must be given from the Māori perspective,'[991] which are enabling provisions for Māori.

However, while Ngā Kaihautū offers a Māori perspective, they do not represent the views of all Māori groups affected by specific activities, so Ngā Kaihautū needs to operate with caution.[992] Still, Ngā Kaihautū has effectively become kaitiaki of the decision-making processes under the statutes the EPA administers thus ensuring that Māori have an adequate opportunity to participate in the decision-making processes for all EPA regulatory practices. Ngā Kaihautū for example, advises the relevant decision-making committee on the context in which Māori submissions to that committee are to be interpreted and understood. Ngā Kaihautū may also provide a separate report to a decision-making committee such as a cultural assessment of a proposed activity. Ngā Kaihautū is critical in this respect to ensuring robust decision-making processes are followed by holding decision-making committees accountable to minimum standards of consultation with affected Māori communities. One risk of the extensive role of Ngā Kaihautū as noted above however is that it could be treated as *the* Treaty partner by the EPA instead of the actual Māori community affected by the activities.[993]

The EPA and EEZ regimes then complement each other and both are important in the decision-making processes. Unfortunately, however, no matter what the strength of Ngā Kaihautū, the EPA's approach to decision-making under the EPA Act must fit within the parameters of the EEZ Act. EEZ applicants are required to consider specific Treaty obligations pursuant to s. 12, EEZ Act and to follow the prescribed procedure for meaningful consultation with affected Māori. Ironically, those procedural and substantive requirements in the EEZ framework can limit the EPA's power to give full effect to the principles of the Treaty during the decision-making processes. For example, even if adherence to the Treaty principles might suggest that an applicant needs to do more than it has, if the applicant has fulfilled the s. 12,

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[988] EPA website on *Māori Engagement Guidelines for Hazardous Substances for Notified Applicants* (2015). Online at: https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf (Accessed November 2018) at 6.

[989] Environmental Protection Authority Act 2011, s. 19(1).

[990] See https://www.epa.govt.nz/about-us/our-people/nga-kaihautu-tikanga-taiao/ (Accessed November 2018).

[991] Environmental Protection Authority Act 2011, s. 19(2).

[992] EPA website on *Māori Engagement Guidelines for Hazardous Substances for Notified Applicants* (2015). Online at: https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf (Accessed November 2018) at 32.

[993] Above, at 35.

EEZ Act requirements to 'give effect to the principles', then no additional requirements can be imposed upon them.[994] The EPA then is not required to go beyond the minimum standard of Māori participation in the decision-making process provided for by the EEZ Act, in conjunction with its requirement to operate the Māori Advisory Committee. Such narrow prescriptive requirements in the EEZ Act and those used by the EPA can minimise the EPA's responsibilities to Māori communities affected by activities.

It is moreover, unclear how the EPA could better incorporate the principles of the Treaty of Waitangi into its decision-making processes. For example, there are some matters within the EPA's control such as the time limits prescribed for making a decision and in what manner submissions may be taken. There have however, been criticisms of these aspects in relation to decisions on applications made under the EEZ Act. For example, Māori have complained about the lack of appropriate participation in applications for approval of pesticides[995] and for new organisms.[996] Consultation on pesticide applications were neither appropriate nor timely,[997] despite being clearly required of applicants,[998] with a detailed framework being provided to assist applicants to do so.[999] Iorns concluded in this respect:

> Ngā Kaihautū has, in multiple reports regarding pesticide applications, noted with concern the lack of early engagement with Māori. The consequences of such a lack of meaningful early engagement is twofold: first, it prevents the applicant from fully engaging with the potential effects of the chemical … on the *kaitiaki* relationship between *iwi* and *taonga* species; and second, it hinders the comprehensive involvement of Māori in the application process.[1000]

Iorns continued:

> Ngā Kaihautū has raised concerns with the treatment of this issue by applicants in its response to several pesticide applications, linking failures in process to failure to consider the substantive issues. … In 2017, the EPA expressed its commitment to 'considering how to incorporate mātauranga Māori into [its] decision making.' It is a

[994] See for example, the deciding view on 'Social and Cultural Impacts: Tangata Whenua Matters' in Marine Consents and Marine Discharge Consents EEZ000011 online at: (https://www.epa.govt.nz/public-consultations/decided/trans-tasman-resources-limited-2016/the-decision/ (Accessed November 2018); and *The Taranaki-Whanganui Conservation Board, and other Appellants v The Environmental Protection Authority,* [2018] NZHC 2217.

[995] For a discussion on the application and decision-making processes for pesticide approval, see Iorns, C, 'Permitting Poison: Pesticide Regulation in Aotearoa New Zealand,' in *EPLJ* (Vol. 35, 2018) 456, at 474.

[996] For a discussion on the application and decision-making processes for new organisms, see, Oldham, O, 'If Māori speak in a forum that doesn't listen, have they been heard at all? A critical analysis of the incorporation of tikanga Māori in decisions on genetic modification,' (Unpublished LLB (Hons) Dissertation, Victoria University of Wellington, 2017).

[997] See, Horn, C and Kilvington, M, *Māori and 1080* (2002) 5 online at: www.landcareresearch.co.nz (Accessed November 2018).

[998] Refer to the EPA instructions to applicants online at: https://www.epa.govt.nz/applications-and-permits/engaging-with-Māori (Accessed November 2018).

[999] EPA, *Māori Engagement Guideline for Hazardous Substances Notified Applications* (2015) online at: https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf (Accessed November 2018).

[1000] Iorns, C, 'Permitting Poison: Pesticide Regulation in Aotearoa New Zealand,' in *EPLJ,* (Vol. 35, 2018) 456, at 474.

welcome step, but illustrates how the process does not yet accommodate very well the consideration of the wider range of possible adverse effects of pesticide use.[1001]

Another limitation has been that EPA consultation has frequently been framed as a means of 'convincing' Māori of the correctness of an outcome that the Crown, it appears, has already decided upon.[1002] Such a perspective was particularly evident in a 1998 Parliamentary Commissioner for the Environment Report[1003] that argued for 'well targeted and effectively delivered information' to 'counteract the suspicions and distrust some Māori [sic]… have to poisons and 1080 in particular.'[1004] The report added that the 'risk that if these consultation/information matters are not convincing, some tangata whenua will remain antagonistic to control operations.'[1005] Such a limiting approach to consultation is problematic given that a failure to adequately consult at the framing stage and subsequently in the decision-making processes constructs Māori as advisors to the Crown rather than as Treaty partners.[1006]

The approach moreover, perceives consultation as 'education' rather than a 'dialogue' between the two parties where they can learn from each other which is another obvious limitation on sharing mana whakahaere tōtika and for incorporating mātauranga and tikanga Māori in an EBM context with the EPA over the EEZ which is contrary to the Treaty of Waitangi partnership.

There is evidence of a commitment within the EPA itself to move away from this limited power imbalance model of consultation.[1007] The EPA's October 2017 briefing to Incoming Ministers repeatedly highlighted the EPA's commitment to 'considering how to incorporate mātauranga Māori into [its] decision making' more generally.[1008] Nevertheless, for consultation with Māori to be effective, applicants under the relevant statute need to consider tikanga and mātauranga Māori as seriously as the EPA does. Hence, to implement EBM appropriately over

[1001] Above.
[1002] In contrast, see Horn, C and Kilvington, M, *Māori and 1080* (2002) 5 online at: www.landcareresearch.co.nz (Accessed November 2018).

[1003] Parliamentary Commissioner for the Environment, *Possum-Management in New Zealand: Critical Issues in 1998* (Office of the Parliamentary Commissioner for the Environment, PCE Progress Report No 1, November 1998) at 7.
[1004] Above.
[1005] Above.
[1006] Oldham, O, 'If Māori speak in a forum that doesn't listen, have they been heard at all? A critical analysis of the incorporation of tikanga Māori in decisions on genetic modification,' (Unpublished LLB (Hons) Dissertation, Victoria University of Wellington, 2017) at 14 and 26–27.
[1007] Environmental Protection Authority, *Māori Engagement Guideline For Hazardous Substances Notified Applications*, (2015) online at: https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf (Accessed November 2018).
[1008] The 2017 Briefing stated: 'We are considering further incorporating mātauranga Māori into the EPA's work. Mātauranga Māori may include the pursuit and application of knowledge and understanding of the environment, following a systematic approach based on evidence, incorporating culture, values and Māori perspectives. This knowledge is not universally pan-Māori, but is held by individual iwi and hapū, based on observation of the environment in their individual rohe (region). Our aspiration to use mātauranga Māori, to develop an appropriate framework, and to draw on a network of mātauranga experts, is important, as any significant change to environmental policy settings is likely to involve cultural, ethical, and scientific issues.' Environmental Protection Agency, *Briefing to Incoming Ministers* (October 2017) at 6.

the EEZ as noted above, some shared governance jurisdiction and incorporation of mātauranga and tikanga Māori is necessary.

The next section will briefly analyse similar limitations with the application of tikanga and mātauranga Māori and of incorporating the Treaty of Waitangi principles in marine protected areas especially in the Kermadec Ocean Sanctuaries Bill 2016.

P. Tikanga Māori, Marine Protected Areas & the Kermadec Ocean Sanctuary Bill 2016

Marine Protected Areas (MPAs) are a relatively recent conservation development that has dominated the form of aquatic conservation initiatives.[1009] MPAs are another management tool to manage the marine environment. Marine reserves are the highest form of marine protection under the Marine Reserves Act 1971. The Department of Conservation (DOC) is responsible for the implementation, management and monitoring of New Zealand's 44 marine reserves.

Two other types of MPAs can be established outside of the Marine Reserves Act 1971. Although no set process is available to create these MPAs, two policies provide guidance - the 2005 Marine Protection Areas Policy and Implementation Plan and the 2008 Marine Protection Areas Classification, Protection Standard and Implementation Guidelines.[1010]

MPAs have moreover, been endorsed internationally for combatting marine exploitation and they have increased from 120 in 1970 to 10,280 in 2013.[1011] The global network of MPAs is currently comprised of over 10,000 areas, which equates to only 6% of the global ocean being protected.[1012] MPAs may provide aquatic ecosystems with a complete reprieve from human interference. MPAs can also implement various degrees of restrictions on what may be taken from an area.[1013]

In 1993, New Zealand ratified the Convention of Biological Diversity in recognition of the need to minimize the consequences of anthropogenic threats to the marine environment and set principles and targets for sustainable development and attempted to comply with Target 11 of the Aichi Biodiversity Targets:[1014]

[1009] Pita, C and others 'An overview of commercial fishers' attitudes towards marine protected areas,' in *Hydrobiologia,* (Vol. 670, 2011) at 289. Refer also to Donnelly, E, 'The Protection of Māori Knowledge and Culture in the Proposed Kermadec Ocean Sanctuary Bill,' (Unpublished Draft Report for MIGC University of Waikato, Faculty of Law, University of Victoria, 2018).

[1010] Department of Conservation, 'Marine Protected Areas: Policy and Implementation Plan,' (2005) at 865-94 online at http://doc.govt.nz/about-us/science-publications/conservation-publications/marine-and-coastal/marine-protected-areas/marine-protected-areas-policy-and-implementation-plan/ (Accessed November 2018).

[1011] Caveen, A, Polunin, N, and Gray, T, *The Controversy over Marine Protected Areas* (Springer, London, 2015) at 11.

[1012] Marine Conservation Institute 'MPAtlas,' online at: www.mpatlas.org ((Accessed November 2018).

[1013] Upton, H and Buck, E, 'Marine Protected Areas: An Overview,' in Mayr, F, (ed) *Marine Protected Areas* (Nova Science Publishers, New York, 2010) at 3.

[1014] Convention on Biological Diversity, 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993), *Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets,* (Target 11).

> By 2020 […] 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas.

While the target of 10% by 2020 has been heralded as being 'politically ambitious,' scientists have identified it as merely the starting point for effective ocean management.[1015] Studies have concluded that although MPAs currently comprise 6% of the ocean, the active protection of anything less than 30% will be insufficient to protect biodiversity, ecosystems and to support the current socio-economic and commercial priorities of states.[1016]

[1015] O'Leary, B and others, 'Effective Coverage Targets for Ocean Protection,' in *Conservation Letters* (Vol. 9, 2016) at 398.
[1016] Above.

Map 9: Marine Protected Areas[1017]

[1017] Online at https://teara.govt.nz/en/map/13882/marine-protected-areas-map (Accessed November 2018).

In establishing MPAs, decision makers must balance a plethora of social, political, economic, cultural and ecological challenges.[1018] The political dimension to the creation of MPAs however, has been identified as a major determinant to success or failure. Unsurprisingly, to generate support for an MPA throughout the spectrum of stakeholders, they must be created in a transparent, democratic manner that seeks to fulfil ecological, commercial fishery management and cultural outcomes.[1019]

In a bid to comply with international obligations, states propose MPAs and no-take zones as the only available conservation tools,[1020] which approach can preclude consideration of alternative environmental management options and has the effect of isolating interested parties. Instead of considering options that may introduce more comprehensive marine resource management approaches, states are instigating strict no-take zones over small areas of their respective EEZ.[1021]

In supporting the introduction of MPAs as a conservation tool, the New Zealand Government published a consultation document in January 2016 that outlined a new approach to marine protection through legislation[1022] and endorsed co-management as a means of recognising Māori as a Treaty partner. Methods for strengthening iwi/Māori involvement were also discussed:

- Including a Treaty clause consistent with current statutory recognition of Treaty of Waitangi obligations;
- Providing meaningful iwi/ Māori involvement in all stages of MPA establishment to ensure that legislative reforms do not result in any consistencies with Treaty settlement legislation;
- Ensuring existing arrangements for non-commercial customary fishing are recognised and maintained, and that customary fishing activities are appropriately accommodated for in marine packages;
- Requiring that any MPA advisory committees include iwi/ Māori representation.[1023]

The document proposed that the Government should strive to implement governance structures for MPAs that recognise and provide for Māori as a Treaty partner.

MPAs have however, been used as a justification to allow unsustainable marine exploitation in zones surrounding MPAs for them to continue[1024] and the establishment of the proposed

[1018] Upton, H and Buck, E, 'Marine Protected Areas: An Overview,' in Mayr, F, (ed) *Marine Protected Areas* (Nova Science Publishers, New York, 2010) at 1.
[1019] Pita, C and others 'An Overview of Commercial Fishers' Attitudes towards Marine Protected Areas,' in *Hydrobiologia,* (Vol. 670, 2011) at 289.
[1020] Joachim, C, *Marine Protected Areas: A Multidisciplinary Approach* (Cambridge University Press, Cambridge, 2011) at 13.
[1021] Fanny, D, 'The Importance of Marine Spatial Planning in Advancing Ecosystem-based Sea Use Management,' in *Marine Policy* (Vol. 32, 2008) 762 at 763.
[1022] Ministry for the Environment, *A New Marine Protected Areas Act: Consultation Document* (Ministry for the Environment, Wellington, 2016).
[1023] Above, at 26.
[1024] Agardy, T and others, 'Mind the Gap: Addressing the Shortcomings of Marine Protected Areas through Large Scale Marine Spatial Planning,' in *Marine Policy,* (Vol. 35, 2011) at 226 at 228.

Kermadec Ocean Sanctuary in 2016 may be an example of the New Zealand Government following such an approach.[1025]

Kermadec Sanctuary Area

The Kermadec region is an area of particular cultural and historical importance to Māori.[1026] Nestled in the upper corner of New Zealand's EEZ, approximately 1,000 kilometres away, the Kermadec Ocean has been referred to as 'one of the most pristine and unique places on earth.'[1027] It is a meeting place of two tectonic plates - the Pacific and Australian. The subduction of the Pacific Plate simultaneously created the Southern Hemisphere's deepest ocean trench and the longest, most hydrothermally active chain of underwater volcanoes.[1028]

Geographically, the points of reference for the Kermadec Ocean are the five visible tops of semi-submerged volcanoes that form part of the 2,800 kilometre trail.[1029] Raoul Island/Rangitāhua is the largest island and was used as a rest area for Māori migrating between the Cook Islands and Aotearoa.[1030] Rangitāhua is where the survivors of the shipwrecked waka Kurahaupō washed up and were picked up by the Aotea waka. The connections of Ngāti Kurī and Te Aupouri as kaitiaki (guardians) over the island has also been statutorily acknowledged in Schedule 4, Ngāti Kurī Claims Settlement Act 2015 and Schedule 4, Te Aupouri Claims Settlement Act 2015. Rangitāhua is a distinct ecoregion and has been crowned an Important Bird Area by BirdLife International as a breeding site for six million seabirds of 39 different breeds.[1031]

[1025] *NZPD,* (717, 15 September 2016) at 13783.

[1026] Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 8.

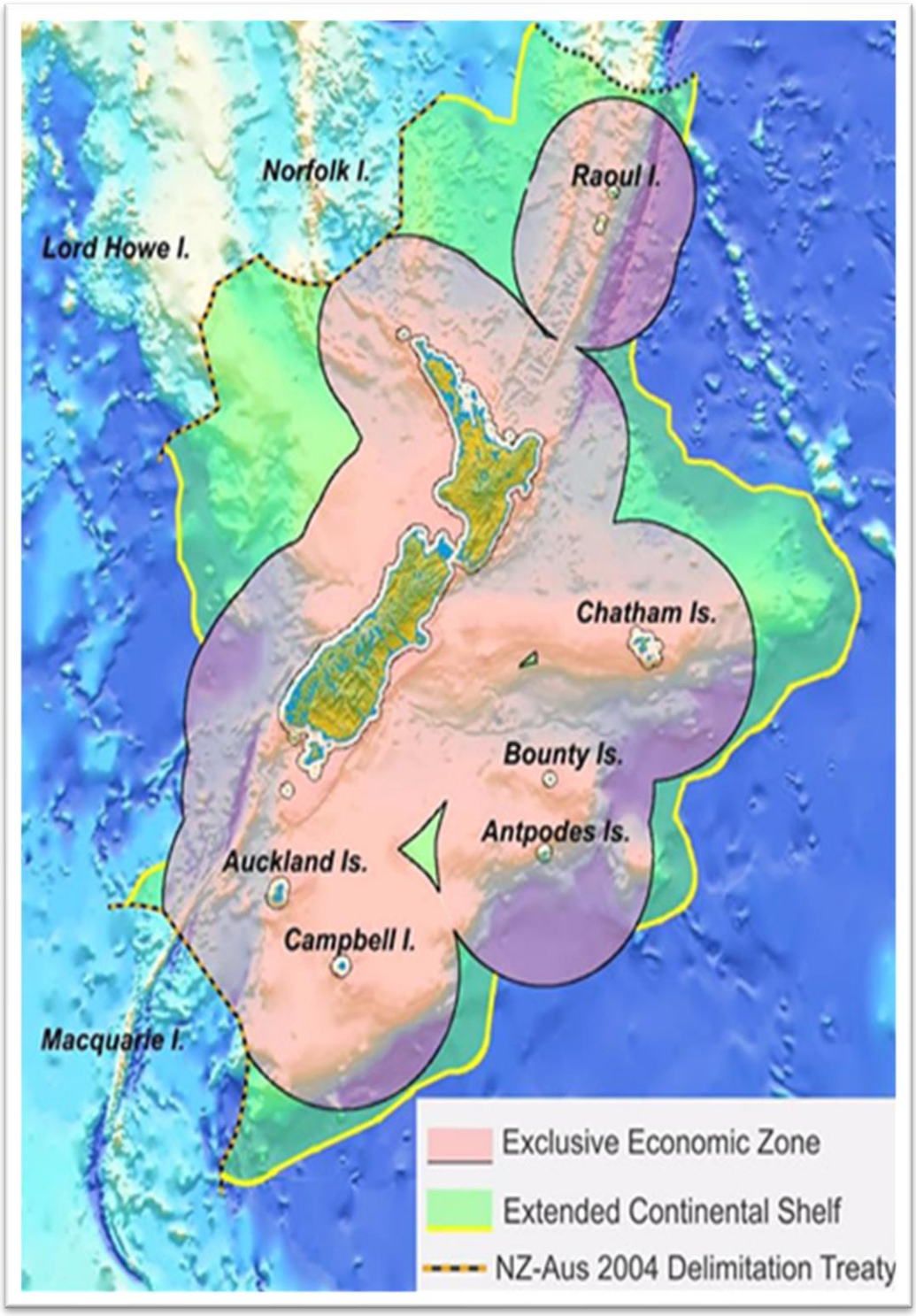
[1027] Ministry for the Environment 'About the Kermadec Ocean Sanctuary,' (2 August 2016) www.mfe.govt.nz (Accessed November 2018).

[1028] Priestly, R, 'Fire and Water,' in *New Zealand Geographic,* (Vol. 119, 2013) (Online ed, 2013, Auckland).

[1029] Department of Conservation 'Kermadec Islands,' www.doc.govt.nz (Accessed November 2018).

[1030] Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 7.

[1031] BirdLife International 'Important Bird Areas factsheet: Kermadec Islands,' (2012) BirdLife International www.birdlife.org (Accessed November 2018).



Map 10: New Zealand EEZ and Extended Continental Shelf[1032]

[1032] GNS Science website Online at: https://www.gns.cri.nz/Home/Learning/Science-Topics/Ocean-Floor/Undersea-New-Zealand/NZ-s-Continental-Shelf (Accessed November 2018).

Map 11: Kermadec Islands Map[1033]

[1033] Greenpeace New Zealand Map online at: https://www.greenpeace.org/new-zealand/story/te-ohu-kaimoana-crying-crocodile-tears-over-kermadec-ocean-sanctuary/ (Accessed November 2018).

The isolation of the ocean around the Kermadec Islands has rendered it a 'biodiversity hotspot' and one of the few marine ecosystems spared from anthropogenic destruction.[1034] The region harbours over 150 species of fish, three species of endangered sea turtles and is a common migration route for 35 species of whale and dolphins.[1035] The absence of commercial fisheries have left the complex marine food chains untouched.[1036]Apex predators such as Galapagos sharks and spotted black groper have ensured the archipelago is a bounty of fish species, sponges, bryozoans and corals.[1037]

Since 1990, the territorial sea area surrounding the five Kermadec Islands – Raoul, Macauley, Cheeseman, Curtis and L'Esperance - out to 12 nautical miles were provided marine reserve status.[1038] In 2007, the area beyond the reserve out to 200 nautical miles was recognised as a benthic protection area (BPA). Some fishing activities have been restricted as a result including dredging and bottom trawling up to 50 metres from the seabed.[1039] However, given the ecological, cultural and historical status of the region, a campaign started to extend the legal protections around the ocean.

The Royal Forest and Bird Protection Society of New Zealand (Forest and Bird), World Wide Fund for Nature New Zealand (WWF), Pew Charitable Trusts and the Kermadec iwi authorities - Ngāti Kurī and Te Aupouri – aggregated to campaign for the protection of the region.[1040] Both the Labour Party and Greens supported the initiative.[1041] Public support through a WWF funded Colmar Brunton poll in April 2016 concluded that 89% of New Zealanders support the Sanctuary, including 86% of Māori respondents.[1042] Because of the hard work of non-governmental organizations and mana whenua, there was a sense of anticipation and expectation leading up to the Sanctuary's proposal.

Kermadec Ocean Sanctuary Bill 2016

From the outset, the proposed Kermadec Ocean Sanctuary Bill (the KOS Bill) was problematic for Māori. Former National Party Prime Minister John Key announced the Government's decision to recognise the region as a MPA at the United Nations General Assembly in New

[1034] Hon. Nick Smith MP, 'Kermadec Ocean Sanctuary Bill introduced,' (8 March 2016) Beehive www.beehive.govt.nz (Accessed 2016).
[1035] Ministry for the Environment, *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (25 February 2016) at 2.
[1036] Clark, M and others, *Biodiversity of the Kermadec Islands and offshore waters of the Kermadec Ridge: Report of a coastal, marine mammal and deep-sea survey* (Ministry of Primary Industries, TAN1612, January 2017) at 7.
[1037] Priestly, R, 'Fire and Water,' in *New Zealand Geographic,* (Vol. 119, 2013) (Online ed, 2013, Auckland).
[1038] Beehive 'Q&A: Kermadec Ocean Sanctuary,' online at: www.beehive.govt.nz (Accessed November 2018).
[1039] Ministry for the Environment, *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (25 February 2016) at 3.
[1040] Forest and Bird, WWF NZ and The Pew Charitable Trusts, 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016) at 2 and Ngāti Kurī Trust Board Inc. 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' at 2; Kermadec Ocean Sanctuary Bill (120—2) (Select Committee Report) at 10.
[1041] Above.
[1042] Above, at 2.

York on 29 September 2015[1043] while campaign leaders, key stakeholders and iwi authorities neither were consulted nor were they informed well in advance.[1044]

Following this announcement, the National Government acted with a sense of urgency to be recognised as a 'world leader in the management and protection of our ocean environment' when they outlined to the UN General Assembly of their intention for the establishment of the Kermadec Ocean Sanctuary (KOS) by November 2016.[1045] To reach the November deadline, the KOS Bill was drafted independently of stakeholder and mana whenua participation.[1046]

The Kermadec Ocean Sanctuary Bill was introduced to Parliament by Environment Minister Hon. Nick Smith on 8 March 2016, was well received within the House of Representatives and was applauded by the PEW Charitable Trust for setting the 'gold standard internationally' for MPAs.[1047] While several challenges with the KOS Bill were raised during its First Reading, it went unopposed to Select Committee.[1048]

The KOS Bill sought to create 'one of the world's largest and most significant fully protected ocean areas.'[1049] At 620,000 square kilometres, the marine reserve will be one of the world's largest and most significant fully protected areas, 35 times larger than the combined area of New Zealand's existing 44 marine reserves and 15% of New Zealand's ocean environment. The reserve will be the first time an area of the New Zealand EEZ will be fully protected.[1050] Within the KOS, mining-related activities, fishing, dumping of any matter, damaging vibrations, seismic surveying and the disturbance of any material will be prohibited.[1051]

Conservation Board

The Conservation Board plays an important role in the governance of the Kermadec Ocean Sanctuary Bill, as well as for recognising the Treaty partnership and mātauranga and tikanga Māori, and will be briefly discussed here. The Conservation Act 1987 states that the Act shall be interpreted and administered to give effect to the principles of the Treaty of Waitangi.[1052] Section 6L(1), Conservation Act 1987 established the Conservation Board[1053] who is responsible for establishing a conservation management strategy for the KOS area and will constitute seven members appointed by the responsible Minister.[1054] Two of the members

[1043] Key, J, PM announces Kermadec Ocean Sanctuary,' (29 September 2015) Beehive online at: www.beehive.govt.nz (Accessed November 2018).
[1044] Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 14.
[1045] Hon. Nick Smith MP *NZPD,* (712, 15 March 2016) at 9662. See also Radio New Zealand 'Legal challenge to Kermadec Ocean Sanctuary,' (20 March 2016) online at: www.radionz.co.nz (Accessed November 2018).
[1046] New Zealand Fishing Industry Association, 'Supplementary Submission A to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016) at 6.
[1047] Forest and Bird, WWF NZ and The Pew Charitable Trusts, 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016) at 2.
[1048] Hon. Nick Smith MP *NZPD,* (712, 15 March 2016) at 9662.
[1049] Above.
[1050] Kermadec Ocean Sanctuary Bill, sch 2, pt 1.
[1051] Clause 9.
[1052] Section 4, Conservation Act 1987.
[1053] Clause 23.
[1054] Clause 24.

are to be nominated from Ngāti Kurī and Te Aupouri, another appointed at the discretion of the Minister of Māori Development to represent 'iwi Māori who have cultural, historical, spiritual, and traditional associations with the Kermadec/Rangitāhua area.'[1055] The remaining four board members are appointed by the Minister of Conservation.[1056]

The KOS Bill was criticised during the First Reading and the Select Committee period. Three key challenges regarding the Conservation Board and the general receptiveness of Māori and the wider public to the Bill were:

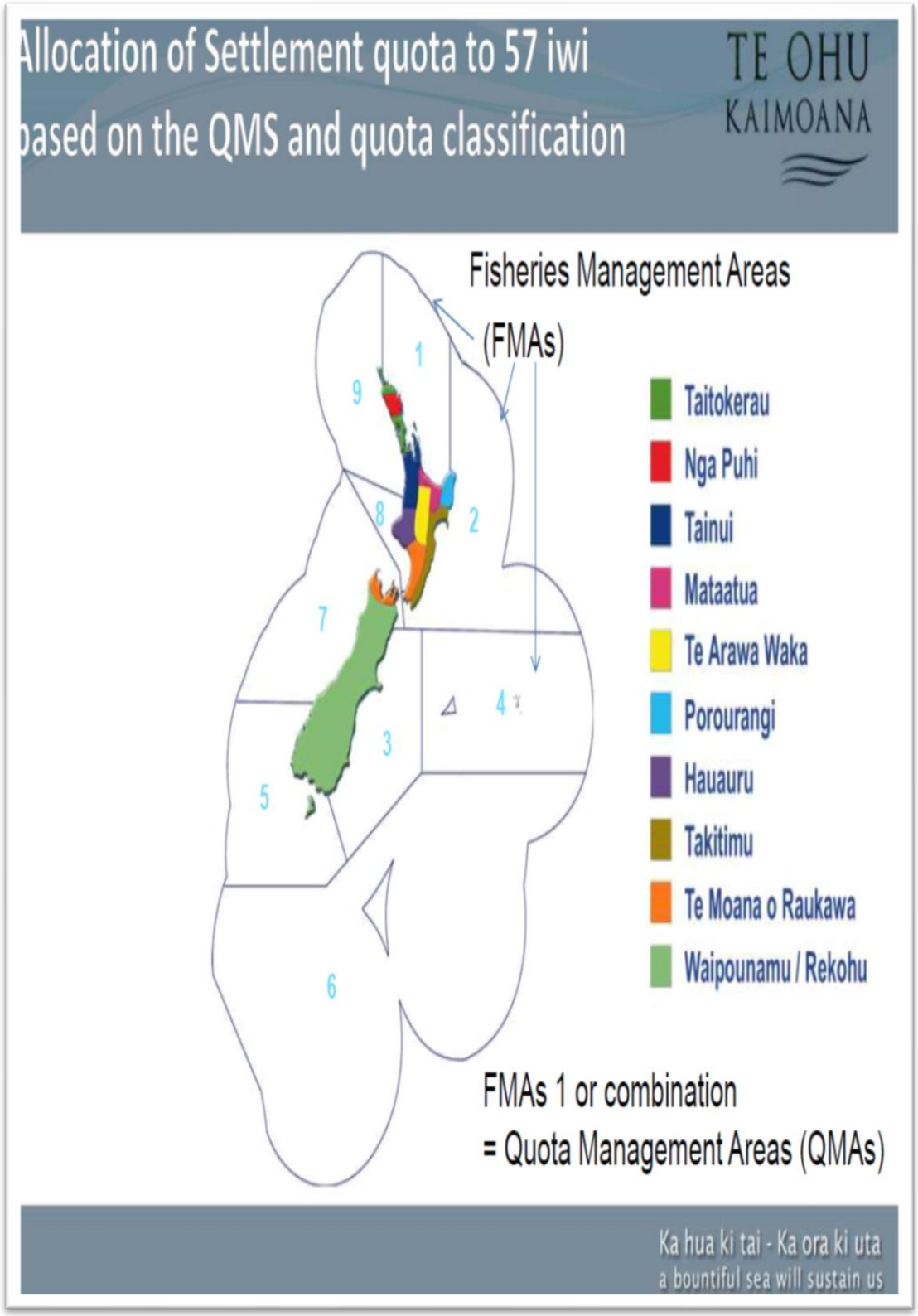
- Māori rights to compensation,
- Failure to consult Māori, and
- Practical enforcement of the Bill

Compromising the integrity of Treaty settlements

The KOS Bill's treatment of fishing quota was problematic for Māori given the restrictions of the KOS abrogated two forms of rights guaranteed by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992[1057] - Māori commercial and customary fishing rights.

Currently, the Kermadec region is recognised as Fishery Management Area 10 (FMA10) and the fishing quota is shared between the Crown and Te Ohu Kaimoana (TOKM)[1058] – the post-settlement governance entity established by the 1992 Māori commercial fisheries settlement and guardian of Māori fishing rights as noted above. TOKM advocates on behalf of Māori fishing interests, allocates fishery assets, and monitors the performance of mandated iwi organisations (MIOs).[1059] The KOS Bill does not extinguish the quota held by TOKM, nor does it disestablish the area as Kermadec Fishery Management Area 10, but what the KOS Bill does do is it simply reduces the total allowable catch to zero[1060] while customary fishing rights remain unextinguished but unusable.[1061]

[1055] Clause 24(2).
[1056] Clause 24(1)(d).
[1057] Section 2.
[1058] Kermadec Ocean Sanctuary Bill (120—2) (Select Committee Report, 2017) at 7.
[1059] Māori Fisheries Act 2004, s. 32.
[1060] Kermadec Ocean Sanctuary Bill, cl 113AC.
[1061] Fisheries (Amateur Fishing) Regulations 1986, reg 27.



Map 12: Fisheries Management Areas (FMAs) based on Tikanga Māori[1062]

[1062] Te Ohu Kaimoana, 'Māori Customary Fishing Rights in the Modern New Zealand Context,' (Unpublished Presentation, Torres Strait, Australia, 8 April 2014) at 11.

The KOS Bill further outlines that the Crown is indemnified against compensating for 'any adverse effect on a right or interest.'[1063] Less than 2% for each fish species is caught inside FMA10 given the area is viewed as economically unviable and future economic benefits are predicted to reflect the status quo.[1064] The rationale for refusing to compensate quota holders is because the property rights are not currently used and do not need to be compensated.[1065] Various NGOs such as WWF, and Forest and Bird moreover, supported this approach because establishing the KOS is 'a major step forward in biodiversity conservation while having no significant impact on existing industries.'[1066]

However, the approach of the KOS is limiting for Māori particularly regarding the protection and integrity of Treaty settlements generally, as well as testing the Crown's respect for Māori commercial fishing interests specifically that were deemed to be a 'full and final' settlement in 1992[1067] as one of the Te Tau Ihu informants opined:

> Our legal rights are based around commercial access to quota so that gives us the legal right to be able to fish that quota or to sell that quota, or generate money out of that quota. That's a legal right we have.[1068]

Refusing to compensate the proprietary rights held by TOKM contradicts the expectation in New Zealand society that property rights are sacrosanct and should only be removed if there is a 'cogent policy justification'[1069] or for legitimate public works concerns. The Crown argued however, that it is not obliged to compensate Māori because establishing the KOS is a sustainability measure and perhaps for public interest.[1070] Beyond a general threat to the environment, there appears to be little evidence of the region facing unsustainable exploitation. [1071] Furthermore, neither Māori customary nor commercial fishing responsibilities are being exercised at an unsustainable rate given the geographical isolation creates a fortress for the region that largely prevents the rights and responsibilities from being engaged.[1072]

[1063] Kermadec Ocean Sanctuary Bill, cl 1(2).
[1064] Ministry for the Environment, *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (25 February 2016) at 7.
[1065] Above, at 8.
[1066] Forest and Bird, WWF NZ and The Pew Charitable Trusts, 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016) at 2.
[1067] Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 9(b). Following the signing of the Fisheries Settlement, the Crown unilaterally extinguished any further commercial fishing interest for Māori. For further information, see Waitangi Tribunal, *The Fisheries Settlement Report* (Wai 307, 1992) at 9.
[1068] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).
[1069] LAC Guidelines on Process and Content of Legislation (2016 edition) at 4 cited in Legislation Design and Advisory External Subcommittee 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill' (2016) at 2.
[1070] Fisheries Act 1996, s. 308.
[1071] Ministry for the Environment, *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (25 February 2016) at 7.
[1072] New Zealand Fishing Industry Association, 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016) at 14.

The Crown's approach to the KOS Bill however exhibits the unilateral abrogation of Māori Treaty rights and the potential for Western conservation values to be treated as paramount and capable of undermining tikanga Māori and the integrity of Treaty settlements. Indeed, Ngāi Tahu Kaumātua Sir Tipene O'Regan stated that the KOS Bill in its current form has the potential to create a 'dangerous' precedent of overriding Treaty of Waitangi settlement rights.[1073]

Lack of Consultation

Consultation with Māori was another concern with the KOS Bill. A Te Tau Ihu informant, speaking generally on unilateral Treaty settlement changes and a lack of consultation, commented:

> The Minister has now exercised discretionary powers to change the weighting of our fishing quota, so Iwi agreed on their weighting and the Minister has changed that with no consultation with Iwi, which is actually a breach of our agreement. If that is reviewed in Court, then if it is legal, the Courts must uphold the law.[1074]

Moreover and specific to the region, Te Aupouri openly criticised the National Government for its failure to consult those statutorily recognised as having mana whenua over the region.[1075] Chairman Riki Witana was contacted hours before the announcement of the KOS and asserted that the Crown's failure to consult Māori was 'disappointing.'[1076] Hon Nick Smith maintained the view that as previous discussions had occurred between Te Aupouri, Ngāti Kurī and the Crown, they were sufficiently consulted on the Crown's intentions to establish a Sanctuary.[1077] The Crown alleged that given both iwi authorities had campaigned alongside NGOs, they had effectively registered support for the KOS,[1078] and therefore the involvement of the two iwi in the procedural creation of the Sanctuary was not strictly necessary given their earlier agreement with the substance of the KOS Bill.[1079]

Labour Fisheries Spokesperson Riro Tirikatene on the other hand claimed that the Government had 'jumped the gun' by announcing the KOS without properly consulting Māori.[1080] Tirikatene stated that the Government 'made a big announcement to the world then thought about Māori interests only after the legislation was introduced.'[1081] In their submission to the Local Government and Environment Committee, Te Aupouri stated that

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[1073] Price, R, 'Kermadec Ocean Sanctuary: a 'dangerous' precedent for Māori rights?' in *Stuff* (23 March 2016) www.stuff.co.nz (Accessed March 2016).

[1074] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

[1075] Harris, C, 'Iwi calls Crown on consultation but backs Kermadecs marine sanctuary,' in *Stuff* (27 March 2016) www.stuff.co.nz (Accessed May 2016).

[1076] Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 13.

[1077] Hon Nick Smith MP, 'Kermadec Ocean Sanctuary objections mistaken,' (11 April 2016) Beehive www.beehive.govt.nz (Accessed May 2016).

[1078] Above.

[1079] Cabinet Economic Growth and Infrastructure Committee, 'Establishment of the Kermadec Ocean Sanctuary,' (10 September 2015) at 4.

[1080] Sachdeva, S, 'Hope grows for compromise on Māori fishing rights in Kermadec Ocean Sanctuary,' *Stuff* (23 September 2016) www.stuff.co.nz (Accessed October 2016).

[1081] Above.

informing the Chairperson of the Sanctuary proposal hours before its announcement was not recognising the position of Māori as an equitable Treaty partner.[1082] The Crown's 'consultation,' Te Aupouri added, was 'not consultation in any sense of the word - the decision had been made and we were simply being informed of that decision.'[1083]

The blatant disregard for Māori involvement in the KOS process indicates that the Crown did not consider the contribution of Māori to be as important which approach has the potential to establish a precarious precedent of failing to consult or facilitating minimal Māori participation in decisions of national significance. While Hon Nick Smith stated that iwi had a 'key influence over the bill establishing the sanctuary and will have an ongoing role in its management,' in reality, the KOS Bill fails to reflect this position.[1084] A result of excluding Māori from the process of designing the KOS is that the product proposed by the Government fails to reflect the Treaty partnership as well as the ethical best practice of acknowledging tikanga Māori or of substantively incorporating Māori worldviews.

Similar challenges occur for other Māori groups around the country including in Te Tau Ihu which one informant voiced:

> There is also implications here of the ultimate Crown control, I mean – we might elect boards, we might elect people to represent us but at the end of the day, it's the Crown decision at the top that actually matters and if those people don't have the right strength and advocacy to be able to negotiate, then things don't happen right.[1085]

Furthermore, iwi participation in the proposal for the KOS governance structure only occurred at the Select Committee stage. Submissions by Ngāti Kurī and Te Aupouri reflected the fears that as minorities in the Conservation Board structure, Māori views would be marginalised.[1086] Ngāti Kurī even suggested that given the Crown unilaterally decided the governance structure; the position of Chair should be granted to iwi.[1087] Ngāti Kurī viewed the measure as a substantive way of power sharing with iwi as a minority on the Board. Hon Nick Smith responded that the Chairperson for the Board *could* be an iwi representative but the prominent consideration was whether they possess the scientific and marine mammal expertise,[1088] which demonstrates the Crown's view that the scientific objectives of the KOS are more important than Māori cultural obligations. In addition, the power imbalance will restrict the ability of iwi to influence how DOC and the EPA chose to implement the Conservation Management Strategy.[1089]

[1082] Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 14.
[1083] Above, at 1.
[1084] Hon. Nick Smith MP *NZPD,* (712, 15 March 2016) at 9662.
[1085] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).
[1086] Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 14.
[1087] Ngāti Kurī Trust Board Inc. 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016) at 9.
[1088] Hon. Nick Smith cited in Price, R 'No co-management with Māori on Kermadec Ocean Sanctuary,' *Stuff* (8 March 2016) www.stuff.co.nz (Accessed May 2016).
[1089] Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 14.

The prevailing science agenda was further demonstrated in the provisions for scientific marine research permitted in the KOS Bill. Research that does not contravene KOS restrictions is automatically permitted.[1090] The original KOS Bill was altered however, in accordance with Te Aupouri's submission that the original considerations for authorization did not have to consider Kermadec/Rangitāhua iwi authority views and Treaty partnership obligations, nor did it have to conform to the Conservation Management Strategy.[1091]

The current form of the KOS Bill establishes that the Environmental Protection Agency is responsible for authorising applications for marine scientific research that may involve a prohibited activity within the area.[1092] Applications may only be refused if certain activities, that are not strictly necessary to contribute to the purpose, will occur during the research.[1093] When granting an application, the EPA must consider the views of Kermadec iwi authorities, which the applicant obtains by consulting trustees of both Kermadec iwi authorities, Te Rūnanganui o Te Aupouri Trust (Te Aupouri) and Te Manawa o Ngāti Kurī Trust (Ngāti Kurī).[1094] Iwi views however, are only considered to the extent that they are relevant to the application and have been provided in writing.[1095] The amendment inserted by the Local Government and Environment Committee considers iwi views but limits the effect on the final decision, keeping iwi involvement to what has been criticized as 'simply a box ticking exercise' not consultation or Treaty partnership.[1096]

Enforcement

The other challenge of the KOS Bill is whether it can actually be enforced in practice. The responsibilities for the enforcement of the KOS will remain the responsibility of the Department of Conservation (DOC). However, the Budget for 2017 does not reflect changes to funding that would enable DOC to extend current resources for managing the KOS.[1097] The Budget for 2017 allocates $0.75 million towards marine protection and development for the entire country.[1098] Nor is there a clear devolution of funding to the Defence Force, particularly the Navy, to ensure more frequent patrolling of the area.[1099]

Such challenges suggest that the Kermadec Ocean Sanctuary in its current form is an arguably unjustified measure for ironically, sustainable management and protection that at the same time unilaterally removes Māori Treaty property rights, undermines the integrity of Treaty settlements, fails to acknowledge tikanga Māori responsibilities and the Treaty partnership, and it may not even be effectively implemented due to it being unimplementable. ACT leader David Seymour succinctly outlined in 2016 that the 'only greater good in drawing lines on a

[1090] Kermadec Ocean Sanctuary Bill, cl 13(3).
[1091] Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 14.
[1092] Kermadec Ocean Sanctuary Bill, cl 13.
[1093] Clause 19.
[1094] Clause 10.
[1095] Clause 19(4)(c).
[1096] Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 20.
[1097] Department of Conservation, 'DOC's Budget 2017 Explained,' (25 May 2017) www.doc.govt.nz (Accessed June 2017).
[1098] Above.
[1099] 'Ministry of Defence,' (25 May 2017) Budget 2017 www.budget.govt.nz (Accessed July 2017).

map and saying 'Thou shalt not fish here' is good publicity for the Government.'[1100] While the possible lack of enforcement is no reason to declare the environmental initiative redundant, it does reflect the political nature of the creation of the KOS.

A Te Tau Ihu informant made an interesting suggestion to assist DOC with enforcement, albeit in another context:

> If you look at the budget for the Department of Conservation, they don't have enough money to look after all of the DOC estate, so the question there is, given that they have an obligation to do nothing that is against the principles of the Treaty and look after it, so a question for the Government is: 'Why don't they give that back to Iwi so Iwi can look after it?'[1101]

Recognition of the Treaty of Waitangi and Tikanga Māori?

The KOS Bill promotes Western conservation values[1102] but, like the EEZ, it does not include a Treaty clause recognising the obligations of the Crown to Māori. The KOS Bill does not recognise the mauri of the region nor does it provide for the practice of tikanga Māori in the creation of the Sanctuary.

The Department of Conservation and the EPA are the key organisations working together to govern the Sanctuary. The EPA will be responsible for ensuring compliance with international obligations and controlling scientific access while DOC will be responsible for the practical management of the Islands with support from the New Zealand Navy.[1103]

In administering its functions, DOC is obliged to discharge their duties in a manner that gives effect to the principles of the Treaty of Waitangi.[1104] The 2011 WAI 262 Waitangi Tribunal '*Ko Aotearoa Tenei Report'* however, criticised DOC for its failure to adequately discharge its obligations over the conservation estate in a manner that incorporates Māori as a Treaty partner.[1105] Over the last seven years since this Waitangi Tribunal Report was published, DOC, it appears, has not sought to incorporate any recommendations relating to incorporating iwi authorities or altered their policies in any way. It appears then that without a substantial change in approach by DOC, it is unlikely to administer its functions over the KOS in a way that enables and empowers iwi to either practice tikanga Māori or to employ mātauranga as the basis of environmental protection.

Direct incorporation of Tikanga Māori in KOS Bill?

Creative and bold innovations in conservation governance have been undertaken in the last five years around the country which is coming from various angles and iwi are pushing to have their input respected. Government Departments are instigating policy changes, and Treaty

[1100] Seymour cited in Sachdeva, S, 'Kermadec sanctuary legislation to be delayed after failed negotiations over Māori rights,' in *Stuff* (14 September 2016) www.stuff.co.nz (Accessed November 2016).
[1101] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).
[1102] Kermadec Ocean Sanctuary Bill, cls 3, 12A-22D.
[1103] Kermadec Ocean Sanctuary Bill (120—2) (Select Committee Report 2016) at 2.
[1104] Conservation Act, s 4.
[1105] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, Legislation Direct, Wellington, 2011) at 297-372.

settlements are reforming the way New Zealand recognises and governs the environment.[1106] Such approaches reflect the importance of reforming the previous mono-cultural, preservationist approach as well as intertwining New Zealand's conservation law with tikanga Māori by engaging with iwi and hapū.

The Hon Nanaia Mahuta however, asserted during the KOS Bill's First Reading that the behaviour of the National Government in the KOS proposal had been in 'direct contrast to the approach' proposed in the MPA discussion document.[1107] The KOS Bill, she added, was proposed without any consultation with iwi associated with the area or representatives for all Māori who hold an interest in the area derived through the Māori Fisheries Settlement 1992.

Indirect incorporation of tikanga through governance?

Another poignant question of the KOS Bill is whether the Conservation Board reflects the core foundations of a successful Treaty partnership and accommodates the inclusion of mātauranga and tikanga Māori. It is important to consider the proposed governance structure and the exclusion of tikanga in the context of co-management developments, Treaty expectations and the *Protected Areas Act: Consultation Marine Document.*[1108]

In summary, while the period of campaigning for more extensive protection of the Kermadec region lasted over eight years, with involvement from a range of invested parties, the KOS Bill demonstrates the unilateral nature of Government actions and inactions. Moreover, the failure to consult, or consider Māori interests both commercially and culturally, is reflected in the Conservation Board. The Conservation Board structure fails to recognise te tino rangatiratanga of Māori it appears, for three reasons:

1) The Conservation Board ignores mātauranga and tikanga Māori,
2) Does not recognise the mauri of the area, and
3) Seeks to enforce a strict preservationist approach.

Mātauranga and Tikanga Māori Ignored

The Conservation Board acknowledges the position of Māori but it does not sufficiently acknowledge tikanga Māori, Māori cosmology or provide significant Treaty partnership options. The entrenched stance of the National Government on the no-take element of the Sanctuary reflects the American National Park model that excludes people from nature rather than accounting for the interdependent EBM relationship between humans and nature.

The Conservation Board is designed to fulfil the commendable purpose of the KOS Bill, which is to 'preserve the Kermadec/Rangitāhua Ocean Sanctuary in its natural state.[1109] But this purpose the Conservation Board is trying to achieve appears to only recognise the Western approach to resource management rather than integrating mātauranga and tikanga Māori. The KOS Bill does not even mention EBM! A 21st century EBM approach for Aotearoa New

[1106] Above, at 324.
[1107] Hon Nanaia Mahuta MP, *NZPD* (711, 15 March 2016) 9662.
[1108] New Zealand Government, *A New Marine Protected Areas Act: Consultation Document,* (Ministry for the Environment, Wellington, 2016).
[1109] Kermadec Ocean Sanctuary Bill, cl 3.

Zealand on the other hand, provides for a Treaty of Waitangi partnership and for the integration of mātauranga and tikanga Māori. Mainstream New Zealand has much to learn from both Western science and Māori science - mātauranga and tikanga Māori - given that EBM is adaptable, place and time specific and it recognises all ecological complexities and connectedness so it should be tailored to a 21st century Aotearoa New Zealand context.[1110] EBM is also flexible and adaptive, collaborative, co-designed and participatory in decision-making processes that involves all interested parties including Māori. EBM should be based on Western science and mātauranga and tikanga Māori and is informed by community values and priorities. The Conservation Board governance structure on the other hand does not recognise te tino rangatiratanga of Māori and seeks to enshrine the paternalistic, preservationist approach to resource management.[1111]

Following the immediate announcement of the National Governments intention to establish the Sanctuary, Te Aupouri Trust Chairperson Rick Witana and Ngāti Kurī Trust Board Chairman Harry Burkhardt hoped a partnership would be formed with the Crown that would 'highlight Māori involvement in protecting and nurturing the environment,'[1112] Witana added that 'it's not often that the role of kaitiaki can be readily identified by non-Māori - this is one of those occasions that the whole world gets to see the concept of kaitiakitanga.'[1113]

Unfortunately, the role of Māori as kaitiaki was not emphasised in the KOS Bill. The commitment that the Kermadec iwi authority demonstrated towards the creation of the Sanctuary was not reflected in the drafting. Not only is there no Treaty clause, but there is no opportunity to explore the integration of mātauranga and tikanga Māori and Western science in the implementation of conservation measures. The introduction of the Kermadec Ocean Sanctuary Bill moreover, did not manifest any elements of co-management as expected in the current political climate and previous discussions, which is particularly disappointing given that initial discussions between the Crown and iwi indicated that the form of governance of the area was anticipated to be co-management.[1114]

Fundamentally, this form of partnership is Crown-controlled, Crown dictated and Crown implemented. The Conservation Board is a pre-determined structure endorsed by the Crown in the Conservation Act 1987.[1115] While the Conservation Act must be read to give effect to the Treaty of Waitangi principles, the Board structure greatly limits the forum and methods of input to the classic bureaucracy-based approach to resource governance.

Māori Participation

The KOS Bill moreover, does not provide any mechanism for Māori to become involved in the administering of the governance plan. The responsibility will continue to fall exclusively to DOC, and to the New Zealand Navy in monitoring the Sanctuary.[1116] Sharing, mutual

[1110] Refer to the Sustainable Seas adopted and adapted working definition of EBM in section 2 of this report.
[1111] Roberts, M and others, 'Kaitiakitanga: Māori Perspectives on Conservation,' in *Pacific Conservation Biology* (Vol. 2 1995) at 7.
[1112] Price, R 'No co-management with Māori on Kermadec Ocean Sanctuary,' *Stuff* (8 March 2016) www.stuff.co.nz (Accessed May 2016).
[1113] Above.
[1114] Hon Ruth Dyson MP *NZPD* (711, 15 March 2016) at 9662.
[1115] Conservation Act, ss. 6L-6W.
[1116] Kermadec Ocean Sanctuary Bill (120—2) (Select Committee Report, 2016) at 2.

responsibility and involvement of Māori begins with the membership on the Conservation Board. The Kermadec iwi authorities' intentions to have a 'role within governance to drive the Sanctuary' failed to arise in the manner that they had hoped for in the prior years of campaigning.[1117] The Conservation Board retains the right of kawanatanga for the Crown and it fails to give credence to te tino rangatiratanga of Māori. The Board then does not reflect a Treaty partnership that respects and strengthens the mutual identities of both Treaty partners.

Consultation

As noted above, developments since 1987 through resource management litigation and statutory recognition have established that it is 'recognised good practice to consult' tangata whenua who may be affected by a proposal.[1118] The Crown's duty to consult, to act reasonably and in good faith, and to make informed decisions in the proposal of the KOS Bill and the Conservation Board, were acutely compromised by the absence of effective consultation between iwi and relevant stakeholders before the announcement of the KOS Bill. The Sanctuary had a significant impact on Māori customary and commercial fishing rights.

The failure to consult with Māori is further reflected in the Board structure. The Crown unilaterally proposed the Conservation Board and then decided, for Māori, the membership that they would be entitled to which is problematic given that co-management was initially discussed with Ngāti Kurī and Te Aupouri.[1119] Hon Nick Smith recognised that the representation on the Board is not as extensive as iwi expected and that co-management was preferred. However, he reconciled his position by asserting 'like all discussions with Māoridom, there's give and take.'[1120]

Although a different context, a Te Tau Ihu informant commented on a similar situation with the RMA:

> There is a growing trend that the Minister has power, so you have the Minister for the Environment, the Minister of Conservation and there is a growing trend that they are giving themselves powers, and if they get back into Government, they're anticipating amending the Act [RMA]. A concern that is raising its head now is the ability of the Minister to exercise discretionary powers to amend coastal plans in accordance with what he wants to be done, without the need for consultation so there's a disturbing trend that these overarching powers (which I think were originally intended to only be exercised for emergency or extraordinary cases such as the Kaikoura earthquake), are now being exercised in what we call an inappropriate use of his discretionary power.[1121]

[1117] Price, R 'No co-management with Māori on Kermadec Ocean Sanctuary,' *Stuff* (8 March 2016) www.stuff.co.nz (Accessed May 2016).

[1118] *Paihia & District Citizens Association Inc v Northland Regional Council (*A71/95).

[1119] Hon Ruth Dyson MP, *NZPD* (711, 15 March 2016) at 9663.

[1120] Price, R 'No co-management with Māori on Kermadec Ocean Sanctuary,' *Stuff* (8 March 2016) www.stuff.co.nz (Accessed May 2016).

[1121] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

Commercial Fishing Interests

The Conservation Board moreover, arose without any consultation with TOKM, the Māori commercial fisheries Treaty partner with considerable proprietary rights in the KOS area. The reneging of commercial interests and the subsequent exclusion of representatives of these interests from the Conservation Board indicates the monocultural focus of the KOS Bill. Evaluations of the success of MPAs demonstrated that success often relies on engaging, accommodating and consulting key players who hold commercial and economic interests in the area.[1122] Commercial fishers are typically the most directly affected by the creation of MPAs and their behaviour can dictate or undermine the success of an MPA in achieving its conservation purpose.[1123]

Predictably, the structure of the Conservation Board does not accommodate the existence of these commercial fishing interests. The Minister of Conservation is responsible for appointing the remaining four members to the Board[1124] which appointments are made with applicants who have the required skills, knowledge or experience to contribute to achieving the Sanctuary's purpose[1125] of preserving the current state of the Kermadec Ocean. Consequently, the interests of commercial stakeholders including those granted by the Māori Commercial Fisheries Settlement - over one-third of New Zealand's commercial fishing rights[1126] - are ignored. By prohibiting the exercise of Māori commercial fishing rights in the KOS, the Government appears to be excluding Māori participation from the region in every shape and form notwithstanding recognised proprietary interests through a Treaty settlement protected by legislation.

Te Ohu Kaimoana was established to advance iwi interests within the fishing industries[1127] as well as to protect and enhance the natural marine environment in a manner consistent with kaitiakitanga.[1128] Currently, the only way Māori can have any influence over the region or to practice tikanga Māori responsibilities is through TOKM.

TOKM made it clear that they do not oppose the creation of the KOS in the first instance. What they oppose is the current form the KOS will take.[1129] Prior to the KOS proposal, TOKM had not fished their quota in the region.[1130] The average annual catch in the region contributed to the fishing livelihoods of five commercial fishing companies but formed 0.004% of all fisheries and 0.011% of export value.[1131] The Regulatory Impact Statement justified the imposition of no-take restrictions because the current data demonstrated that the area was

[1122] Upton, H and Buck, E, 'Marine Protected Areas: An Overview,' in Mayr, F, (ed) *Marine Protected Areas* (Nova Science Publishers, New York, 2010) at 1.
[1123] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, Legislation Direct, Wellington, 2011) at 302.
[1124] Kermadec Ocean Sanctuary Bill, cl. 24(1)(d).
[1125] Clause 3.
[1126] Hon Ruth Dyson MP, *NZPD* (711, 15 March 2016) at 9663.
[1127] Māori Fisheries Act 2004, s. 32.
[1128] Te Ohu Kai Moana Trustee Limited, 'Submission on the Kermadec Ocean Sanctuary Bill,' (2016) at 7.
[1129] Above, at 4.
[1130] Ministry for the Environment, *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (25 February 2016) at 8.
[1131] Above.

largely unused apparently due to commercial fisheries operations within the area being commercially unviable.

Iwi opposition to commercial fisheries in the Kermadec region was also widespread. Due to the tikanga practices of kaitiakitanga over the region, TOKM even voluntarily supported the imposition of restrictions on the types of fishing practices conducted within the region.[1132] The KOS Bill in its proposed form failed to recognise this Treaty partnership, as well as the application of mātauranga and tikanga Māori that was already exercised over the area. [1133]

The KOS Bill then fails to uphold the Treaty principles and to acknowledge mātauranga and tikanga Māori in a substantive way that appeared to be operating effectively ironically, anyway. The Government asserted its kawanatanga authority but at the expense of te tino rangatiratanga, mātauranga and tikanga Māori, which compromises were severely limiting for Māori mana whakahaere. The establishment of the KOS may be permanently undermined by this procedural oversight of the Executive.

Current Position of KOS Bill

Leading up to the 2017 election, the relationship between TOKM and the National Government reached an impasse. TOKM criticised the government's demonisation of Māori interests and refusal to engage in negotiations,[1134] which position appeared to be largely supported across the political spectrum. The Labour Party noted that their support was dependent on a resolution with TOKM.[1135] The Māori, ACT and NZ First Parties withdrew their support subject to the adequate compensation of property rights derived from the Māori Commercial Fisheries Settlement 1992.[1136] The former National Government's approach to establishing the KOS revoked Māori Treaty interests, and contradicted the Treaty principle of partnership and was framed as an unjustified and politically charged removal of rightfully recognised Māori Treaty rights and tikanga responsibilities under the guise of sustainability.[1137]

Following the election of the new Labour Government in 2017, predictably the KOS Bill has been placed on hold before the Second Reading.[1138] The controversy surrounding the KOS Bill's abrogation on Māori Treaty rights guaranteed in the 1992 Māori Commercial Fisheries Settlement was unable to be resolved between the Crown and iwi representatives. Te Ohu

[1132] Te Ohu Kai Moana Trustee Limited, 'Submission on the Kermadec Ocean Sanctuary Bill,' (2016) at 7.
[1133] Previous Māori Party Co-Leader Marama Fox cited in Marwick, F, 'Rahui a possible way out of Kermadec impasse,' (20 September 2016) Newstalk ZB www.newstalkzb.co.nz (Accessed October 2016).
[1134] Jamie Tuuta cited in, Sachdeva, S, 'Kermadec sanctuary legislation to be delayed after failed negotiations over Māori rights,' *Stuff* (14 September 2016) www.stuff.co.nz (Accessed October 2016)..
[1135] Andrew Little cited in Trevett, C and Jones, N, 'PM John Key: Kermadec sanctuary will be put on ice if no agreement with Māori Party,' *New Zealand Herald* (20 September 2016) www.nzherald.co.nz (Accessed October 2016).
[1136] Forbes, M, 'Government to delay Kermadec Ocean Sanctuary Bill,' Radio New Zealand (14 September 2016) www.radionz.co.nz (Accessed October 2016).
[1137] Te Ohu Kai Moana Trustee Limited, 'Submission on the Kermadec Ocean Sanctuary Bill,' (2016) at 28.
[1138] Moir, J 'Winston Peters confident of Kermadec Marine Sanctuary deal by end of year,' Radio NZ (24 July 2018) www.radionz.co.nz (Accessed August 2018).

Kaimoana even lodged proceedings against the Crown in the High Court for failure to consult or consider rights granted in a full and final settlement.[1139]

The National Government subsequently conceded that the process was mishandled and consultation should have occurred,[1140] which concession resulted in the former Environment Minister Nick Smith stepping down from negotiations with TOKM. The current Environment Minister Hon David Parker and Deputy Prime Minister Winston Peters are currently engaging in negotiations to reach a compromise on the structure and restrictions of the KOS.[1141] Peters is confident that by considering alternative options such as a mixed approach to environmental management, the deadlock can be resolved before the end of 2018.[1142]

As at October 2019, the Ministry for the Environment reported that the KOS Bill would continue its progression through the House of Representatives once the litigation on the Bill has been resolved and a way forward is agreed with the parties.[1143] A better way forward may be to adopt EBM and sustainability to preserve the Kermadec Ocean Sanctuary in its natural state[1144] while also recognising co-governance and co-designed structures that acknowledge the Māori constitutional partnership based on the Treaty of Waitangi that effectively incorporates tikanga and mātauranga Māori within this EBM context.

The next section will focus on the Marine and Coastal Area (Takutai Moana) Act 2011 exploring the themes of tikanga Māori, sharing governance power and concurrent jurisdiction within an EBM context.

Q. Concurrent Jurisdiction & Marine and Coastal Area (Takutai Moana) Act 2011

The Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) was enacted to repeal the controversial Foreshore and Seabed Act 2004[1145] that severely limited Māori property rights in the marine foreshore and seabed areas based on pre-existing historic aboriginal rights. MACA introduced a new framework for recognising and protecting customary rights in the marine and coastal area. This recognition will include the right to go to the High Court (or to

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[1139] Te Ohu Kaimoana issued proceedings seeking a declaration that the KOS Bill breaches the Crown's commitments to Māori established in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and under their obligations as a Treaty partner. Further information can be found in the New Zealand Fishing Industry Association, 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016) at 9 and 'Legal Challenge to Kermadec Ocean Sanctuary,' Radio NZ (20 March 2016) www.radionz.co.nz (Accessed May 2016).

[1140] John Key cited in Trevett, C and Jones, N, 'PM John Key: Kermadec sanctuary will be put on ice if no agreement with Māori Party,' *New Zealand Herald* (20 September 2016) www.nzherald.co.nz (Accessed October 2016).

[1141] Moir, J 'Winston Peters confident of Kermadec Marine Sanctuary deal by end of year,' Radio NZ (24 July 2018) www.radionz.co.nz (Accessed August 2018).

[1142] Above.

[1143] 'About the proposed Kermadec Ocean Sanctuary,' Ministry for the Environment, online at: https://www.mfe.govt.nz/marine/kermadec-ocean-sanctuary/about-sanctuary (Accessed February 2020).

[1144] Kermadec Ocean Sanctuary Bill 2016, s. 3: Purpose of this Act.

[1145] Marine and Coastal Area (Takutai Moana) Act 2011, s. 5. See also the controversial Court of Appeal decision that sparked the foreshore and seabed debacle *Attorney-General v Ngāti Apa,* [2003] 3 NZLR 577. Refer also to Jones, M, 'The Status and Limits of the Marine and Coastal Area (Takutai Moana) Act 2011 Report and Database Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).

negotiate an out-of-court settlement with the Crown) to seek customary marine title for areas with which groups such as iwi and hapū have a longstanding and exclusive history of use and occupation. Although not many MACA claims have been processed to date, the Office of Treaty Settlements (OTS) now Te Arawhiti, on behalf of the government, received over 380 applications up to the statutory cut-off date of 3 April 2017.[1146]

Of the 387 MACA applications filed before the cut-off date, 175 applications were made in both the High Court and Crown engagement. Of the existing Crown engagement applications, the Crown has decided to engage with groups where the Crown had an existing commitment before 2017. Existing Crown engagement commitments to date are with the following Māori groups:

1) Te Whānau ā Apanui;
2) Ngāti Koata;
3) Te uri o Hau;
4) Te Korowai o Ngāruahine;
5) Rongomaiwahine;
6) Ngā hapū o Ngāti Porou;
7) Ngāti Pāhauwera;
8) Taumata B; and
9) Ngāti Porou ki Hauraki.[1147]

It is anticipated the MACA will provide greater impetus for incorporating mātauranga and tikanga Māori within an EBM context once ownership and jurisdiction are returned to Māori and they can be more involved as Treaty of Waitangi partners on their own terms. Under MACA, hundreds of iwi, hapū and whānau are currently negotiating with the Crown over customary rights and interests over the marine and coastal estate. To date, few MACA claims have been settled nor have MACA provisions been fully implemented.

Three redress options are available under MACA –

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

Customary Marine Title (CMT) refers to customary interests based on aboriginal title established by a Māori applicant group in a specified location of the common marine and coastal area pursuant to MACA. Customary marine title is potentially a very strong legal

[1146] Crown Law Office, 'Internal Paper,' (002.0535, 2017). See also Te Arawhiti: 'Applications made under the Marine and Coastal Area Act' online at https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications-made-under-the-marine-and-coastal-area-act/ (Accessed March 2020).
[1147] Above.

imperative for Māori as a Treaty partner that will grant to them the right to check and even deny resource consents, marine reserves, conservation areas and DOC concessions with some exceptions. CMT will moreover guarantee to Māori ownership of minerals within the specified area excluding precious minerals under the Crown Minerals Act 1991 – gold, silver, petroleum and uranium. CMT will also guarantee to Māori interim custody of newly discovered taonga tuturu which is defined in s. 2, Protected Objects Act 1975 as an object that relates to Māori culture, history or society and was or appears to have been manufactured or modified in New Zealand by Māori, or brought into New Zealand by Māori' or used by Māori; and is more than 50 years old.[1148]

Furthermore, CMT will provide a right to consultation on some Government and Council decisions. CMT then is potentially a very strong enabling provision for incorporating mātauranga and tikanga Māori and for empowering the Treaty partnership as long as the Māori applicant group can pass the stringent statutory tests[1149] in s. 58, MACA:

> **s. 58 Customary marine title**
>
> (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group –
> (a) holds the specified area in accordance with tikanga; and
> (b) has, in relation to the specified area –
> (i) exclusively used and occupied it from 1840 to the present day without any substantial interruption; or
> (ii) received it, any time after 1840, through a customary transfer in accordance with subsection (3)
> (2) For the purpose of subsection (1)(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between—
> (a) the commencement of this Act; and
> (b) the effective date.
> 3) For the purposes of subsection (1)(b)(ii), a transfer is a customary transfer if—
> (a) a customary interest in a specified area of the common marine and coastal area was transferred— and

[1148] Section 2, Protected Objects Act 1975.

[1149] Refer to Ministry of Justice, *Recognising Customary Rights under the Marine and Coastal Area (Takutai Moana) Act 2011,* (Ministry of Justice, Wellington, no date). For an academic analysis of the MACA tests, see Joseph, R, 'Frozen Rights? The Right to Develop Māori Treaty and Aboriginal Rights,' in *Waikato Law Review,* (Vol. 19, Issue 2, 2011) at 117-133.

(b) the transfer was in accordance with tikanga; and
(c) the group or members of the group making the transfer—
(i) held the specified area in accordance with tikanga; and
some members of a group who were not part of the applicant group;
(i) held the specified area in accordance with tikanga; and
(ii) exclusively used and occupied the specified area from the time of the (ii) had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and
(d) the group or some members of the group to whom the transfer was made have—
(i) between or among members of the applicant group; or
(ii) to the applicant group or some of its members from a group or transfer to the present day without substantial interruption.
(4)Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law.

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

s. 78 Protection of wāhi tapu and wāhi tapu areas
(1) A customary marine title group may seek to include recognition of a wāhi tapu or a wāhi tapu area –
(a) in a customary marine title order, or
(b) in an agreement.
(2) A wāhi tapu protection right may be recognised if there is evidence to establish –
(a) the connection of the group with the wāhi tapu or wāhi tapu area in accordance with tikanga; and
(b) that the group requires the proposed prohibitions on access to protect the wāhi tapu or wāhi tapu area.

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

81 Compliance

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

(2) Every person commits an offence who intentionally fails to comply with a prohibition or restriction notified for that wāhi tapu or wāhi tapu area, and is liable on conviction to a fine not exceeding $5,000.
(3) Despite subsection (2), the offence provisions of the Heritage New Zealand Pouhere Taonga Act 2014 apply if a wāhi tapu or wāhi tapu area subject to a wāhi tapu protection right is protected by a heritage covenant under section 39 of that Act.
(4) To avoid doubt, it is not an offence for a person to do anything that is inconsistent with the prohibition or restriction included in the wāhi tapu conditions if—

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

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

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

s. 51 Meaning of protected customary rights

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

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

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

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

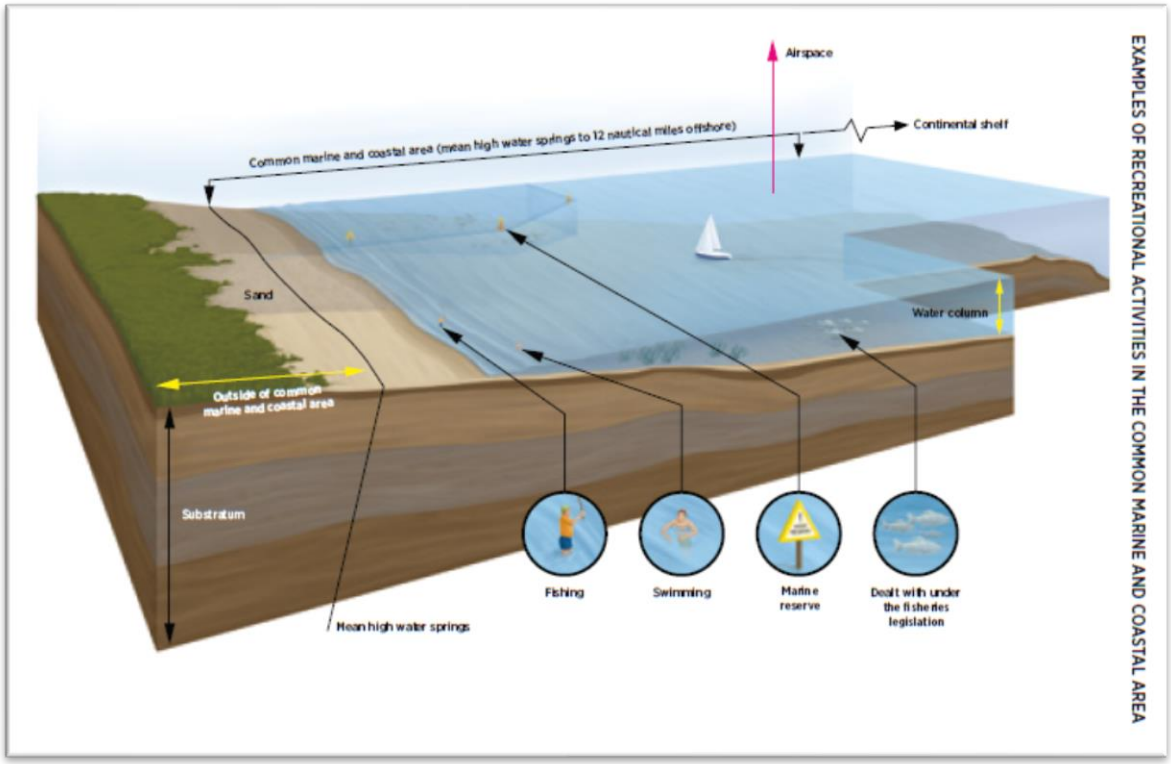
(ii) marine mammals within the meaning of the Marine Mammals Protection Act 1978; or

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

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

The challenges with MACA however are the fact that over 380 claims were filed in April 2017[1150] and are yet to be processed, so time and resources appear to be major challenges. Furthermore, the fact the central government - through the Office of Treaty Settlements (OTS) now Te Arawhiti - and regional and local governments appear to still be developing policy, funding options and capacity to deal with the MACA claims, hence it is still too early to assess how effective or not MACA is for Māori.

[1150] Crown Law Office, 'Internal Paper,' (002.0535, 2017).



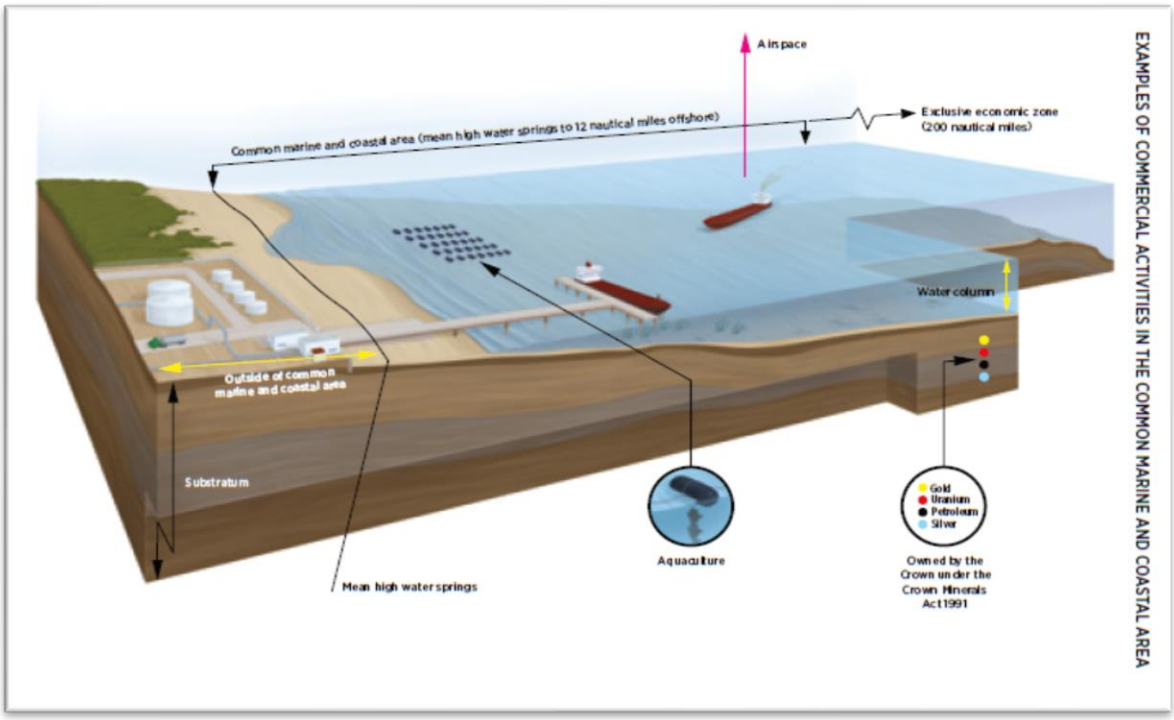


Diagram 10: Some Recreational and Commercial Activities under the Marine and Coastal Area (Takutai Moana) Act 2011[1151]

[1151] Ministry of Justice, *Recognising Customary Rights under the Marine and Coastal Area (Takutai Moana) Act 2011,* (Ministry of Justice, Wellington, no date) at 4-5.

Testing MACA Tests

The first case where the High Court applied the tests for CMT under MACA however, was *Re Tipene.*[1152] The case concerned a 200m radius area between two islands off the southwest coast of Rakiura - Stewart Island. The High Court found that CMT exists under s. 58, MACA over the claimed area, and the applicant had authority to bring the application on behalf of the applicant group but the holder of the CMT order will be determined at a later date. Given that this case involved a small area of a remote island at the bottom of the South Island, it would have had fewer stakeholders to compete with the MACA application hence, it is suspected, the straightforwardness with which the application was processed but even then, the High Court decision to determine the CMT holder was reserved.

One of the other MACA claims that has been processed is Ngāti Pāhauwera in the Mohaka, Northern Hawkes Bay area. Ngāti Pāhauwera applied for MACA claims from the northern banks for the Poututu Stream to the southern end of the Esk River.[1153] To this end, Ngāti Pāhauwera applied for CMT over the whole application area (refer to the overleaf maps).[1154] Ngāti Pāhauwera moreover, applied for WTP over certain areas including to impose a temporary rāhui after a drowning or in a location where a death, a body or koiwi (human bones) are located, and for other prohibitions on polluting, littering, gutting of fish on the beach or in the water, and for overexploiting or wasting of resources, as well as a prohibition on polluting the river mouth.

Furthermore, Ngāti Pāhauwera applied for PCRs over the whole area to take, utilise, gather, manage and preserve all of the natural and physical resources including sand, gravel, pumice, driftwood, kokowai (decorative ochre), wai tapu (sacred water), īnanga (small whitebait), kokopu (large whitebait, native trout) and tauranga waka (waka launching areas).[1155]

Ngāti Pāhauwera commenced its MACA application in 2012 but they also applied earlier in the Māori Land Court under the former Foreshore and Seabed Act 2004. Consideration of the application followed a rigorous process of evidence collection, which included public submissions. During 2013-2014, evidence was collected by the parties which were assessed against the MACA statutory tests. A report was also commissioned from a non-statutory Independent Assessor, which was Hon. John Priestley, a retired High Court Judge, who independently advised the Minister on the extent to which the MACA tests were met.[1156] The Independent Report concluded:

> A customary marine title under s. 58 in their favour in respect of the area claimed in the common marine and coastal area between Poututu Stream and Ponui Stream to a

[1152] *Re Tipene,* [2016] NZHC 3199.

[1153] Much of the documentary evidence and information on the Ngāti Pāhauwera MACA claims can be accessed online at: Te Arawhiti Office for Māori Crown Relations, 'Te Kahui Takutai Moana (Marine and Coastal Area) – Applications made under the Marine and Coastal Area Act,' online at: https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications-made-under-the-marine-and-coastal-area-act/agreements-and-orders/ (Accessed May 2020).

[1154] Ngāti Pahauwera Development Trust, 'Takutai Moana Ratification Booklet for Members of Ngāti Pahauwera,' (Unpublished Ngāti Pahauwera Report, May-July 2017).

[1155] Above.

[1156] Priestley, J, 'Report of Independent Assessor on Evidence supporting claims by Ngati Pahauwera under the Marine and Coastal Area (Takutai Moana) Act 2011,' (Minister of Treaty Negotiations, 15 December 2015).

distance of 250 metres from the mean high-water springs and including all river and stream mouths with the exception of the Mohaka River mouth.

Recognition of wāhi tapu under s. 78 in the customary marine title area limited solely to negotiated tikanga fishing practices to prevent the beach and fishing grounds from being polluted, and rāhui necessary to restore tapu in the event of deaths, drownings, and the discovery of bodies or koiwi in the area. Such negotiated restrictions to be for appropriately short periods and limited to the taking of fish, kaimonana and resources.

Establishment of protected customary rights (subject to agreed area specificity on taking, utilisation, gathering, management and preservation) to take, utilise, gather, manage, and preserve sand, stone, gravel, pumice, driftwood, kokowai, wai tapu, īnanga, kokopu, tauranga waka and hangi stones. Such customary rights to be subject to the statutory restrictions, scope and effect set out in ss 51 and 51 of the Act.[1157]

After reviewing the evidence by Ngāti Pāhauwera and receiving the Independent Assessors Report by Hon John Priestley, the Minister of Treaty of Waitangi Negotiations, the Hon Christopher Finlayson at the time, responded in an official letter on 23 August 2016:

I have now considered the evidence and the parties' assessments, together with Hon Priestley's report. My conclusions are as follows:

i) I am not satisfied on the basis of the evidence presented to me in support of the application that the tests for protected customary rights or wāhi tapu protection in the Marine and Coastal Area (Takutai Moana) Act 2011 are met in any part of Ngāti Pāhauwera's application area;

ii) I am satisfied that the test set out for customary marine title in section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 is met in the Ngati Pāhauwera application area in:
   a. the common marine and coastal area between mean-high water springs and lean low-water springs; and
   b. within the following points only:
      i. lat. 39.091811, long. 177.291402 (a point near the Waihua River mouth) and lat. 39.092867, long. 177.29197 (a point offshore from the Waihua River mouth), and
      ii. lat. 29.150189, long. 177.12798 (a point near the Ponui Stream mouth), 39.151176, long. 177.128491 E (a point offshore from the Ponui Stream mouth), but
   c. excluding any part of the bed of the Mohaka River that is in the common marine and coastal area.[1158]

[1157] Above, at 27.

[1158] Hon Christopher Finlayson, 'Official Letter, Ngāti Pahauwera determination of customary interests under the Marine and Coastal Area (Takutai Moana) Act 2011,' (Trustees, Ngāti Pahauwera Development Trust, 23 August 2016) at 1-2.

Accordingly, the Minister of Treaty of Waitangi Negotiations, the Hon Christopher Finlayson, offered to enter into a recognition agreement with Ngāti Pāhauwera recognising CMT in a thin stretch of the common marine area approximately 16 kms long.[1159]

Map 13: Ngāti Pāhauwera MACA Claims, Northern Hawkes Bay Map 2016[1160]

[1159] Te Arawhiti Office for Māori Crown Relations, 'Te Kahui Takutai Moana (Marine and Coastal Area) – Applications made under the Marine and Coastal Area Act,' online at: https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications-made-under-the-marine-and-coastal-area-act/agreements-and-orders/ (Accessed May 2020).

[1160] Above.

Unfortunately, the result of negotiating directly with the Crown under MACA for Ngāti Pāhauwera resulted in their being awarded a miserly less than 1% of the CMT they applied for in their claim. Furthermore, the Crown did not recognise any of the wāhi tapu or PCR claims Ngāti Pāhauwera applied for which are the redress instruments that could restore the Treaty of Waitangi partnership for Ngāti Pāhauwera to enable them a reasonable share of governance jurisdiction over their traditional rohe moana.[1161]

However, the trustees of the Ngāti Pāhauwera Development Trust and the Crown initialled the recognition agreement for CMT pursuant to MACA in 2017, the first under MACA, over part of the Ngāti Pāhauwera rohe moana, albeit a minute part. The agreement is still waiting to be finalised.[1162]

Ngāti Pāhauwera disagreed however, with the Minister's views of their MACA application, the Crown's assessment of the Ngāti Pāhauwera evidence to prove their CMT, WTP and PCRs, as well as the Minister's general interpretation of MACA. Ngāti Pāhauwera in addition to initialling this recognition agreement with the Crown subsequently appealed to the High Court for further deliberation for a broader area of the rohe moana shown in the over page map.[1163]

What the situation indicates on the MACA however is possibly a lack of 'utmost good faith' negotiations, the Crown's very conservative interpretations of the MACA, the challenge of passing the stringent MACA statutory tests in s. 58 for example, a general reluctance to sufficiently recognise pre-existing Māori property rights in the coastal marine area based on aboriginal title, a lack of political will to share governance jurisdiction, and the enormous power imbalance between the Treaty of Waitangi partners.

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

> The Marine and Coastal Area Act is cruel. Is it empowering? Not at all. It will increase grievances and serve only to fatten the wallets of lawyers. I think the legal profession needs to look at itself because I think they should be giving good advice to people on their chances of success. The Crown has put out its criteria. It is simple and says if you cannot meet those things, you will not be successful, then why. I think 98% of those ones with claims cannot succeed.[1164]

Another Te Tau Ihu informant stated:

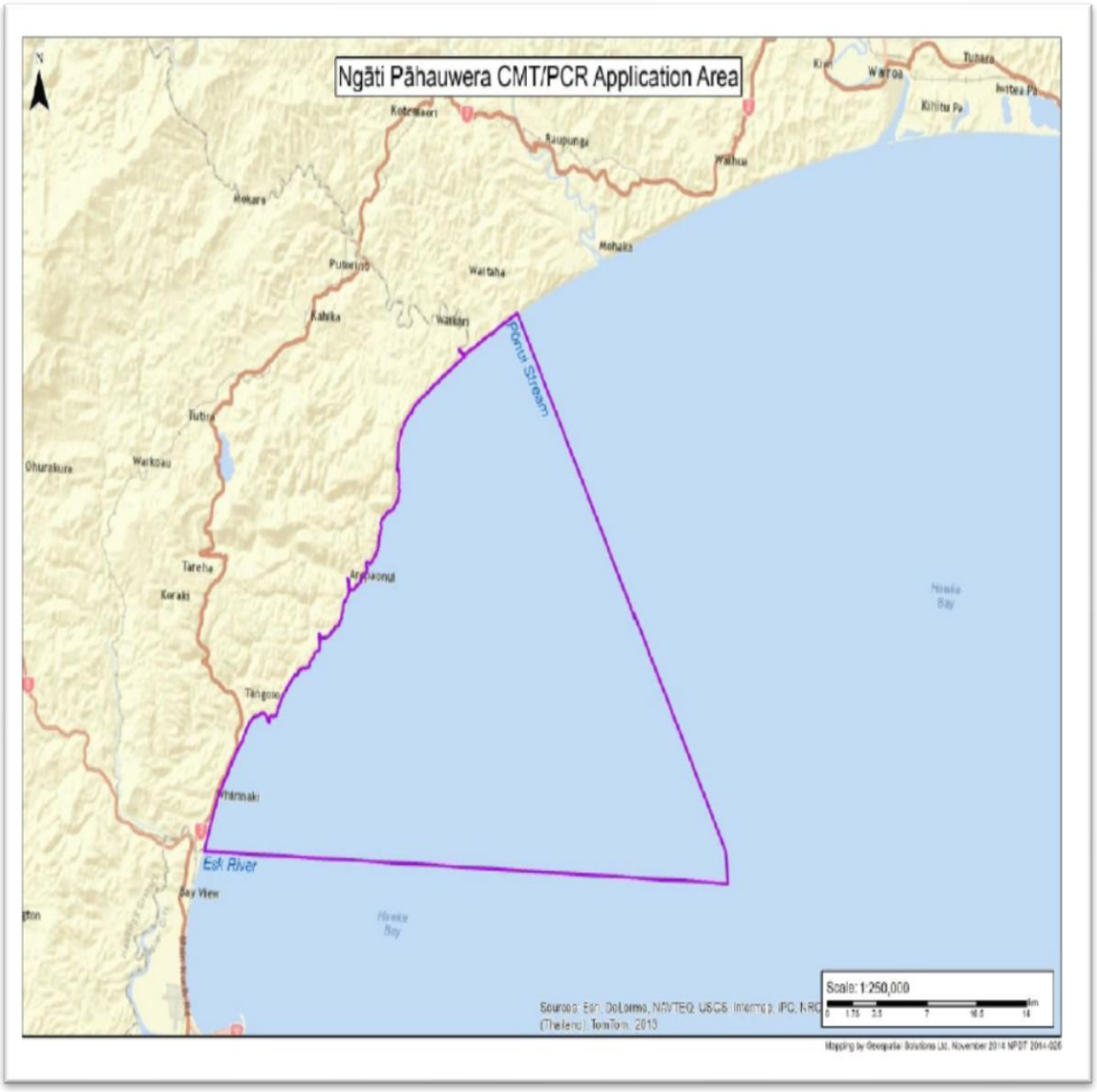
[1161] Ngāti Pahauwera Development Trust, 'Takutai Moana Ratification Booklet for Members of Ngāti Pahauwera,' (Unpublished Ngāti Pahauwera Report, May-July 2017).

[1162] Te Arawhiti Office for Māori Crown Relations, 'Te Kahui Takutai Moana (Marine and Coastal Area) – Applications made under the Marine and Coastal Area Act,' online at: https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications-made-under-the-marine-and-coastal-area-act/agreements-and-orders/ (Accessed May 2020).

[1163] *The Marine and Coastal Area (Takutai Moana) Act 2011 v Ngāti Pahauwera Development Trust*, (CIV 2011 485 821, Unreported, High Court Decision, Wellington, 15 March 2017). Another High Court hearing is being planned to decide overlapping claims between Ngāti Pahauwera and Ngāi Tahu ki Mohaka in early 2021.

[1164] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

We are part of the leadership towards the foreshore and seabed so it's important for us. However, whilst we did lodge a MACA claim at the last minute during the stampede, we only did it to defend our territory from the next tribe really. There's not a hell of a lot in those MACA's. I don't hold much hope and the process and test were terrible and I'll be surprised if anybody really gets through that test.[1165]



Map 14: Ngāti Pāhauwera Development Trust broader MACA Claim Area 2019

One other Te Tau Ihu informant commented further on MACA:

[1165] Above.

> Our trust didn't lodge a MACA claim because we did not have the capacity. Some of the elected leaders actually didn't have the expertise or understand the system and the High Court action we were involved in took a lot of energy and focus away from the real business.[1166]

Furthermore, James Anaya, UN Special Rapporteur, referred to the above customary title tests in the Marine and Coastal (Takutai Moana) legislation in his 2011 Special Rapporteur Report on the rights of Indigenous peoples in New Zealand.[1167] Anaya emphasised that New Zealand law needs to be aligned with international standards regarding the rights of Indigenous peoples to their traditional lands and resources. Anaya added that the unilateral, uncompensated extinguishment of Indigenous rights under the previous Foreshore and Seabed Act 2004 and possibly the Marine and Coastal Area (Takutai Moana) Act 2011 is inconsistent with the UN Declaration on the Rights of Indigenous Peoples.[1168]

The power imbalance actually undermines an authentic partnership and shared governance jurisdiction options, as well as limiting the opportunities to integrate mātauranga and tikanga Māori in an EBM context over the marine estate, which is deeply concerning for Māori as one Te Tau Ihu informant concluded: 'Most of the provisions under the MACA and RMA are not empowering to Māori.'[1169]

R. Glimmer of Hope – Ngāti Porou

Perhaps a more positive development in terms of power sharing and concurrent jurisdiction over the takutai moana area is with Ngāti Porou. Ngāti Porou are New Zealand's second largest iwi with approximately 90,000 members, mostly dispersed around Aotearoa New Zealand and the world. One of the tribe's greatest assets is its isolation and strong sense of mana motuhake. Ngāti Porou maintain that at the heart of their strength is mana tangata, mana whenua and mana moana as asserted by Te Rūnanganui o Ngāti Porou, the legal entity representing Ngāti Porou tribal interests:

> Historically ngā whānau me ngā hapū o Ngāti Porou exercised exclusive control over our lands and waters within the Ngāti Porou rohe, including the foreshore and seabed (takutai moana).
>
> In contemporary times, Ngāti Porou retain at least 90 percent of our whenua takutai (coastal lands) and continue to exercise mana over our takutai moana – from Potikirua

[1166] Above.

[1167] Anaya, J, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples, Addendum: The Situation of Maori People in New Zealand' (UN General Assembly, Human Rights Council, 18th Session, UN Doc:A/HRC/18/XX/Add.Y, 17 February 2011) at 17-18.

[1168] Above, at 18.

[1169] MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).

> in the north to Te Toka a Taiau in the south. The rights of ngā hapū o Ngāti Porou, however, came under threat as a result of the Foreshore and Seabed Act 2004.[1170]

The late Dr Apirana Mahuika expressed, in typical Ngāti Porou form, the mana whakahaere exclusive jurisdiction assertions and aspirations of Ngāti Porou over the coastal marine environment within their rohe when he asserted:

> Our view in relation to the foreshore is that absolute authority and sovereignty [exclusive jurisdiction] rests solely with us. The term 'rangatira' not only means chief or person of high status, but equally applies to ownership of property and the absolute authority [exclusive territorial jurisdiction] resting with a particular whānau or hapū.
>
> Therefore the term rangatira is synonymous with the English word ownership. Another interpretation of the term ownership to Māori is absolute authority and sovereignty (mana tuturu/mana motuhake) [exclusive jurisdiction].
>
> From these terms we get the expression mana whenua and also mana moana. The term mana whenua relates primarily to genealogy. If one had no genealogical connection to a particular area they have no claim to mana whenua. And the same applies to mana moana. Therefore we are very familiar with our relationship (whānaungatanga) to the land and also to the sea; the foreshore stretching to the sea, coastal lands stretching landwards.
>
> Some have mistakenly thought that ownership of the land is different from the ownership of the sea and sea resources. But we say 'No'. It is possible to express ownership over both. This ownership is inherited at birth, from our ancestors who have lived there since time began. When one looks at lands and coastal lands (whenua takutai) in Ngāti Porou, long before the Treaty of Waitangi our ancestors were living on those lands and expressing their traditional practices to the foreshore and fishing grounds, in each of those areas.[1171]

Dr Apirana Mahuika added:

> Whānau and hapū of Ngāti Porou recognise and respect the boundaries and territories of each kin group and therefore their rangatira rights over these regions. In spite of legislation and the raupatu of our lands over successive governments and generations, for Ngāti Porou, mana tuku iho never dies but it endures forever. The same applies to te takutai moana. E kore te mana iwi memeha (Iwi mana never dies).[1172]

[1170] Te Rūnanganui o Ngati Porou, *Mana Moana – Nga Hapu o Ngati Porou Foreshore and Seabed Deed of Agreement. A guide to understanding the process to ratify amendments to the Deed,* (Te Rūnanganui o Ngati Porou, Gisborne, 2016).
[1171] Above.
[1172] Above.

Ngāti Porou Deed of Agreement and Bill 2008

Since the introduction of the Foreshore and Seabed Act 2004, Te Rūnanganui o Ngāti Porou and Ngāti Porou hapū representatives have been working tirelessly to ensure the legal recognition of the mana of nga hapū - co–governance and shared jurisdiction - over their respective takutai moana, and to secure the best legal protections for hapū to undertake a whole spectrum of activities according to tikanga Māori and law. A major step forward was the ratification of the Nga Hapū o Ngāti Porou Foreshore and Seabed Deed of Agreement 2008 (NPDOS), which was signed at Parliament in 2008 by 48 hapū representatives and the Crown.

The 2008 NPDOS was signed between Nga Hapū o Ngāti Porou and the Crown under s. 96(1), Foreshore and Seabed Act 2004 (FASA) on the basis that Ngāti Porou had a claim for territorial customary rights - the FASA equivalent of customary marine title under MACA - over a specified area of the public foreshore and seabed. The NPDOS acknowledges Ngāti Porou mana whenua and concurrent jurisdiction at the highest political level and as recognising the priorities they consider important to their livelihood in the coastal marine area.

The NPDOS set out the traditional mana whenua and mana moana relationships between Ngāti Porou and its territory, Ngāti Porou and the Treaty of Waitangi, and Ngāti Porou and the Crown. Clause U, NPDOS states:

a. Ngāti Porou continue to assert that they have ongoing and enduring ownership interests unbroken by the Act [MACA]; and
b. The mana of nga hapū o Ngāti Porou in relation to ngā rohe moana o ngā hapū o Ngāti Porou is:
    i. Unbroken, inalienable and enduring; and
    ii. Held and exercised by nga hapū o Ngāti Porou as a collective right.

Map 15: Ngāti Porou Rohe (Territory)[1173]

[1173] Tamati Muturangi Reedy, 'Ngāti Porou - Tribal boundaries and resources,' in Te Ara – the Encyclopedia of New Zealand, online at: https://teara.govt.nz/en/map/647/ngati-porou-tribal-area (Accessed May 2020).

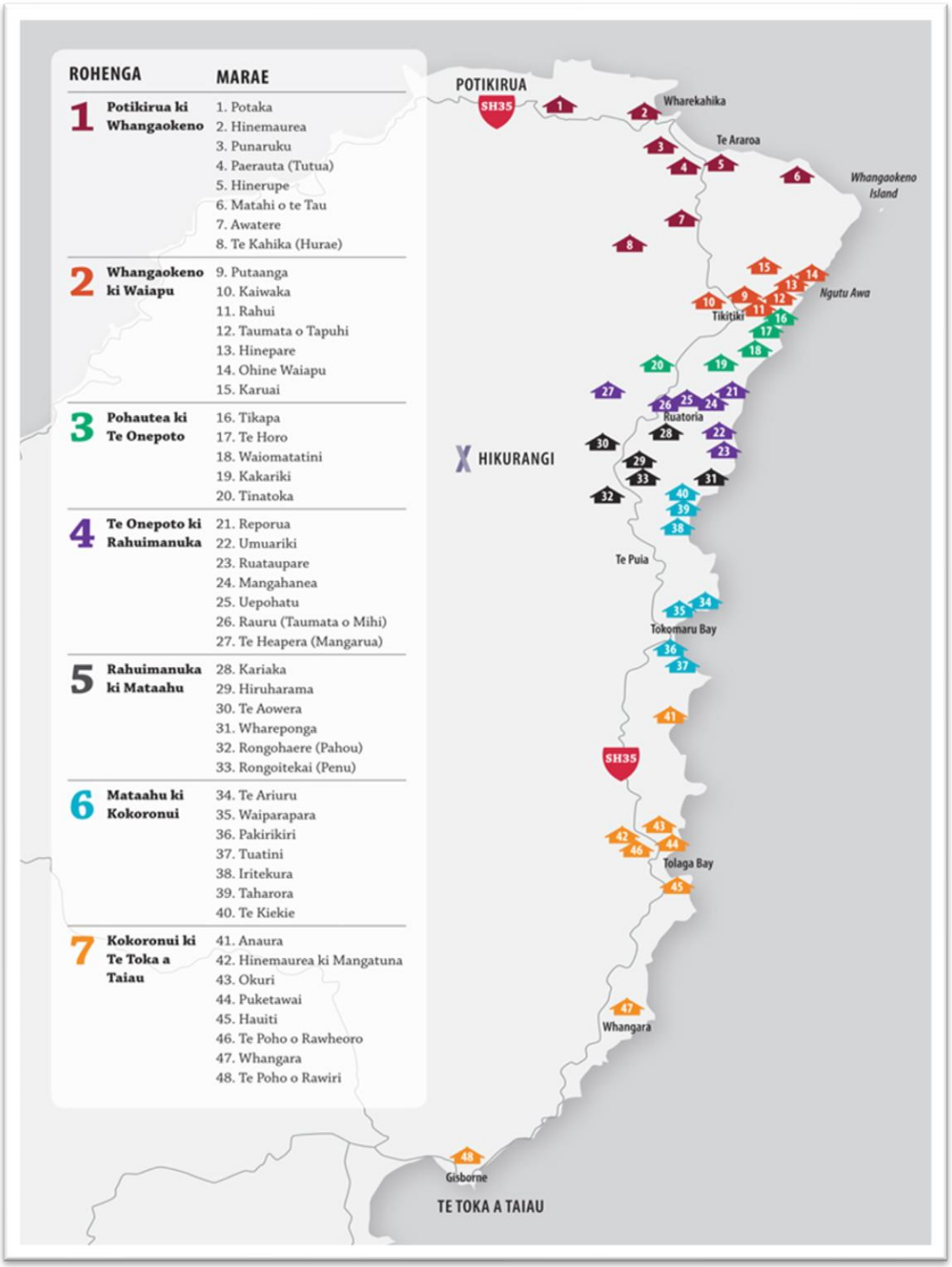
Clause W-BB, NPDOS acknowledges the recognition and protection of the economic, cultural and spiritual relationship between Ngāti Porou and ngā rohe moana o ngā hapū o Ngāti Porou as a taonga tuku iho [inherited treasure] o ngā hapū o Ngāti Porou. The NPDOS also protects the cultural distinctiveness and social well-being of ngā hapū o Ngāti Porou in a way that provides certainty of their relationships with each other and the public, which may include shared co-governance and concurrent jurisdiction within the Ngāti Porou rohe.

Clauses O and Q, NPDOS refer to the important Treaty of Waitangi relationship between Ngāti Porou and the Crown and implicitly the shared co-governance and concurrent jurisdiction responsibilities over the coastal and marine estate within their rohe that is acknowledged from the Treaty relationship:

> O. Although not all of the rangatira of nga hapū o Ngāti Porou signed Te Tiriti o Waitangi/the Treaty of Waitangi, nga hapū o Ngāti Porou have regarded themselves bound by the Treaty and have treated the Crown as a friend and protector of the rangatiratanga guaranteed to them under Article 2 of the Treaty. Accordingly, ngā hapū o Ngāti Porou have acted in the service of New Zealand and have honoured their obligations arising under the Treaty.
>
> Q. Ngā hapū o Ngāti Porou have entered into this Deed to better secure the legal expression, protection and recognition of their mana in relation to the ngā rohe moana o ngā hapū o Ngāti Porou, but still do not agree with the Act and, in particular, section 13(1).

The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill (NRMNP) was subsequently introduced in the House of Representatives to give effect to the NPDOS and was designed to fit with existing provisions of the RMA, Conservation Act 1987 and Crown Minerals Act 1991. But, following a change in Government, the progress of NRMNP was delayed by the repeal of the Foreshore and Seabed Act 2004, and enactment of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA). Since 2011, Ngāti Porou were in further discussions with the Crown about potential amendments to the original NPDOS to better reflect improvements under MACA. The NPDOS was updated to reflect these changes in the Crown's position.

Although drafted with Ngāti Porou coastal marine resources in mind, NRMNP contained many provisions that would assist in interpreting MACA. For example – under clauses 7 and 8, both the traditional identity as hapū and iwi of Ngāti Porou and the territory they occupy are defined by Ngāti Porou according to their own mātauranga and tikanga customs and practices, which, in turn, are based on whakapapa (genealogy) and mana whenua (land title).



Map 16: Ngāti Porou Whānau and Hapū[1174]

[1174] Rohenga Tipuna (Hapū and Marae clusters) and Primary Marae Map, Te Rūnanganui o Ngāti Porou, online at: https://ngatiporou.com/nati-biz/about-te-runanganui-o-ngati-porou/rohenga-tipuna-0 (Accessed February 2020).

Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019

As noted above, Ngāti Porou entered into direct negotiations under the former but now repealed Foreshore and Seabed Act 2004. Four years later, the Nga Rohe Moana o Nga Hapū o Ngāti Porou Bill 2018 was introduced into the House of Representatives on 29 September 2008. Further negotiations, policy shifts, the repeal of the Foreshore and Seabed Act 2004, enactment of the Marine and Coastal Area (Takutai Moana) Act 2011, and more endless negotiations resulted in the enactment in 2019 of the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (NRMNPA).

The purpose of NRMNPA is noted in s. 3 to contribute to the legal expression, protection and recognition of the continued exercise of mana by ngā hapū o Ngāti Porou in relation to ngā rohe moana o ngā hapū o Ngāti Porou that includes shared governance and concurrent jurisdiction. The other purpose in s. 3 is to give effect to the NPDOS 2008 between ngā hapū o Ngāti Porou and the Crown.

It is still early days but the NRMNPA appears to contain numerous sections that share governance power and concurrent jurisdiction between the New Zealand government, local government, Te Rūnanganui o Ngāti Porou and ngā hapū of Ngāti Porou. Section 15, NRMNP for example, allows relevant hapū to be party to Environment Court proceedings while, under s. 16, resource consent applications need to be notified to relevant hapū. Section 19 refers to Environmental Covenants:

> **19 Development and signing of covenant**
> (1) Ngā hapū o Ngāti Porou may develop and sign an environmental covenant setting out issues relating to, and objectives, policies, and rules or other methods for,—
> **(a)** promoting the sustainable management of the natural and physical resources of ngā rohe moana o ngā hapū o Ngāti Porou; and
> **(b)** protecting the integrity of ngā hapū o Ngāti Porou, including their cultural and spiritual identity with ngā rohe moana.
> (2) Ngā hapū o Ngāti Porou must provide a copy of the environmental covenant to Gisborne District Council as soon as practicable after ngā hapū o Ngāti Porou and the responsible Minister have signed it.
> (3) To avoid doubt, a rule set out in the environmental covenant is not a rule as defined by section 2 of the Resource Management Act 1991 and does not have the force of law.

Section 20 states that if a key public document covers or directly affects ngā rohe moana o ngā hapū o Ngāti Porou (other than a customary marine title area), Gisborne District Council (GDC) must ensure that the document considers the matters of the hapū in the environmental covenant that relate to resource management issues. Under s. 21, the GDC must review each key public document that covers or directly affects the coastal and marine space of Ngāti Porou after and every time it receives a hapū environmental covenant. These hapū environmental covenants then provide local hapū with input into policy for the region.

Sections 21-28, NRMNPA allow for a review of key public documents and the hapū environmental covenants that the GDC must 'take into account.' Section 24 states that if a consent authority is considering a resource consent application for an activity within, adjacent

to, or directly affecting ngā rohe moana, the consent authority must have regard to the matters in the environmental covenant that relate to resource management issues. Section 25 adds that ngā hapū o Ngāti Porou may require the GDC to reconsider a decision regarding no changes or variations to a key public documents and s. 26 allows the GDC to either confirm or change its decision and initiate changes or variations to the document.

Sections 31-33 similarly acknowledge these hapū environmental covenants but nationally with the Minister for the Environment[1175] and Heritage New Zealand.[1176] Section 33 adds that the GDC must consider hapū environmental covenants when giving consideration to s. 77, Local Government Act 2002:

> **77 Requirements in relation to decisions**
> (1) A local authority must, in the course of the decision-making process,—
> (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
> (b) assess the options in terms of their advantages and disadvantages; and
> (c) if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.

Section 33 moreover states that the GDC must consider hapū environmental covenants in exercising its responsibility to make judgments about s. 81, Local Government Act 2002:

> **81 Contributions to decision-making processes by Māori**
> (1) A local authority must—
> (a) establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority; and
> (b) consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and
> (c) provide relevant information to Māori for the purposes of paragraphs (a) and
> (2) A local authority, in exercising its responsibility to make judgments about the manner in which subsection (1) is to be complied with, must have regard to—
> (a) the role of the local authority, as set out in section 11; and
> (b) such other matters as the local authority considers on reasonable grounds to be relevant to those judgments.

It appears then from these NRMNPA provisions that the legislation is empowering of ngā hapū o Ngāti Porou which appears to include shared power and mana whakahaere tōtika provisions.

[1175] Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s. 31.
[1176] Above, s. 32.

Sections 34-44 refer to Protected Customary Activities, including hapū giving approval for proposed resource consent proposed activities,[1177] while ss. 45-51 refer to wāhi tapu and wāhi tapu areas. Interestingly, s. 47, authorises Ngāti Porou hapū wardens and fisheries officers some jurisdiction powers under MACA and the Fisheries Act 1996 including:

> **47 Wardens and fishery officers**
> (1) Wardens may be appointed by the relevant hapū, in accordance with regulations made under section 118 of the Marine and Coastal Area (Takutai Moana) Act 2011, to promote compliance with a prohibition or restriction imposed in relation to a wāhi tapu or wāhi tapu area. …
> …
> (3) A warden appointed under subsection (1) is responsible to the relevant hapū for the functions described in section 80(2) of the Marine and Coastal Area (Takutai Moana) Act 2011.
> (4) A fishery officer may enforce prohibitions or restrictions imposed in relation to a wāhi tapu or wāhi tapu area if and to the extent that, any fishing breaches the prohibitions or restrictions.
> (5) For the purpose of subsection (4), a fishery officer may enter a wāhi tapu or wāhi tapu area—
> (a) to assist in implementing a prohibition or restriction:
> (b) to advise fishers of any applicable prohibition or restriction:
> (c) to warn fishers to leave the wāhi tapu or wāhi tapu area:
> (d) to record any failure of a fisher to comply with a prohibition or restriction, and the details of the fisher, if the officer has reason to believe the failure is intentional:
> (e) to report any such failure to a constable.

Sections 48-51 refer to customary fishing practices and extend the area of ngā rohe moana to the outer limit of the exclusive economic zone.[1178] Section 49(3) allows the Minister of Fisheries to recommend regulations to establish 1 or more fisheries management committees for the customary fishing area of ngā hapū o Ngāti Porou and to provide for the appointment to and removal of members for the committees who are also recognised as kaitiaki.[1179] In terms of concurrent jurisdiction, s. 49(3)(c), provides for persons to issue on behalf of members of a fisheries management committee all authorisations and provide for the appointment of the persons and cancellation of appointments. Section 49(3)(g) provides for the fisheries management committee members to issue oral and written authorisations to take, hold, and distribute fisheries resources for customary food gathering purposes, while s. 49(3)(h) allows fisheries management committees to:

> … to propose bylaws for any of the following areas that are covered by a fisheries management plan:

[1177] Above, s. 41(3)(b).
[1178] Above, s. 48(b).
[1179] Above, s. 48(3)(b).

(i) a customary marine title area:
(ii) an area of the New Zealand fisheries waters in the relevant area of interest of Ngāti Porou:

Another significant power sharing and concurrent jurisdiction section of NRMNPA is ss. 68-73 which refer to the whakamana accord which are the relational instruments entered into by ngā hapū o Ngāti Porou and the relevant Crown Minister in charge of artefact relationships, conservation, environment, fisheries and minerals under paragraph 17, schedule 2, NPDOS. These instruments do not create legal interests in resources and do not restrict either Ngāti Porou or the Crown from exercising any other powers but implementing these instruments will provide valuable direct links to central Government and will strengthen the relationship between ngā hapū o Ngāti Porou, the iwi under Te Rūnanganui o Ngāti Porou, and local government agencies.

Sections 74-94 NRMNPA refer to customary marine title (CMT) for ngā hapū o Ngāti Porou including s. 77 veto right over resource consents:

77 Customary marine title hapū to determine whether to give permission for activity

(1) A customary marine title hapū may, by notice to the Council or EPA no later than 40 working days after the referral of a resource consent application under section 76,—

(a) give permission in writing for the proposed activity for the purposes of section 74(1)(a); or

(b) decline in writing to give permission for the proposed activity.

(2) If the hapū does not give notice by the deadline in subsection (1), the hapū is to be treated as having given its permission in writing for the proposed activity for the purposes of section 74(1)(a).

It appears then the new Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 for Ngāti Porou provides broad scope for sharing co-governance powers and concurrent jurisdiction, which will be an important development to monitor in the coming years. The new statute appears to forge a path of authentic power sharing and concurrent jurisdiction that will slot easily into EBM over the coastal marine estate.

Although dated back to 2011 when the MACA was enacted and in the midst of the negotiations with Ngāti Porou over its foreshore and seabed claims, the late Dr Nin Tomas referred to the relationship between the Crown and Ngāti Porou and warned:

> Clearly Ngāti Porou had high hopes of establishing a better relationship with the Crown as a result of the coastal marine negotiations. The fact that mining exploration licences were being issued by the Crown within the territory claimed by them, at the same time as their Bill was being formulated, is evidence that their partner is not willing to fully disclose its agenda for activities that may be consented to within their territory. While mining may be viewed as being outside the ambit of the negotiations conducted for the coastal marine area, it falls below the standard required of a Treaty partner acting in good faith to purposely exclude the other partner from knowing about important initiatives within their territory. On a brighter note however, the

existing Deed-based relationship creates leverage for further negotiated claims once initial mining explorations have been completed and especially if oil is found in Ngāti Porou territory.[1180]

Ngāti Porou and the Department of Conservation

The Department of Conservation (DOC) is the Crown agency responsible for managing and promoting conservation of the natural and historic heritage of New Zealand on behalf of, and for the benefit of present and future New Zealanders. Conservation legislation must be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi, to the extent that those principles are consistent with the Conservation legislation.

As part of the Ngāti Porou Claims Settlement Act 2012, in ss. 38-43, the Crown issued a Conservation Protocol through the Minister of Conservation regarding TRONP and DOC. The Protocol sets out how Ngāti Porou, the Minister, the Director-General, and DOC will work together to develop a positive, collaborative, and enduring relationship in good faith as Treaty partners, which is potentially concurrent territorial jurisdiction.

Implementation of the Protocol includes arranging an Annual Business Meeting between DOC and TRONP at which DOC will present a synopsis of the Department's work programme (in the form of a report), as it relates to the Protocol Area for consideration and feedback. DOC is currently working with TRONP Board members on a plan to embed Ngāti Porou tikanga into the various sections of the conservation Protocol. Once completed, DOC will work with iwi to develop joint implementation plans with Ngāti Porou mātauranga and tikanga underlying the basis of these plans.

Subsequently, TRONP and DOC entered into a specific Treaty relationship in 2017 that acknowledges the opportunities for further shared co-governance and concurrent jurisdiction within its territory. The Department of Conservation 2017-2018 Report, which is one way for the Protocol to be implemented between Te Rūnanganui o Ngāti Porou and DOC, states:

> Ngāti Porou has cultural, spiritual, traditional and historic associations with the land, waters and indigenous flora and fauna within the Ngāti Porou Protocol Area and accept responsibility as kaitiaki [Ngāti Porou dialect] under tikanga Māori to preserve, protect and manage natural and historic resources. Ngāti Porou wishes to express the following four principles:
>
> 1. Toitu te Mana Atua Ngāti Porou natural and historic resources are cared for, managed, and promoted in a manner that is consistent with Ngāti Porou tikanga and will benefit future generations;
>
> 2. Toitu te Mana Whenua Ngāti Porou natural and historic resources are actively cared for, managed, and promoted in a manner that respects their origins and connections to particular Ngāti Porou whānau and hapū of Ngāti Porou;

[1180] Tomas, N, 'Māori Land Law: The Coastal Marine (Takutai Moana) Act 2011,' in *New Zealand University Law Review*, (Vol. 381, 2011) at 401-404.

3. Toitu te Mana Tangata Ngāti Porou natural and historic resources are accessed and utilized in a manner which is consistent with the tikanga of Ngāti Porou whānau and hapū;

4. Toitu te Tiriti o Waitangi Consistent with the partnership principle underlying Te Tiriti o Waitangi, Ngāti Porou and the Minister have entered into the Conservation Protocol in good faith and as equals [concurrent jurisdiction]. Ngāti Porou and the Minister acknowledge that they are obliged to give effect to the Conservation Protocol and act in good faith, fairly, reasonable and honourably towards each other.[1181]

Furthermore, the 2019 DOC Annual Report noted that DOC is working with Ngāti Porou for a Ngā Whakahaere Takirua chapter - a long term strategy for the care, use and management of conservation areas across the Ngāti Porou rohe - of the East Coast/Hawkes Bay Conservation Management Strategy.[1182]

The extensive legal, policy and practical provisions that Ngāti Porou have negotiated with the Crown within their rohe appear to be much more conducive to co-governance and co-designed structures that acknowledge the Ngāti Porou Treaty of Waitangi constitutional partnership and that effectively incorporate Ngāti Porou tikanga and mātauranga within an EBM context over the Ngāti Porou Takutai moana marine estate.

Given the above extensive shared governance powers and jurisdiction for Ngāti Porou, the next section will discuss the importance of other Treaty of Waitangi settlements that acknowledge the Treaty partnership and as a means of incorporating mātauranga and tikanga Māori into an EBM context over the marine estate.

S. Treaty of Waitangi Settlement Legislation

Treaty of Waitangi settlements rather than the RMA, the EEZ Act, MPAs like the proposed Kermadec Ocean Sanctuary and MACA applications (besides the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 which is essentially a Treaty settlement anyway) are proving to be the major catalyst for sharing power and jurisdiction and for recognising and protecting mātauranga and tikanga Māori over the coastal marine estate in a more meaningful way. Treaty of Waitangi settlements are realising new partnerships through settlements deeds, legislation, Memoranda of Understandings and other formal and informal relationships protocols that are proving to be more effective. The Waitangi Tribunal has even characterised the RMA as being 'fatally flawed' due to its inability to require decision makers to act,

[1181] 'A Protocol Issued by the Crown through the Minister of Conservation Regarding Ngati Porou and the Department of Conservation, (22 May 2012) and Department of Conservation Te Papa Atawhai, *Operational Report for Te Rūnanganui o Ngāti Porou: Department of Conservation Annual Business Planning*, (Annual Meeting with Te Rūnanganui o Ngāti Porou, Department of Conservation Te Papa Atawhai, Gisborne, November 2018) at 13.

[1182] Department of Conservation Te Papa Atawhai, *Annual Report for the Year Ended 30 June 2019*, (Department of Conservation Te Papa Atawhai, Wellington, October 2019) at 154.

paradoxically, in conformity with the Treaty of Waitangi.[1183] Referring to the s.8 RMA provision to 'take into account' the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), the Waitangi Tribunal noted as early as 1993, two years after the RMA was enacted:

> Implicit in the requirement to 'take into account' Treaty principles is the requirement that the decision-maker should weigh such principles along with other matters required to be considered, such as the efficient use and development of geothermal resources (to which 'particular regard' must be given under s. 7 [to kaitiakitanga]). The role and significance of Treaty principles in the decision-making process under the [RMA] Act is a comparatively modest one.[1184]

The Waitangi Tribunal added:

> It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect, the legislation is fatally flawed.[1185]

As illustrated recently in the 2017 *Hokio Trusts v Manawatu-Wanganui Regional Council*[1186] decision, the High Court endorsed the Environment Court's decision regarding procedural obligations under s 8, RMA[1187] that it is 'not properly concerned with giving effect to the Treaty, but taking into account the principles of the Treaty.'[1188]

Similar challenges of ignoring Treaty partnership obligations or failing to fully acknowledge mātauranga and tikanga Māori responsibilities are evident in the EEZ Act, with MPAs, the KOS Bill, and MACA. In this respect, the Waitangi Tribunal continued:

> It is inconceivable that Māori would have signed the Treaty had they not been assured that the Crown would protect their rangatiratanga over their valued resources for as long as they wished. In return, they exchanged the power of governance. … The Crown is under a clear duty under the Treaty to ensure that the claimants' taonga is protected. The partnership, which the Treaty embodies and represents, requires no less.[1189]

The Waitangi Tribunal then recommended an amendment to the RMA:

> The tribunal finds that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi. … The tribunal recommends that an

[1183] See for example, Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993,* (Wai 304, Brookers Ltd, Wellington, 1993) at 145-146.
[1184] Above.
[1185] Above.
[1186] *Hokio Trusts v Manawatu-Wanganui Regional Council*, [2017] NZHC 1081.
[1187] Above, at 63.
[1188] Above, at 75-76.
[1189] Above.

> appropriate amendment be made to the Resource Management Act providing that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, *shall* act in a manner that is consistent with the principles of the Treaty of Waitangi[1190] [emphasis added].

As noted above, similar limitations are echoed in the MACA, the EEZ Act, with MPAs and the Kermadec Ocean Sanctuary Bill.

In contrast, Treaty settlement legislation can impose specific requirements on Local Government to work with or enable tribal and hapū entities in resource management recognising traditional, historic, cultural and spiritual associations of specific Māori entities to the environment, and potentially provide for the authentic exercise of rangatiratanga and kaitiakitanga within the respective tribal rohe (territory) as one Te Tau Ihu informant asserted:

> If you look at Council, they have a number of staff available to work on district plans, environmental plans compared to Iwi who will only have one person. As long as our Iwi's interests are respected and listened to and then implemented, we'll be happy. If not, then something needs to change which is when you need a few strong-willed people to challenge Council. In the past, they didn't listen to our interests but now they are getting better from what I can see. Our Iwi ensures that we regularly engage with Council and maintain a strong voice with them. Sometimes it has been good and other times not. However, once our settlement was finalised and with the changes of the RMA, they realised they needed to work with us a lot more and take our views into account whereas before they didn't. Now they are aware of it, the writing is on the wall and they need to work with iwi or else.[1191]

Another Te Tau Ihu informant commented in this respect:

> Legally, we rely on the Treaty and RMA to enforce our legal rights. However, we don't have much resources to meet our needs. We use a representative from our trust to work with Local Council and science organisations to ensure our interests are protected in the marine coastal space. In the past, Māori didn't have a say and as Council's seemed to have it all, they did not take Māori seriously. Council are now getting better, as more power sharing is happening, Iwi are able to protect a lot more.[1192]

One other Te Tau Ihu informant added:

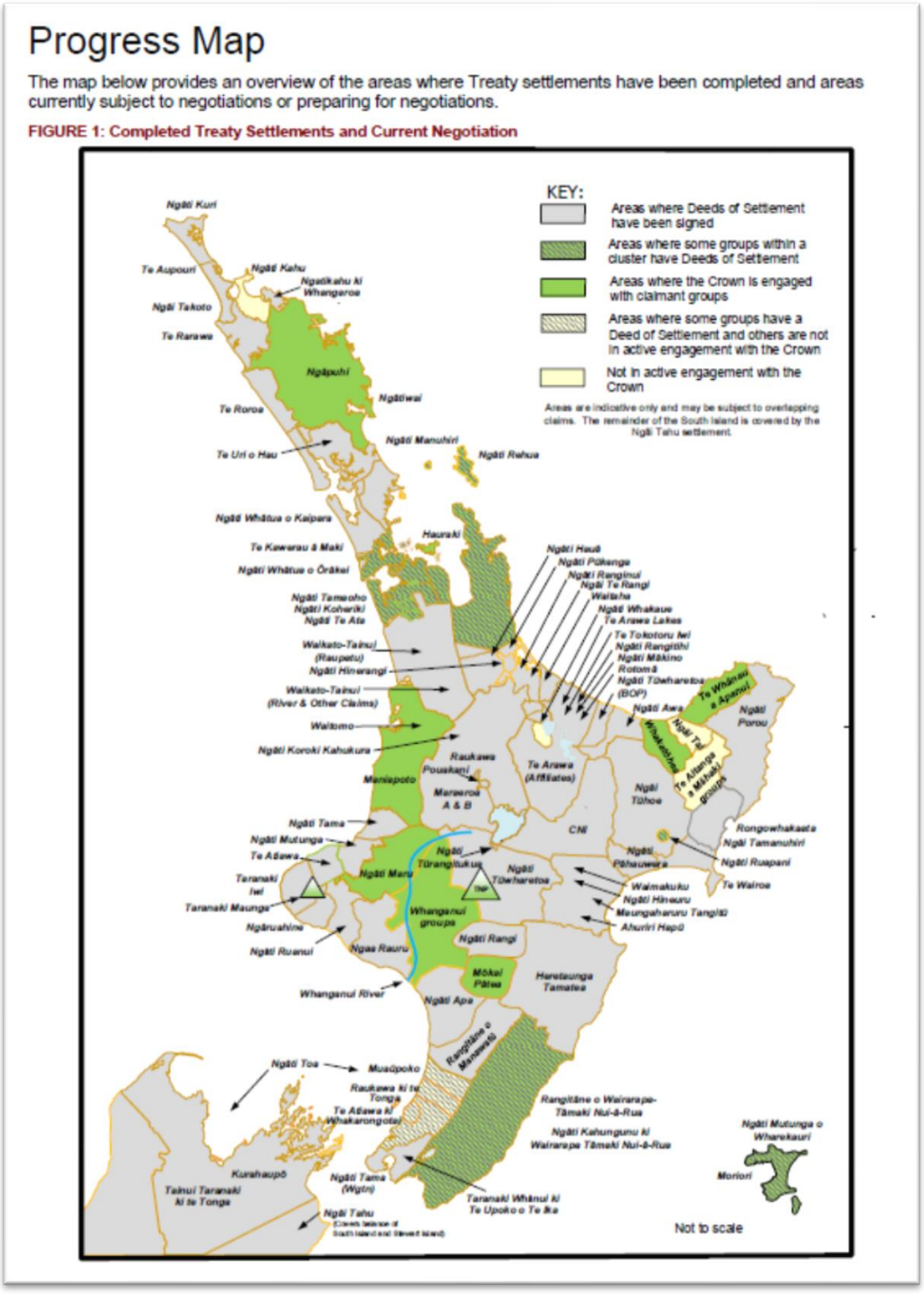
> Trying to manage the overall resources of New Zealand is not an easy task. Here we have multiple Councils and think about all the jobs and the people that they have to do them. Then they say that we (Iwi) can do all of that. Well it's a really big challenge,

[1190] Above.
[1191] MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).
[1192] Above.

> a very big challenge. Our main role is to build resources so we can try and improve lives of our people.[1193]

Hence, Treaty settlements currently offer more opportunities for acknowledging the Treaty partnership and for Māori to work within their own mātauranga and tikanga frameworks to exercise customary management mechanisms over the coastal marine estate more effectively including in an EBM context. Treaty of Waitangi settlements then are about settling past and contemporary grievances with the Crown and moving into a more transformative forward-looking space of engagement as Treaty partners with customary rights and responsibilities as kaitiaki.

[1193] Above.



Map 17: Completed Treaty Settlements & Current Negotiations 2020[1194]

[1194] Te Arawhiti, Office for Maori Crown Relations, *Te Kahui Whakatau (Treaty Settlements) Year-to-date Progress Report 1 July 2019-31 March 2020,* (Te Arawhiti, Office for Maori Crown Relations, Wellington, 2020)

As at May 2020, over 80 Treaty of Waitangi settlement agreements[1195] have been negotiated and at least 50 of these Treaty settlements include some form of redress that includes a form of kaitiakitanga over the marine estate including statutory acknowledgements, deeds of agreement and co-management models.[1196] Statutory acknowledgements are recognised under the RMA in ss. 95B-95E, 149ZCF and Schedule 11, and require consent authorities to provide summaries of all resource consent applications that may affect iwi and hapū. Deeds of Recognition, on the other hand, oblige the Crown to consult with iwi and hapū and to have regard for local Māori views regarding specific sites of significance, which are both enabling legislative provisions of shared governance and recognition of mātauranga and tikanga Māori.

The next section will focus specifically on some recent co-management models.

T. Co-Management Models – Waikato, Te Urewera and Whanganui

Co-management frameworks for environmental management represent a new era in Treaty of Waitangi settlements. Under such arrangements, shared responsibilities for duties, functions and powers under the RMA are vested, to varying degrees, in tribal entities.[1197] Such arrangements provide opportunities for Māori involvement in ecosystem-based management.

Waikato-Tainui Co-Management

The key aspects of the Waikato River Settlement, pursuant to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (WTRCWRSA), included:

- a commitment by the Crown and Waikato-Tainui to enter a new era of co-management over the Waikato River;
- Crown recognition of the significance of the Waikato River to Waikato-Tainui;
- a primary, direction-setting document for the Waikato River called the Vision and Strategy document or 'Te Ture Whaimana,' which has special and unique legislative status as the primary direction-setting document for the Waikato River;
- the establishment of a new single co-governance entity - the Waikato River Authority;

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at 5. Online at: https://www.govt.nz/assets/Documents/OTS/Quarterly-reports/Quarterly-report-to-31-Mar-2020.pdf (Accessed May 2020).

[1195] Refer to the comprehensive MIGC report on Treaty of Waitangi settlement redress options by Takuira, J, 'Treaty of Waitangi Settlement Redress Options Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018). Refer to also Appendix 4 for a table by Takuira outlining over 50 Treaty settlement redress mechanisms over the coastal and marine estate.

[1196] Above.

[1197] Some other co-management agreement examples include Tūpuna Maunga o Tāmaki Makaurau Authority (over the Auckland City maunga - volcanoes), Te Waihora Co-Governance Agreement (Lake Elsmere, Christchurch), Ngā Poutirao o Mauao (Mt Maunganui, Tauranga), Maungatautari ecological island trust (the prominent maunga (mountain) outside of Cambridge, Waikato), Ngāti Whatua Orakei Reserves Board (Okahu Bay, Auckland), Parakai (Kaipātiki Recreation Reserve (Ngāti Whatua o Kaipara) and the Rotorua Te Arawa Lakes Strategy Group (under the Local Government Act 2002). See the Auditor General Report 'Principles for effectively co-governing natural resources,' online at: https://www.oag.govt.nz/2016/co-governance/docs/co-governance-amended.pdf (Accessed August 2018).

- the establishment of a clean-up trust for the Waikato River – the Waikato River Clean-Up Trust;
- joint management agreements;
- recognition and provision for Waikato River related customary activities undertaken by Waikato-Tainui members;
- the Kīngitanga Accord and other accords as agreed in the 2008 Deed of Settlement;
- provision for co-management of river-related land, and
- a commitment to engage over dispositions.[1198]

The WTRCWRSA provides for the overarching purpose of the settlement - 'to restore and protect the health and wellbeing of the Waikato River for future generations.' [1199] The WTRCWRSA enables the vision and strategy, jointly developed by the Guardians of the Waikato River,[1200] to be deemed as part of the Regional Policy Statement of Waikato Regional Council.[1201] The members of the Guardians of the Waikato River include the five iwi (tribes) along the length of the Waikato River – Waikato-Tainui, Ngāti Raukawa, Te Arawa, Ngāti Maniapoto and Ngāti Tuwharetoa - and relevant Territorial Authorities.[1202] Each Territorial Authority is required to enter into a Joint Management Agreement (JMA) with Waikato-Tainui, which allows for the co-management of the Waikato River by Waikato-Tainui, other iwi, and the Territorial Authority.[1203]

[1198] Refer to both the See New Zealand and Waikato-Tainui, *Deed of Settlement in Relation to the Waikato River*, (Her Majesty the Queen in Right of New Zealand and Waikato-Tainui, 17 December 2009) and the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

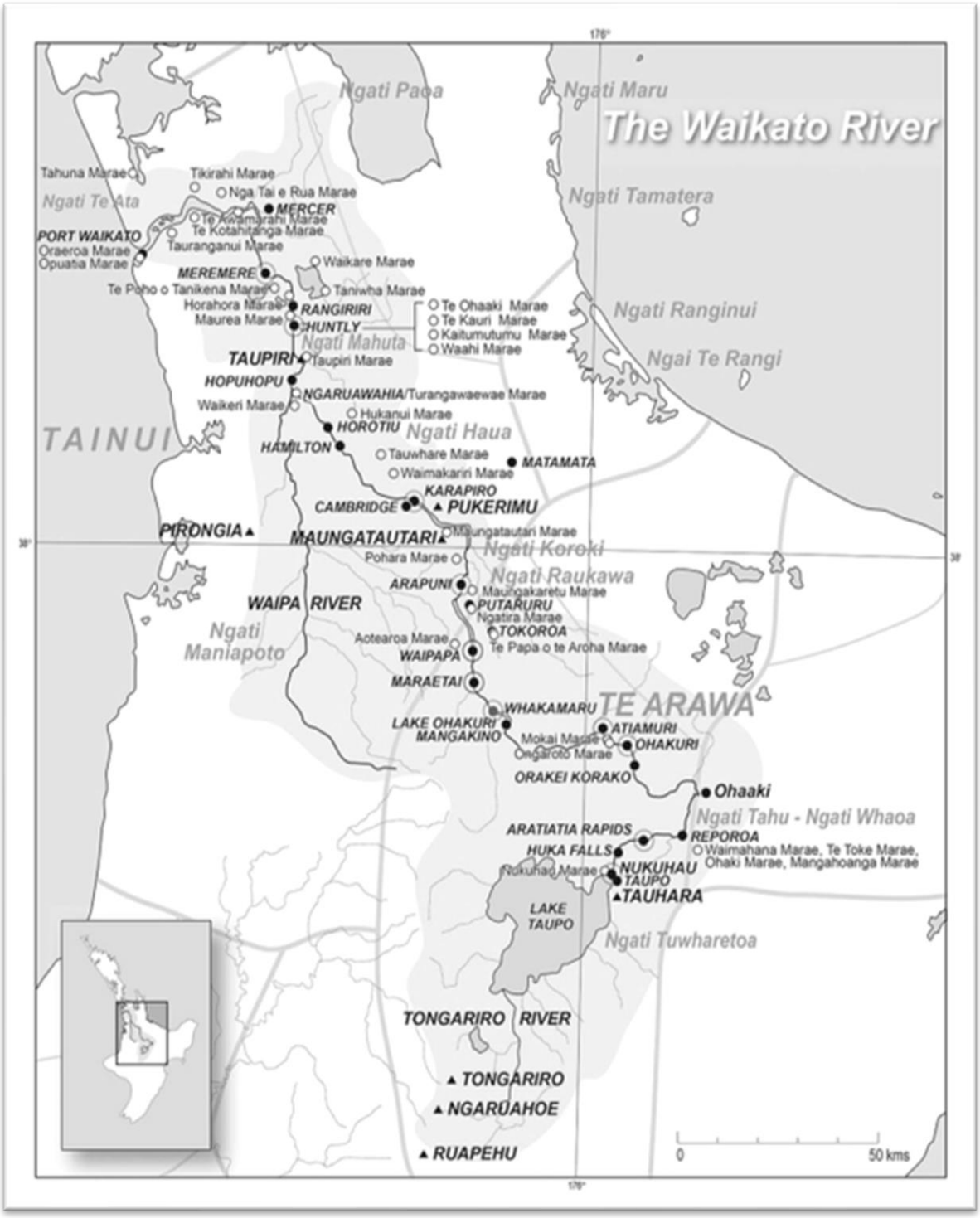
[1199] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss. 3 and 4.

[1200] The Agreement in Principle was eventually signed by Crown and Waikato-Tainui on 16 December 2007 included the formation of a Guardians establishment committee to develop a vision and strategy for the Waikato River that comprised 8 appointees – 4 from Waikato-Tainui and 4 from other Waikato River iwi. See New Zealand and Waikato-Tainui, *Deed of Settlement in Relation to the Waikato River*, (Her Majesty the Queen in Right of New Zealand and Waikato-Tainui, 17 December 2009) clauses 6.1, 6.2, 7.19, 7.20, 7.21, and 20.4.

[1201] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss. 4(c), 5(1), 9 and 11.

[1202] Above, Schedule 5 & Schedule 6. See also the Ngati Tuwharetoa, Ruakawa and Te Arawa River Iwi Waikato River Act 2010 and Commencement Order 2010.

[1203] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss. 41-55; and New Zealand and Waikato-Tainui, *Deed of Settlement in Relation to the Waikato River*, (Her Majesty the Queen in Right of New Zealand and Waikato-Tainui, 17 December 2009) clauses 7.10, 7.13, Part 3, clause 2, Part 4, clauses 1, 6.2, 7.10 and 7.13.



Map 18: Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 Catchment Tribes[1204]

[1204] Socio-Political Map of the Waikato River and Catchment in Muru-Lanning, M, 'At Every Bend a Chief, At Every Bend a Chief, Waikato of a Hundred Chiefs: Mapping the Socio-Political Life of the Waikato River,' in Wagner, J & Jacka, J, *Island Rivers: Fresh Water and Place in Oceania*, (Australian National University Press, Australia, 2018) at 137-164.

The 'Te Ture Whaimana Vision and Strategy' is the primary document for the Waikato River with the focus on restoring and protecting the health and wellbeing of the Waikato River for future generations. Te Ture Whaimana is incorporated directly into the Waikato Regional policy statement; reviewed by the Waikato River Authority to add targets and methods as necessary; is given effect under the Resource Management Act 1991 and conservation legislation; and given the status of a statement of general policy under conservation legislation.[1205]

The WTRCWRSA provided for a new single governance institution - the Waikato River Authority (WRA) – with a 50:50 Crown-Māori membership with one Crown member nominated by Environment Waikato and one nominated by relevant Territorial Authorities. The purpose of the WRA is to:

- provide direction through the vision and strategy to achieve the restoration and protection of the health and wellbeing of the Waikato River for future generations;
- promote an integrated, holistic and co-ordinated approach to the implementation of the vision and strategy and the management of the Waikato River; and
- fund rehabilitation initiatives for the Waikato River in its role as trustee for the Waikato River Clean-Up Trust.[1206]

Co-management agreements under the WTRCWRSA comprise:

- joint management agreements (JMAs);
- participation in specific and defined Waikato River-related resource consent decision-making;
- recognition of a Waikato-Tainui environmental plan;
- provision for regulations relating to fisheries and other matters managed under conservation legislation; and
- an integrated river management plan.[1207]

The Kīngitanga Accord between Waikato-Tainui and the Crown sets out the joint commitments of the parties to an enhanced relationship, to support integrated co-management and to protect the integrity of the settlement. The Accord includes specific commitments to:

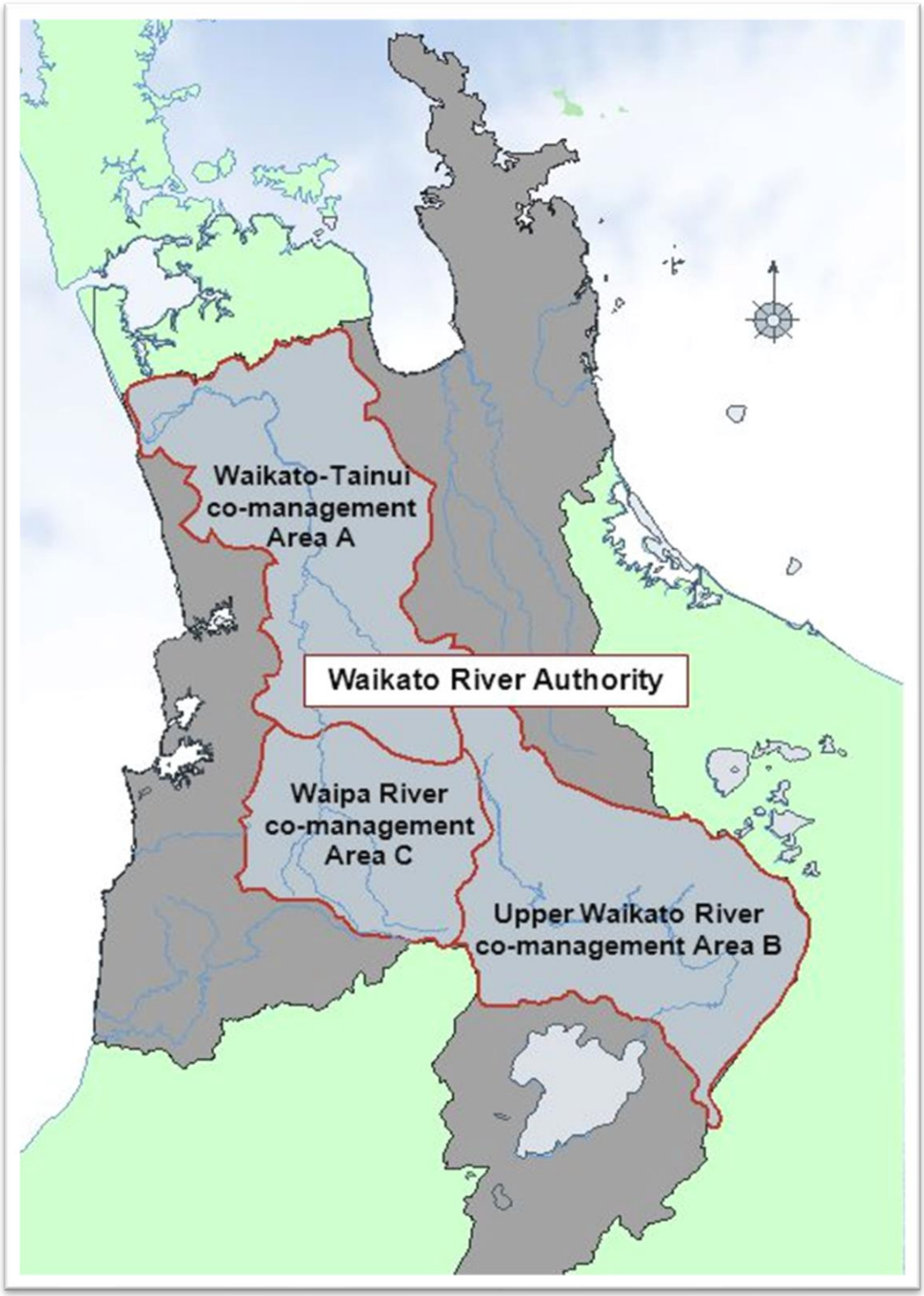
- develop and agree on portfolio-specific accords with the Ministers of Conservation, Fisheries, Land Information, Environment, Arts, Culture and Heritage, Local Government, Agriculture, Biosecurity, Energy and with the Commissioner of Crown Lands; and
- explore accords between Waikato-Tainui and other Ministers and agencies to support Waikato-Tainui to establish memoranda of understanding with Councils and other relevant agencies.[1208]

[1205] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss. 9-17.

[1206] Above, ss. 22-31.

[1207] Above, ss. 35-38, 80.

[1208] Above, s. 63.



Map 19: Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 Co-Management Areas[1209]

[1209] Waikato Regional Council, Mark Brockelsby Presentation, 'The Resource Consent Process in the Waikato River Catchment: The Practical Implications of the Co-Management Framework,' (30 November 2010).

An example of a Joint Management Agreement (JMA) is the Waikato District Council and Waikato-Tainui JMA signed on 23 March 2010. Given the real beneficiary of the settlement is the Waikato River; the WTRCWRSA provides financial redress through the 'clean-up fund' to achieve the restoration of the health and wellbeing of the Waikato River. The JMA affirmed the commitment between Waikato-Tainui and the Waikato District Council to:

- Enter into a new era of co-management over the Waikato River;
- Achieve the overarching purpose of the settlement to restore and protect the health and wellbeing of the Waikato River for future generations; and
- To provide an enhanced relationship between Waikato-Tainui and the Waikato District Council on areas of common interest.[1210]

Schedules to the JMA outline the process for engagement to achieve the purpose, principles and objectives of the agreement.[1211] Staff of the Waikato District Council work closely with staff of the Waikato Raupatu River Trust to implement JMAs.

Each of the above redesigned laws and institutions are significant in terms of acknowledging and including Waikato-Tainui in the political and economic development, as well as the environmental ecosystem-based governance of the Waikato River and broader Waikato Region. Each of the above reformed laws and institutions then go a long way to empowering Waikato-Tainui in 21st century New Zealand. On these new Waikato-Tainui post-settlement governance institutions, Sir Robert Mahuta concluded:

> Now we shall govern ourselves, educate ourselves and continue our battles through peaceful means. So, in the end, the mana of Waikato stands revealed again: we have restored wealth to the tribe, we have our own governance; we can attend to the needs of our people ourselves. This is what was guaranteed to us in the Treaty of Waitangi. It is what our ancestors sought when they agreed to hold the Kiingitanga for the motu. … The temptation to indulge in romanticising the past is very real. But the solutions we sought were not to re-establish anything but to explore new solutions that would outlast the present and be durable for the future. …Waikato is a modern tribe who will find modern solutions to modern problems. … a settlement was settled, it will do for ourselves, for now.[1212]

Although the WTRCWRSA is co-governance agreement over the Waikato River, not the marine coastal estate, co-governance also applies to Te Puaha – the Waikato River mouth and some limited coastal marine space. Section 12, WTRCWRSA states:

[1210] Above, Schedule 1.

[1211] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss. 41-55.

[1212] Mahuta, R.T, 'Afterword,' in McCann, D, *Whatiwhatihoe: The Waikato Raupatu Claim,* (Huia Publishers, Wellington, 2001) at 332-333.

12 Effect of vision and strategy on Resource Management Act 1991 planning documents

(1) The vision and strategy prevails over any inconsistent provision in—

(a) a national policy statement issued under section 52 of the Resource Management Act 1991; and

(b) a New Zealand coastal policy statement issued under section 57 of the Resource Management Act 1991.

In addition, s. 47, WTRCWRSA is about the resource consent process and refers to activities that are captured in the vision and strategy which includes to:

xiv) dump waste or other matter from a ship or aircraft in the part of the Waikato River within the coastal marine area;

(xv) dump a ship or aircraft in the part of the Waikato River within the coastal marine area;

(xvi) occupy any land that forms part of the Waikato River within the coastal marine area:

(xvii) remove sand, shingle, shell, or other natural material from the bed or banks of the part of the Waikato River within the coastal marine area;

(xviii) occupy any part of the Waikato River within the coastal marine area for the purpose of an aquaculture activity; and

(xix) use, or do activities on, the surface of the water in the part of the Waikato River within the coastal marine area.[1213]

A Waikato River Authority leader mentioned discussed the importance of the River mouth during the negotiations:

During negotiations, we had a focussed debate with the Office of Treaty Settlements to extend the scope of the Vision & Strategy, Waikato River Authority and settlement provisions, to what we defined as the mouth of the Waikato River. We specifically used the term 'Te Puuaha o Waikato.' The mouth of the River, not Port Waikato, which is recognised as a town at the end of the river. It was a very important point to secure in the settlement. The issue was that the RMA definition states that the coastal marine area extends one kilometre upstream of a river, or six times the river mouth width. With regards to the Waikato River, that 1km captured a significant area of cultural importance to the Awa [River] and the taangata whenua [people of the land]. Within that 1 km is an area sometimes termed as a 'cradle of life' where our tuna [eels] migrate through, matamata (whitebait) spawn, we access kaimoana [seafood], and also it is the home of one of our taniwha [guardians]. So we couldn't exclude that space from the

[1213] Section, 47, Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

> Awa. That RMA line would've been another form of confiscation in our view. So we extended into the Coastal Marine space, to capture what we defined as the entire river length.[1214]

The WTRCWRSA co-governance agreement then does include some of the coastal marine estate albeit limited to Te Puaha - the river mouth. Such a Māori-Crown co-management alliance with the Māori community was unprecedented in New Zealand in the 20th and 21st centuries.

Given that the WTRCWRSA is a decade on and the overall shared vision for the WTRCWRSA is to restore and protect the health and wellbeing of the Waikato River for future generations, it is similar to a shared EBM vision of repairing, restoring and sustaining the whole of the New Zealand marine and coastal estate. One is inclined to question the effectiveness of the co-governance of the Waikato River in terms of the vision. To this question, a Waikato River Authority leader responded:

> From my perspective, it is working, but we have yet to achieve full effectiveness. The expectations versus what can, and is being achieved can be the difficult part. Co-governance is effective for the Waikato River because it is such as large natural space. We need the Crown at the table and all other [Māori and non-Māori] partners so the responsibility to restore the awa isn't just shifted to the iwi.[1215]

What some may perceive as another governance challenge of the WTRCWRSA (and other Treaty settlements) is that the Crown will neither acknowledge nor declare full ownership over the Waikato River and other natural resources by iwi and hapū. Recent Treaty of Waitangi settlements have resulted in several natural areas being designated as legal entities that effectively own themselves but unlike the Waikato River, are governed and managed by a board comprised of Crown and iwi representatives.[1216] The Te Urewera Act 2014 acknowledges Ngāi Tūhoe as kaitiaki and tangata whenua of Te Urewera and the statute removes the status of Te Urewera as a National Park vested in the Crown. Consequently, the land became a 'legal entity' with all the rights, powers, duties and liabilities of a legal person.[1217]

In a similar manner, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 recognises the intrinsic mana of the environment itself and empowers iwi to share in management responsibilities through a trust, Te Pou Tupua, constituted equally of tribal and governmental members to co-manage the Whanganui River. The Act provides the Whanganui River its own legal status – Te Awa Tupua – as a legal person recognising 'Te Awa Tupua' as an indivisible and living whole compromising the Whanganui River from the mountains to the

[1214] MIGC, Mana Whakahaere Project Interview Series, (Waikato River Authority Interviewee, 2020).

[1215] Above.

[1216] In the case of Te Urewera, the ratio of board members will change from Tūhoe-Crown members of 4:4 to 6:3 after 3 years.

[1217] Urewera Act 2014, s. 11(1).

sea and incorporating all of its physical and metaphysical elements[1218] which reflects the mātauranga and tikanga understanding of Whanganui iwi of the ecosystem as a whole and its connectedness and complexity.

The legal status of Te Awa Tupua must be recognised and provided for by persons exercising or performing a function, power or duty under an Act if the exercise or performance of that function, power or duty relates to the Whanganui River, or if an activity within the Whanganui River catchment affects the Whanganui River and if, and to the extent that, the Te Awa Tupua status or Tupua te kawa (customary practices) relates to that function, duty or power.[1219] These provisions appear to share political authority and jurisdiction through co-governance as well as being be an integrated ecosystem-based management approach within a rohe and in a manner that is consistent with the mātauranga, tikanga and kawa of Whanganui iwi and hapū.

The Te Urewera Act 2014 and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 then recognise the mana of the natural resource itself and the rangatiratanga and mana whakahaere tōtika of the local iwi and hapū through what appears to be an authentic Treaty of Waitangi partnership underpinned by mātauranga and tikanga. The provisions appear to reflect movement towards collaborative approaches to natural resource governance and management resulting in much anticipated positive changes to resource management in New Zealand including hopefully, ecosystem-based management. Consequently, it is hoped that cultural, social and environmental values and priorities will not be outweighed by entrenched neoliberalist economic values, and enduring and sustained reverence and respect for ecosystem-based management emerges that integrates mātauranga and tikanga Māori as originally envisaged in the Treaty of Waitangi.

The recognition of the independent autonomy of the Whanganui River moreover, roughly accords with the customary view that rivers possess their own mana (authority) and mauri (life force). Like the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the focus in the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 is on the future health and well-being of the river and its people. In addition, measures are provided to facilitate tribal engagement in the RMA planning and consent making processes associated with the river, which appears to be shared power and jurisdiction.[1220] But by vesting the river with legal personality, the government has effectively side-stepped the issue of ownership.[1221] The tribes thus cannot gain any commercial benefit from use of the resource, which is a concern.

Moreover, while the Whanganui and Waikato River tribes have a greater say in RMA decisions, they cannot stop for example, the issuing of natural resource consents over the river to

[1218] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Part 2(12). See also Iorns, C, 'Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand,' in *Hors serie VertigO - la revue électronique en sciences de l'environnement* (Vol. 22, 2015) at 1-15 and Iorns, C, 'Access to Environmental Justice for Māori,' in *Yearbook of NZ Jurisprudence* (2017) at 141-181.

[1219] Above, Part 2(2, 13).

[1220] Above, ss. 8 and 63.

[1221] See also the Tūhoe deal where the Crown rejected ownership of conservation land and offered instead to vest the park with legal personality to be co-chaired by Māori and the Crown in the Te Urewera Act 2014. See also the Marine Coastal Area (Takutai Moana) Act 2011, which simply declares that no one owns the foreshore and seabed.

extract or divert water or to build dams on them.[1222] Such an outcome for the Whanganui is a far cry from the recommendation made by the Waitangi Tribunal that the river in its entirely be vested in the tribes, which would mean that any resource consent application would require the tribe's approval.[1223]

These recent Treaty of Waitangi co-management agreements then promote tribal engagement in RMA regulatory processes yet they remain directed at the right to culture as far as they are limited to effective participation and the overall objective of restoring and protecting the health and wellbeing of the rivers for future generations.[1224] Tribes are not granted the right to give their free, prior and informed consent in relation to the use of the rivers for hydroelectric projects for example.[1225]

The Waitangi Tribunal has even been heavily critical of the use of Treaty settlements to stop gaps in the RMA in its 2011 *Ko Aotearoa Tenei Report* when it observed:

> It is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed. It is equally disappointing that Māori are being made to expend the potential of their Treaty settlement packages or customary rights claims to achieve outcomes the Resource Management Law Reform project (now two decades ago) promised would be delivered anyway. [1226]

As noted above, other co-management agreements include the Māori customary fisheries regulations, which significantly allow for iwi to establish bylaws in relation to the taking of kai moana (seafood) that may also be reflective of aspects of ecosystem-based management. Tangata whenua may establish mātaitai reserves following consultation with the local community – i.e. people who own land in the proximity of the proposed mataitai reserve.[1227] Reserves can only be applied for over traditional fishing grounds and must be areas of special significance to the tangata whenua. Tangata whenua may also establish bylaws for the reserves, which may restrict or prohibit the taking of a particular species within a mataitai reserve. However, as noted above, the process of establishing reserves and the bylaws themselves are heavily scrutinised by the Minister of Fisheries, which again undermines tribal rangatiratanga as envisaged in the Treaty of Waitangi partnership.

[1222] However, the consent of Te Pou Tupua may be required in relation to the use of the bed of the Whanganui River in Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s. 41.

[1223] See Waitangi Tribunal, *The Whanganui River Report 1999,* (GP Publications, Wellington, 1999) at 343-348.

[1224] See Te Aho, L, 'The 'False Generosity' of Treaty Settlements – Innovation and Contortion,' in Erueti, A, *The UN Declaration on the Rights of Indigenous peoples: Implementation in Aotearoa*, (Victoria University Press, 2017). Te Aho also noted that the issue of ownership is expressly deferred by the Treaty settlement in Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss. 64 and 90.

[1225] The requirement in the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) in Articles 10, 19, that States obtain the 'free, prior and informed consent of Indigenous peoples before engaging in any activity that could significantly affect them' is pertinent here. Refer to Erueti, A, *The UN Declaration on the Rights of Indigenous peoples: Implementation in Aotearoa*, (Victoria University Press, 2017).

[1226] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, Legislation Direct, Wellington, 2011) at 279.

[1227] Refer to the Kaimoana Customary Fishing Regulations 1998, Reg 61 and the Fisheries Act 1996, ss. 174-185.

The next section will explore some recent special legislative initiatives for actualising the Treaty partnership and for integrating mātauranga and tikanga Māori in an EBM context.

U. Special Legislation

Special legislation is a further innovative initiative that enables the development and implementation of integrated management that empowers tangata whenua rangatiratanga and kaitiakitanga and is simultaneously reflective of ecosystem-based management. Three such examples are the Hauraki Gulf Marine Park Act 2000, the Fiordland (Te Moana o Atawhenua) Marine Engagement Act 2005 and the Kaikoura (Te Tai o Marokura) Marine Management Act 2014.

Each example refers to special legislation that is place-specific and recognises and understands both the values of the associated ecosystem as a whole and the need to address cumulative and multiple stressors. The ecocentric acknowledgement of humans as ecosystem components with multiple values has resulted in the establishment of collaborative and participatory stakeholder working groups that recognise the Māori constitutional relationship based on the Treaty of Waitangi, mana whenua and mana moana at all levels and is mindful of tikanga Māori such as whakapapa, kaitiakitanga and mauri,. Long-term sustainability is moreover, a fundamental value with clear intent to maintain values and uses for future generations. The strategies and plans that have been enabled by these special statutes include clear goals and objectives based on knowledge – Māori and non-Māori – and are mindful of the need for adaptive management, appropriate monitoring and acknowledgement of uncertainty.

Sea Change – Tai Timu Tai Pari Initiative Hauraki

The Sea Change – Tai Timu Tai Pari initiative is an aspirational spatial plan case study under the Hauraki Gulf Marine Park Act 2000 that advocates ecosystem-based and Māori resource management and co-governance and is a result of a marine spatial planning exercise led a by co-governance partnership between Hauraki tangata whenua and local government in collaboration with various agencies and stakeholders.[1228]

The Tikapa Moana Hauraki Gulf, like other parts of the New Zealand coastal marine estate, is under significant pressure and its communities have observed a marked decline in the environmental quality, abundance of resources and general mauri of the area. The Sea Change – Tai Timu Tai Pari project was established in 2013 to reverse the decline and was led by a governance group representing a Treaty of Waitangi partnership between mana whenua and local government agencies having equal membership. A Stakeholder Working Group was also involved that comprised 14 members reflecting a diverse range of interests including mana whenua, environmental and conservation, commercial and recreational fishing, aquaculture, land use, farming and infrastructure.

[1228] See Forum Ag, 'Sea Change – Tai Timu Tai Pari: Hauraki Gulf Marine Spatial Plan,' online at: 2020PlanWR.pdf http://seachange.org.nz/Page Files/1166/5086 SCTTTP Marine%20Spatial%20Plan WR.pdf (Accessed August 2018). See also Harmsworth, G, 'The role of Māori values in Low-impact Urban Design and Development, (LIUDD), Discussion Paper, no date).

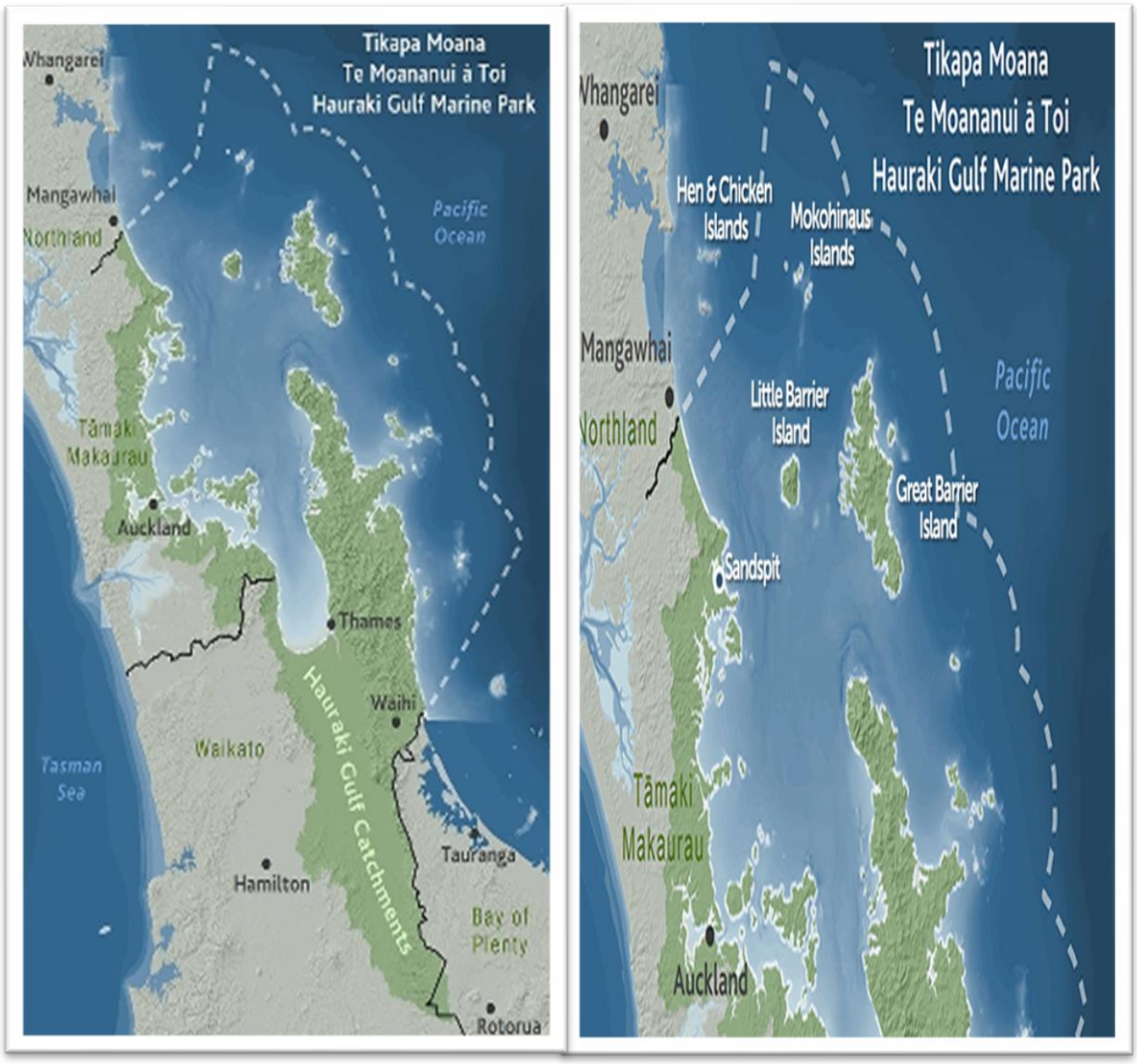
The plan lays the foundation for an integrated approach to managing the Hauraki Gulf and aims to secure a healthy, productive and sustainable future for the Gulf through:

1) Improving the understanding of the pressures on the coastal and marine resources,
2) Identifying and proposing long-term solutions to improve overall health, mauri, quality and well-being,
3) Providing increased certainty for the economic, cultural and social goals of communities in and around the Gulf, and
4) Ensuring that the ecosystem functions that make those goals possible are sustained.[1229]

The plan was co-designed resulting in four overarching concepts that reflect EBM and appear to be innovative and disruptive of the status quo:

1. Kaitiakitanga – guardianship;
2. Mahinga Kai Pātaka Kai – replenishing the food basket;
3. Ki Uta Ki Tai – ridge to reef, mountain to sea; and
4. Kotahitanga – prosperous communities

[1229] Majurey, P and Beverley, P, *Tai Timu Tai Pari Sea Change Hauraki Gulf Marine Spatial Plan: An Introduction and Overview,* (Hauraki Gulf Forum, MPI, DOC, Waikato Regional Council and Auckland Council, May 2017) at 2.



Map 20: Sea Change Tai Timu Tai Pari[1230]

The plan reflects a strong sense of te Ao Māori and advocates for strategies and initiatives that enable and empower mana whenua to lead tikanga-based resource management within a broader ecosystem-based management context. The plan then is a new departure from the current New Zealand resource management ad hoc, disparate and inadequate management approaches. Within an ecosystem-based management context, the innovative plan also appears to provide an opportunity to disrupt the status quo that simply is not working to improve sustainable and tangible environmental and cultural outcomes.

The Stakeholder Working Group allegedly worked in a highly collaborative manner, demonstrating significant levels of personal commitment, sacrifice, perseverance and vision

[1230] See the Waikato Regional Council Sea Change – Tai Timu Tai Pari website online at: https://www.waikatoregion.govt.nz/council/policy-and-plans/coastal-policy/sea-change/ (Accessed November 2018).

to deliver the plan.[1231] The next step for the Hauraki Gulf Marine Spatial Plan is implementation, which can be challenging. Time will tell how effective this initiative is in terms of collaborative co-governance and mobilising diverse stakeholder groups - government, industry and communities - as well as mana whenua, all collaborating with a common interest in the health and well-being of the Hauraki Gulf. How the plan integrates mātauranga and tikanga Māori and reflects the Treaty partnership in an EBM context will also prove to be important elements for the success of the plan.

The next section will explore international Indigenous case studies of co-governance power sharing and concurrent jurisdiction as compelling models of EBM best practices over the coastal marine estate that may be beneficial for implementing EBM in Aotearoa New Zealand.

V. International EBM Case Studies – Canada and Australia

> Europe during the Discovery era refused to recognize any meaningful legal status or rights for indigenous tribal peoples because "heathen" and "infidels" were legally presumed to lack the rational capacity necessary to assume an equal status or to exercise equal rights under the West's medievally derived colonizing law. Today, principles and rules generated from this Old World discourse of conquest are cited by the West's domestic and international courts of law to deny indigenous peoples the freedom and dignity to govern themselves according to their own vision.[1232]
>
> - Professor Robert A. Williams Jr.

The Indigenous peoples of Canada and Australia, like Māori in Aotearoa New Zealand, had dwelt in their respective territories for centuries perhaps even millennia, and were self-determining 'nations' with their own complex systems of governance and law. These first Indigenous laws, institutions and systems of self-governance varied dramatically among the various cultures and Indigenous 'nations' in each country.

As noted in more detail above, Māori systems of self-governance were based on their cosmogony, which, as with other Indigenous peoples, was a blueprint for life, setting down innumerable precedents by which Māori communities were guided in the governance and regulation of their day-to-day existence. Indigenous worldviews are as diverse as their languages but they appeared to generally acknowledge the natural order of living things and the relationship to one another and to the environment.[1233] The overarching principle of

[1231] Majurey, P and Beverley, P, *Tai Timu Tai Pari Sea Change Hauraki Gulf Marine Spatial Plan: An Introduction and Overview,* (Hauraki Gulf Forum, MPI, DOC, Waikato Regional Council and Auckland Council, May 2017) at 1.
[1232] Williams, R, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, Oxford, 1990) at 326.

[1233] For a discussion on North American Indigenous worldviews, see generally Dickason, O.P, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Oxford University Press, Ontario, 2002) chapters 2-4 (and Dickason's extensive bibliography); Jeness, D, *The Indians of Canada*, (Acland, Ottawa, 1932); Surtees, R,

balance underpinned all aspects of life and each person formed part of the genealogy that linked Indigenous peoples back to the beginning of the world. The very survival of the whole was dependent upon everyone who comprised of it where all had a unique role to play.

The Nisga'a, Mohawk, Mi'kmaq, Inuit, Cree and other Indigenous peoples in Great Turtle Island Canada; the Bamaga, Boigu, Cherbourg, Dauan, Erub, Eulo, Hammond Island, Hope Vale, Iama, Injinoo, Kubin, Mabuiag, Masig, Poruma, Saibai, Seisia, Ugar, Umagico, Warraber, Woorabinda, Wujal Wujal, Yarrabah and other Indigenous Aboriginal and Torres Strait Islander peoples in Australia; and the Ngāti Maniapoto, Ngāti Kahungunu, Waikato, Ngāti Porou, Ngāti Ranginui, Ngāi Tahu, Ngāpuhi, Ngāti Raukawa and other Indigenous peoples in Aotearoa New Zealand had effective self-governance systems, laws and governance institutions for utilising and conserving their terrestrial and marine and coastal seascape environments (as noted for Māori in an earlier section of this report).

These Indigenous self-governance systems generally bore little outward resemblance to the governance structures, institutions and processes that the European newcomers imported into Canada, Australia and New Zealand – a feature that largely explains why the European newcomers gave so little thought to displacing and ignoring Indigenous systems of governance, power, jurisdiction, wealth distribution, and social control that had served these Indigenous 'nations' for generations, centuries, perhaps even millennia. As the processes of colonisation unfolded, a sustained effort was made to impose British and then Canadian, Australian and New Zealand laws and institutions on these Indigenous peoples. Efforts were made to destroy traditional Indigenous practices and replace them with laws and institutions such as the Indian Act, Aboriginal Affairs Act and Māori Affairs Act governments and the Departments of Indian Affairs, Aboriginal Affairs and Māori Affairs. Colonisation was determined to dramatically change many things for these Indigenous peoples.

Indeed, colonialism thrust the First Nations, Inuit and Mētis, Aboriginal and Torres Strait Islander and Māori worldviews into a perilous state of imbalance. Land and natural resource loss through confiscations and other legal machinations wreaked havoc on the relationship between people and the natural environment; forcible individualisation of land and property disturbed the balance between members of kin-groups; Christianity and introduced diseases damaged in many ways the connection between people and spiritual beings; and the individualistic and economic assumptions underlying capitalism and Western liberalism destroyed Indigenous peoples' reciprocity economies, the equilibrium between kin, the physical and metaphysical world, the environment, and the fundamental reciprocal obligations to past, present and future generations.

The Original People (Holt, Rinehart & Winston, 1971); Crowe, K, *A History of the Original Peoples of Northern Canada* (McGill University Press, Montreal, 1974); Miller, J, 'People, Berdaches and Left-Handed Bears' in *Journal of Anthropological Research* (Vol. 38, No. 3, 1982) at 272-87; Miller, J & Eastman, C (eds) *Tsimshian and Their Neighbours of the North Pacific Coast* (Seattle, 1984); McMillan, A, *Native Peoples and Cultures in Canada: An Anthropological Overview* (Douglas & McIntyre, Vancouver, 1988); and Hallowell, A, 'Ojibway Ontology, Behaviour and World View' in Hallowell, A *Contributions to Anthropology* (University of Chicago Press, Chicago, 1976). For a specific discussion on the Nisga'a world view, see Nisga'a Tribal Council, *Nisga'a: People of the Nass River*, (Douglas & McIntyre, Vancouver, 1993); Nisga'a Language and Culture Department, *From Time Before Memory: The People of K'amligihahlhaahl* (Nisga'a Language and Culture Department, New Aiyanch, B.C, 1996) and the four volume study on Nisga'a society in Nisga'a Tribal Council, *Nisga'a Society: Ayuukhl Nisga'a Study* (Nisga'a Tribal Council, Wilp Wilxo'oskwhl Nisga'a Publications, 1995).

However, as Māori academic Ranginui Walker observed: 'the coloniser had not taken into account the resilience of human nature.'[1234] Contrary to popular expectations at the time, First Nations, Inuit, Mētis, Aboriginal, Torres Strait Islander and Māori did not perish altogether. Indigenous peoples have survived and after five centuries of colonial and imperial influence, Indigenous peoples are seeking to move beyond survival to overcoming the forces of colonisation and neo-colonialism. Like many Indigenous peoples globally, Indigenous peoples in Canada, Australia and New Zealand are actively seeking to reassert control and governance over their own lives, the environment, the marine and coastal estate, to determine their own futures, and to once again be self-determining 'Peoples.'

For many Indigenous peoples, internal self-determination and self-government are perceived as ways to preserve their cultural identities and to regain control over the government and management of matters that directly affect them. Self-government is referred to as an 'inherent' right, a pre-existing right rooted in Indigenous peoples' indigeneity - long occupation and government of land and resources as first citizens prior to European settlement. Many Indigenous peoples speak of self-determination and self-government as responsibilities given to them by the Creator and as a spiritual connection to the land and natural resources.

First Nations and Māori often point to Treaties with the British Crown (and other colonial nations in a First Nations context while the British in Australia did not sign Treaties with Aboriginal and Torres Strait Islanders due to the malign policy of *terra nullius*) as acknowledging the self-governing status of Indian and Māori 'nations' at the time of Treaty signing.

Furthermore, cultural diversity is as valuable as the biological diversity upon which the world depends for its proper functioning. Ancient Indigenous (and non-Indigenous) cultures are worthy of preservation, conservation and development. Rather than transforming Indigenous cultural heritage into what Benjamin Barber has so aptly called 'McWorld'[1235] instead, the kind of development advocated by the Indian economist Amartya Sen[1236] should be sought – a development that brings with it the freedom to individuals and Peoples to develop their capabilities, including, most importantly, the capability to be themselves and to govern themselves. Indeed, the political and legal systems of Canada, Australia and New Zealand need to adapt and develop to accommodate the best values, laws and institutions from all cultures – Indigenous First Nations, Inuit, Mētis, Aboriginal, Torres Strait Islander, Māori and mainstream Canadian, Australian and New Zealand cultures.

To these ends, the next sections of the report will explore how much the legal systems in Canada and Australia have adapted to incorporate Indigenous worldviews, values, laws and institutions and shared power and jurisdiction in co-governing the marine and coastal estate in specific areas.

[1234] Walker, R *Ka Whawhai Tonu Matou: Struggle Without End,* (Auckland: Penguin Books, 1990) at 10.

[1235] Barber, B *Jihad v McWorld* (New York: Ballantyne Books, 1996).

[1236] Sen, A, *Development as Freedom* (New York: Knopf, 2000).

Canada Indigenous Peoples Shared Governance and EBM

Indigenous self-governance and self-determination rights in Canada are very complex and diverse among Canada's Indigenous peoples – First Nations Indians, Mētis and Inuit. As a result, the federal and provincial governments have developed a number of options and policies for recognising self-government to assist with the realisation of internal self-determination that includes:

- Judicial Self-Government – common law;
- Legislated Self-Government;
  -Indian Act Band Self-Government;
- Negotiated Self-Government;
  -Guaranteed Participation;
  - Co-management arrangements; and
  -Public Government;
- Coordinated Ethnic Self-Government;
- Separate Ethnic First Nations Self-Government; and
- Other Self-Government Models

Judicial Self-Government – Litigated Common Law Self-Government

In Canada, as in countries such as New Zealand and Australia, Indigenous peoples often have had no choice but to resort to litigation in their efforts to seek justice, recognition and the realisation of their internal self-determination rights and responsibilities through the human rights discourse discussed above, recognition of historic Treaties, and the common law doctrine of aboriginal title.

Prior to 1973, recognition of aboriginal title in Canadian law was limited. The conservative view was set by the Judicial Committee of the Privy Council in *St Catherine's Milling and Lumber Co. v The Queen*[1237] which held that aboriginal title was a mere 'personal and usufructuary right' dependent upon the goodwill of the Sovereign.[1238] However, the 1973 landmark Supreme Court of Canada decision of *Calder v Attorney-General of British Columbia*[1239] provided the impetus behind the federal government's policy shift to negotiate contemporary Treaties with Aboriginal peoples.[1240] Although the Nisga'a lost on a technicality, the Supreme Court did agree with the Nisga'a that title to Aboriginal lands had not yet been resolved. Six of the seven judges confirmed that aboriginal title is a legal right

[1237] *St Catherines Milling and Lumber Co. v The Queen* (1887) 14 A.C. 46.

[1238] Above, and Wickliffe, C, 'A Māori Commentary on the Paper Written by the Hon. Bertha Wilson entitled: Self-determination of Native Peoples: A Canadian Perspective on Emerging Issues in New Zealand' (Unpublished Paper, 1997, in author's possession) at 35.

[1239] *Calder v Attorney-General of British Columbia* (1973) 34 D.L.R. (3rd) 145.

[1240] Canada, *Perspective's in Native Claims Policy* (A background paper prepared for the Canadian Arctic Resources Committee's Third National Workshop on 'People, Resources and the Environment North of 60,' (Yellowknife, June 1-3, 1983) at 2-3.

derived from the Indians' historic possession of their tribal lands and that it existed whether governments recognised it or not.[1241]

Throughout the 1980s, the early 1990s and the new millennium, the Supreme Court of Canada provided an increasing recognition of aboriginal and Treaty rights as well as the constitutional responsibilities of the Crown to Indigenous peoples through a series of decisions based on aboriginal and Treaty rights.

That Indigenous peoples are the first citizens of Canada, Australia and New Zealand is central to the concept of aboriginal rights.[1242] These rights inure to Indigenous peoples 'by virtue of their occupation upon certain lands from time immemorial.'[1243] In demanding the realisation of internal self-determination through a broad range of economic, social, cultural and political rights and responsibilities, Indigenous peoples are essentially making specific claims for the recognition of this prior presence.[1244]

Michael Asch argued that at their core, aboriginal rights (including title) involve having the ability to maintain ways of life that are distinct from the non-Indigenous population of Canada:

> These ways of life are not to be interpreted as ethnic in the sense of a Canadian mosaic, but rather as a composite of autonomous systems that integrates languages, economies, social organisations, political organisations, religions and other values into a total culture. … The right to preserve and develop such autonomous systems in Canada is perceived to derive, in part, from the manifest failure of the current programs designed to develop viable lifeways for the majority of the aboriginal population. However, at the core, it arises from a vision of Canada as a colonial manifestation and from the perception of aboriginal peoples as 'colonised' nations that, like those indigenous populations on other continents, have an inherent right to assert their self-determination and control over their own affairs.[1245]

The recognition of what has been termed the 'Aboriginality' of Indigenous peoples is important in Canada as Hawke and Maslove commented:

> The role of the Federal government vis-à-vis aboriginal peoples concerns the preservation and enhancement of 'Indianness' or more generally, 'aboriginality.' This includes the definition and protection of the special status of aboriginal persons, institutions and land. There is no reason to confine such special status to those residing

[1241] British Columbia, *B.C Treaty Commission: Annual Report 1995 - 96* (B.C Government, 1996) at 15.

[1242] See Morse, B, (ed) *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Carleton University Press, Ottawa, 1985) at 48.

[1243] Isaac, T, 'The Storm over Aboriginal Self-Government: Section 35 of the Constitution Act 1982 and the Redefinition of the Inherent Right to Aboriginal Self-Government' *C.N.L.R* (Vol. 2, 1992) 6 at 8.

[1244] See Boldt, M & Long, J.A (eds) *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985) at 140.

[1245] Asch, M, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Methuen Publications, Ontario, 1984) at 37.

> on reserve lands, since section 91(24) [British North America Act 1867] applied to Indians as persons and communities wherever they are. … it follows that the Federal government must acknowledge a responsibility for those programs and services which are required by the special needs of 'aboriginality.' … special Federal development programs and services are required to preserve and strengthen … 'aboriginality.'[1246]

This notion of 'aboriginality' is substantially a cultural one,[1247] the scope of which has been discussed by the Canadian judiciary through the doctrine of aboriginal title rights.

The Supreme Court of Canada moreover, clarified the distinction between aboriginal rights and aboriginal title in the 1996 decision of *R v Van der Peet:*[1248]

> … aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organisation and distinctive cultures of aboriginal peoples on that land. In considering whether a claim has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification of aboriginal rights.[1249]

This distinction was reaffirmed in *R v Adams*[1250] and *R v Côtē*[1251] where the Supreme Court held that aboriginal rights protected by s. 35, Canadian Constitution Act 1982 are not confined to rights inexorably linked to aboriginal title. They can exist on land to which aboriginal title cannot be established because some Indigenous peoples were nomadic and they survived through reliance on practices, customs and traditions that were unrelated to aboriginal title. The Court then held that aboriginal title was just one manifestation of aboriginal rights. Although obiter dicta, the significance of aboriginal title as a sub-set of the doctrine of aboriginal rights is an important development in the common law as Wickliffe opined: 'it potentially expands the number of aboriginal claims that may be made to pre-existing rights.'[1252]

[1246] Hawke, D & Maslove, A 'Fiscal Arrangements for Aboriginal Self-Government' in Hawke, D (ed) *Aboriginal Peoples and Government Responsibility* (Carleton University Press, Ottawa, 1989) 93 at 100-1.

[1247] McHugh, P, 'Constitutional Theory and Māori Claims' in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 159.

[1248] (1996) 137 D.L.R (4th) 289.

[1249] Above, at 320.

[1250] (1996) 137 D.L.R (4th) 657, 666-668.

[1251] (1996) 138 DLR 385, 399-401.

1252 Wickliffe, C, 'A Māori Commentary on the Paper Written by the Hon. Bertha Wilson entitled: Self-determination of Native Peoples: A Canadian Perspective on Emerging Issues in New Zealand' (Unpublished Paper, 1997, in author's possession) at 4.

Map 21: Canada Political Map

Aboriginal title emerged as a prevailing issue following the *Calder* decision[1253] but was laid to rest by the Supreme Court of Canada in *Guerin v R.*[1254] The Court found that aboriginal title to traditional or reserve lands is an independent legal right, not dependent on the Royal Proclamation 1763, executive order or the Indian Act. It is more than a mere personal usufructuary right. Aboriginal title is generally inalienable other than to the Crown who also acts under a fiduciary obligation to deal with the land on the Indians' behalf. The Courts added that extinguishment of aboriginal title could occur by a number of means including conquest, purchase or the exercise of dominion in a manner adverse to the right of native occupancy.[1255]

Subsequently, the Canadian Constitution Act 1982[1256] affirmed the existing aboriginal and Treaty rights without specifying their scope. Section 35(1), Constitution Act 1982 states:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The judiciary has a role of defining the aboriginal rights of Indigenous peoples in Canada. Prior to the Constitution Act 1982, aboriginal rights existed only at common law and could be extinguished or regulated by Parliament with or without Aboriginal consent.[1257] However, s. 35(1) of the Constitution Act 1982 recognised and entrenched 'Aboriginal' rights. Any interference with these rights must be justified consistent with the test adopted in *R v Sparrow*[1258] where the Supreme Court of Canada ruled that aboriginal rights might only be extinguished by express and unambiguous means. Nevertheless, the Aboriginal complainant must first establish the traditional existence of the aboriginal right concerned and must show that it was an integral part of life.[1259]

Furthermore, the Supreme Court of Canada ruled in *R v Sparrow*,[1260] that s. 35, Constitution Act 1982 is not an 'empty box.' Rather the Court found that the aboriginal right to fish for social, ceremonial and food purposes is recognised and affirmed by s. 35 of the Constitution, thereby leaving the door open to the possibility that other aboriginal rights, including the right of self-government, are also guaranteed by the Constitution Act 1982.

The 1993 *Delgamuukw v British Columbia*[1261] decision adopted the 'integral part of their distinctive culture' test to describe the 'practice, custom or tradition that is sufficiently significant and fundamental to the culture and social organisation of a particular group of

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[1253] See *Attorney-General of Ontario v Bear Island,* [1985] 1 CNLR 1, 31-2 Ont .S.C.

[1254] *Guerin v R* [1984] 2 S.C.R. 335, 336; [1985] 1 CNLR 120.

[1255] *Calder v Attorney-General of British Columbia* (1973) 34 D.L.R. (3rd) 313 per Judson J.

[1256] In 1982, the Constitution of Canada was patriated to Canada and the British Parliament no longer held legislative jurisdiction and authority over Canada pursuant to the enactment of the Canada Constitution Act 1982. See Hogg, P, *Constitutional Law of Canada,* (Carswell, Toronto, 2019).

[1257] See *R.* v *Sikyea*, [1964] S.C.R. 642; *R.* v. *George*, [1966] S.C.R. 267; *Daniels* v *The Queen*, [1968] S.C.R. 517; *R.* v *Derricksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.).

[1258] [1990] 1 S.C.R 1075. See also *R.* v *Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw* v *British Columbia*, [1997] 3 S.C.R. 1010; *and R.* v *Marshall [No. 2]*, [1999] 3 S.C.R. 533.

[1259] *R v Sparrow* [1990] 1 SCR 1075, at 1099.

[1260] (1990) 46 B.C.L.R. (2d) 1.

[1261] [1993] 5 C.N.L.R 1.

aboriginal people to command recognition as an aboriginal right.'[1262] The *Delgamuukw* test recognised that aboriginal rights are integral to a distinctive culture. The protection of these rights provides a legal basis for aboriginal communities to maintain their distinct ways of life and to develop their culture.

Determining those practices, customs or traditions that are integral to aboriginal culture however is often controversial. Anthropologists describe aboriginal rights as having a 'multivalent' quality – many different layers of definition depending on the speaker, the context of use, and the time at which evoked.'[1263] Still, it is clear that an integral part of Indigenous culture was and continues to be the existence of self-governance systems, laws and governance institutions over community and territory. In Canada, the aboriginal right to self-government has been recognised by the Federal Government as 'inherent' – those which 'inhere in the very meaning of aboriginality.'[1264] Although the Canadian judiciary has readily accepted traditional activities like hunting, fishing and trapping as inhering in aboriginality and included within the doctrine of aboriginal rights, there has been little opinion on the scope of claims to non-resource rights such as self-government.

In the initial decision *Delgamuukw v British Columbia*,[1265] the Supreme Court of British Columbia ruled that aboriginal rights, including aboriginal title and the right of self-government, were extinguished in British Columbia by the Crown's efforts to establish a general regime for land use and ownership when the colony was established in the mid-nineteenth century.[1266] The Court of Appeal of British Columbia subsequently overturned much of this first *Delgamuukw* ruling in 1993. As they brought the *Delgamuukw* action before the courts, the Gitksan and Wet'suwet'en peoples of northwestern British Columbia asserted that they own their traditional lands and have inherent jurisdiction in relation to them. Such jurisdiction, they asserted, is exercised through their 'House' and feast systems (potlatch), and the traditional institutions of Gitksan and Wet'suwet'en self-government. Jurisdiction, they argued, is exercised in the determination of House membership, the maintenance of the House system, the regulation of family relations, education, harvesting, management and conservation of House territories and resources, dispute resolution and relations with other peoples.

Given that Indigenous peoples have been asserting their rights and responsibilities to self-governance and jurisdiction since first contacts with Europeans, the Gitksan and Wet'suwet'en maintained that their right to govern themselves is a broad and fundamental one. In the same way, they contended, as the Crown's underlying title and aboriginal title are co-existing, so also are the concepts of Crown sovereignty and aboriginal jurisdiction. Aboriginal jurisdiction, they maintained, has both deep historical roots and contemporary significance in the law.

[1262] *Delgamuukw v British Columbia* [1993] 5 C.N.L.R 1, 104 D.L.R 470 at 517 (B.C.C.A) reversing [1991] 5 C.N.L.R 1, 79 D.L.R (4th) 185 (B.C.S.C) at 641.

[1263] Boldt, M & Long, J.A (eds) *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985) at 141.

[1264] Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government,* (Federal Policy Guide, Ottawa, 1995) at 1.

[1265] [1991] 5 C.N.L.R 1, 79 D.L.R (4th) 185 (B.C.S.C) at 641.

[1266] See Cassidy, F (ed) *Aboriginal Title in B.C: Delgamuukw v. The Queen* (The Institute for Public Policy, Montreal, 1992).

The Court of Appeal did not respond positively to any of these arguments however. With regard to the broad assertion by the Gitksan and Wet'suwet'en of inherent jurisdictional powers, the Court declared:

> Rights of self-government, encompassing a power to make general laws governing the land and resources in the territory, and the people in that territory can only be described as legislative powers.[1267]

Such rights, the Court argued, would enable the Gitksan and Wet'suwet'en to limit provincial jurisdiction and establish a third order of government within Canada. This, the Court of Appeal contended, could not be done. 'It was on the date that the legislative power of the Sovereign was imposed,' the Court declared, 'that any vestige of aboriginal law-making competence was superseded.'[1268] When Crown sovereignty and English law were imposed in the Colony of British Columbia in the mid-nineteenth century, the Court of Appeal maintained, the Indigenous right of self-government, the right to make general laws governing people, land and resources, was superseded.

Even if this were not the case, the idea that the governments of Indigenous peoples could have undelegated legislative powers, the Court held, is inconsistent with the constitutional division of powers. Sections 91 (Federal) and 92 (Provincial) of the Constitution Act 1982, from this perspective, exhaustively distribute legislative power in Canada. Moreover, s. 91 (24), Constitution Act 1982 awards legislative competence in relation to 'Indians' to Parliament.

The Gitksan and Wet'suwet'en, the Court of Appeal conceded, had an organised society with traditions, rules and regulations, upon the establishment of Crown sovereignty in their traditional territories. As long as the members of their communities agree to adhere to their traditional practices, the Court noted, there is no reason why the Gitksan and Wet'suwet'en should not continue to follow them, but they cannot do so if their actions are in conflict with the laws of British Columbia or Canada.

Two of the five justices who took part in the British Columbia Court of Appeal's ruling dissented, but neither treated the right to self-government in a way that would be acceptable to Indigenous peoples. Refusing to use the term self-government, Hutcheon J argued that Aboriginal peoples have not lost the right to what he termed 'self-regulation.' He also advised that it would be useful to 'avoid reference to aboriginal laws' because the word 'laws' carries with it the notion that the Indigenous traditions were enforceable by some state authority.' This, he concluded, could not be the case. For this reason, Hutcheon J asserted, the term 'self-regulation' is preferable to the term 'self-government.'[1269]

Although he used the term self-government, another judge, Lambert J, concurred with Hutcheon J's views that aboriginal rights in relation to governance do not rest on aboriginal laws. Nor do these rights reflect a claim to aboriginal sovereignty, Lambert J contended. To the contrary, 'it may be helpful', the Justice suggested:

[1267] *Delgamuukw v British Columbia* [1993] 5 C.N.L.R. [1993] 5 W.W.R. 97, 104 D.L.R. (4th) 470, 30 B.C.C.A 1, 49 W.A.C 1, (B.C.C.A).

[1268] Above.

[1269] Above.

> … to compare aboriginal self-government and self-regulation to the self-government and self-regulation practiced by a forest company or a ranching company or a Hutterite community in relation to their own land and the resources on their land, and to the ordering of their internal affairs.[1270]

The Gitksan and Wet'suwet'en sought to appeal the second *Delgamuukw* decision in the Supreme Court of Canada in the fall of 1993 and the Court agreed to hear the appeal. In June 1994 however, British Columbia and the Hereditary Chiefs of the Gitksan and Wet'suwet'en signed an Accord of Recognition and Respect. The province, the Wet'suwet'en, and the Gitksan agreed to join with Canada to resolve the outstanding self-governance jurisdiction issues through Treaty negotiations. If 'significant progress' in these negotiations could be made over the subsequent year to a year and a half, then the parties to the *Delgamuukw* action would discontinue the appeal to the Supreme Court. Such a move provided a strong indication that there is some hope for a political as contrasted with a more strictly legal resolution to many of the issues that Indigenous peoples have brought before the Canadian public, but it remained to be seen if this would occur.

Although the B.C Court of Appeal found that the plaintiffs had no jurisdiction to enact laws that would conflict with provincial and federal laws, thereby missing the Gitskan and Wet'suwet'en claims to self-government, this decision involved considerable discussion of the nature of aboriginal rights that stems from occupation and use of land as their traditional home prior to the assertion of British sovereignty. Aboriginal rights are site-specific and are integral to the distinctive culture of an aboriginal society. But the precise bundle of rights that a particular aboriginal community can assert depends upon a number of factors including the nature, kind and purpose of the use and occupancy of the land and the extent to which such use and occupancy was exclusive or non-exclusive. An integral aspect of this occupation of land was surely the exercise of effective self-governance, which included jurisdiction. As noted by Marshall CJ in the famous 1832 Supreme Court of the USA decision of *Worcester v State of Georgia*:[1271]

> America … was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.[1272]

The doctrine of continuity ensured that aboriginal rights would form part of Canadian (and New Zealand) common law. Different approaches adopted by judiciaries over the years have determined the nature of those aboriginal rights recognised at common law.

Still, Lambert J.A in his dissenting judgment concluded:

[1270] Above.

[1271] *Worcester v State of Georgia* 31 U.S (6 Pet.) 515 (1832) at 542-43.

[1272] Above. Marshall CJ also noted at 559: 'The settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self-government – associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right to self-government.'

> I would declare that the present Aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples, would include rights of self-government and self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity.[1273]

Lambert J.A's judgment can be read restrictively given that self-government and self-regulation are exercisable only to 'preserve and enhance' the identity of Indigenous peoples. In remains to be seen whether self-government and self-regulation could include legislative jurisdiction and authority akin to that held by the provinces or Parliament.

In *R v Williams,*[1274] the B.C Court of Appeal agreed with the trial court decision that any possibility that Indigenous self-government authority remained unextinguished was terminated by the British Columbia Terms of Union of 1871[1275] and by the Constitution Act 1867, wherein all legislative powers were divided between the federal and provincial governments. The fact that Indians are subjects of the Crown either by Treaty [1276] or otherwise[1277] sets a limiting context within which self-government could exist in Canada, by means other than negotiated agreements.

In *R v Pamajewon,*[1278] the appellants claimed the right to operate casinos and regulate high stakes gambling on reserve, describing this as a 'broad right to manage the use of their reserve lands.'[1279] The Court noted however, that this right is not specific enough for the *R v Van der Peet*[1280] test, which requires that the asserted right must be examined in light of the specific history and culture of the Indigenous group claiming the right, having regard to the specific circumstances of the case. This position was reaffirmed by the Supreme Court of Canada in its decision in *Delgamuukw*,[1281] wherein Lamer C.J noted that 'rights to self-government, if they existed, cannot be framed in excessively general terms.'[1282] The Court held that based on the evidence presented, high-stakes gambling was not an activity that formed an integral part of the distinctive cultures of the Shawanaga and Eagle Lake First Nations. The Court focused on the need for specificity in analysing any aboriginal right to self-government, if such a right exists within the rubric of s. 35(1), Constitution act 1982. The onus to demonstrate this level of specificity is placed on the Indigenous group claiming such a right.

In *Campbell v B.C*,[1283] the British Columbia Supreme Court considered an application seeking an order that the Nisga'a Final Agreement 2000 (NFA) is, in part, inconsistent with the Constitution of Canada and therefore, in part, of no force or effect. The applicant argued that the NFA was inconsistent because it purports to bestow upon the governing body of the Nisga'a Nation legislative assemblies of the provinces by ss. 91 and 92, Constitution Act 1867. The Court held that the assertion of sovereignty by the British Crown did not necessarily

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[1273] *Delgamuukw v B.C.,* [1993] 5 C.N.L.R (B.C.C.A.) at 250.
[1274] [1995] 2. C.N.L.R 229 (B.C.C.A.).
[1275] *British Columbia Terms of Union,* R.S.C 1985, Appropriate II, No.
[1276] See *Logan v Styres* (1959), 20 D.L.R (2d) 416 (Ont. H.C).
[1277] See *Pawis v R* [1979] 2.C.N.L.R 52 (F.C.T.D).
[1278] *R v Pamajewon* [1996] 2 S.C.R 821.
[1279] Above, at para. 27.
[1280] (1996) 137 D.L.R (4th) 289.
[1281] *Delgamuukw v B.C* [1997] 3 S.C.R. 1010.
[1282] Above, at 170.
[1283] *Campbell v B.C (A.G),* [2000] 4 C.N.L.R. 1 (B.C.S.C).

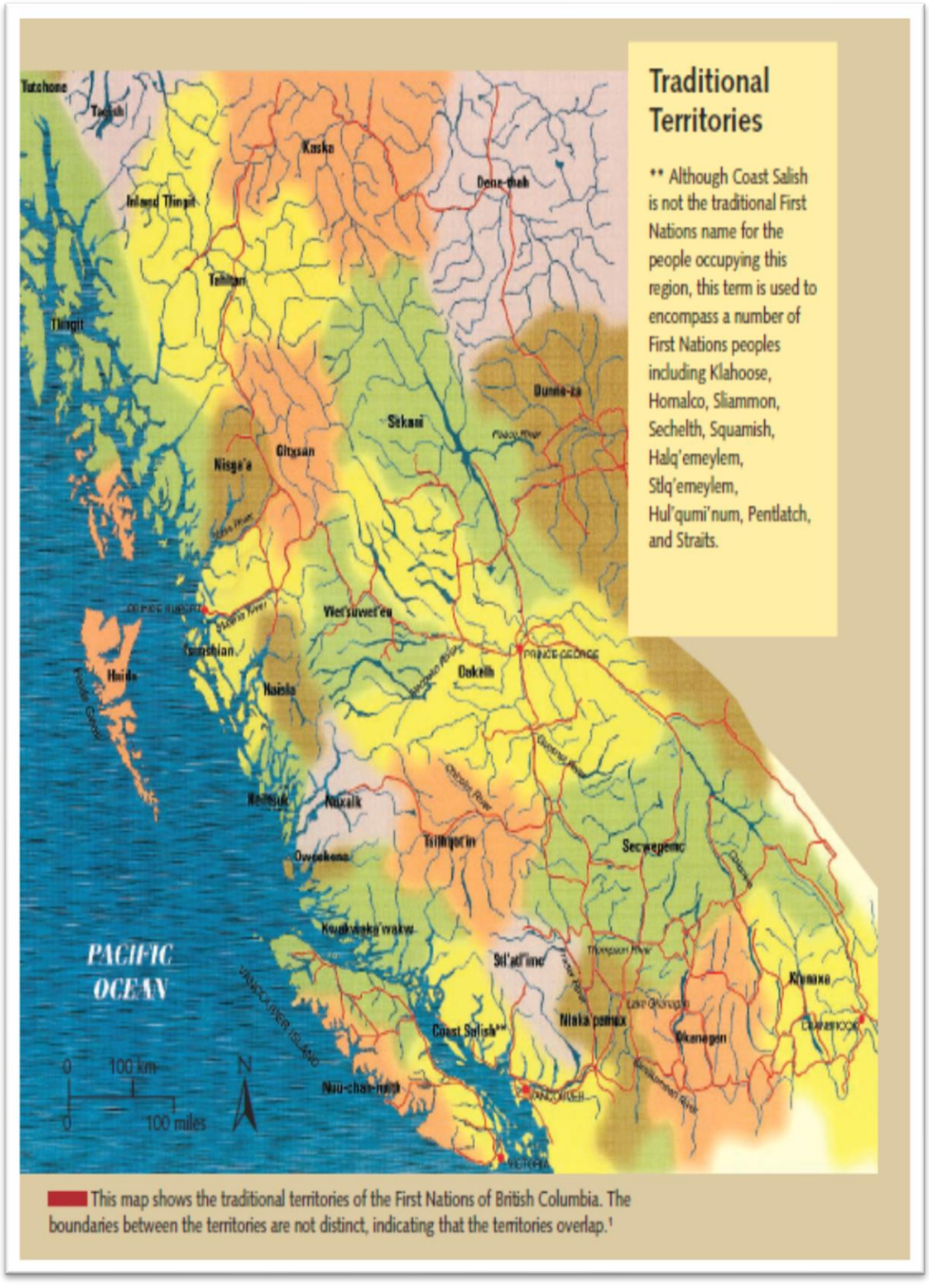
extinguish the right of Indigenous people to govern themselves. Any aboriginal right to self-government could be extinguished after Confederation and before 1982 by Federal legislation or it could be replaced or modified by the negotiation of a Treaty. Post-1982, such rights could not be extinguished, but they may be defined and given meaning by way of a Treaty.

The Court held that the NFA defined the content of Indigenous self-government expressly. The Constitution Act 1867 did not distribute all legislative power to Parliament and the provincial legislatures. The Constitution Act 1867 did not purport to and does not end what remains of the royal prerogative of aboriginal and Treaty rights, including the diminished but not extinguished power of self-government, which remained with the Nisga'a in 1982. Section 35, Constitution Act 1982 recognised and affirmed a constitutionally limited form of self-government that remained with the Nisga'a after the assertion of sovereignty – and the NFA and settlement legislation give that limited right definition. The Nisga'a Lisims Government then is subject both to the limitations set out in the NFA itself and to the limited guarantee of the rights recognised and affirmed by s. 35, Constitution Act 1982.

The stance of the Canadian courts regarding the Indigenous right of self-government may well change over time, as various challenges to the power of the Crown make their way through the judicial system. Based on Canadian jurisprudence, if the right to Indigenous self-government exists at all, the Supreme Court of Canada seems focused on limiting that right to specific activities of governance and only as a relatively minor power of self-regulation. Demonstrating the substantive right of self-government envisioned by many Indian bands and Indigenous peoples in Canada will be subject to a high standard in the legal system. From this perspective, there can only be one set of laws and one set of governing institutions in Canada, the laws and institutions, which are explicitly described in the Constitution Act 1982.

Subsequently, the Canadian Provincial Premiers, Territorial government leaders, Indigenous and the federal government leaders agreed, as part of the 1992 Charlottetown Accord on amendments to the Constitution Act 1982, some recognised inherent right of self-government for Indigenous people. For the first time, Indigenous organisations were full participants in the negotiation tables of power. However, the Charlottetown Accord was rejected in a national referendum.

In the wake of the defeat of the Charlottetown Accord, it would be fair to say that the 'one law for all' and 'we are all one people' perspectives tend to be a dominant influence on Indigenous self-government in Canadian (Australian and New Zealand) political circles. Like Treaty making, direct negotiations between the various parties is probably the best means for Indigenous peoples in Canada to achieve self-government and to assist with realising the group's rights and responsibilities of internal self-determination. A Supreme Court injunction, moreover, provides a lever in the negotiation processes.



This map shows the traditional territories of the First Nations of British Columbia. The boundaries between the territories are not distinct, indicating that the territories overlap.[1]

Map 22: B.C First Nations[1284]

[1284] Campbell, K, Menzies, C & Peacock, B, *B.C First Nations Studies,* (British Columbia Ministry of Education, Victoria, Canada, 2003) at 17.

Legislated & Institutionalised Self-Government – Indian Act Bands

Indigenous self-government that is created and protected by ordinary legislation is a form of self-government that is unilaterally created and can be unilaterally changed by a majority vote in Parliament. It is produced at least in part by elected politicians. The best example in Canada is perhaps the Indian Act itself.

The Indian Act 1876[1285] is a comprehensive piece of legislation that covers activities in all sectors of Indian communities and has been the central piece of legislation governing the status of Indians, the administration of reserves, registration of Band Councils, administration of the affairs of the Band Councils, and the extent of their jurisdiction. Band self-government is first and foremost Band Council government – government by a group of members who have been chosen in one way or another by the general membership in their constituent communities. Traditionally, the Indian Act encouraged assimilation often through paternalism. Indeed, the stated purpose of the Act was to 'protect Indians until they were ready to be treated like other Canadians.'[1286] The current main purposes of the Indian Act as described by the Department of Indian Affairs and Northern Development (DIAND at the time) in the Penner Report are:

> To provide for band councils and the management and protection of Indian lands and moneys, to define certain Indian rights, such as exemption from taxation in certain circumstances, and to define entitlements to band membership and to Indian status.[1287]

Armitage, however, articulated the omnipotent and omnipresent power of the Indian Act as an instrument to subordinate the Indigenous peoples of Canada:

> The Indian Act 1876 was conceived as a complete code of management of Indian affairs. … Resistance from First Nations peoples was met with amendments to the Indian Act – amendments that made its provisions even more effective. … When First Nations bands elected their traditional leaders, the act was amended (in 1884) to give the government the power to depose those considered to be immoral, incompetent, or intemperate and to prevent their re-election. When traditional First Nations customs, in the view of missionaries or Indian agents, interfered with progress towards assimilation, legislation was introduced to ban them (e.g. in 1884 the potlatch [BC] and the Sun Dance [Prairies] were banned). In 1920, provisions requiring First Nations peoples to seek permits to appear in traditional dress and to perform traditional dances were written into the Indian Act; when the First Nations peoples of Manitoba and the Northwest Territories persisted in continuing to hunt and fish the act was amended so that the game laws applied to them as well as to non-aboriginals (1890); when schools on the reserves were not well attended and First Nations parents failed to send their children to residential schools, provisions permitting the governor-general-in-council to issue regulations and to commit children to such institutions were written into the act (1894); when these

[1285] Indian Act 1876, S.C 1876.

[1286] Canada, *Indian Self-Government in Canada: Report of the Special Committee,* (Penner Report, Queen's Printer, Ottawa, 1983) c. I-5.

[1287] Above, at 17.

> provisions failed to obtain consistent attendance, the act was strengthened by classifying delinquent all children who did not attend and by making their parents subject to criminal penalties (1920); and when First Nations peoples failed to apply for enfranchisement, provisions making it compulsory were written into the act (1922).[1288]

The status and rights of Indians in the provinces has depended on this legislation and the numbered Treaties affecting the southern half of Canada. The first of these post-confederation Treaties were negotiated in 1871 for the cession of lands in Manitoba and the adjoining area of the North West Territories. These were the first and second of what have been called the numbered Treaties. In total, the federal government of Canada concluded 11 numbered Treaties. The final Treaty, negotiated in 1921, covered the Mackenzie Valley. The Treaties usually adopted a formula of apportionment of land rights based on individual members of an Indian Band. This was the basis upon which land was allocated for reserves and, if not possible, how compensation was assessed. In addition, these Treaties deal with hunting and fishing rights over non-settled areas. Before 1982, federal laws could over-ride the terms of Treaties.[1289] Now s. 35, Constitution Act 1982 ratifies and affirms 'existing aboriginal and treaty rights' and, pursuant to ss. 25 and 52(1), Constitution Act 1982, these rights are deemed to be part of the supreme law of Canada. These matters are significant because they affect the status and powers of the individual Band Councils recognised under the Indian Act.

Band Reserves Uncertain

A Canadian Indian reserve is defined in s. 2, Indian Act 1990 as:

> A tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.

A band is defined as a 'body of Indians' meaning persons registered or entitled to be registered as an Indian under the Indian Act:

a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart …
b) for whose use and benefit in common, moneys are held by Her Majesty, or
c) declared by the Governor in Council to be a band for the purposes of this Act.

Governance of a reserve is vested in a Band Council, elected under the provisions of ss. 74-80, Indian Act or in s. 2(1):

> The council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band.[1290]

[1288] Armitage, A *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (Vancouver: UBC Press, 1995) at 78-9.
[1289] Indian Act 1970, R.S.C I.C-6, s. 88 as amended.
[1290] Section 2(1), Indian Act 1990.

The legal status of a Band appears to be unclear[1291] and shrouded in mystery however, as McHugh termed it.[1292] McHugh noted that a Band is considered an unincorporated association,[1293] which means that it may hold property for its members on either trust or a co-ownership basis.[1294] Williston and Rolls observed:

> An unincorporated association, other than a partnership, or a quasi-corporation, has no legal existence apart from its members. It is not a legal entity capable of suing or being sued econ nominee: it is not capable of contracting or appointing an agent, and service cannot be affected against its officers. Any proceedings against an association are a nullity and not a mere regulation which can be waived by the entry of an appearance, and judgments by or against it are null and void.[1295]

Woodward added:

> A band, as an enduring entity with its own government, is a unique type of legal entity under Canadian law. The rights and obligations of the band are quite distinct from the accumulated rights and obligations of the members of the band. What distinguishes a band from a club is that a band exists apart from any voluntary act of its members. In this respect, a band is more like a nation than a club. But no comparison is totally appropriate. In law a band is in a class by itself.[1296]

Isaac noted that some cases suggest that a band is neither a legal person nor a corporation while other cases suggest a more liberal approach.[1297] The now defunct First Nations Governance Act 2002 proposed to clarify this position by expressly providing that Band Councils are natural persons and are capable of entering intro contracts, being sued and other related functions.[1298] Band councils are currently distinct entities capable of being sued and have been found to be similar to municipal forms of government.[1299] Hence the Indian Act has provided meagre legal certainty for a band and Band Council, which has proven to be

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[1291] Isaac, T, *Aboriginal Law: Cases and Materials: Cases and Materials* (Purich, Saskatoon, 2004) at 464.

[1292] McHugh, P 'Native Land Development' in *Saskatchewan Law Review* (Vol. 47, No. 1) at 141.

[1293] Above citing *Mintuck v Valley River Band* 63A [1976] 4 W.W.R 543 (Man. Q.B); [1977] 2 W.W.R 309 (Man.C.A); *Afton Band of Indians v A.G* (N.S) [1978] 3 R.P.R 298 (N.S.S.C., T.D); *Mathias v Findlay* (sub.nom. *Joe v Findlay*) (1978) 4 W.W.R 653 (B.C.S.C); (1980), 109 D.L.R (3rd) 747 (B.C.S.C); *Cache Creek Motors Ltd v Porter* (1980), 14 B.C.L.R 13 (B.C.S.C).

[1294] Lloyd, D, *The Law Relating to Unincorporated Associations* (London, 1938) at 165, 175; Paton, G & Derham, D (eds) A *Textbook of Jurisprudence* (4th Ed) (Oxford, 1972) at 428.

[1295] Williston, W & Rolls, R, *The Law of Civil Procedure* (Vol. 1, Toronto, 1970) at 290.

[1296] Woodward, J, *Native Law* (Carswell, Toronto, 1989) at 397.

[1297] *R v Cochrane*, [1997] 3 W.W.R 660 (Man. Co. Ct) and *R v Peter Ballantyne Band* [1987] 1 C.N.L.R 67 (Sask. Q.B). These cases held that a band is neither a natural nor a legal person and is not a corporation. However, other cases have held that a band can sue and be sued and is a legal entity with legal rights and obligations, notwithstanding that it may not be a legal person.' See *Springhill Lumber v Lake St. Martin Indian Band* [1986] 2 C.N.L.R 179 (Man.Q.B) and *Clow Darling Ltd v Big Trout Lake Band of Indians* [1990] 4 C.N.L.R 7 (Ont. D.C).

[1298] First Nations Governance Act (2002) Bill C-61, s. 15.

[1299] *Isolation Sept-Iles Inc. v Montagnais de Sep-Iles ef Maliotenam* [1989] 2 C.N.L.R 49 (Que. S,C). See also *Mohawks of the (Bay of Quinte) Tyendinega Mohawk Territory (Re),* [2001] 1 C.N.L.R. 195 (Can. Indust. Rels. Bd) at paras. 28-9.

detrimental in terms of attracting external (and internal) investors, providing insufficient collateral for loans to further business, and possession not title of reserve lands for band members, and therefore hindering economic, social, cultural and political development opportunities. Indeed Jason Calla of Fiscal Realities, an economic consulting firm with First Nation clients commented on lost opportunities on Indian reserves:

> Approval of a development project on Indian land [Indian Act reserves] can take four to six times longer than approval on non-Indian land. … The problem – due partly to the legislated oversight involvement of the Federal Indian affairs department – is holding back bands and tribes from their climb out of poverty. … Governments are losing $2 billion a year in revenue because Canada's Indians are not participating in the economy at the same level as other Canadians. …The glacial-like approval process turns off potential investors, who divert projects to adjacent non-aboriginal lands.[1300]

Calla added that the main issue is the relationship with DIAND:

> The Indian Act puts Ottawa in a conflict of interest. On the one hand, the department, which has a major say in projects on aboriginal lands, wants to encourage economic development. However, it also has a fiduciary responsibility to protect First Nations interests and that discourages risk-taking. … We hope we can streamline some of the processes if we have a stronger level of jurisdiction ourselves, for example over the ability to lease lands and also ease the access as far as financing using the equity of our lands or other resources.[1301]

Band Structure

Under the Indian Act, certain powers of self-government are conferred on elected chiefs and Band Councils,[1302] the Minister of Indian and Northern Affairs, and the Governor in Council. Band members can select their own Band Council governments. A chief and between two and twelve councillors are chosen either by indigenous custom or by elections from among adult band members pursuant to ss.74 and 77. This is a system that grants much power to the Federal Cabinet and the Minister, at the expense of Band autonomy and self-government. For example, the Minister may declare that a band council consisting of chief and councillors shall be elected 'for the good government of a band.' Regulations for elections are laid out in the Act and the Governor in Council may make additional regulations regarding elections, band meetings and council meetings. In effect, the Band Councils are trustees of band assets, and must act fairly in allocation of lands for the benefit of all band members.

[1300] 'Red Tape stymies native Indians, economist says' in *Vancouver Sun*, (22 November 2001).

[1301] Above.

[1302] See generally, Indian Act, R.S.C 1985, c/ I-8, especially ss. 74-86; and Bartlett, R.H, *The Indian Act of Canada* (2nd ed)(University of Saskatchewan Native Law Centre, Saskatoon, 1988), chapter IV.A; and Woodward, J *Native Law* (Carswell, Toronto, 1989).

Band Powers

The Governor in Council has the power to declare a body of Indians to be a Band under the Indian Act. He or she may also decide what powers may or may not be conferred on the Band. The Governor in Council can determine what parts of a reserve may be vested in a Band, may consent to the expropriation of Band lands, regulate natural resource use on reserves, regulate the estates of Indians, regulate meetings of Bands, veto loans and the list goes on. The Minister likewise has control over Band matters relating to elections, by-laws, spending of Band funds, management of Band artefacts and so on.

Section 81, Indian Act outlines that a band council may make by-laws subject to disallowance by the Minister, to:

- provide for the health of residents on reserves;
- regulate traffic;
- observe law and order;
- prevent disorderly conduct and nuisance;
- regulate domestic animal activities;
- construct and maintain water courses, roads, bridges, ditches, fences and other local works;
- divide reserves into zones and enforce prohibitions for these zones;
- regulate the construction, repair and the use of buildings
- survey and allot reserve lands among band members;
- destroy and control noxious weeds;
- regulate bee-keeping and poultry raising;
- construct and regulate water works;
- control and prohibit public games, sports and other amusements;
- regulate the conduct and activities of merchants on reserves;
- preserve, protect and manage fur-bearing animals, fish and other game on reserve;
- remove and punish persons trespassing on reserves;
- regulate the residence of band members and other persons on the reserve, and
- provide for entry permits to band lands except for parties entitled to enter the reserve pursuant to Federal or applicable provincial authority.

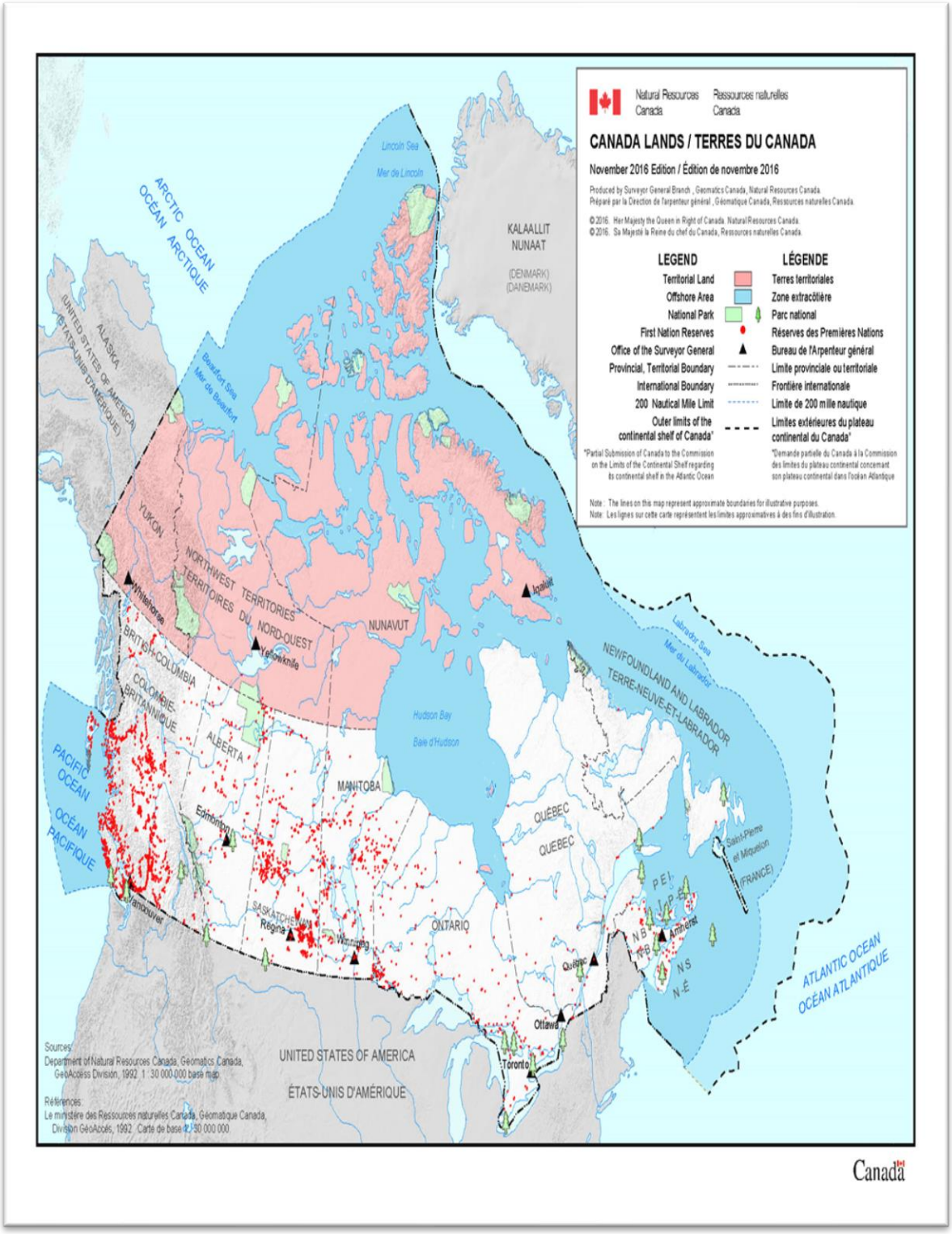
The band may make money by-laws 'where the Governor in Council declares that a band has reached an advanced stage of development.' The money by-law power extends to the taxation of reserve lands occupied by band members and the licensing of business, callings, trades and occupations. The Band Council may also make by-laws regarding the sale, barter, supply, manufacture or possession of intoxicants on the reserve which power is not subject to disallowance.

The Band Council therefore is a municipal-type legislative self-government model. Evelyn Peters noted that band government under the Indian Act is limited in its jurisdiction and that this arrangement does not actually represent self-government, but rather self-administration or self-management.[1303] The Indian Act imposed Eurocentric governance systems and values

[1303] Peters, E, *Aboriginal Self-Government Arrangements in Canada* (Institute of Intergovernmental Relations, Queens University, Kingston, Ontario, 1987) at 5.

on First Nations peoples. Not surprisingly, First Nations have been frustrated by the paternalism inherent in the Indian Act, which perhaps has parallels with the Māori Trust Boards Act 1955 and the old Māori Affairs Act legislation, as well as Te Ture Whenua Māori Act 1993 trusts and incorporations in some respects.

Social Darwinism, humanitarianism and evangelical Christianity legitimated this type of paternalism and assimilationism against Indigenous peoples in New Zealand and Canada. If the bottom line for Indigenous self-governance and to realise internal self-determination rights and responsibilities is some jurisdiction by an Indigenous people of their own governing institutions, processes, systems and disputes, then Indian Act band councils represent a cultural perspective structural arrangement.



Map 23: Canada First Nations Band Reserves 2020[1304]

[1304] Canada Lands, Government of Canada, online at: https://www.nrcan.gc.ca/earth-sciences/geomatics/canada-lands-surveys/about-canada-lands/10855 (Accessed May 2020).

Treaty Settlement Negotiated Self-Government

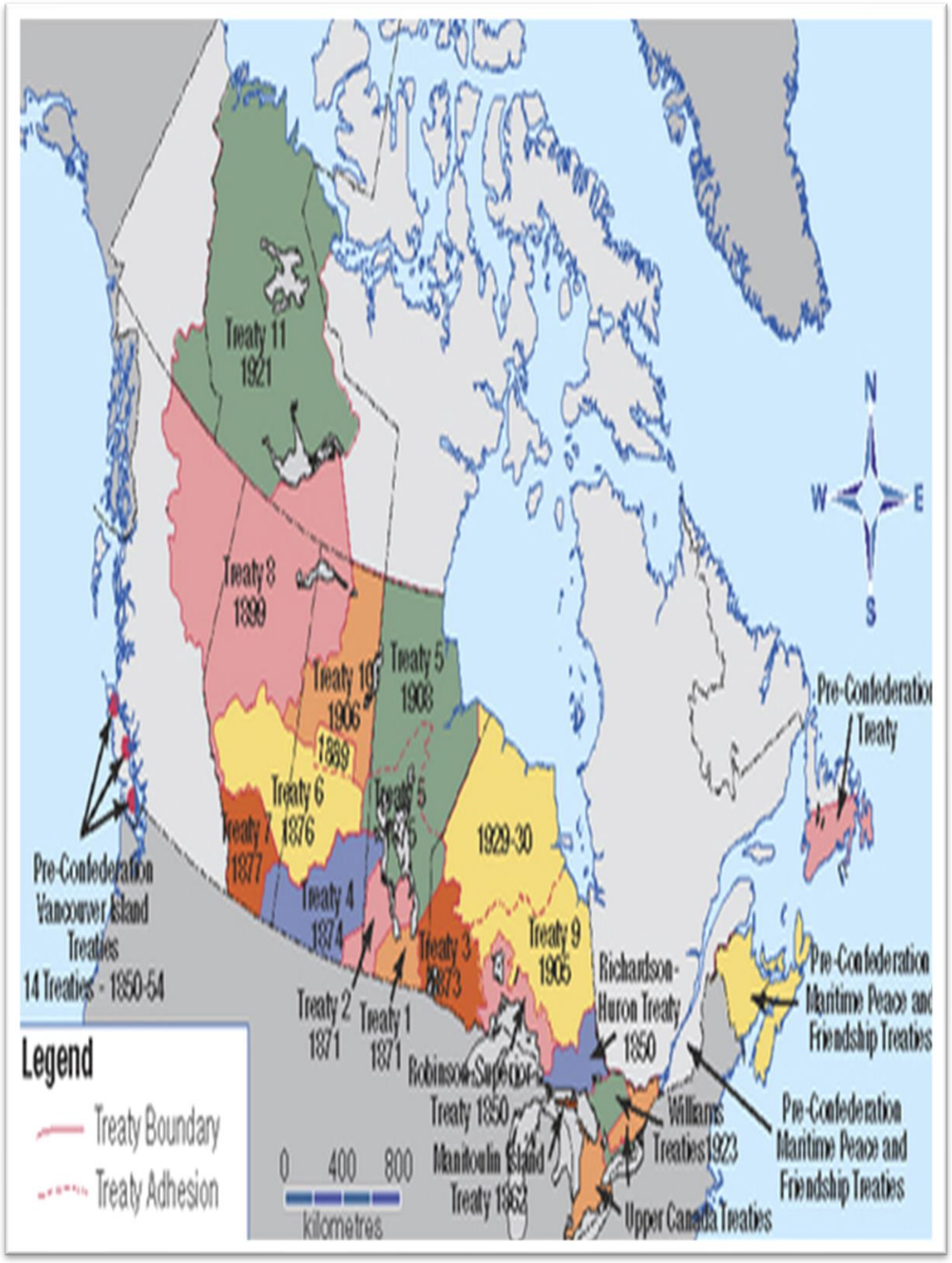
Another avenue for developing self-governing arrangements in Canada since 1973 is negotiated comprehensive land claims settlements. Increasingly in the 1990s, many Indigenous people in Canada pointed to the Treaty-making process as the best road to self-government. Treaty settlement agreements are more generally termed 'land claims settlements'.

The federal government of Canada stated in its claims policy:

> It is recognised that land claims negotiations are more than real estate transactions. In defining their relationships, aboriginal people and the Government of Canada will want to ensure that the continuing interests of claimants in settlement areas are recognised. This will encourage self-reliance and economic development as well as cultural and social well-being [internal self-determination]. Land claims negotiations should look to the future and should provide a means whereby aboriginal groups and the Federal government can pursue shared objectives such as self-government and economic development.[1305]

Comprehensive claims are defined as claims based upon traditional use and occupancy and unextinguished aboriginal title (i.e. not dealt with by Treaty or 'superseded by law'). Much of the landmass of Canada was subjected to Treaties up until 1921. For the most part, Canada has not honoured the spirit of these Treaties. This is so with regard not only to what might be termed these 'historic Treaties' but also to 'modern Treaties'. The largest percentage of specific land claims is made within territories and relates to the concerns of Bands and Councils living in these areas. Remaining lands that fall within the arc beginning in Newfoundland and Labrador in the east, through to Quebec, the eastern portion of the Northwest Territories, most of the Yukon Territory and into British Columbia in the west form the majority of comprehensive land claims (unextinguished aboriginal title claims) in Canada.

[1305] Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, (Federal Policy Guide, Ottawa, 1995) at 1. For a good reference on self-government in Canada, see Wherrett, J, *Aboriginal Self-Government*. (Law and Government Division CIR 96-2E. Political and Social Affairs Division, Parliamentary Research Branch, Library of Parliament, Ottawa, 27 September 1999, Revised 1 August 2000). Perhaps one of the better studies of aboriginal self-government in Canada appears to be Boldt, M, *Surviving as Indians: The Challenge of Self-Government* (University of Toronto, Toronto, 1993) and McGilligan, S, 'Self-Government Agreements and Canadian Courts,' in *Aboriginal Policy Research Consortium International*, (Western University Scholarship, 2010) at 31 online at https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1413&context=aprci (Accessed May 2020). For a more ideological critique of the politics behind self-government, see Mawhiney, A-M, *Towards Aboriginal Self-Government: Relations Between Status Indian Peoples and the Government of Canada, 1969-1984*, (Garland, New York, 1994). See also Hylton, J, *Aboriginal Self-Government in Canada* (Purich, Saskatoon, 1994).



Map 24: Canada Numbered Treaties 1871-1921[1306]

[1306] 'Indigenous People and Historical Globalisation map,' online at http://mrlowegpcsd.weebly.com/indigenous-people--historical-globalization.html (Accessed May 2020).

Modern Treaties or land claim agreements have brought many benefits to Indigenous peoples. The Nunavut agreement in the eastern Arctic is increasingly cited as a model for Indigenous self-government in countries such as Australia. The Nunavut, James Bay, Yukon, Nisga'a and other agreements have provided for the transfer of hundreds of millions of dollars and enormous land areas from the governments of the Crown to Indigenous entities and institutions.

Specifically, land claims agreements usually include rights to lands and resources that are relatively extensive when compared to the lands and resources to which most Indigenous peoples in Canada currently have access. The agreements also provide for significant monetary compensation packages as well as the creation of many boards and entities to foster health, education, economic development and environmental protection as well as a variety of other concerns.

According to the revised statement of comprehensive claims policy in 1986, a new feature then of the policy was the possibility of negotiations on a broader range of self-government matters. The 1986 policy statement explicitly provided that self-government arrangements negotiated through claims settlements would not receive constitutional protection without a constitutional amendment to that effect, which meant that the government preferred to negotiate self-government arrangements separately from other matters in order to avoid entrenchment under s. 35(3), Constitution Act, 1982. Section 35(3) provides that the recognition and affirmation of existing Treaty rights, while s. 35(1), includes 'rights that now exist by way of land claims agreements or may be so acquired.' The latest list of signed comprehensive Treaty settlement agreements include the following:

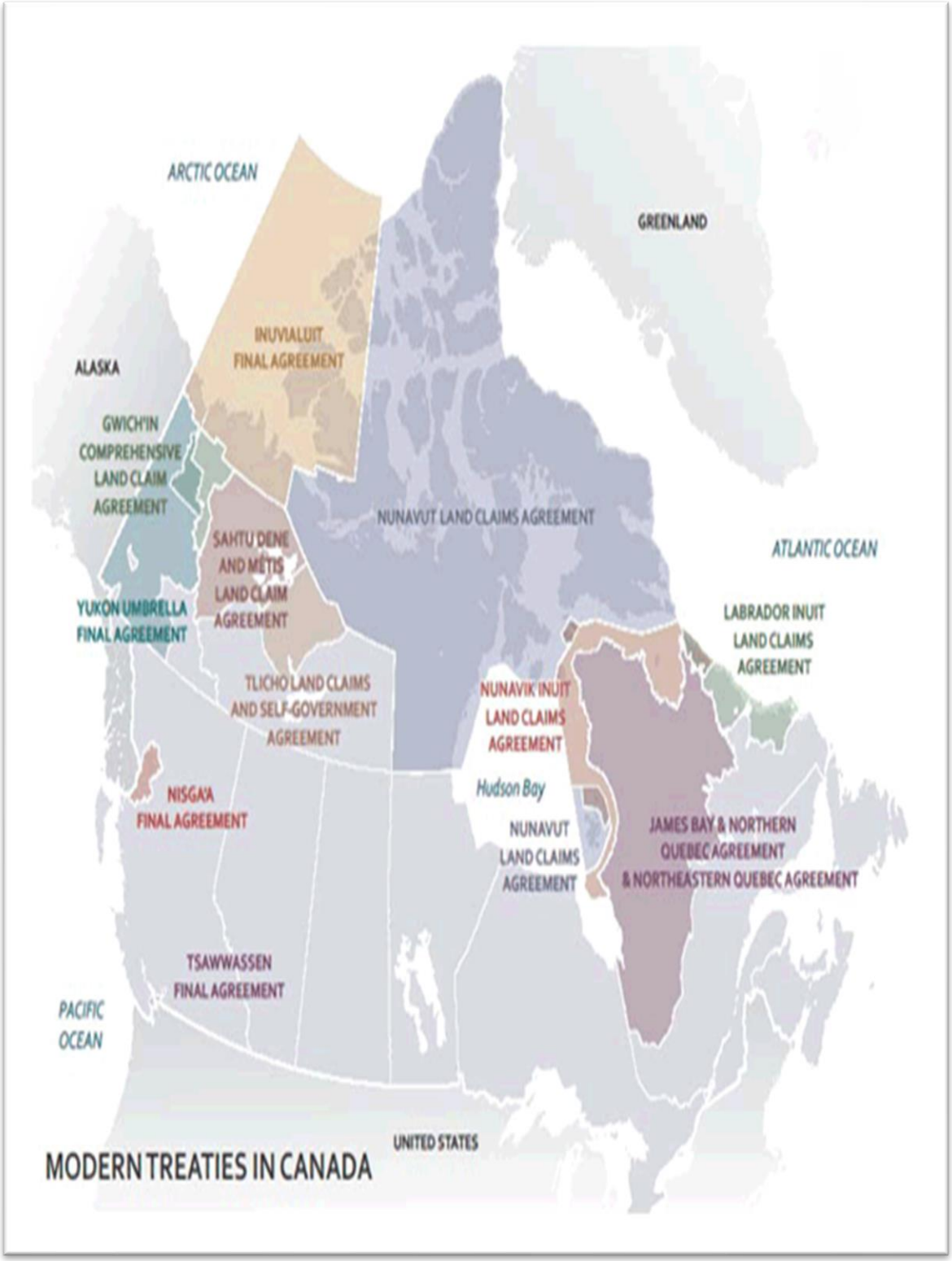
1. James Bay and Northern Quebec Agreement (Quebec) (1977)
2. Northeastern Quebec Agreement (Quebec) (1978)
3. Inuvialuit Final Agreement (Northwest Territories) (1984)
4. Sechelt Indian Band Self-Government Act (British Columbia) (1986)
5. Gwich'in Comprehensive Land Claim Agreement (Northwest Territories) (1992)
6. Council for Yukon Indians Umbrella Final Agreement (Yukon) (1993)
7. Nunavut Land Claims Agreement (Nunavut) (1993)
8. Sahtu Dene and Métis Comprehensive Land Claim Agreement (Northwest Territories) (1994)
9. Mi'kmaq Education Agreement (Nova Scotia) (1997)
10. Nisga'a Final Agreement (British Columbia) (2000)
11. Tlicho Agreement (Northwest Territories) (2005)
12. Labrador Inuit Land Claims Agreement (Newfoundland and Labrador) (2005)
13. Westbank First Nations Self-Government Agreement (British Columbia) (2005)
14. Nunavik Inuit Land Claims Agreement (2008)
15. Tsawwassen First Nation Final Agreement (British Columbia) (2009)
16. Maa-nulth First Nations Final Agreement (British Columbia) (2011)
17. Eeyou Marine Region Land Claims Agreement (2012)
18. Sioux Valley Dakota Nation (Manitoba) (2014)
19. Tla'amin Nation Final Agreement (British Columbia) (2016). [1307]

[1307] 'General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations,' Government of Canada, online at: https://www.rcaanc-cirnac.gc.ca/eng/1373385502190/1542727338550 (Accessed May 2020).

Some of the current self-government and claims negotiations include:

1. Miawpukek First Nation of Conne River (Newfoundland and Labrador) 2004
2. Nunavik Regional Government (Quebec) 2011
3. Micmac Nation of Gespeg (Quebec) 2014
4. Cree Nation Governance (Quebec) 2012
5. Fort Frances (Ontario) 2010 Anishnaabeg of Naongashiing First Nation, Couchiching First Nation, Lac La Croix First Nation, Naicatchewenin First Nation, Nigigoonisiminikaaning First Nation, Rainy River First Nation, Seine River First Nation and Stanjikoming First Nation
6. Anishinabek Nation (Union of Ontario Indians) Agreements on Governance and Education (Ontario)
7. Akwesasne (Quebec and Ontario) 2011
8. Nishnawbe Aski Nation (Ontario) 2009
9. Blood Tribe (Alberta) 2011
10. Meadow Lake First Nations (Saskatchewan) 2010
11. Whitecap Dakota First Nation Self-Government Negotiations 2012
12. Inuvialuit 2014
13. Gwich'in 2014
14. Déline – Sahtu Dene and Métis 2014
15. Fort Good Hope 2012
16. Colville Lake 2012
17. Tulita – Dene and Métis 2015.[1308]

[1308] 'General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations,' Government of Canada, online at: https://www.rcaanc-cirnac.gc.ca/eng/1373385502190/1542727338550 (Accessed May 2020).



Map 25: Modern Treaties in Canada[1309]

[1309] 'Modern Treaties in Canada map,' Indigenous and Northern Affairs Canada online at: www.aadnc-aandc.gc.ca (Accessed May 2020).

Fiscal Approach for Self-Government Arrangements

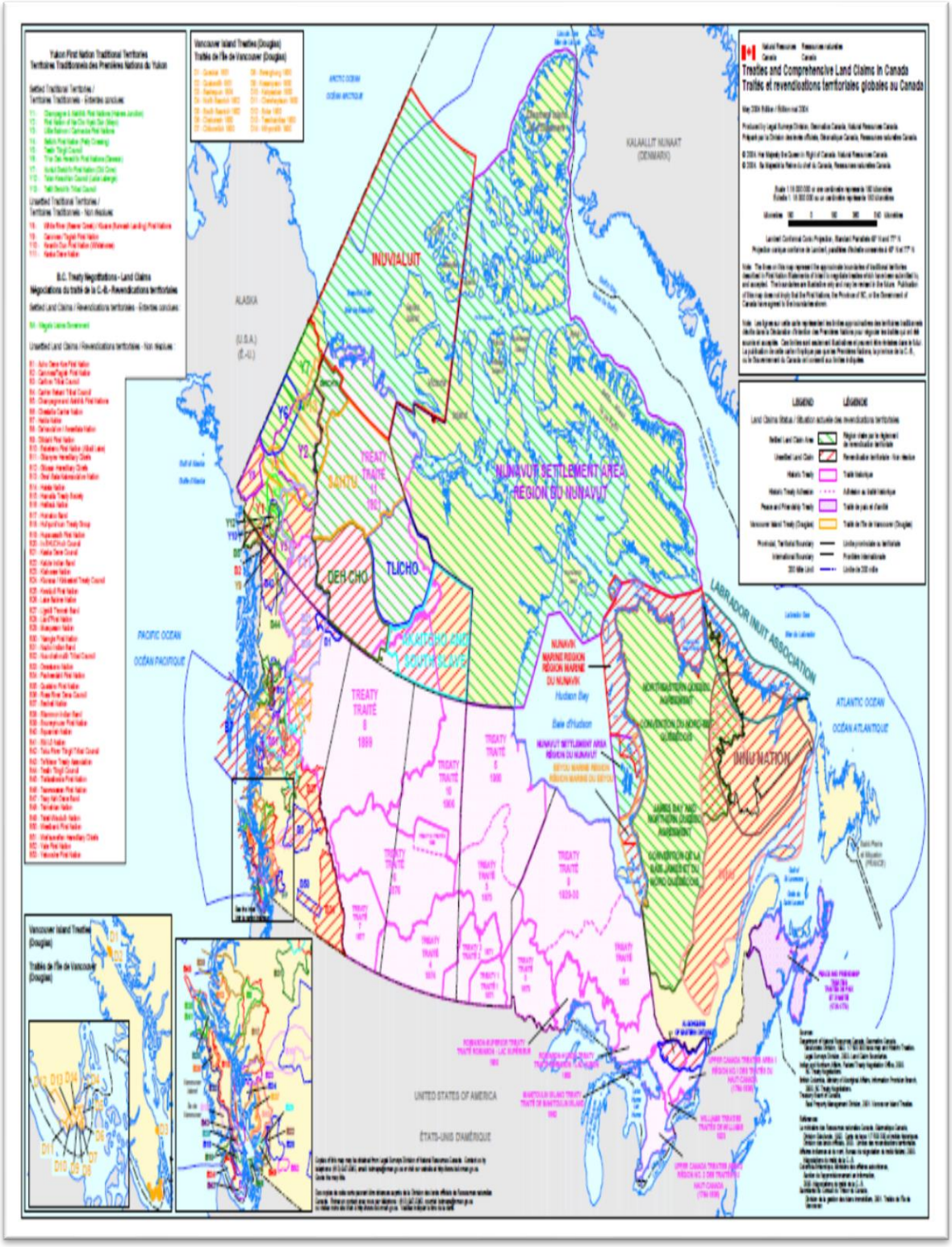
In July 2015, the government of Canada released a policy framework for implementing fiscal arrangements with self-governing Indigenous groups where the government is committed to ensuring that modern treaties and self-government agreements continue to contribute to strengthened and renewed relationships with Indigenous groups across Canada. The effective implementation of reasonably stable, predictable, and flexible fiscal arrangements is an essential component of success for self-government.

In March 2016, the Canadian government concluded individual fiscal arrangements with more than 25 Aboriginal governments as part of the self-government negotiation process, which are renewed on a periodic basis.

Based on many years of experience, the government has identified the need to improve its approach to these self-government fiscal arrangements, and will work collaboratively with self-governing Indigenous groups to develop an improved fiscal policy framework that will strengthen self-governing Indigenous groups and their relationship with the Government of Canada.

The Government of Canada also has an Own-Source Revenue policy which takes into account the ability of self-governing Indigenous groups to contribute to the costs of their own government activities when determining the level of federal transfers, and what is included and excluded in the calculation. [1310]

[1310] Government of Canada, online at: https://www.rcaanc-cirnac.gc.ca/eng/1438009865826/1551196364246 (Accessed May 2020).



Map 26: Canada Treaties and Land Claims[1311]

[1311] Trent University Treaty Recognition Week, Canada Treaties and Land Claims map online at https://www.trentu.ca/education/sites/trentu.ca.education/files/documents/TrentUSchoolofEd_TreatiesWeek_ResourcePackage.pdf (Accessed May 2020).

Forms of Self-Government

As noted above, a number of these comprehensive Treaty settlement agreements have included a self-government component with at least three types of self-government forms available:

- Guaranteed Participation;
- Public Government; and
- Coordinated Ethnic Government.

In addition, examples of Indigenous co-management in Canada within these self-government models are typically categorised as 'land-claims based' – arising from obligations under comprehensive land claim settlements between First Nations and government; or 'crisis-based' - a result of real or perceived resource crises.[1312] Indigenous co-management agreements also tend to fall into two additional categories:

1. co-management structures that establish a relationship of equal partnership between First Nations and government; and
2. community-based co-management arrangements that incorporate First Nations as one of many local interest groups with a legitimate stake in environmental management.[1313]

Furthermore, co-management arrangements may be area-specific or relate to a particular species or resource.[1314]

Guaranteed Participation – Co-Management Structures

One self-government approach found in land claims agreements in Canada and relevant for EBM and shared governance jurisdiction is guaranteed participation in public structures of government. Guaranteed participation is an important element in all land claims agreements, and the key governmental element in the earlier agreements. In Nunavut, the key governmental element is in the creation of a new territory in which Inuit constitute a majority, while in the Yukon, it is separate self-government agreements. Typically, Indigenous peoples are guaranteed a certain proportion of seats on an administrative, advisory or decision-making body. The JBNQA Inuit have guaranteed representation in fields such as education, game, environmental and development control and justice.

Co-Management Structures – Shared jurisdiction?

Comprehensive land claims agreements have been negotiated throughout Canada to secure Indigenous participation in decision-making and shared governance jurisdiction at the regional and sub-regional levels through co-management structures. A bottom line for all

[1312] Scott, C, 'Co-Management and the Politics of Aboriginal Consent to Resource Development: The Agreement Concerning a New Relationship between Le Gouvernement du Québec and the Crees of Québec,' in Michael Murphy, M, (ed) *Canada: The State of the Federation 2003: Reconfiguring Aboriginal-State Relations* (McGill-Queen's University Press, Montreal, 2005) 133 at 134.

[1313] Above.

[1314] Above.

Indigenous proposals for self-governance to realise internal self-determination rights and responsibilities is shared power and jurisdiction through co-governance arrangements.

James Bay and Northern Quebec Agreement 1975 - Co-Management

The James Bay and Northern Quebec Agreement 1975 (JBNQA) provides for a number of regional boards and commissions to administer lands, to look after Treaty entitlements, to stimulate economic development and to provide public services in the region concerned. Although these agencies are established through legislation, they are explicitly provided for in the comprehensive land claims agreement. Furthermore, the Cree Indians have reserves and status under the Indian Act, while the Inuit parties to the JBNQA have won municipal status for their communities under Quebec legislation. Providing for Indigenous representation on regional boards and commissions like the JBNQA is one method of securing Indigenous participation in regional affairs.

The JBNQA established a hunting, fishing and trapping co-coordinating committee to administer the JBNQA's fish and wildlife management regime. Indigenous and Crown parties are represented equally and other corporations attend as observers. Committee members can change at the discretion of the parties and the chair rotates annually among the parties. The committee is limited to an advisory role designed to review, manage and supervise the management regime but the ultimate authority remains with the Crown, with certain exceptions for establishing upper-kill limits. Recommendations are forwarded to the Minister who may accept, reject or alter them. The sole obligation of the Minister is to inform the board of the reasons for his/her decision. There is a technical secretariat funded by the Crown who supports the board. However, the Cree and Inuit must pay their own costs of participation. At the local level, there are community landholding corporations that manage the exclusive harvesting rights of the Indigenous beneficiaries and provide authority over sport hunting, fishing, outfitting and non-Indigenous access on Category I and II lands. In order to support these corporations, the parties have created expensive research departments.[1315]

The Cree and Inuit have been not surprisingly dissatisfied with the results of the co-management regimes created under the JBNQA. The Indigenous parties regarded these arrangements, as partnerships with the Crown, believing the JBNQA would secure their lands and way of life in exchange for enabling certain developments. The Indigenous peoples also believed the JBNQA would be implemented in good faith and in a cooperative spirit.[1316] In practice, harvesting rights and environmental protection have proven subordinate to the right to development. Furthermore, instead of creating a partnership, the JBNQA excluded the Cree and Inuit from any significant influence, power and jurisdiction authority on development, use and allocation of natural resources.

The Cree and Inuit feel that the management regime did not help them to control events affecting wildlife and local resources, despite the intent of the regime. There have been significant challenges surrounding the mandate, structure and operation of the advisory

[1315] Royal Commission on Aboriginal Peoples (RCAP), *Restructuring the Relationship* (Appendix 4b at section 1, Ottawa, 1995).

[1316] Usher, J, *North Project Area 5: Land, Resource and Environment Regimes Contemporary Aboriginal Land, Resource and Environment Regimes Origins, Problems and Prospects* (Report prepared for Royal Commission on Aboriginal Peoples Land, Resource and Environmental Regimes, P.J Usher Consulting Services, 1996) at 5.4.1.

committees. The Crown never intended to delegate management to the boards or to make them instruments of the nation-state.[1317] The idea of consultation was quite innovative in the early 1970s, but today the right to be consulted exists for all Indigenous groups across Canada. While there have been some improvements in environmental protection, it is not clearly integrated into the Crown's decision-making processes. Hence, given its complexity and perhaps political will or lack thereof, the JBNQA has not been fully implemented after 50 years because (although very complex), it appears that it was not fully implement-able.

New Agreement Concerning the New Relationship Between the Government of Quebec and the Crees of Quebec 2002

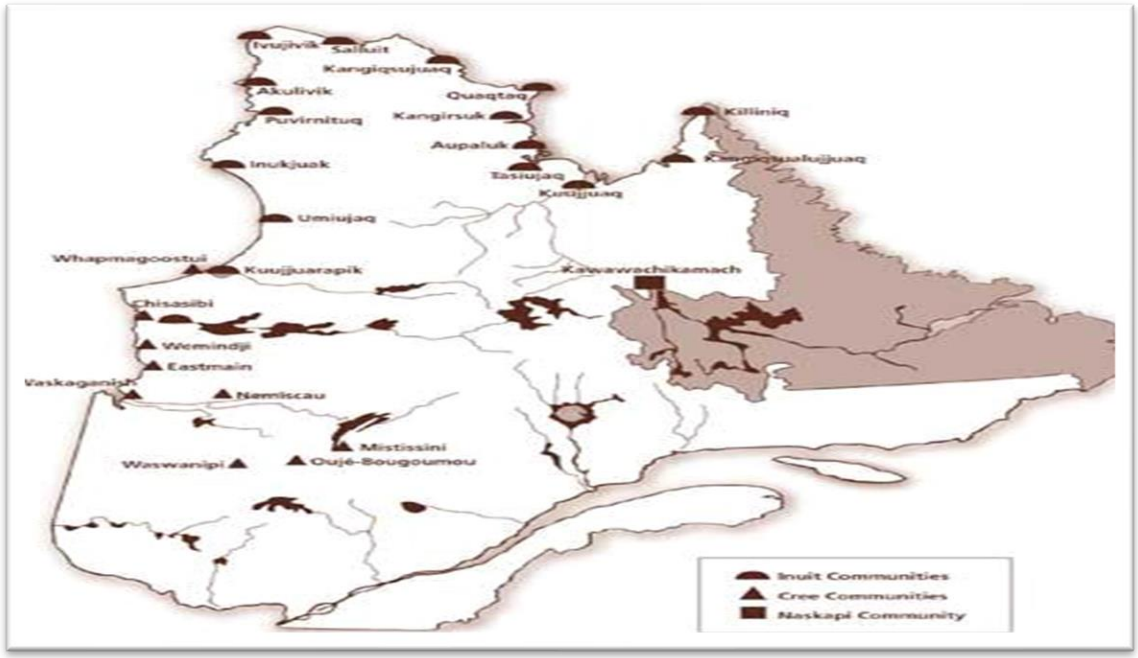
Twenty-five years after the JBNQA very few Cree were employed in the development of the territory, they had little control over resource management and lacked housing and community infrastructure. In response to widespread dissatisfaction and given new development projects in forestry, mining and hydro-electricity, the parties went back to the negotiation table. Under the new agreement, the James Bay Cree were to be paid $70 million a year for the next fifty years for hydro-electric development. $850 million was also promised in construction contracts for Cree companies, training and employment programs for permanent and construction jobs, and transmission lines to Cree communities. In an important symbolic move, both parties acknowledged the 'nation to nation' relationship between Quebec and the Crees based on respect and cooperation. A new co-management agreement was also negotiated, which forced the government to take the best interests of the Cree into account but still limited the Cree to a consultative role. The New Agreement states:

- the continued application of the provincial forestry regime still applies, but the Cree traditional way of life has to be taken into account, sustainable development is to be better integrated into the process of forestry management and the Cree are to participate in several management processes;
- new management units will be created by a Cree-Quebec working group;
- sites of special interest to the Cree are to be mapped by the Cree in coordination with the Ministry of Natural Resources;
- the new Cree-Quebec Forestry Board is to create longer-term planning and management of forestry activities;
- community level working groups will be created with an advisory role.

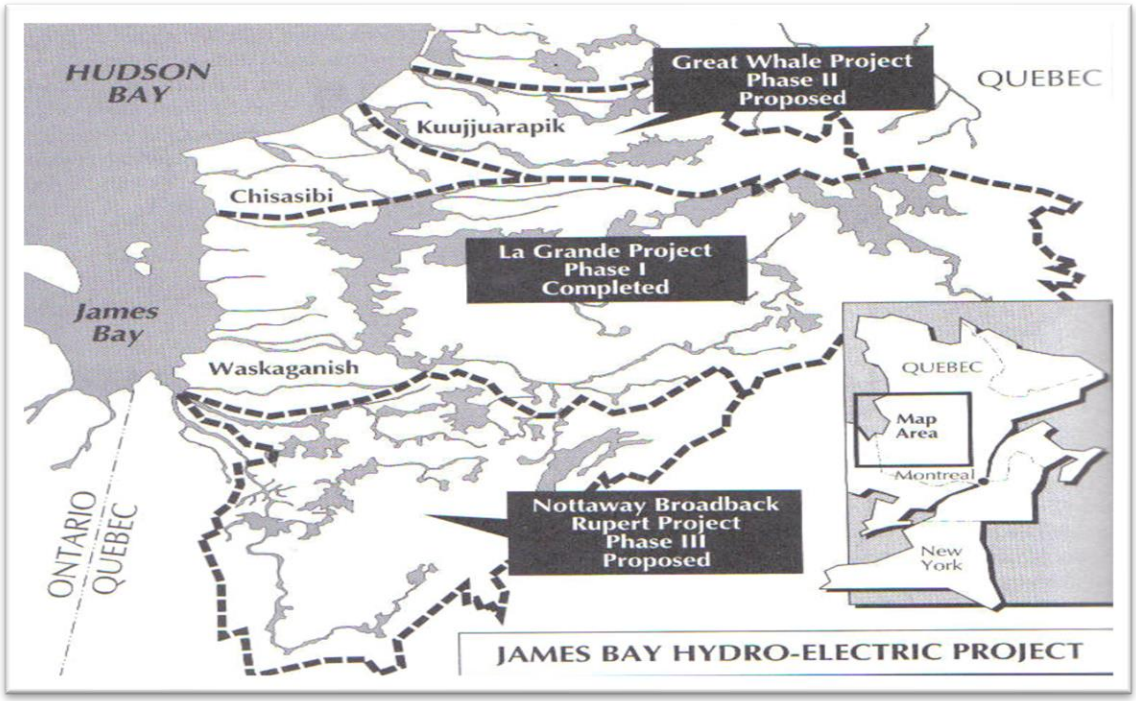
In terms of shared jurisdiction, the James Bay Cree share in their co-management institutions, which includes a cultural perspective and active cultural involvement with the 2002 agreement.

In addition, Canada prepares an annual report on the implementation of the JBNQA and Northeastern Quebec Agreement. Although no longer a statutory requirement under the James Bay and Northern Quebec Native Claims Settlement Act 1977, the Standing Committee on Public Accounts recommended in 1988 that the Minister of Aboriginal Affairs and Northern Development Canada table annual reports on all native claims settlements.

[1317] Above.



Maps 27 & 28: JBNQA Indigenous Communities[1318]



[1318] Government of Canada, online at https://www.rcaanc-cirnac.gc.ca/eng/1100100030830/1542984701672?wbdisable=true (Accessed May 2020).

Inuvialuit Final Agreement Co-Management Regime 1984

The Inuvialuit Final Agreement (IFA) 1984 created several Inuvialuit institutions and five co-management bodies, founded on the recognition of Inuvialuit harvesting, land and resource rights. These rights give the Inuvialuit exclusive rights to harvest furbearers and the preferential right to harvest most other species of wildlife. Exclusive rights are limited to subsistence, thus omitting exclusive commercial rights. The co-management regime was established to achieve the following objectives:

- integrate the interests of harvesters and government in resource management;
- integrate wildlife management jurisdictions;
- Integrate wildlife and habitat management;
- integrate traditional and scientific knowledge;
- balance conservation interests with those of development;
- compensate harvesters for loss and future loss from development and;
- promote self-management and self-regulation among harvesters backed by government regulations.

The management scheme created several management institutions:

- Hunters and Trappers Committees (HTC) - Inuvialuit beneficiaries advise and collect data for the Game Council on issues of local concern, establish by-laws in their area regulating harvesting rights and can enforce lawful use of resources;
- Inuvialuit Game Council charged with the responsibility (along with the Inuvialuit Regional Corporation (IRC)) of overall implementation of the IFA. It has 13 representatives – two from each HTC and a Chair. The Council appoints members to the joint boards and distributes information, allocates quotas and represents Inuvialuit wildlife interests nationally and internationally;
- Fisheries Joint Management Committee represents equally the Crown and Inuvialuit designed to assist both parties in administering their respective responsibilities. It determines harvesting levels, maintains a registration system and regulates general public fishing. It also advises the Minister on policy and regulation issues;
- Wildlife Management Advisory Council provides advice to the appropriate ministers and other bodies on matters relating to wildlife policy and administration of harvesting. It also prepares a wildlife conservation and management plan for the whole western Arctic region;
- Environmental Impact Screening Committee examines all development proposals to determine the potential negative impact on the environment and harvesting. Proposals projecting a significant impact are referred to a Review Board, which recommends to the Minister whether the project should continue;
- Joint Secretariat provides administrative and technical support services to all joint committees. It administers funding, provides staff to respond to issues, shares information amongst the parties and collects information for the harvest study.[1319]

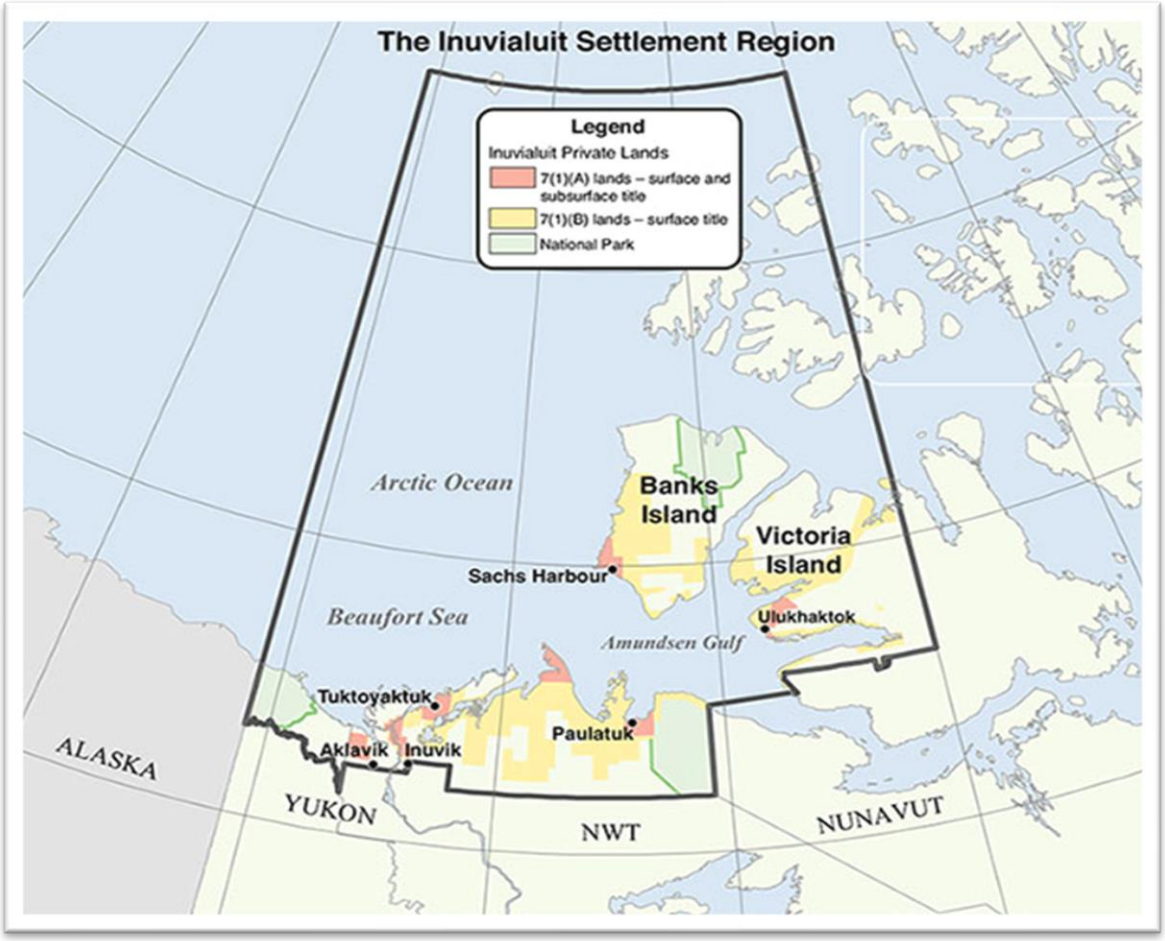
[1319] Royal Commission on Aboriginal Peoples (RCAP), *Restructuring the Relationship* (Appendix 4b, Ottawa, 1995) at section 1.

The IFA goes further than the JBNQA in that it creates advisory boards, although it falls short of real power and jurisdiction sharing, given that no recommendation from one of the advisory boards has been overturned.[1320] The IFA has allowed for a high-degree of Inuvialuit integration and participation, so that the Inuvialuit appear to be largely in control of their resources. This success has been attributed to Inuvialuit members' fluency in English, cultural comfort between the parties, a transparent decision-making process, trust in the quality of the technical staff and chairs of the boards and trust in the strength of the IFA itself.[1321] Clear funding agreements also ensured operations could run effectively. The clarity of both party mandates has made co-operation and decision-making much easier as well as allowed for greater flexibility in the operation of the IFA while still retaining its ultimate vision. The IFA has resulted in a better understanding of the resources and wildlife populations and has protected the environmental integrity of the region including over the ocean.[1322] The biggest challenge with the IFA is the Crown's unwillingness to change its power structure or to compromise its ultimate jurisdiction, which uncertainty undermines the Inuvialuit's right of internal self-determination and could undermine their ability to protect their territory and culture.

[1320] Usher, J, *North Project Area 5: Land, Resource and Environment Regimes Contemporary Aboriginal Land, Resource and Environment Regimes Origins, Problems and Prospects* (Report prepared for Royal Commission on Aboriginal Peoples Land, Resource and Environmental Regimes, P.J Usher Consulting Services, 1996) at 5.4.2.
[1321] Above.
[1322] Craig, D, 'Recognising Indigenous Rights through Co-Management Regimes: Canadian and Australian Experiences' in *New Zealand Journal of Environmental Law* (Vol. 199, 2002) at 25-28.

Map 29: Inuvialuit Treaty Settlement Region[1323]

[1323] Inuvialuit Map online at https://www.nationalia.info/new/10581/inuvialuit-to-receive-autonomy-within-canada (Accessed May 2020).



Map 30: Inuvialuit Treaty Settlement Region[1324]

Nisga'a Final Agreement 2000 - Co-Management

The Nisga'a Final Agreement 2000 (NFA) allows the Nisga'a nation to have complete jurisdiction over fish, wildlife and forestry within their own territory. Beyond the Nisga'a territory, the Nisga'a are to be involved in management committees providing advice and recommendations to federal and provincial governments. In addition, Nisga'a are allocated rights to salmon according to a harvest agreement and are encouraged to participate in the commercial fishing industry. The Nisga'a received an annual allocation for moose, grizzly bear and mountain goat and work with the Minister of Environment, Lands and Parks regarding management.

Although there is little information available as to the success of the Nisga'a co-management arrangement, the NFA seems promising. The Crown has transferred unprecedented governance jurisdiction over wildlife, forestry, water, the marine estate at the mouth of the Nass River and mining to Nisga'a Lisims Government (NLG), highlighting that the Nisga'a have real decision-making power. In the 2002 Annual Report of the NFA, Nisga'a Lisims Government expressed their satisfaction with the NFA and noted the growth of their

[1324] Inuvialuit Final Agreement, Government of Canada online at https://www.rcaanc-cirnac.gc.ca/eng/1427987089269/1543249556315 (Accessed May 2020).

economy and the growing health of their marine and wildlife populations because of conservation efforts.[1325] Nisga'a control over their own governing institutions, including this co-management regime would appear to be parallel cultural institutions.

Map 31: Nisga'a Treaty Settlement, Northern B.C

[1325] Nisga'a Lisims Government, *'Prosper' - Nisga'a Final Agreement 2002 Annual Report*, (Published under the authority of the Nisga'a Nation, the Province of British Columbia and the Government of Canada, 2002).

Labrador Inuit Land Claims Agreement 2003 - Co-Management

The Labrador Inuit Land Claims Agreement (LILCA) was signed in August 2003, after 25 years of negotiations and sets out arrangements for land ownership, resource sharing and self-government. LILCA provides for the establishment of the Labrador Inuit Settlement Area (LISA) over 72,520 sq kilometres in northern Labrador, and includes fee simple ownership of 15,800 sq kilometres known as Labrador Inuit Lands (LIL). The self-government provisions of LILCA require the preparation of a constitution, as well as the creation of an Inuit Central Government known as the Nunatsiavut Government (NG).[1326] Five local governments were established, along with community corporations to represent the interests of Inuit residing outside of the settlement area.[1327] NG and each community government is a legal entity with legal personality to enter into contracts, hold property, raise, borrow and expend money, sue and be sued, and to form corporations and other legal entities.[1328] The legislative powers and jurisdiction of the NG extend to the making of laws applicable to the Inuit in LIL with respect to culture, language, education, health, social services as well as law enforcement and justice.[1329] In terms of institutional representation, the LILCA guarantees Labrador Inuit representation in Part 2.21:

> **Warranty of Representation**
> Labrador Inuit Association represents and warrants to Canada and the Province that it represents Inuit.

LILCA established the Torngat National Park reserve as well as several other protected areas with an advisory co-management board created with equal representation from the Inuit and the Federal and Territorial governments, complete with a clear mandate, budget and decision-making process (consensus decision-making, with democratic voting as a last resort). LILCA also outlines how future protected areas would be established, requiring the completion of a protected area agreement with the NG. The carrying out of any archaeological activities within national parks or reserves also requires consultation with the NG. Further, any land development requires a comprehensive plan to be created by the Province and the Nunatsiavut Government. Federal and provincial environmental assessment laws will continue to apply across the Settlement Area.

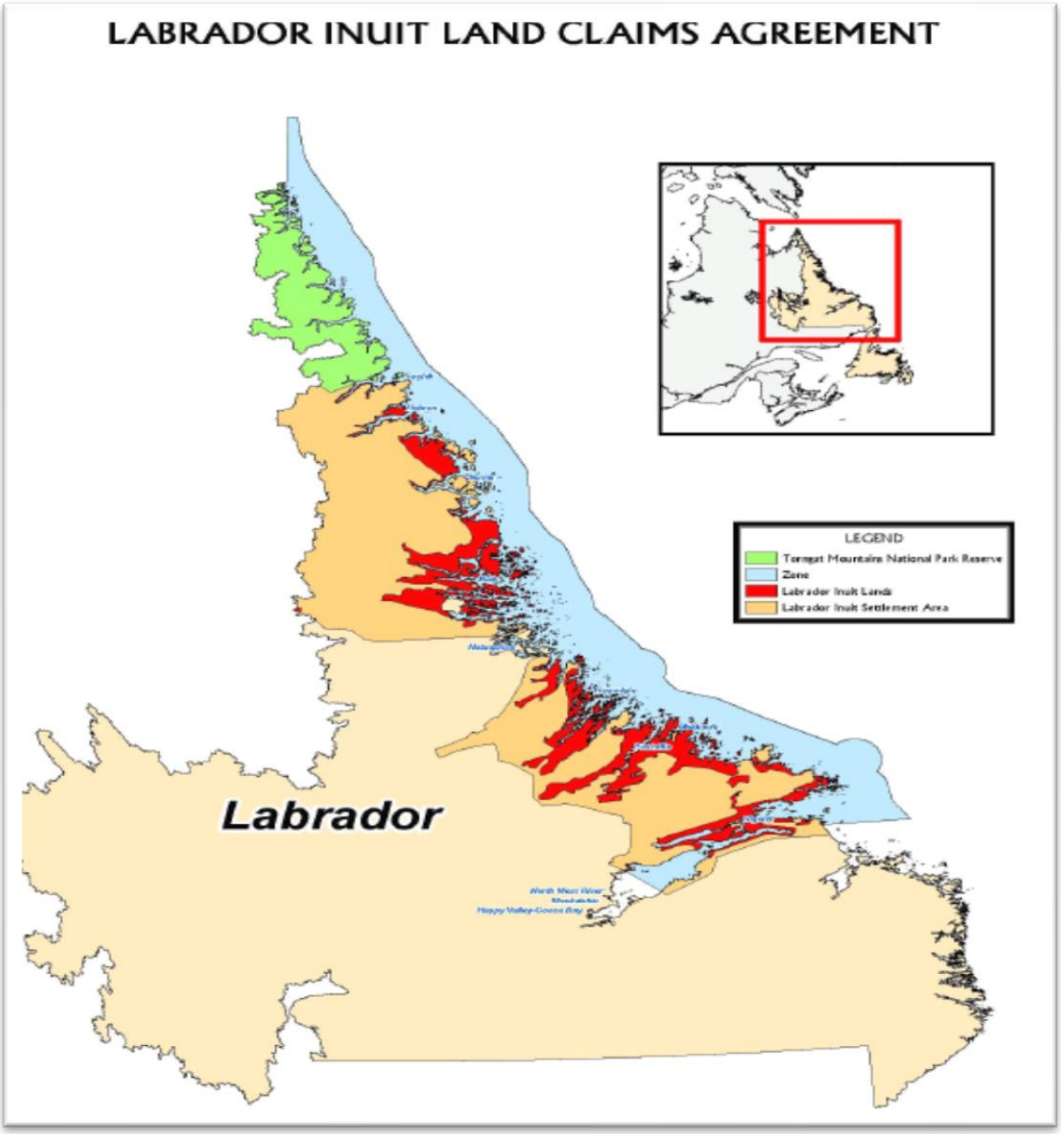
Labrador Inuit have rights to harvest wildlife, plants, fish and marine mammals for food and social purposes throughout the LISA. The Crown upon recommendation by NG will determine

[1326] Canada, Newfoundland and Labrador and the Inuit of Labrador, *Labrador Inuit Lands Claims Agreement, 2003* (Her Majesty the Queen of Canada, Her Majesty the Queen of Newfoundland and Labrador and the Inuit of Labrador, Ottawa, 2003), Chapter 17: 'Labrador Inuit Self-Government'. Online at: http://www.laa.gov.nl.ca/laa/liaclaims/pdf/complete.pdf (Accessed March 2020).
[1327] Above, Chapter 17.38 and Schedules 17-A, B, C, D and E. Community Corporations are established pursuant to the Municipalities Act 1999.
[1328] Above, Part 17.4.1.
[1329] Above, Chapter 17. Parts 17.5 – 17.37.

any limits. With some exceptions, the NG will control who may harvest plants, wildlife, and fish within the Settlement Area. Existing commercial fishing licenses will not be affected; however, the Inuit will receive a percentage of revenues from new commercial fishing licenses. Compensation may be payable where developers carry out projects that adversely affect wildlife, fish, habitat or harvesting activities of the Inuit.

As a co-management regime, LILCA is strong in terms of the legislative and political strength of the new governing body, the Nunatsiviut Government, but the Crown remains unwilling to transfer to the Inuit full jurisdiction over the management of natural resources including the coastal marine estate, although there are consultation requirements and a co-management advisory board for the new National Park. Still, if the recommendations coming from these new structures are reasonable and supported by the whole board, the Inuit have the possibly of playing a key role in the resource management of the area. LILCA also shows a genuine effort to appropriately accommodate Inuit culture, language and values, with a focus on consensus building and Inuktitut language rights.[1330]

[1330] See Fagan, C, *The Successes and Failures of Indigenous Co-Management Regimes in Canada: Possible Ways the Waikato River Claim Settlement Process Can Learn from the Canadian Experience* (Waikato Raupatu Trustee Co. Ltd., Hamilton 2005).



Map 32: Labrador Land Claims Agreement[1331]

Public Government

Indigenous People are free to participate in the ordinary structures of public government throughout Canada and several have made significant contributions in recent times.[1332] Where Indigenous peoples constitute a potential majority of the electorate, their opportunity for influence is enhanced. Such is the case for the Inuit in the northeastern Arctic region of Canada or Nunavut.

[1331] Labrador Inuit Land Claims Agreement Map, online at: https://www.gov.nl.ca/exec/iias/files/map.pdf (Accessed May 2020).

[1332] For example, Elijah Harper, the Manitoba M.L.A; Nellie Cournoyea, former government leader of the Northwest Territories; Ethel Blondin-Andrews, M.P; and Paul Okalik, government leader Nunavut.

Nunavut Self-Government

For decades, Inuit of the central and eastern Arctic have been calling for the creation of a new territory which effort increased in 1976 when the Inuit Tapirisat of Canada submitted a proposal to the federal government requesting the creation of a new territory to be called Nunavut ('our land' in the Inuktitut dialect of the region). A 1982 plebiscite and several years of negotiations followed. A key provision of the Tungavik Federation of Nunavut land claim agreement, which was finalised in 1991, was the creation of a new territory. The Nunavut Settlement Agreement (NSA)[1333] committed Canada, the government of the North West Territories (NWT), and the Tungavik Federation of Nunavut to negotiate a political accord to deal with powers, financing and timing for the establishment of the Nunavut public government.

The NSA with the Inuit finalised in 1992-1993 provided for Inuit self-government, albeit public government. Article 4, NSA committed Canada to passing legislation to create a new Territory, the Nunavut Territory, with its own Legislative Assembly and public government, separate from the Government of the remainder of the Northwest Territories (NWT), and to that end a political accord was negotiated by the parties.[1334] Consequently, the Nunavut Act 1993[1335] (NA) was passed to establish the Territory of Nunavut and to provide for its public government. The Nunavut territory and public government were established on 1 April 1999. NG has jurisdictional powers and institutions similar to those of the government of the NWT. Inuit control through public government is premised upon the existence of an Inuit majority in Nunavut. Currently, 85% of the population of the region is Inuit hence the Nunavut government represents Inuit values and cultural traditions, apparently including the allowing of workers time off to pursue traditional activities such as seal hunts.

On 15 February 1999, residents of Nunavut held their first election for members of their Legislative Assembly and Paul Okalik was selected as the territory's first premier. The NA provides for the seat of Government to be designated by the Governor-in-Council, for the appointment of a Commissioner for Nunavut and a Deputy to exercise the powers formally exercised by the Commissioner of the Northwest Territories. The NA moreover, authorises the establishment of the Executive Council of the Nunavut and the Legislature with powers to make laws, including laws of general application that apply to all people or only in respect of Indians and Inuit. Among the laws that may be made are laws for the purpose of implementing the land claims agreement entered into by the Inuit and the Canadian Government.

The NA also authorises the establishment of the Supreme Court and Court of Appeal of Nunavut; the Nunavut Consolidated Revenue and associated procedures, the Nunavut Implementation Commission; the process for the retention of Crown lands and rights to beneficial use; and the process for the protection of cultural sites and property.[1336] The

[1333] *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada,* (Tungavik and the Department of Indian and Northern Affairs, Ottawa, 1993).

[1334] Above, Article 4.1.1.

[1335] The Nunavut Act 1993 (Statutes of Canada 1993, Ch. 28).

[1336] See generally Nunavut Tungavik *Nunavut '99: Changing the Map of Canada* (Nortext Multimedia Inc, Nunavut Tungavik Inc, Iqaluit, Nunavut, 2000). For a good discussion on Nunavut, see Jull, P & Roberts, S *The Challenge of Northern Regions* (Australian National University North Australia, Darwin, 1991); Jull, P, 'New Deal

legislative Assembly, Cabinet and territorial courts operate in the three official languages of the Territory - English, French and Inuktituk. With government departments and agencies set up in the twenty-eight communities throughout the territory, the Nunavut government is decentralised, responding to the political, cultural and economic needs of the region.

The Government was established in evolutionary stages over sixteen years with the Federal Government promising more than $1.2 billion in capital transfer payments to the people of Nunavut. Commenting on the Nunavut Settlement John Amagoalik noted:

> Through the settlement of our land claims and the rebirth of Nunavut, our generation has won back our right to determine our political future. … There is a resurgence of Inuit pride and we have become loyal Canadians.[1337]

The Government of Nunavut is a 'public government' not an 'ethnic form' of self-government. Indeed, the Nunavut negotiators conceded early to opt for a public government, which was a pragmatic decision that would assist them in their quest to achieve a self-governing territory. The Inuit people originally wanted an Inuit government but the negotiators urged them to eliminate 'nativeness', and 'separateness' because it would be unsuccessful. Yet by supporting a public government, they noted 'we can get the same thing.' The Nunavut negotiators always maintained their non-negotiable position of a separate territory with their own government. They were even willing to sacrifice the claim rather than give up and sign an agreement that did not include this crucial point.

The Nunavut public government and Nunavut land claim are both linked such as the number of Inuit employed in the public service being directly proportional to the number of Inuit in Nunavut society and respective expertise in required areas. An interesting innovation of the Nunavut public government entity is the fact that it has no political parties at the territorial level. Instead, the legislative assembly of the territory operates on the basis of consensus politics according to Indigenous decision-making, through consensus of the majority of its members rather than political party lines in contrast with other territorial and provincial legislative governments.

The Nunavut public government shares all of the principles of good government, democratic institutions, the rule of law, equality, respect for human rights, transparency, public participation and democratic elections like any territorial government but with a number of major differences. The Indigenous Inuit of Nunavut are the politically acknowledged majority who are governing and managing their own affairs consistent with Inuit values, culture and traditions, a largely Inuit public service, and a decentralised government. Indeed, Allen Maghagak, the former chief negotiator, stated:

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for Canada's North' in *North* (Vol. 1, 1999) at 5-10; Jull, P 'Reconciliation and Northern Territories, Canadian Style: The Nunavut Process and Product' in *Indigenous Law Bulletin* (Vol. 4, No. 20, 1999) at 4-7; and Jull, P, 'Nunavut: The Still Small Voice of Indigenous Governance' in *Indigenous Affairs,* (Vol. 3, 2001) at 42-51.

[1337] Nunavut Tungavik *Nunavut '99: Changing the Map of Canada* (Nortext Multimedia Inc, Nunavut Tungavik Inc, Iqaluit, Nunavut, 2000).

> Pressing for a Nunavut government was essential to make sure that our claims settlements covered everything. Past claims agreements dealt only with real estate and cash.[1338]

In terms of real political power and jurisdiction, Tom Molloy who was involved in the negotiations of Nunavut for the federal government, stated:

> The government of Canada was not keen about creating [Nunavut Inuit] boards that would have full decision-making powers. They were prepared to create boards that would have an advisory role … Ultimately, it was agreed that the treaty would provide a guarantee that there would be boards that would be called instruments of public government. In other words, the creation of a board and its responsibilities, functions, powers, objectives and duties would be set out in the treaty to function as instruments of public government.[1339]

Whether these Nunavut boards and Nunavut public government constituted authentic power and shared jurisdiction, or just delegated authority, Molloy implied:

> We were creating a new relationship, a relationship that balanced rights set out in the treaty with the role of public government and public government institutions. I believe that the creation of Nunavut is a current example of a successful partnership in pursuit of the public interest. … [In] Nunavut the Federal government, the Inuit, and the territorial government were willing to share some uncertainty and risk, and they found creative ways to find solutions, which would allow the common goals of each of the parties to be obtained.[1340]

Molloy concluded:

> We have the Nunavut model, which I say, is not self-government; it's public government, but as a result of a treaty, the Inuit have a role to be decision-makers in the public government process in a real way.[1341]

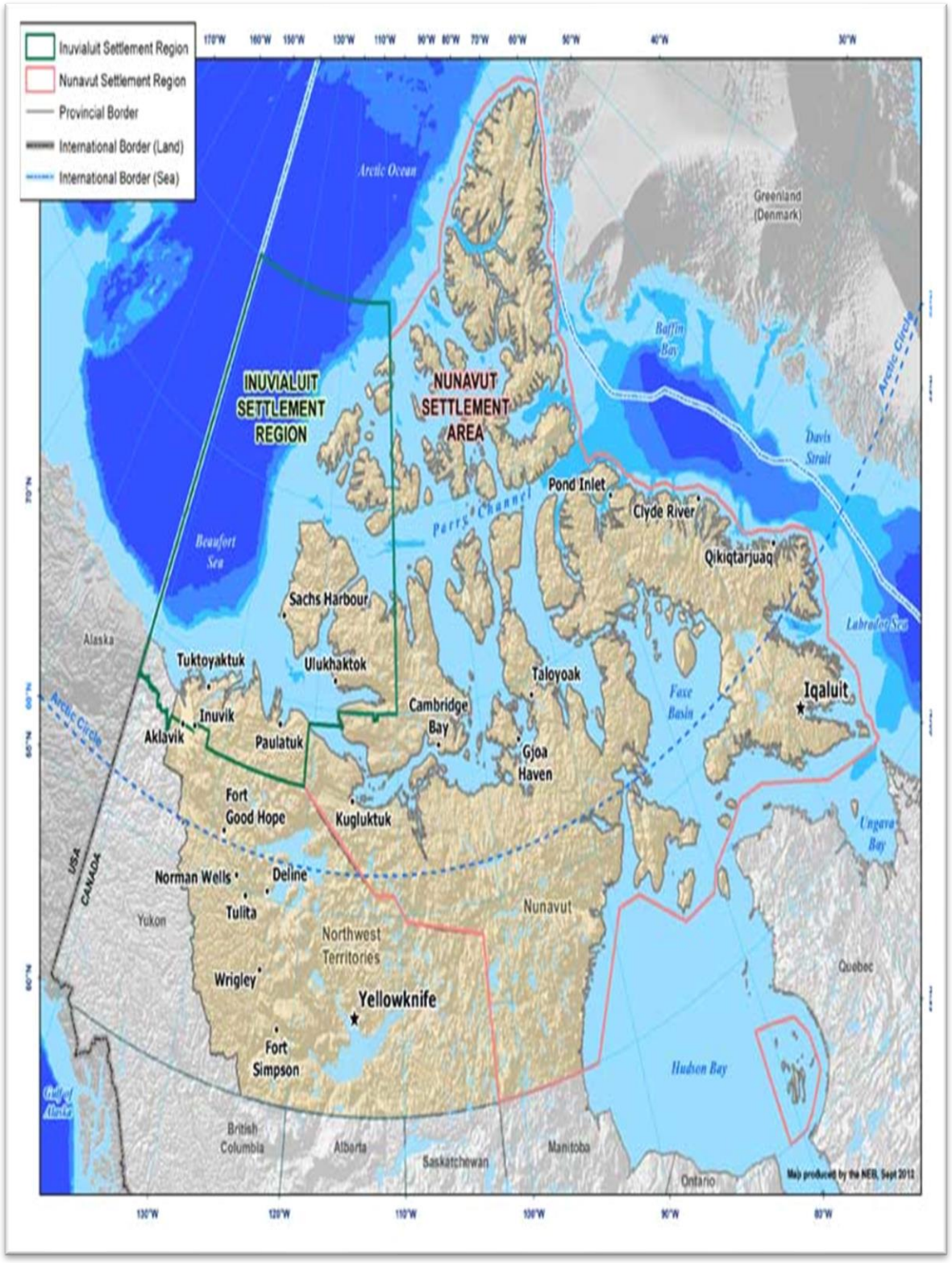
It would appear then that the Nunavut public governance model for the Inuit is a self-determining, self-governance model within existing mainstream governance structures that provides the Inuit shared governance jurisdiction over the territory, which includes the coastal marine estate.

[1338] Above.

[1339] Molloy, T, Government of Canada, 'Nunavut – Opportunities through Public Government' in BCTC, *Speaking Truth to Power III: Self-Government: Options and Opportunities* (B.C Treaty Commission, Vancouver, 14-15 March 2002) at 61.

[1340] Above.

[1341] Above.



Map 33: Inuvialuit and Nunavut Settlement Areas[1342]

[1342] Canada Energy Regulator, Government of Canada, online at https://www.cer-rec.gc.ca/glbl/nwt-nnvt-mp-eng.html (Accessed May 2020).

Kativik Public Government

The JBNQA provided for a form of public government for the Inuit signatories at the local level. The Act Concerning Northern Villages and the Kativik Regional Government 1978 (Kativik Act) applies to the territory of Quebec situated north of the 55th parallel. The Kativik Act established Inuit settlements in northern Quebec as northern village municipalities under provincial legislation. The Kativik Act and the institutions created by it are not of an ethnic character. Local and regional governments represent municipalities in which all residents, Indigenous and non-Indigenous, may vote, be elected and otherwise participate. Still, over 90% of the population in the area are Inuit and receive benefits under the JBNQA, hence the inevitable ethnic 'flavour' as it were, of this public government form.

Administrative Structure

The JBNQA provided for the enactment by the province of legislation establishing municipal community government and municipal regional government. Part I of the Kativik Act refers to the local level of government. Inuit settlements became, after receiving letters patent, 'Northern Village Municipalities.' The inhabitant's and ratepayers of every municipality form a corporation. Northern village municipal corporations may:

- enter into contracts and agreements;
- purchase lands and property for municipal purposes;
- found, maintain, assist, and subsidise bodies for industrial, commercial and tourist promotion; and
- assist in the furtherance of any social welfare enterprise of the population.[1343]

An elected council manages northern village municipal corporations. The Kativik Act outlines qualifications for municipal office, composition of the council, elections and procedures for passing and enforcing by-laws.

General Legislative Powers

Municipalities are empowered to make by-laws to secure the peace, order, good government, health, general welfare and improvement of the municipality. Municipalities have powers to make by-laws concerning:

- zoning and land use planning to the extent that by-laws do not affect the rights of Inuit Landholding Corporations;
- expropriation subject to the regulations of the Kativik Act;
- taxation for local purposes;
- regulation of buildings and other structures;
- public health and hygiene;
- parks, recreation and culture;
- regulation of roads, traffic and transportation; and
- public works.[1344]

[1343] Act Concerning Northern Villages and the Kativik Regional Government 1978, Part I.
[1344] Above.

By-laws may not be contrary to the laws of Canada or of Quebec, or inconsistent with any special provision of the Kativik Act. Municipal council by-laws shall not be contrary to the ordinances of the Regional Government in matters of competence. The Quebec Minister of Municipal Affairs is empowered to disallow any by-law.

Regional Organisations - Aggregation

Part II of the Kativik Act created the Kativik Regional Government (KRG) who has the powers of a northern village municipality, described in Part I of the Kativik Act, over those parts of the territory that are not part of the village corporations, and regional powers over the whole territory including the municipalities; and it exercises regional powers. KRG has the general powers of a corporation under the Civil Code of Quebec and it is competent in matters of:

- local administration and assistance to northern village municipalities;
- transport and communications;
- regional police; and
- advising the provincial government about manpower training and utilisation.

KRG's internal structure, operation and procedures for making by-laws and ordinances are set out in the Kativik Act. A council and executive committee govern KRG; the administration of its business is governed by officers (manager, secretary and treasurer) and by department. The council is composed of regional councillors elected by the municipalities.

Certain provisions of the JBNQA, not incorporated into the Kativik Act, give additional functions, including:

- administration of the Inuit hunting, fishing and trapping support program;
- acting as a regional health and social service council charged with promoting the advancement of public health; and
- acting in an advisory capacity in matters related to the administration of justice, protection of the environment, the Kativik School Board, and the Kativik Regional Development Council.

Kativik has paramountcy in relation to municipal by-laws. It has the power to establish minimum standards for building and road construction, sanitary conditions, water pollution and sewerage. It may establish radio and television aerials, public transportation services and a regional police force for the enforcement of its ordinances and of other laws. Subject to the powers of Federal and provincial governments, Kativik may make laws governing harvesting activities and hunting and fishing by non-indigenous peoples. The Quebec Minister of Municipal Affairs, however, is empowered to disallow any by-law passed by Kativik.

The federal and Quebec governments have been negotiating with the Makivik Corporation, which represents the Inuit, to further the self-government powers gained by the Inuit of Northern Quebec pursuant to the JBNQA. The Makivik Corporation (Makivik) was created on 23 June 1978 to 'administer the implementation of the JBNQA and invest the $90 million in

compensation, paid over 20 years from 1975 – 1996.' The mandate of Makivik is to foster socio-economic development among the 14 Inuit communities that are signatories[1345] to the JBNQA.

In terms of realising Inuit internal self-determination rights and responsibilities by controlling their own governance institutions, processes and systems, Kativik Government would be close to parallel Inuit cultural governance institutions.

[1345] The traditional territory of the Inuit communities of the JBNQA is called Nunavik. The population in 2016 was approximately 13,188. See 'Nunavik's population grows, but slows from last census: StatsCan,' in Nunatsiaq News, (9 February 2017) online at: https://nunatsiaq.com/stories/article/65674nunaviks_population_grows_but_slows_from_last_census/ (Accessed May 2020).

Map 34: Nunavik - the vast territory administered by the Kativik Regional Government[1346]

[1346] Arctic and Northern Studies, University of Washington, online at https://guides.lib.uw.edu/research/arctic/nunavik (Accessed May 2020).

Inuvialuit Final Agreement Public Government

The Inuvialuit Final Agreement (IFA) 1984 has no specific provision for self-government.[1347] Instead, the IFA represents an example of comprehensive co-management for resource management and economic development. According to Connelly, self-government by the Inuvialuit in the Western Arctic Region is largely impractical due to the fact that through the vast settlement area, there would be several overlapping claims to social services from both Indigenous and non-Indigenous peoples.[1348] Instead, the Inuvialuit pursued with the federal and territorial governments a form of regional public Indigenous government that takes over delivery of territorial government programs. In this sense, the Inuvialuit control social service delivery and other financial issues *related* to self-government, but for practical purposes, it would take on a community approach.[1349]

Several mechanisms have been established both to integrate the Inuvialuit into formal decision making for resource management and economic development. The IFA created several Inuvialuit institutions and five co-management bodies, founded on the recognition of Inuvialuit harvesting, land and resource rights. Such rights give the Inuvialuit exclusive rights to harvest furbearers and the preferential right to harvest most other species of wildlife. Exclusive rights are limited to subsistence, thus excluding exclusive commercial rights.

For Inuvialuit economic development, a number of corporate structures to administer and manage settlement funds, lands and other benefits were established:

- The Inuit Regional Corporation (IRC), the umbrella organisation for the Inuvialuit, composed of representatives from each of the six community corporations, to receive the settlement funds and lands and to coordinate Inuvialuit implementation efforts;
- Six Inuvialuit Community Corporations, to control the IRC through elected representatives to the board.
- The Inuvialuit Land Corporation to administer the settlement lands; and
- The Inuvialuit Development Corporation and the Inuvialuit Investment Corporation to carry on business on behalf of the Inuvialuit and to invest settlement funds on behalf of beneficiaries.

The IFA guarantees that Inuvialuit will be a part of making any changes to public government in the Northwest Territory and that even though they are not considered status Indians, Inuvialuit will be treated the same as other Indigenous groups.[1350] In terms of realising internal self-determination rights and responsibilities by controlling their own governing

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[1347] Connelly, R, Regional Director of Inuvik Region, (Department of Executive, GNWT, 1995) cited in 'Yukon Umbrella Final Agreement, 1993' in ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis* (Ministry of Aboriginal Affairs, BC, Federal Treaty Negotiations Office, December 1995) at 4-5; and ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: Final Report* (Ministry of Aboriginal Affairs, BC and Federal Treaty Office, BC, July 1995) at 4-5.

[1348] Above.

[1349] Department of Indian Affairs and Northern Development, *Western Arctic (Inuvialuit) Claim Implementation Annual Review 1990-1991,* (Department of Indian Affairs and Northern Development, Ottawa, 1991); Department of Indian Affairs and Northern Development, *Western Arctic (Inuvialuit) Claim Implementation Annual Review, 1991-1992,* (Department of Indian Affairs and Northern Development, Ottawa, 1992); Department of Indian Affairs and Northern Development, *Western Arctic (Inuvialuit) Claim Implementation Annual Review,1992-1993,* (Department of Indian Affairs and Northern Development, Ottawa, 1993).

[1350] Cited from the Inuvialuit website: www.beaudelselfgov.org/inuvialuit.html (Accessed January 2020).

institutions and processes, the IFA as a public government form includes active cultural involvement structural arrangements.

Map 35: Inuit Nunangat (Homeland) Treaty Settlement Agreements in Canada including Nunavut[1351]

[1351] Inuit Treaty Settlement Map, Research Gate online at: https://www.researchgate.net/figure/Map-of-Inuit-Nunangat-The-darker-the-colour-the-more-recent-the-land-claims-settlement_fig1_323124614 (Accessed May 2020).

Coordinated Ethnic Self-Government

The coordinated ethnic government approach provides for a governmental structure, which is ethnic at the local level, but coordinated with provincial or territorial structures at the regional and provincial or territorial levels. Examples of ethnic self-government include the JBNQA 1975 and the Sechelt Indian Band Self-Government Act 1986.

James Bay and Northern Quebec Agreement 1975, Northeastern Quebec Agreement 1978

The Cree and Naskapi First Nations of northern Quebec were the first indigenous groups to negotiate self-government as part of their land claim agreements, the James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement (JBNQA) in 1975 and 1978 respectively. Under the JBNQA, the James Bay Cree have governments, which are ethnic at the local level, exercising the powers of a band but without the ministerial or cabinet controls in the Indian Act. These local governments are coordinated with provincial structures at the regional level where there is a Cree Regional Authority. The Inuit have public, not coordinated ethnic, local government structures, as discussed above, which they dominate demographically, and a coordinated regional government, the Kativik Regional Government. Both the Cree and the Inuit have guaranteed participation in advisory bodies.

The JBNQA obligated the federal government to recommend to Parliament special legislation respecting local government and land administration for the Cree Indians of the James Bay Territory. These provisions for local government were implemented pursuant to the Cree-Naskapi (of Quebec) Act (CNA) 1984, which replaced the Indian Act for the Cree and Naskapi,[1352] and limited the responsibilities of the federal government in the day-to-day administration of band affairs and lands. The nature and scope of the CNA was pre-determined in many respects by the JBNQA from which it emerged and as such, the CNA operates in conjunction with the JBNQA.

Governance Structure

Separate systems of municipal government were established for the Cree and Inuit at both local and regional levels. Each of the nine Cree and Naskapi Bands were incorporated and have the 'capacity, rights, powers and privileges of a natural person' subject to the limits declared by the JBNQA.[1353] The Cree band councils were invested with local governmental powers over 1A lands;[1354] Village Corporations managed 1B lands as municipalities under provincial law, and Cree bands at the regional level. Each corporation and its Category IA and IA-N lands constitute a municipality or a village under the Quebec Cities and Towns Act. Band corporations have by-law powers similar to those possessed by local governments under

[1352] Cree-Naskapi (of Quebec) Act 1984, ss. 5, 13, 15

[1353] Above, ss. 12-14.

[1354] Above, s. 21.

provincial legislation. In addition, there is provision for Indigenous involvement in the delivery of community services such as education, health, and community law enforcement.[1355]

In general, band corporations have by-law powers similar to those possessed by a local government under provincial legislation. The CNA recognised local Indigenous government powers and established a system of land management. Section 12(1), CNA transformed the James Bay Cree Indian Act bands into separately constituted corporations with good governance and management objectives to make by-laws:

> a) to act as the local government authority on its Category IA or IA-N land;
> b) to use, manage, administer and regulate its Category IA or IA-N land and the 15 natural resources thereof;
> c) to control the disposition of rights and interests;
> d) to regulate the use of buildings;
> e) to use, manage, and administer its moneys and other assets;
> f) to promote the general welfare of the members of the band;
> g) to promote and carry out community development and charitable works in the community;
> h) to establish and administer services, programs and projects for members;
> i) to promote and preserve the culture, values and traditions of the Cree;
> j) to exercise the powers and carry out the duties conferred or imposed on the band ... by and Act of Parliament.[1356]

A Band Corporation acts through its Council in exercising its powers and carrying out its duties under the CNA.[1357] The CNA also establishes guidelines for Council meetings, procedures for passing and enforcing by-laws and procedures for holding referenda. Each Band Corporation has also established its own election by-law. The election by-law must be approved by the electors of the Band, and by the Minister. Under the terms of the CNA, the election by-law covers the way in which an election is called for elections, and the means by which the chief and councillors are chosen. The Bands are required to forward to the Minister copies of all by-laws enacted. The Minister is not empowered with authority to approve Band by-laws except in relation to election, and hunting, fishing and trapping by-laws.

Institutional Representation

The Grand Council of the Crees (Eeyou Istchee – 'Our Land') ('Grand Council') and the Cree Regional Authority (CRA) were established as the Cree's post-Treaty settlement self-governance entities in 1974 and 1978 respectively. Both entities are composed of the elected chiefs, and one other elected member from each band. The Grand Council provides the forum for inter-village discussion of policies affecting all Cree. The Grand Council established the CRA, which attends to administration, education and culture to local Cree; the Cree Board of Compensation (CBC), which is responsible for the use of compensation funds under the

[1355] Richardson, B, *Regional Agreements for Indigenous Lands and Cultures in Canada: A Discussion Paper* (North Australia Unit, Australia National University, 1995) at 22. See also Jull, P & Roberts, S *The Challenge of Northern Regions* (Australian National University North Australia, Darwin, 1991).
[1356] Cree-Naskapi (of Quebec) Act 1984, ss 12(1), and 21.
[1357] Above, ss. 25-26.

agreement; and the Cree Regional Economic Enterprise Company (CREECO), which manages business development.[1358]

The Grand Council was created by Letters Patent issued in 1974 by the Deputy Register General of Canada pursuant to the Canada Corporations Act 1970.[1359] The Cree Regional Authority was established pursuant to the Quebec National Assembly: The Act Respecting the Cree Regional Authority 1978.[1360] The Grand Council and the Cree Regional Authority are two distinct legal entities but they have identical membership, boards of directors, governing structures and are de facto managed and operated as one entity by the Cree 'nation.'[1361] The Grand Council has twenty members – a Grand Chief and Deputy Grand Chief elected at large by the Cree, the chiefs elected by each of the nine Cree communities, and one other representative from each community. The form and level of Cree representation therefore appears to be commensurate with particular functions with local representation appearing to be the starting point.[1362]

Governance Functions

The powers and functions of the Grand Council, according to its Letters Patent, include the following:

- to act as a regional council, group or association to solve and assist in solving the problems of the Cree people of Quebec;
- to assist the Cree through all means permitted by law to affirm, exercise, protect, enlarge and have recognised and accepted the rights, claims and interests of the Cree of Quebec;
- to foster, promote, protect and assist in preserving the way of life, values and traditions of the Cree people;
- to improve and assist in improving the conditions in Cree communities and lands or northern Quebec and to foster and promote the development of the Cree communities, lands and people of Quebec;
- to act as a regional or local government, authority, administrative or managerial body, institution or group in respect to such subject matters as may be given, delegated or confided to it by the Cree people;
- to provide regional services in regard to programs, communications and activities which may affect or benefit the Cree people of Quebec.[1363]

[1358] ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis* (Ministry of Aboriginal Affairs, BC, Federal Treaty Negotiations Office, December 1995) at 3.

[1359] Canada Corporations Act, R.S.C. 1970, c. C-32.

[1360] Act Respecting the Cree Regional Authority, R.S.Q., c. A-6.1.

[1361] 'Cree Governance' as discussed in the Grand Council of the Crees (Eeyou Istchee) online at http://www.gcc.ca/gcc **(**Accessed November 2019).

[1362] Cree-Naskapi (of Quebec) Act 1984, ss. 25-26 where Cree Bands are represented through their Cree Councils who delegate representative authority to the Cree Regional Authority for regional functions who then delegate authority on to the Grand Council of the Cree for pan-Cree national functions.

[1363] Above.

The CRA is a corporation – its corporate seat is the Category I lands allocated to the James Bay Cree. The powers of the CRA are exercised by a council, which consists of the chief and one other member of each Band Corporation. The CRA is the chief administrative entity of the area. In terms of administration its powers and responsibilities are:

- to appoint Cree representatives on the James Bay Regional Zone Council;
- to appoint representatives of the Cree on all other structures, bodies and entities established pursuant to the JBNQA;
- to give valid consent, when required under the JBNQA, on behalf of the James Bay Cree; and
- to co-ordinate and administer all programs of the Band Corporations, with their consent.

Services are provided throughout to the Crees, the Naskapis, and to their lands, which the CRA accomplishes by offshoot organisations affiliated with the CRA.

According to the Act Respecting the Cree Regional Authority 1978,[1364] the functions of the CRA include:

- to give consent, on behalf of the James Bay Crees, where such consent is required pursuant to the JBNQA or pursuant to an act;
- to appoint representatives of the James Bay Crees on all agencies, bodies and entities established pursuant to the JBNQA or an act;
- to relieve poverty, promote the general welfare and advance the education of the James Bay Crees, promote the development and means of intervention of the Cree communities and promote civic improvements;
- to assist in any social welfare enterprise of the James Bay Crees;
- to assist in the organisation of recreational centres and public places for sports and amusements;
- to work toward the solution of the problems of the James Bay Crees and, for such purposes, to deal with all governments, public authorities and persons;
- to provide technical, professional and other assistance to the James Bay Crees;
- to assist the James Bay Crees in the exercise of their rights and in the defence of their rights.[1365]

From the above functions, it is obvious that the Grand Council, Cree Regional Authority and Band Corporations are the institutional governance entities that represent the James Bay Crees in the modern era in their endeavours. Thus with the new Cree governance entities, the Cree bands established statutory entities with extensive powers, functions, jurisdiction and authority to pass by-laws concerning matters including the maintenance of public order, local taxation, the administration of band affairs, environmental protection over lands and the

[1364] Act Respecting the Cree Regional Authority, 1978 R.S.Q., c. A-6.1.
[1365] Above.

marine estate, roads and transportation, business regulations, and land and resource use and planning.[1366]

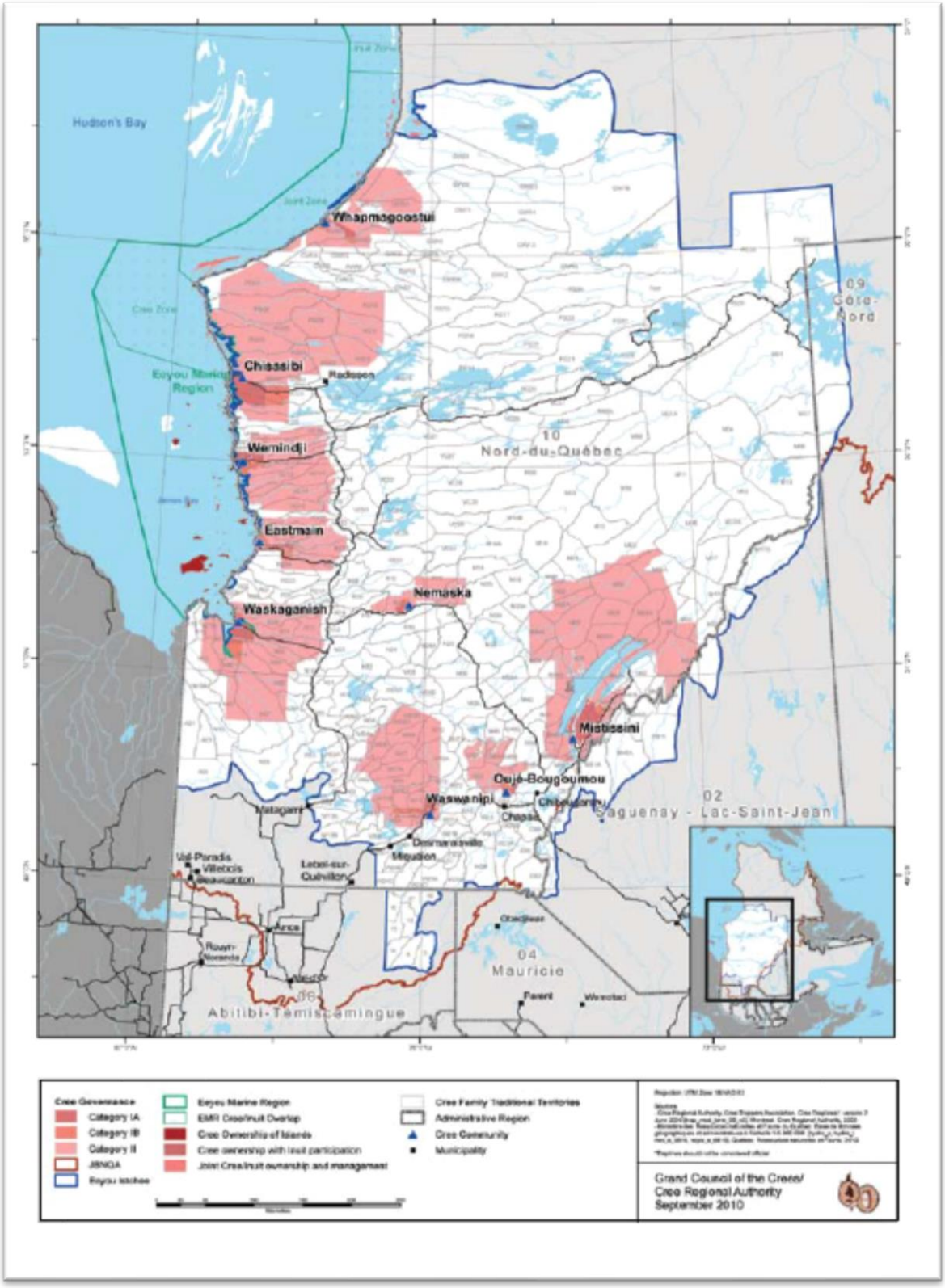
Notwithstanding these extensive governance provisions, the Cree leadership commented in 2011 on the inadequacy of the Cree governance structures. The James Bay Regional Zone was an entity that was supposed to be established between Indigenous Cree and Inuit and non-Indigenous peoples and the Municipality of James Bay at the outset of the JBNQA. The James Bay Cree leaders stated of the James Bay Regional Zone and the Municipality of James Bay:

> The James Bay Regional Zone as a governance partnership was never fulfilled. The Zone Council was systematically ignored by Quebec and by the Municipalite de Baie James (MBJ). It was never adequately funded and never exercised any real governance functions. … The MBJ … has always been rejected by the Cree because it
>
> (a) Excluded the Cree from the regional governance of the Territory;
> (b) Marginalized the Cree in their Category 1 lands; and
> (c) Contradicted the Nation-to-Nation relationship between the Cree and Quebec, reaffirmed in the 2002 Paix de Braves;
> (d) Was adopted without Cree consent, without any meaningful consultation;
> (e) Violated the Crees' treaty rights under the JBNQA.[1367]

The Cree leaders added:

> The exclusion and marginalization of the Cree are not only wrong, they do not reflect the reality of the Cree presence on the ground throughout Eeyou Istchee [Cree for 'our land']. … the Cree must be included in the governance of all of Eeyou Istchee. New governance structures must be developed for Eeyou Istchee, in full consultation with the Cree. These structures must reflect the Nation-to-Nation relationship between the Cree and Quebec. And they must lay the foundation for a strengthened partnership between the Cree, Quebec and the non-Aboriginal population in the development of the Territory.[1368]

[1366]ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis* (Ministry of Aboriginal Affairs, BC, Federal Treaty Negotiations Office, December 1995) at 3.
[1367] Cree Nations of Eeyou Istchee, *Cree Vision of Plan Nord,* (Cree Nations of Eeyou Istchee, James Bay, Canada, 2011) at 20.
[1368] Above, at 21.



Map 36: Eeyou Istchee ('Our Land') Cree Family Territories JBNQA[1369]

[1369] Cree Nations of Eeyou Istchee, *Cree Vision of Plan Nord,* (Cree Nations of Eeyou Istchee, James Bay, Canada, 2011) at 18.

Coordinated Ethnic Self-Government - Sechelt Indian Band Self-Government Act 1986

The Canadian Government has passed special legislation recognising the principle of self-government in relation to Bands formally constituted under the Indian Act. A coordinated ethnic self-government approach replaces an Indian Act band by providing for a governmental structure that is ethnic at the local level, but coordinated with provincial or territorial structures at the regional and provincial or territorial level. The Sechelt Indian Band Self-Government Act[1370] (SIBSGA) is an example of this approach. In May 1986, SIBSGA was passed after 15 years of negotiation and consultation. This was a specific piece of legislation that allowed the Sechelt Indian Band, consisting of 33 reserves and located on the British Columbia coast about 50 kilometres north of Vancouver, to move towards self-government.

Governance Structure

The Sechelt Indian Band Council is the governing body of the Band, and the Band acts through the Council in exercising its powers. The Band Council has municipal status under provincial legislation and is an Indigenous governing body that has Federal powers to more than 900 status Sechelt Indians.[1371] The Sechelt Band is established as a legal entity with the capacity, rights, powers and privileges of a natural person.[1372] The Band may:

- enter into contracts and agreements;
- acquire and hold property or any interest therein and sell or otherwise dispose of that property or interest;
- expend or invest moneys;
- borrow money; and
- do such things as are conducive to the exercise of its rights, powers and privileges.[1373]

Executive

The Band's written constitution determines membership of the Band and the Band Council and it lists the powers and duties of the Band and its Council.[1374] This constitution was ratified via referendum by the Band and was declared in force in October 1986. A written Band Constitution may contain the ability to:

- establish the composition of the Council, its terms of office and tenure of its members;
- establish procedures relating to the election of Council members;
- establish the procedures or processes to be followed by Council in exercising the Band's powers and carrying out its duties;

[1370] The Sechelt Indian Band Self-Government Act SC 1986 – C-93.

[1371] Above, c. 27. See also the companion British Columbia statute, The Sechelt and Indian Government District Enabling Act 1987, S.B.C c. 16, proclaimed in force on 23 July 1987. See also Taylor, J, & Paget, G, 'Federal/Provincial responsibility and the Sechelt' in Hawkes, D, *Aboriginal Peoples and Government Responsibility* (ed) *Aboriginal Peoples and Government Responsibility* (Carleton University Press, Ottawa, 1989), chapter 8.

[1372] The Sechelt Indian Band Self-Government Act 1986, S.C, s. 5(1).

[1373] Above, s. 6.

[1374] Above, s. 7.

- provide for a system of financial accountability of the Council to the members of the Band;
- include a membership code for the Band;
- establish rules and procedures relating to the holding of referenda;
- establish rules and procedures to be followed in respect of the disposition of interests in Sechelt lands;
- set out specific legislative powers of the Council selected from among the general classes of matters set out in the SIBSA; and
- provide for any other matters relating to the government of the Band, its members, or Sechelt lands.[1375]

The Governor-in-Council, on the advice of the Minister, has the power to declare in force the Constitution or amendments to the Constitution.[1376] The Band Council can moreover, determine its own membership through a membership code.[1377] Although the Band owns its former Indian Act reserve land in fee simple title,[1378] the land is deemed to be s. 91(24) land under the Constitution Act, 1867.[1379] Section 87, Indian Act[1380] applies to the Sechelt who are Indians under the Indian Act.[1381] Generally, the Indian Act applies to the Sechelt where SIBSGA does not.[1382] Furthermore, SIBSGA is without prejudice to the Sechelt's comprehensive land claim.

Governance Powers

The Band Council has the power to make laws in relation to matters coming within any of the following classes of matters to the extent that it is authorised by the Constitution of the Band. Section 14(1), Sechelt Indian Band Self-Government Act 1986 states that the Sechelt Council has the power to make laws in relation to matters coming within the following classes of matters:

- access and residence on Sechelt lands;
- zoning and land use planning in respect of Sechelt lands;
- expropriation, for community purposes, of interests in Sechelt lands;
- taxation for local purposes;
- administration and management of property belonging to the Band;
- education of Band members on Sechelt lands;
- social and welfare services including custody and placement of children of Band members;
- health services on Sechelt lands;

[1375] Above, s. 10(1).
[1376] Above, s. 11(1).
[1377] Above, s. 10(2). But this right is subject to the Indian Act membership rights in existence immediately prior to the establishment of the code.
[1378] The Sechelt Indian Band Self-Government Act 1986, S.C, s 5(2). The Band has decided itself that the land cannot be alienated except by a 75 per cent referendum vote.
[1379] Above, s. 31.
[1380] Above. This section confers tax immunity on Indians who are or have an interest in reserve lands.
[1381] Above, s. 35(1).
[1382] Above.

- preservation and management of natural resources on Sechelt lands;
- preservation, protection and management of fur-bearing animals, fish and game on Sechelt lands;
- public order and safety on Sechelt lands;
- construction, maintenance and management of roads and the regulation of traffic on Sechelt lands;
- operation of business, professions and trades on Sechelt lands; and
- prohibition of the sale of, barter, supply, manufacture or possession of intoxicants on Sechelt lands.

Regional Organisation - Aggregation

The Governor-in-Council may recognise the Sechelt Indian Government District Council,[1383] which may exercise jurisdiction over land outside Sechelt reserve lands. The District is a legal entity with powers to:

- enter into contracts or agreements;
- acquire and sell property; and
- spend, invest or borrow money.[1384]

The Sechelt Indian Government District Council is the governing body for the District with members coming from the Band Council. The powers and duties of the Band Council may be transferred to the District Council by the Governor-in-Council if provincial legislation is in place. In its capacity as a District Council, it also has provincial powers over the more than 500 non-Indians who live in the area;[1385] hence, an advisory group that includes non-Indians advises the governing body. The Band District Council can enter into agreements with the province for exercising municipal-type powers.[1386] The Band's municipal and regional powers go beyond those exercised by Band Councils.[1387]

Some Challenges

The Sechelt community-based self-government model has been spurned by other First Nations as being little more than municipal administration, governed by provincial legislation and lacking constitutional protection.[1388] On the other hand, this protection may be possible later, either together with or separately from a Sechelt land claim agreement. The Sechelt people contend that theirs is a unique model, established in response to their particular

[1383] The Sechelt Indian Band Self-Government Act 1986*,* S.C, s. 17.

[1384] Above, s. 18.

[1385] Pursuant to the Sechelt and Indian Government District Enabling Act 1987*,* S.B.C c. 16.

[1386] For example, it levies taxes on behalf of the province in return for full municipal taxes and obtains the rest of its funding through a block funding arrangement with the Federal Government.

[1387] The powers include zoning, taxation, roads, education, welfare, game, businesses, estates, and generally, 'matters' related to the good government of the Band, its members or Sechelt lands.' Sechelt Indian Band Self-Government Act 1986*,* S.C s. 14. See also The Sechelt and Indian Government District Enabling Act 1987*,* S.B.C*,* s. 15.

[1388] See Etkin, C.E, 'The Sechelt Indian Band: An Analysis of a New Form of Native Self-government,' in *Canadian Journal of Native Studies* (Vol. 8, No. 1, 1988) at 73-105; and Taylor, J, & Paget, G, 'Federal/Provincial responsibility and the Sechelt' in Hawkes, D, *Aboriginal Peoples and Government Responsibility* (1989) at 297.

situation, and not intended to constrain other communities. In the meantime, the Sechelt have secured substantial practical and formal control over their own affairs. Graham Allen, lawyer for the Sechelt Band commented on the Sechelt self-government model when it was being negotiated in 1986:

> There were two propelling concerns for the Sechelt people as to why they very strongly wanted to be self-governing. One was their urge to own their own land. … Sechelt wanted to be able to hold land like the white man does. The other part of that … is the requirement by the Sechelt that they be able to effectively manage their own land. Sechelt had the most leases and the most reserves in BC and a huge land management program was underway…. Sechelt wanted to become [legal not just beneficial] owner of their reserves.[1389]

Following the Penner Report in 1983, Sechelt produced its next concept that was:

> … basically, an opting out act in which an individual First Nation could say we've had enough of the Indian Act, we want to opt out, there's a provision to do that, and we will now develop our own constitution and that will set out how we will govern ourselves – our institutions.[1390]

Allen discussed the political climate at the time when David Crombie was the Minster of Indian Affairs who was committed to trying new approaches to self-government:

> [Crombie] was very clear, instead of making communities fit our legislation, we will make legislation that fits the community. He said self-government will be the process, not the end result.[1391]

As if to refute the criticism of SIBSGA being just another municipal-style of government, Allen noted:

> [Sechelt] holds these 33 former reserves in fee simple title, and it has [sic] complete land management control. For those who talk about municipal-style government, [Sechelt] has also the ability of lawmaking in areas of education, health, child custody, social and welfare services for its own membership. These are provincial-level powers that Sechelt enjoys under this model.[1392]

In 2016, the Sechelt Nation signed three agreements with the province to get 288 hectares of Crown land a share of provincial forestry revenue and capacity funding. Sechelt signed a

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[1389] Allen, G, Snarch & Allen Law Firm, 'The Sechelt Indian Band and Self-Government' in British Columbia Treaty Commission *Speaking Truth to Power III: Self-Government Options and Opportunities'* (BC Treaty Commission, Vancouver, 2002) at 47.

[1390] Canada, *Indian Self-Government in Canada: Report of the Special Committee,* (Penner Report, Queen's Printer, Ottawa, 1983) c. I-5.

[1391] Allen, G, Snarch & Allen Law Firm, 'The Sechelt Indian Band and Self-Government' in British Columbia Treaty Commission *Speaking Truth to Power III: Self-Government Options and Opportunities'* (BC Treaty Commission, Vancouver, 2002) at 48.

[1392] Above.

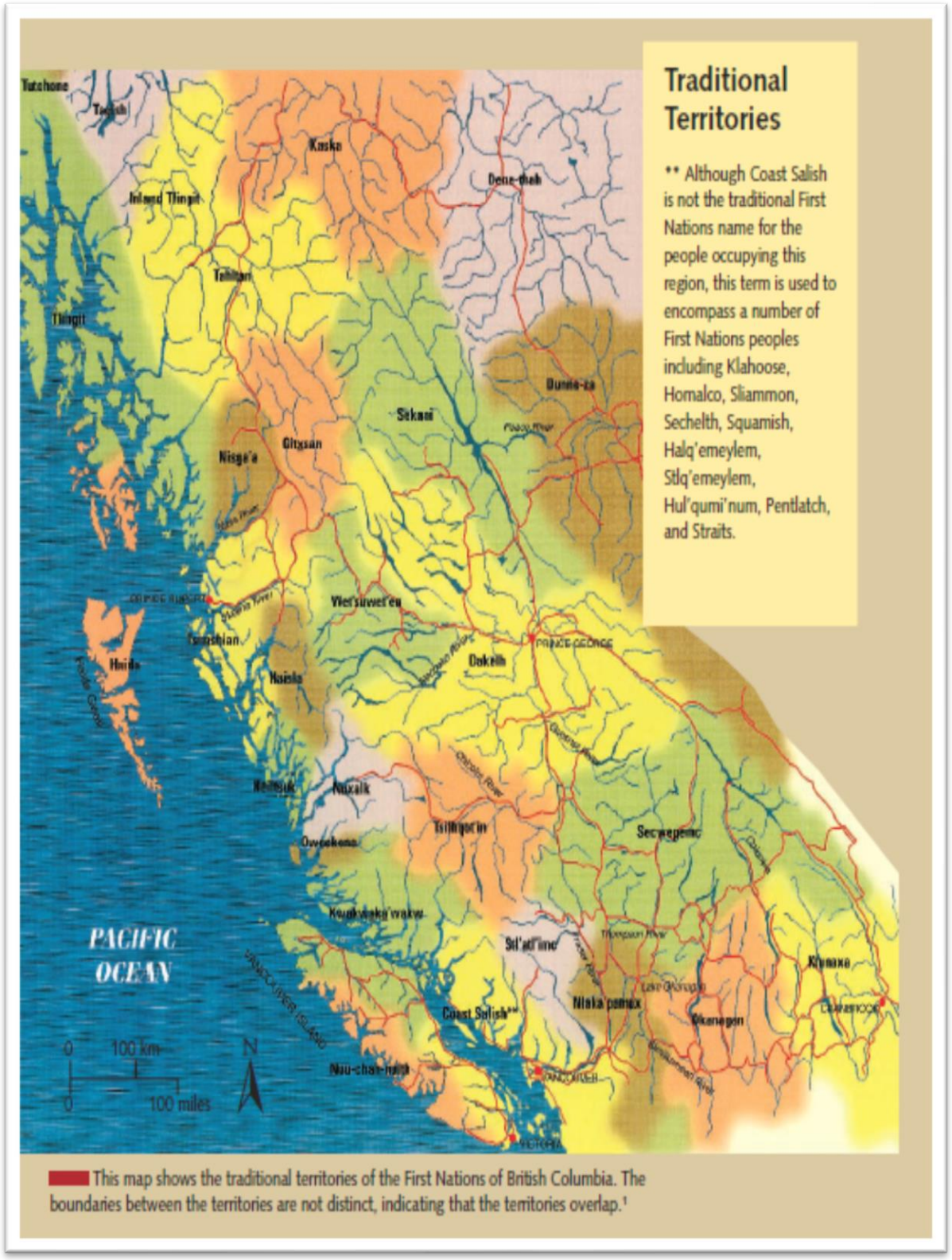
reconciliation agreement with the province, an interim forestry agreement and a government to government agreement with the province that granted them certain rights and territory while leaving the door open for more negotiations in the future.[1393]

In terms of realising internal self-determination rights and responsibilities and the degree of control and jurisdiction Sechelt have over their own governing institutions, processes, and systems in the respective settlement areas, the Sechelt have active cultural governance arrangements with strong economic development.

[1393] 'Sechelt Nation pens new deal with province for 288 hectares,' in *Coast Reporter,* (21 July 2016).

Map 37: B.C Sunshine Coast including Sechelt First Nation Reserve[1394]

[1394] Map online at https://globetrottinggrandparents.wordpress.com/2017/05/26/bcs-sunshine-coast/ (Accessed March 2020)



Map 38: B.C First Nations[1395]

[1395] Campbell, K, Menzies, C & Peacock, B, *B.C First Nations Studies,* (British Columbia Ministry of Education, Victoria, Canada, 2003) at 17.

Summary

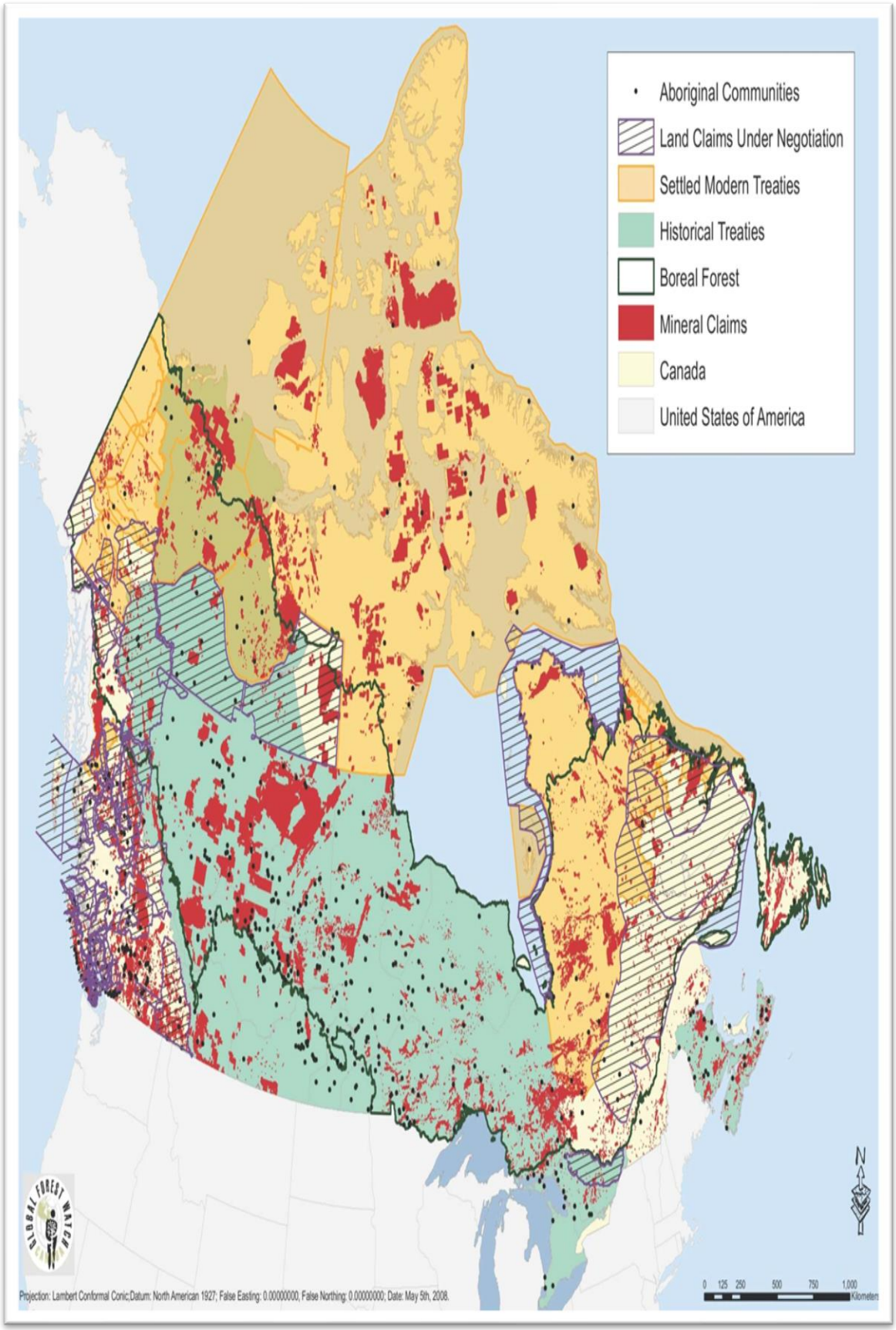
Many Indigenous groups in Canada have negotiated a limited form of shared self-government jurisdiction over the environment including in many areas the coastal marine estate through comprehensive treaty settlement and self-government agreements. The federal government's self-government negotiations include comprehensive self-government negotiations (i.e. a range of jurisdictions), sectoral negotiations (i.e. one jurisdiction such as education, child welfare) and self-government negotiations that are proceeding with a large number of communities in conjunction with their comprehensive land claims negotiations. In 2020, hundreds of Indigenous communities were negotiating different forms of self-government covering every province and the territories (excluding Nunavut).

Many of these comprehensive and self-government agreements include scope for co-governance and co-management over the environment within the respective territories of the Indigenous group, and much of this scope includes the coastal marine estate with the James Bay Cree and Inuit in Northern Quebec, the Inuit in Nunavut, Inuvialuit, Labrador and Nunavik and the Nisga'a in B.C. Although the settlement agreements do not mention EBM explicitly, the Indigenous cultures themselves adhere to EBM sustainability principles such as:

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

From the above analysis, many of the co-governance laws, policies, institutions and priorities of Indigenous comprehensive and self-government agreements in Canada are very extensive as compared to New Zealand and Australia (as noted below) with what appears to be more scope for exercising shared co-governance jurisdiction particularly the Inuit agreements in the far north such as Nunavut and Labrador. But comprehensive and self-government agreements are not without their challenges as well which include, inter alia, increased governance structures and bureaucracy in small communities, capacity and capability building, insufficient resourcing for self-government and co-governance, balancing the economic and commercial with the environmental, social and cultural objectives, and authentic power sharing from the federal and provincial governments.

The next section will explore the Great Bear Initiative as an explicit and dynamic case study of EBM in practice over the terrestrial and marine coastal estate in B.C, Canada.



Map 39: Indigenous Claims and Treaties in Canada

Canada Great Bear Initiative – EBM and Shared Jurisdiction in Practice

The Great Bear Initiative (GBI) in British Columbia (BC), Canada, is regarded as being an EBM and co-governance case study that has successfully integrated the views and perspectives of First Nations as well as fulfilling the overall vision of sustainably protecting and enhancing the Great Bear ecosystem through aggregation.

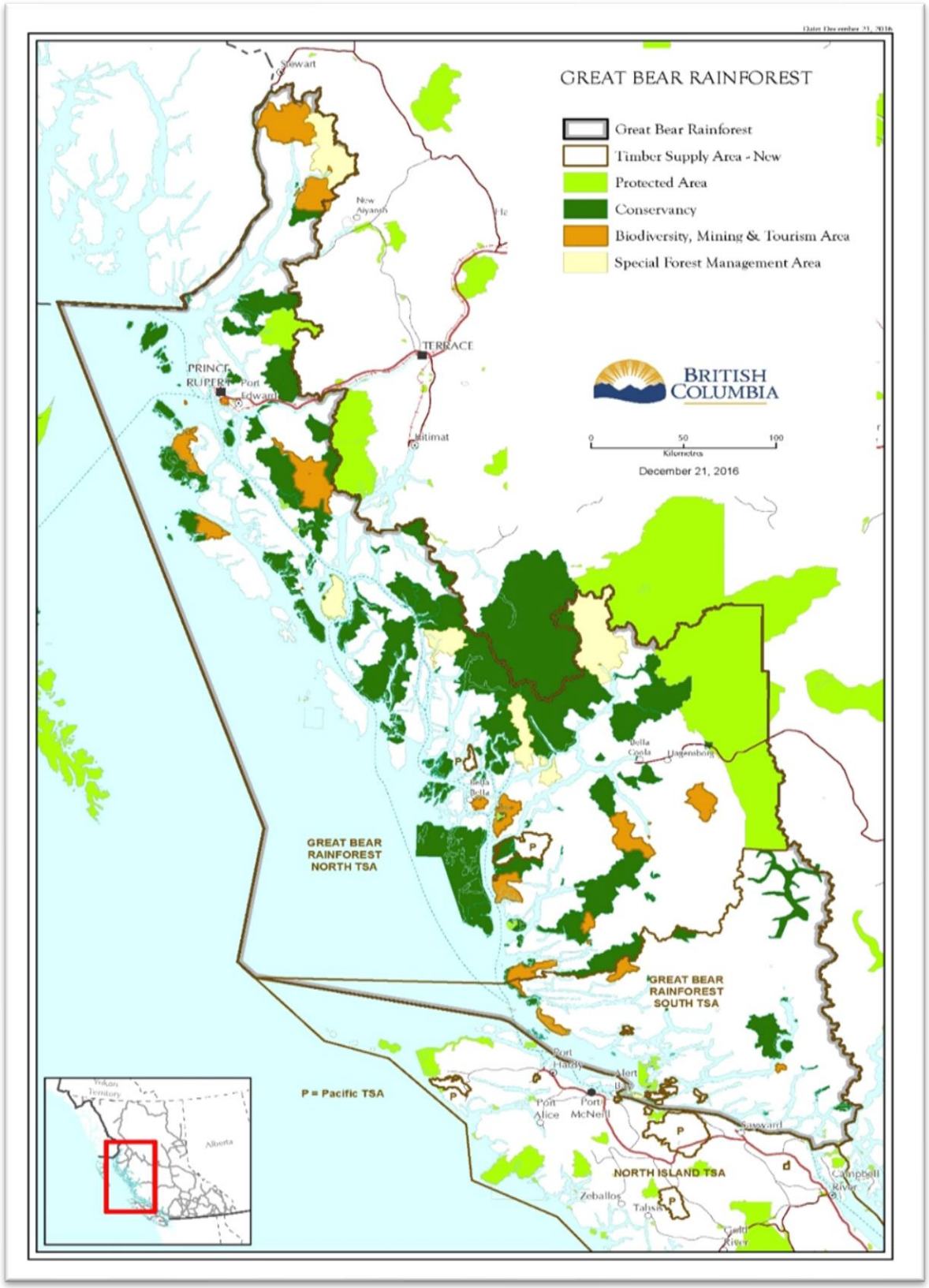
B.C Great Bear Initiative

The GBI started officially in 2005 when leaders from BC, industry and other stakeholders as well as First Nations agreed to work together to form a collective presence in the Pacific North Coast to implement EBM over the Great Bear forest and marine estate. The GBI emerged initially from conflict between environmentalists, industry and First Nations. Joint protests of First Nations and environmentalists emerged against logging as well as environmental degradation. Consequently, First Nations, environmentalists, the provincial government and the forestry industry aggregated together to work in a more sustainable way under EBM and First Nations traditional ecological knowledge – the First Nations equivalent to mātauranga and tikanga Māori. Similar principles have been applied in the Marine Plan Partnership (MaPP) utilising two key principles:

1) Ecosystem-based management; and
2) Government to Government relationships between First Nations and the BC Provincial Government.

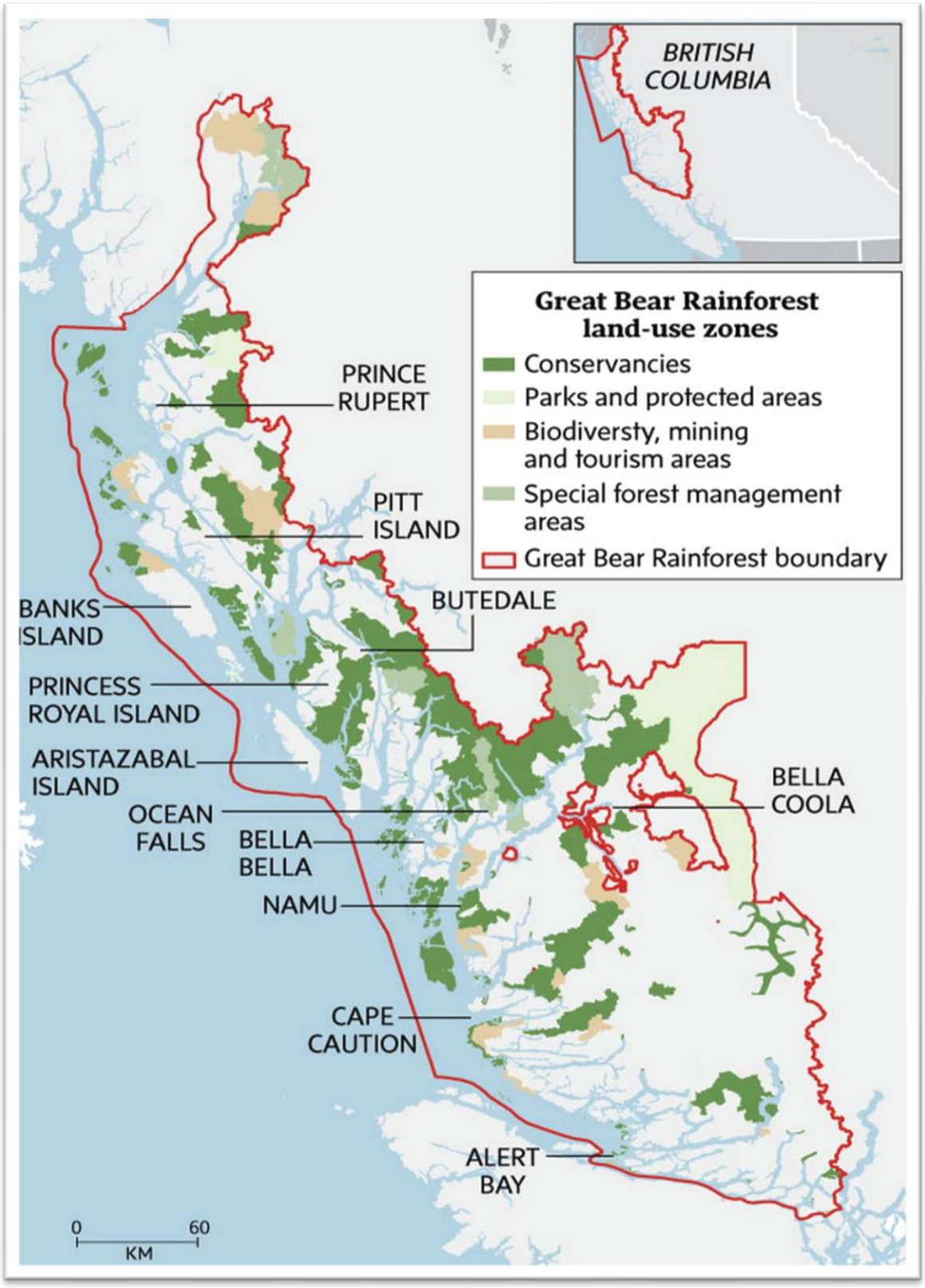
The GBI covers 6.4 million hectares from Alaska to the Discovery Islands along with Haida Gwaii, which represents a quarter of the world's temperate rainforest. The GBI covers the territories of 26 First Nations while the MaPP includes the territories of 17 First Nations mostly the same as the GBI and each has their own diverse culture, language and tribal governance structure. The democratic, demographic, geographic, historic and cultural differences are so diverse and complex over the GBI and MaPP areas that a traditional top down approach would have been disastrous. EBM and the Nation-to-Nation principled approach positioned First Nations in a collaborative rather than competitive position.

EBM was initially developed in the GBI through a series of land-use plans between First Nations and the British Columbia provincial government. The Coastal First Nations (CFN) and other First Nations worked together to reach innovative land use planning agreements with the provincial government that enabled the CFN communities to take an active role in developing a conservation-based economy.



Map 40: Great Bear Rainforest Area[1396]

[1396] Online at https://www.sfmcanada.org/en/sustainable-forest-management/great-bear-rainforest (Accessed November 2018).



Map 41: Great Bear Initiative Land Use Zones[1397]

[1397] Online at https://www.theglobeandmail.com/news/british-columbia/key-players-in-great-bear-rainforest-deal-find-common-ground/article28475126/ (Accessed November 2018).

GBI Governance

The Marine Plan Partnership (MaPP) advances co-governance principles under the GBI that includes shared governance and management of the territories with greater First Nations participation in environmental governance and decision-making.[1398] First Nations, the B.C. provincial government, environmentalists, NGOs and other stakeholders working collaboratively under the principle of EBM, make such an approach possible.

The key GBI co-governance principles appear to be EBM and nation-to-nation relationships between First Nations and the provincial and deferral governments. Hence, the GBI balances and manages multiple Indigenous and non-Indigenous interests and priorities, which is exactly what EBM strives to achieve with all groups focusing on a shared vision – sustainability and conservation of the land Great Bear Forest and the coastal marine estate in this context.[1399]

The GBI territory include 26 First Nations who are governed through sub-regional collectives in the Nanwakolas Council and the Coastal First Nations (CFN) – GBI that includes the Band Council of the Haida Gwaii Nation. MaPP itself includes 17 First Nations, which are similar to the GBI nations and are governed by the sub-regional collectives of the Nanwakolas Council, the CFN, the Council of Haida Gwaii and the North Coast Skeen First Nations Stewardship Society (NCSFNSS). Most of these governance entities are made up of elected Band Councils under the Indian Act.[1400]

The governance boards then of the GBI are representatives from the B.C provincial government and First Nations, which acknowledges the nation-to-nation principle as well as the constitutional position of First Nations as Indigenous first citizens rather than one of many stakeholders. First Nations however, are still represented through their own respective Indian Act Band governments. At a sub-regional level, First Nations are governed by the Council of Haida Gwaii Nation for Haida Gwaii, the CFN-GBI for the central coast, the North Coast Skeen First Nations Stewardship Society for the north coast, and the Nanwakolas Council for north Vancouver Island.[1401]

Each of these governance organisations were established to advocate for First Nations but also to collaborate and co-govern on shared initiatives for land and marine resource management within an EBM context. Other stakeholders such as scientists, environmentalists, industry, and community members are included on advisory committees. However, the MaPP governance model provides stakeholders with a voice but it removes them from the actual decision-making function of governance.

[1398] Low, M and Shaw, K, 'First Nations Rights and Environmental Governance: Lesson from the Great Bear Rainforest,' in *B.C Studies,* (Vol, 172, 2011) at 9-33.

[1399] Tiakiwai, S, Kilgour, J and Whetu, A, 'Indigenous Perspectives of Ecosystem-Based Management and Co-governance in the Pacific Northwest: Lessons for Aotearoa,' in *Alter Native,* (An International Journal of Indigenous Peoples, Vol. 13, No. (2), 2017) at 70-73.

[1400] Above.

[1401] Above.

Map 42: GBI Coastal First Nations Communities[1402]

[1402] Online at https://coastfunds.ca/first-nations/coastal-first-nations-great-bear-rainforest-initiative/ (Accessed November 2018).

In 2005, the CFNs extended the planning model to the marine and coastal areas through various marine planning processes with the BC provincial government and industry to plan for the best and most responsible use of the marine estate in an EBM context. The CFNs have identified enormous risks to the marine estate including:

1) Declining fish stocks and ocean biodiversity,
2) Climate change,
3) Potential oil and gas threats,
4) Overfishing impacts on traditional First Nations harvesting, and
5) Risks of oil spills and pollution from potential crude oil tanker traffic.[1403]

In 2008, CFN-GBI signed an agreement with the federal government to work collaboratively on the development of a marine planning process for the Pacific North Coast Integrated Management Area. In 2010, the BC provincial government joined the agreement. In 2015, CFNs and BC provincial government signed marine plans through the MaPP to manage the competing demands for the use of the marine estate. CFN created local and regional marine use plans for the central and north coast, Haida Gwaii and north Vancouver Island regions.[1404] The MaPP collaborations cover approximately 102,000 km of coast. Each sub-region has a marine plan that aggregates into an overarching Regional Action Plan where collective actions are identified and implemented at the regional level.

In addition, MaPP provides zoning and direction on a wide variety of marine and ocean permitted activities including:

1) Log handling,
2) Tourism,
3) Alternative energy opportunities, and
4) Aquaculture.[1405]

MaPP are informed by traditional ecological knowledge, and scientific and local knowledge. MaPP are also shaped by community values and interests, scientific information and input from coastal stakeholders and the public.[1406] MaPP are moreover, based on EBM that integrates human well-being, ecological integrity and First Nations governance. To this end, MaPP adapted its own definition of EBM:

> Ecosystem-based management is an adaptive approach to managing human activities that seeks to ensure the co-existence of healthy, fully functioning ecosystems and human communities. The intent is to maintain those spatial and temporal

[1403] See the Coastal First Nations Great Bear Initiative website https://coastalfirstnations.ca/our-sea/marine-plan-partnership-for-the-north-pacific-coast-mapp/ (Accessed November 2018).
[1404] Above.
[1405] Above.
[1406] See the Marine Plan Partnership for the Pacific North Coast website http://mappocean.org/about-mapp/sub-regions/ (Accessed November 2018).

characteristics of ecosystems such that component species and ecological processes can be sustained and human well-being supported and improved.[1407]

Map 43: Great Bear Rainforest and Haida Gwaii Communities[1408]

[1407] MaPP, *Title,* (2016) available online at: http://mappocean.org (Accessed November 2018).

[1408] 'First Nations have created a robust conservation economy in Great Bear Rainforest Report,' Mongabay News and Inspiration from Natures Frontline online at https://news.mongabay.com/2019/06/first-nations-have-created-a-robust-conservation-economy-in-great-bear-rainforest-report/ (Accessed May 2020).

The MaPP EBM framework is built on the principles of ecological integrity, human well-being, good governance and collaborative management, and as noted above, integrates science and First Nations traditional ecological knowledge to advance EBM.

Price, Roburn and MacKinnon provided an overview of the implementation of EBM in the Great Bear Rainforest although they did not focus on EBM over the coastal marine space. Nevertheless, they did provide a valuable insight into the representative management of resources within an EBM model.[1409] Price et al described the shift of power away from the provincial government into the hands of Indigenous peoples and stakeholders and the changing dynamics and interactions between stakeholders and various interest parties that have ensued as Price noted:

> Environmental groups and forest companies have typically been locked in bitter conflict, the two coalitions agreed to work together to generate solutions.[1410]

The power shifts have given way to a more integrative collaborative approach to management that has acted as a catalyst for cooperation and building consensus between multiple interest groups over a shared environment in an EBM context.

In 2017, the Coastal First Nations (CFN)-GBI coordinated discussions with the federal government to create a Reconciliatory Framework Agreement for collaboratively managing the GBI marine waterways and resources,[1411] which was subsequently signed in June 2018. The agreement provided for a new collaborative governance framework to guide marine planning and conservation including the creation of a Marine Protected Area Network while ensuring safe shipping and emergency response capabilities on the B.C coast.[1412]

The CFN-GBI also developed a First Nations Ocean Management Framework to help member First Nations to work collaboratively with partners and other First Nations along the north and central B.C coast to advance shared priorities to the Reconciliation Framework Agreement 2018.[1413] This Reconciliation Framework Agreement for Bioregional Oceans Management and Protection was signed in June 2018 with 14 BC Coastal Nations to promote a more coordinated and efficient approach for the governance, management, and protection of oceans in the Pacific North Coast, including marine ecosystems, marine resources and marine use activities.[1414]

Furthermore, the Coastal First Nations Fisheries Resources Reconciliation Agreement was signed by the federal government and the CFN on 26 July 2019. The seven participating First Nations include the Heiltsuk Nation, Kitasoo/Xai'xais First Nation, Metlakatla First Nation,

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[1409] Price, K, Roburn, A and MacKinnon, A, 'Ecosystem-Based Management in the Great Bear Rainforest,' *For. Ecol. Man*. (Vol. 258, 2009) at 495.

[1410] Above.

[1411] Coastal First Nations, *Coastal First Nations Great Bear Initiative Annual Report 2017: Protecting Our Coast, Building Our Economy,* (Coastal First Nations, Vancouver, 2017) at 14.

[1412] Above.

[1413] Above. See also 'Government of Canada signs historic reconciliation agreement with B.C Coastal First Nations' in CFN-GBI website online at: https://coastalfirstnations.ca/government-of-canada-signs-historic-reconciliation-agreement-with-b-c-coastal-first-nations/ (Accessed May 2020).

[1414] Above.

Nuxalk Nation, Wuikinuxv Nation, Gitga'at First Nation and Gitxaala Nation. This Reconciliation Agreement promised to allow the seven First Nations advanced economic opportunities and collaborative governance, as well as expand community-based commercial fishing access in traditional territories. Coastal First Nations will also have better access to existing commercial fishing licenses and quota, and an enhanced role in fisheries governance.[1415] One of the CFN leaders commented:

> When we change the dial from a top-down approach to engagement with First Nations and fisheries access, to a focus on the co-development, co-design, and co-delivery of resource management, the result is a move toward self-determination, and real, sustainable prosperity for Canada's First Nations.[1416]

Some Challenges

The Coastal First Nations Reconciliation Agreements for co-governance and co-management sounds promising like many Indigenous agreements however, the federal government still holds the deciding hand as one report noted:

> But Canada stops short of relinquishing their management powers. … as with all fisheries in Canada, overarching management and associated decisions remain with the Department of Fisheries and Oceans.[1417]

Still, Chief Marilyn Slett, President of Coastal First Nations, remained optimistic:

> This agreement will get families and fishers back on the water and re-establish a small boat fleet in our communities. By working together – on a nation-to-nation basis - we will provide opportunities for our communities to fully participate in the fishing economy; create new jobs and investments; and increase economic opportunities and build capacity.[1418]

The importance of building capacity as well as the need to communicate messages to the wider public in a clear manner appear to be another key governance challenge of the GBI. Conservation efforts opened up new economic opportunities to local communities for

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[1415] 'Canada signs fisheries agreement with seven BC Coastal First Nations – offering up co-management but retaining control,' Ha-Shilth-Sa: Canada's Oldest First Nations Newspaper, online at: https://hashilthsa.com/news/2019-07-26/canada-signs-fisheries-agreement-seven-bc-coastal-first-nations-%E2%80%93-offering-co (Accessed May 2020).

[1416] 'Government of Canada signs historic reconciliation agreement with B.C Coastal First Nations' in CFN-GBI website online at: https://coastalfirstnations.ca/government-of-canada-signs-historic-reconciliation-agreement-with-b-c-coastal-first-nations/ (Accessed May 2020).

[1417] 'Canada signs fisheries agreement with seven BC Coastal First Nations – offering up co-management but retaining control,' Ha-Shilth-Sa: Canada's Oldest First Nations Newspaper, online at: https://hashilthsa.com/news/2019-07-26/canada-signs-fisheries-agreement-seven-bc-coastal-first-nations-%E2%80%93-offering-co (Accessed May 2020).

[1418] Above.

example, yet stakeholders continued to see conservation methods as opposing economic benefits. Knowledge and education were critical to deal with the situation and had to be broad and clear.

The development of key strategic and strong relationships between First Nations, governments, stakeholders and various interest groups with seemingly divergent objectives and values is another challenge but also a key factor in the success of the GBI.[1419] The focus on relationships and co-governance arrangements provided a firm foundation for the particularities of an EBM approach rather than focusing on particularities themselves which perspective allowed for the management of the marine ecosystems to be intergenerational and more sustainable over time.

Another key governance challenge for the First Nations themselves is the place of traditional customary First Nations laws and institutions and Band Council governance structures of the Indian Act. Band Councils are elected by the First Nations communities yet these communities also have hereditary chiefs or traditional leaders who sometimes clash in terms of community goals, strategies and priorities. In this respect, one of the CFN-GBI leaders commented to our researchers:

> The traditional/hereditary leaders' role in GBI governance … the traditional stewards of the lands and resources are not involved in the decision-making processes. … The current case law in Canada is based on flawed precedent that is aligned with assimilation techniques with the courts recognizing the elected chief and council representing the community because they have been democratically elected. … The elected chiefs are appointed to the board of GBI.[1420]

Referring to the Band Council leaders, the CFN informant stated:

> At the lower level tables where land use planning, fisheries, energy, and tourism is dealt with at the provincial and federal levels, the Crown likes the [Band Council] structure because it is a one stop shop. They forget that the risk is the hereditary leaders have to be consulted. They leave that up to the elected chief and council to do that and cover it off. … The board members are expected to report the meeting results to their respective leadership. Typically, that is limited to the elected chief and council. Each council have their own protocols that defines their relationship with the hereditary leaders.[1421]

The same CFN leader added:

> There are few communities that follow traditional law with the hereditary titleholders at the head of the table. We talk about the importance, but walk to a different tune when it comes to our governance. … From my observations and experience, the traditional leaders are not at the table. In most of the member communities, they are

[1419] Tiakiwai, S, Kilgour, J and Whetu, A, 'Indigenous Perspectives of Ecosystem-Based Management and Co-governance in the Pacific Northwest: Lessons for Aotearoa,' in *Alter Native,* (An International Journal of Indigenous Peoples, Vol. 13, No. (2), 2017) at 69-79.

[1420] MIGC, Mana Whakahaere Project Interview Series, (Coastal First Nations Interviewee, 2020).

[1421] Above.

> loosely consulted briefly at the beginning and endpoint. They … leave their hereditary chiefs on the sidelines as an after-thought. … Our elected leaders allow the corruption to continue unabated.[1422]

The CFN leader concluded on the place of hereditary chiefs in GBI governance:

> With respect to our traditional leaders … we have allowed them to be marginalized. They have lost too much of our [traditional cultural] ways and have not kept relevant with modern politics, business, and law.[1423]

Another key governance challenge of the GBI is the place of traditional customary law. The CFN informant opined:

> Our traditional governance is still alive and strong as evidenced by our feast [potlatch] system where we practice our laws. Our laws guide and define our leadership and governance. … Our Nuyem [laws] says that we have a responsibility to speak and act when wrong is pervasive. We lost our way. … That is why we need a renaissance to rebuild our laws, governance, and leadership forums. … The recognition of traditional law is taking on a life and we need to develop structure that can stand up against common law and the doctrine of discovery. … GBI has not taken it to that level yet![1424]

With respect to the overall vision and objectives of the GBI, a CFN leader commented on the overall efficacy of the GBI as well as the place of non-Indigenous consultants in First Nations governance:

> I think the idea was bang on but the wheels fell off during the transition to execution. We do not trust our own people and we pay extreme amounts to [non-First Nation] consultants and advisors. … I believe that the GBI is not working. We have too many [non-First Nation] people in control. Some of them are genuinely good. …. [But] In the operations, it is all [non-First Nation] people that are hired to implement the GBI. GBI is making a lot of [non-First Nation] people rich! [1425]

Notwithstanding the challenges, the Great Bear Initiative and the Marine Plan Partnership over the marine estate in BC, Canada, certainly provide a compelling case study for deeper exploration and analyses for Aotearoa New Zealand.

On the other hand, a further very important recent development on Indigenous rights in B.C, Canada, that should assist with implementing the GBI and EBM more effectively in the Province is the 2019 Legislative Assembly of British Columbia landmark Bill 41 which adopted

[1422] Above.

[1423] Above.

[1424] Above.

[1425] Above.

the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) into B.C domestic law. Bill 41 enacted the B.C Declaration on the Rights of Indigenous Peoples Act 2019 (BCDRIPA) that appears to be the first of the former British settler nations (at least among the CANZUS States[1426]) to adopt and therefore to fully support UNDRIP into domestic law.[1427]

The BCDRIPA requires that Indigenous peoples contribute to legislation that will affect their lives such as providing free, prior and informed consent (FPIC) for any projects on Indigenous lands. The BCDRIPA moreover, mandates the B.C Government to bring Provincial laws into harmony with UNDRIP. The new legislation requires development of an action plan to achieve this alignment over time providing transparency and accountability, and requires regular reporting to the B.C Legislature to monitor progress. Furthermore, the BCDRIPA allows for flexibility for the Province to enter into agreements with a broader range of Indigenous Governments and it provides a framework for decision-making between Indigenous Governments and the Province on matters that impact their citizens.[1428]

An important joint statement from members of the B.C Legislative Assembly stated:

> It is time we recognise and safeguard Indigenous peoples' human rights, so that we may finally move away from conflict, drawn out court cases and uncertainty, and move forward with collaboration and respect. Ensuring that Indigenous peoples are part of the policy-making and decision-making processes that affect them, their families and their territories is how we will create more certainty and opportunity for Indigenous peoples, B.C businesses, communities and families everywhere.[1429]

To summarise, we have covered the GBI and BCDRIPA landmark initiatives briefly in this section but need to explore both initiatives much deeper in terms of building broad constructive relationships of trust between diverse communities, focusing on a common objective brought about by environmental crises but also exploring new opportunities that emerge from such crises that all can equitably contribute to and benefit from. What policies and structures are required to bring such diverse groups to aggregate time, resources and aspirations together while implementing EBM over the marine estate? What governance structures, laws and institutions are available for actualising Treaty partnerships between Governments, industry and Indigenous peoples? What effective co-governance models are available that successfully share power and governance jurisdiction while also integrating First Nations traditional ecological knowledge - mātauranga and tikanga Māori in an Aotearoa New Zealand context – industry and science effectively over the marine estate? Our MIGC

[1426] 'CANZUS' = Canada, Australia, New Zealand and the United States of America.

[1427] See Gabrielle Wast, 'British Columbia adopts UN standards for Indigenous rights,' in Jurist: Legal News and Commentary online at: https://.www.jurist.org/news/2019/11/british-columbia-adopts-un-standards-for-indigenous-rights/#:~:text=The%20Legislative%20Assembly%20of%20British,population%20of%20First%20Nations%20people (Accessed August 2020).

[1428] See 'B.C Declaration on the Rights of Indigenous Peoples Act' in British Columbia Government, online at: http:// https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples (Accessed August 2020).

[1429] Above, (Wast).

researchers are continuing to work closely with the GBI leaders and hope to explore these, the BCDRIPA, and other relevant research areas deeper in the future.

The next section will explore similar themes of co-governance and co-designed structures that acknowledge Indigenous peoples' partnerships and that effectively incorporate Indigenous worldviews within an EBM context over the marine estate in Australia, in particular over the Great Barrier Reef in Queensland.

Australia Great Barrier Reef - EBM and Shared Jurisdiction in Practice?

Australian Case Law

The Indigenous peoples of Australia include Aboriginal Peoples and Torres Strait Islanders, some of which have native title Indigenous claims to the Great Barrier Reef (GBR). The doctrine of aboriginal or native title is the recognition by Australian law that Aboriginal and Torres Strait Islander people have rights and interests to their land that come from their traditional laws and customs. The classic case illustrating the use of international standards by a judiciary to guide the interpretation and application of domestic rules in the context of Indigenous peoples and the application of the doctrine of aboriginal title is the 1992 High Court decision of Australia in *Mabo v Queensland [No.2].*[1430]

The case involved an effort by Aboriginal people to assert Indigenous (Aboriginal) rights in lands designated as Crown lands. The Queensland Government argued that Crown ownership of lands precluded aboriginal rights over the same lands.[1431] In separate opinions, the High Court rejected the Crown's claim because it was based on the premise that the aboriginal lands were *terra nullius* (lands legally deemed to have no sovereign or property rights) prior to European settlement, despite the presence of Indigenous people.[1432] Brennan J held that the common law should be interpreted in conformity with contemporary values embraced by Australian society and in light of contemporary international law:

> If it were possible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country ... The expectations of the international community accord in this respect with contemporary values pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights ... brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and

[1430] *Mabo v Queensland,* (1992) 175 C.L.R 1. For a good analysis of this case, see Reynolds, H 'The Mabo Judgment in Light of Imperial Land Policy' in *UNSWLJ* (Vol. 1, 1993) at 16; and Pritchard, S *Indigenous Peoples, the United Nations and Human Rights* (Zed Books, Australia, 1998).
[1431] Above, at 25 (per Brennan. J).
[1432] For an excellent analysis of the *terra nullius* fiction and its legal history in Australia, see Reynolds, H, *The Law of the Land* (Penguin Books, Melbourne, 1988); and Reynolds, H, *Frontiers: Aborigines, Settlers and Land* (Allen & Unwin, Sydney, 1987).

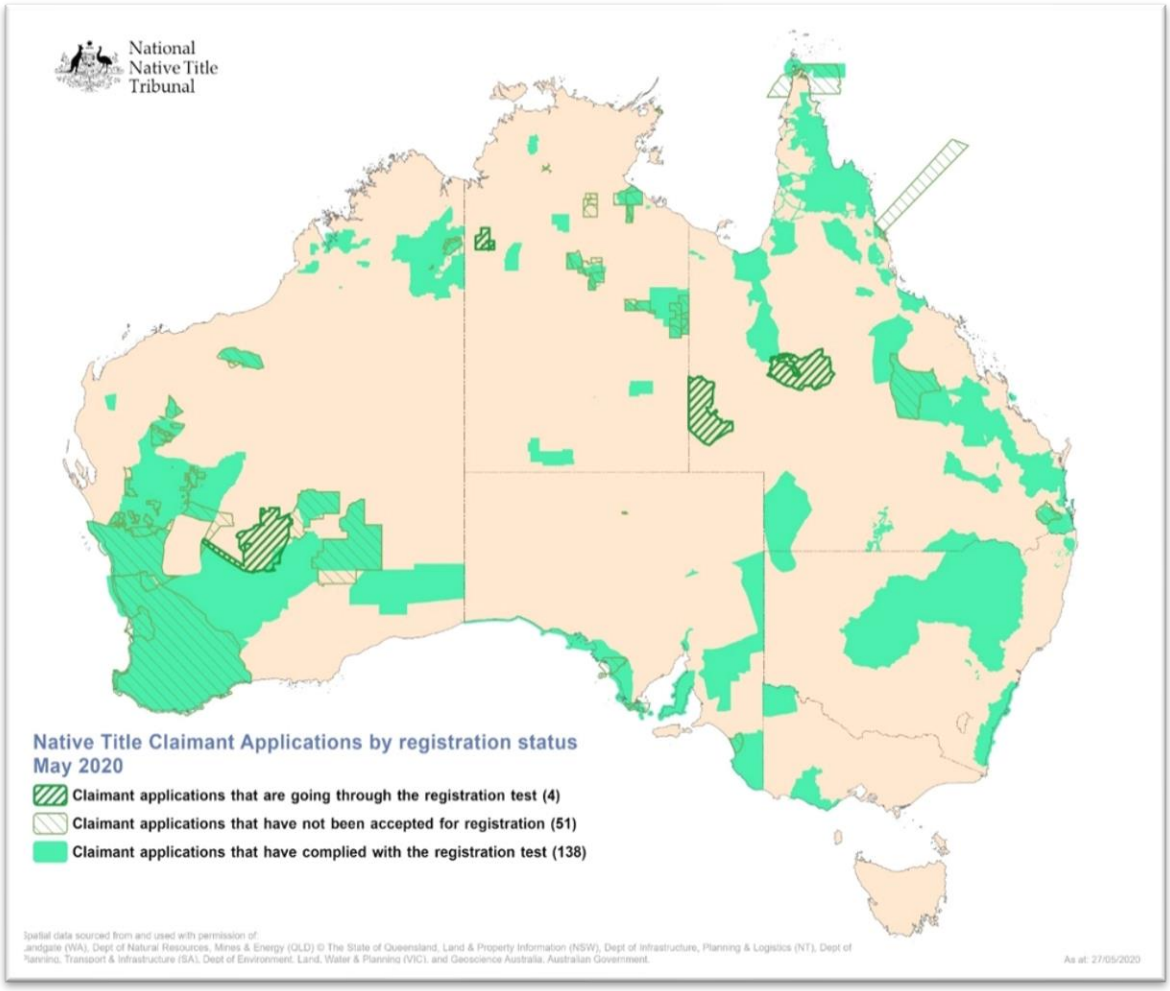
> important influence on the development of the common law, especially when international law declares the existence of universal human rights.[1433]

Brennan J also cited the advisory opinion of the ICJ in the *Western Sahara* case,[1434] which critically examined and questioned the theory of *terra nullius* as a colonial tool for the acquisition of sovereignty over Indigenous peoples.[1435]

Thus guided by the important influence of international law, the Court reinterpreted the common law property regime by ousting the previously relied upon theory and practice of *terra nullius.* The result was a radical reinterpretation of common law doctrine to recognise aboriginal title and rights of beneficial ownership based on historical use and occupancy, rights alienable only to the nation-state and subject to extinguishment by the nation-state through conveyances or other official acts.[1436] In recognising and defining aboriginal title, the Australian High Court in *Mabo* invoked common law precedents in the United States and Canada that established similarly circumscribed Indigenous land rights.[1437]

The doctrine of aboriginal title recognises that in certain cases there was and is a continued beneficial legal interest in land held by local Indigenous Aboriginal and Torres Strait Islanders which survived the acquisition of radical title to the land by the Crown at the time of sovereignty in 1788.[1438]

[1433] *Mabo v Queensland,* (1992) 175 C.L.R 1, 41-2 (per Brennan. J).
[1434] *Western Sahara,* Advisory Opinion, 1975 I.C.J. 12.
[1435] *Mabo v Queensland,* (1992) 175 C.L.R 1, at 40-41 (per Brennan J). See also 175 C.L.R at 181-82 (per Toohey J).
[1436] Above, at 58-60 (per Brennan J).
[1437] Above, at 60 (per Brennan J).
[1438] For a discussion on the High Court decision and its impact on Australian law, see generally Stephenson, M.A. & Ratnapala, S (eds) *Mabo: A Judicial Revolution* (University of Queensland Press, St. Lucia, Queensland, 1993).



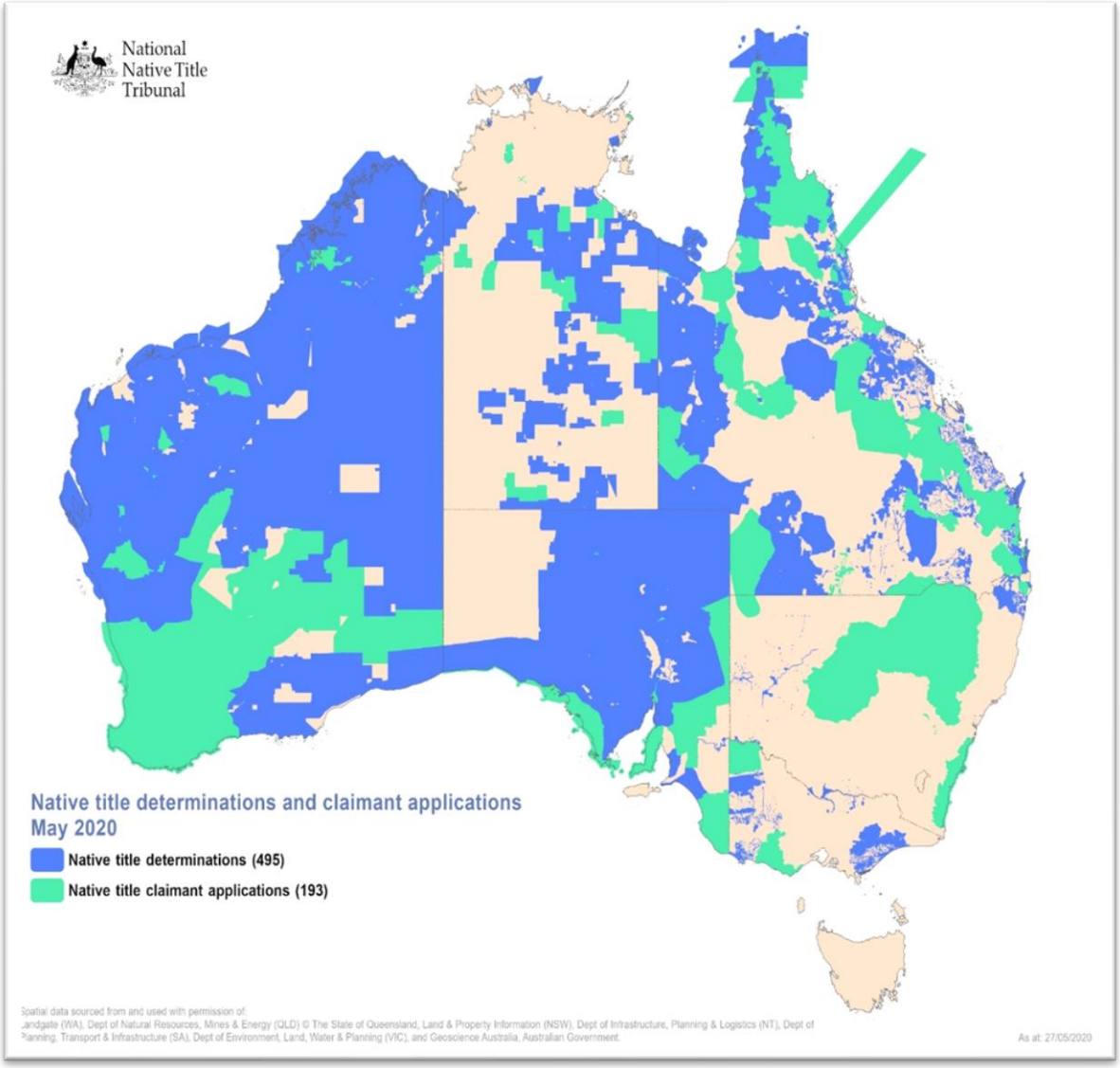
Map 44: Native Title Applications 2020 including the marine estate sea country[1439]

In 1993, the Keating Government formalised the recognition of native title by legislation with the enactment Native Title Act 1993 (NTA) that created a framework to clarify the legal position of landholders and the processes to be followed for native title to be claimed, protected and recognised through the courts,[1440] where Indigenous peoples may secure possessory rights in lands and compensation for lands lost.[1441]

[1439] National Native Title Tribunal http://www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx (Accessed May 2020).

[1440] This negotiation process is summarised in International Work Group for Indigenous Affairs, *The Indigenous World: 1993-94* (International Work Group for Indigenous Affairs, Copenhagen, 1994) at 92-3.

[1441] Native Title Act 1993 (Commonwealth), No.110 of 1993. For descriptions of the features of the Act and its ramifications, see Butt, P 'Mabo Revisited - Native Title Act' in *Journal of International Banking Law* (Vol. 9, 1994) at 75; and Ladbury, R & Chin, J 'Legislative Responses to the Mabo Decisions: Implications for the Australian Resources Industry' in *Journal of Energy and Natural Resources Law* (Vol. 12, 1994) at 207.



Map 45: Native Title Determinations & Applications 2020[1442]

The Federal Court of Australia arranges mediation in relation to claims made by Aboriginal and Torres Strait Islander peoples, and hears applications for, and makes, native title determinations. Appeals against these determinations can be made to a full sitting of the Federal Court and then to the High Court of Australia. The National Native Title Tribunal (NNTT), established under the Native Title Act 1993, is a body that applies the 'registration test' to all new native title claimant applications, and undertakes future act mediation and arbitral functions.

The 1998 High Court decision of *Wik Peoples v Queensland,*[1443] found that the statutory pastoral leases under consideration by the court did not bestow rights of exclusive possession

[1442] National Native Title Tribunal http://www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx (Accessed May 2020).

[1443] *Wik Peoples v The State of Queensland* [1996] HCA 40, (1996) 187 CLR 1 (23 December 1996), High Court.

on the leaseholder. As a result, native title rights could co-exist depending on the terms and nature of the particular pastoral lease. Where there was a conflict of rights, the rights under the pastoral lease would extinguish the remaining native title rights. The *Wik* decision found that native title could coexist with other land interests on pastoral leases, which cover some 40% of the Australian land mass.

As a result of *Wik*, the Native Title Act 1993 was amended pursuant to the Native Title Amendment Act 1998 which introduced the '10 Point Plan' by the Howard Government that streamlined the claims system and provided security of tenure to non-Aboriginal holders of pastoral leases and other land title, where that land might potentially be claimed under the NTA. The amendment placed some restrictions on native title claims.

The 2001 High Court decision of *Yarmirr v Northern Territory,*[1444] was the first native title claim in Australia to sea country. The case was an application made on behalf of a number of clan groups of Aboriginal people to an area of seas and seabeds surrounding Croker Island in the Northern Territory. The High Court rejected the arguments of the Commonwealth that:

- it was legally impossible for native title to exist offshore because the common law did not extend offshore and it was a requirement of the Native Titles Act 1993 that native title rights are recognised by the common law, or alternatively;
- because native title had been extinguished by the vesting of offshore waters and the seabed in the Northern Territory.

But it also rejected the claimants' argument that it is possible to recognise exclusive native title rights even if those rights are subject to the international law right of innocent passage, the public right to navigate the seas and the rights of the holders of fishing licences. The majority decided that a native title right to exclude others would, as a matter of law, be inconsistent with other rights that are recognised as existing in offshore areas, particularly:

- the common law public rights to navigate and to fish, and
- the international right of innocent passage of ships through territorial waters.

Olney J determined that members of the Croker Island community have a native title right to have free access to the sea and seabed of the claimed area for a number of purposes. The result of the case was that the determination of native title rights includes:

- the native title rights do not confer rights to the exclusion of all others;
- the native title rights include free access to the sea and seabed within the claim area in accordance with traditional laws and customs for the purposes of:
    - travelling through or within the area;
    - fishing and hunting;
    - visiting and protecting places that are of cultural and spiritual importance; and
    - safeguarding cultural and spiritual knowledge.

[1444] [2002] HCA 56.

The decision paved the way for other native title applications involving waters to proceed.[1445]

The following year, the 2002 High Court decision of *Yorta Yorta v Victoria*,[1446] was a native title claim by the Yorta Yorta Aboriginal people of north central Victoria. Olney J however, ruled that the 'tide of history had washed away' any real acknowledgement of traditional laws and any real observance of traditional customs by the applicants hence the High Court adopted strict requirements of continuity of traditional laws and customs for native title claims to succeed.

The 2013 High Court of Australia decision of *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia*[1447] on the other hand, related to the largest native title claim to sea country in Australia's history in the Torres Strait, Northern Australia. The native title claimants were successful in their appeal where the court unanimously upheld native title rights to commercial fishing.

A claim to sea country in the Torres Strait had been a long time coming. The original *Mabo* decision included a sea claim, but the portion of the claim relating to the sea was not pursued to the High Court for technical legal reasons. The *Akiba Torres Strait Sea* claim was lodged in 2001 and went through two Federal Court decisions before its appeal to the High Court. The area in question was approximately 44,000 square kilometres of sea country in the Torres Strait in far north Queensland. The claim related to rights to enter, remain, use and enjoy the area and rights to access and take resources.

In 2018, an Indigenous Land Use Agreement (ILUA) was agreed between the Kaurna Yerta Aboriginal Corporation (KYAC), the Kaurna people, the South Australian government, and the federal government which was the first ILUA to be agreed to in any Australian capital city. The native title rights cover Adelaide's whole metropolitan area and includes '17 parcels of undeveloped land not under freehold.' Some of the land is Crown land; some is state government and private land owned by corporations. Justice Mortimer said it would be 'the first time in Australia that there [had] been a positive outcome within the area of (native title) determination.'[1448]

The National Native Title Register (NNTR), maintained by the NNTT, is a register of approved native title determinations. A determination can be that native title does or does not exist. As part of the determination of native title, native title groups are required to nominate a Native Title Prescribed Body Corporate (PBC) to hold (as trustee) or manage (as agent) their native title. Following a determination, PBCs are entered onto the NNTR where the PBC becomes a Registered Native Title Body Corporate (RNTBC). In 2011, 160 registered determinations of

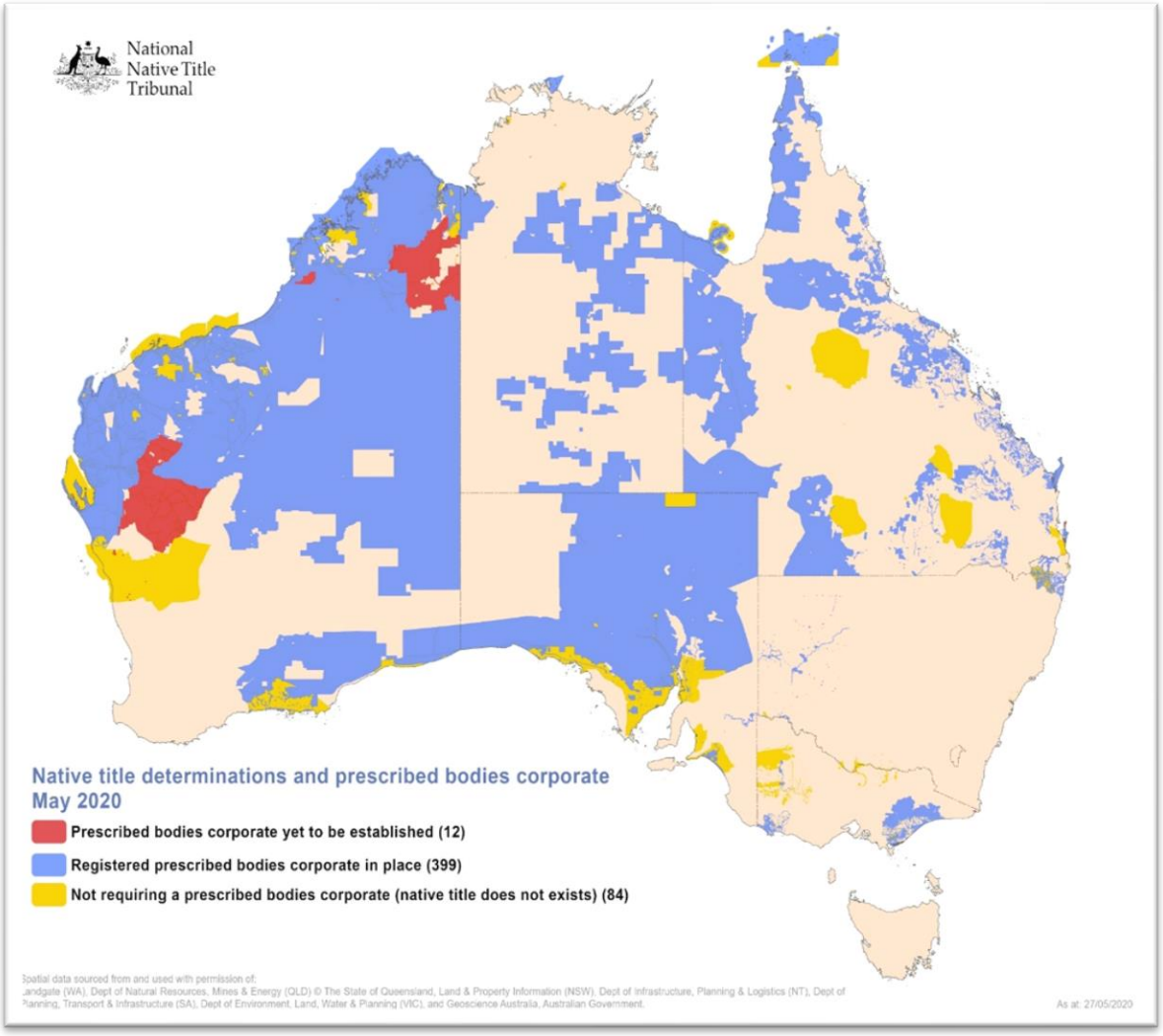
[1445] See Bourova, E; Dias, N, 'Bidyadanga Initial Works Indigenous Land Use Agreement (ILUA)' (12 August 2011). ATNS (28 October 2011 ed.). Online at https://www.atns.net.au/agreement.asp?EntityID=5479 (Accessed May 2020).

[1446] *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998), Federal Court.

[1447] [2013] HCA 33.

[1448] Richards, S, 'Our ancestors will be smiling: Kaurna people gain native title rights,' in INDaily: Adelaide Independence News, (21 March 2018). Online at: https://indaily.com.au/news/2018/03/21/kaurna-people-granted-native-title-rights-historic-australian-first/ (Accessed May 2020).

native title covered some 1,228,373 km^2 (or approximately 16 per cent) of the land mass of Australia. That number has risen over the years.



Map 46: Native Title Bodies Corporate 2020[1449]

Great Barrier Reef Marine Park and EBM

The Great Barrier Reef (GBR), is located off the coast of Queensland, Australia, and is a UNESCO World Heritage site, is rated one of the seven natural wonders of the world and is the world's largest living structure. The (GBR) is the largest coral reef globally stretching 2,300 kilometres and covering 344,400 square kilometres, which is about the same size as Germany, Malaysia or Japan and is bigger than New Zealand or the UK. Most of the GBR was inscribed as World Heritage in 1981 based on the natural heritage criterion.[1450] Spanning 2,300 km, it is home to 600 types of soft and hard corals, 200 birds, more than 100 species of jellyfish, 3,000 varieties of molluscs, 2,500 sponges, 500 species of worms, 1,625 types of fish, 133

[1449] National Native Title Tribunal http://www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx (Accessed May 2020).
[1450] UNESCO, *Great Barrier Reef,* (2018), Online at: http://whc.unesco.org/en/list/154 (Accessed May 2020).

varieties of sharks and rays, 6 of the 7 global species of sea turtle and more than 30 species of whales and dolphins many of which are endemic to the area.[1451] The GBR includes over 3000 coral reefs, 600 continental islands, 300 coral cays and about 150 inshore mangrove islands, and complex bathymetry from the shallows to over 2000 m depth and is collectively one of the world's most diverse marine ecosystems.[1452]

To conserve and protect its natural beauty, in 1975 the Government of Australia enacted the Great Barrier Reef Marine Park Act 1975 (GBRMPA), which established the Great Barrier Reef Marine Park Authority (GBRMPA), because of broad public concerns about the need to manage the iconic environment of the GBR in the face of increasing and potential threats, including oil drilling and limestone mining.

A host of other complex legislation and strategies affect the GBR Park and how it functions such as the Environment Protection and Biodiversity Conservation Act 1999, National Strategy for Ecologically Sustainable Development, National Strategy for the Conservation of Australia's Biological Diversity, Australia's Oceans Policy, National Strategy for the Conservation of Australian Species and Communities Threatened with Extinction, the Nature Conservation Act 1992, Marine Parks Act 1982, Fisheries Act 1994, and the Queensland Nature Conservation (Wildlife) Regulation 1994.

However, the main statute is the Great Barrier Reef Marine Park Act 1975 (GBRMPA) which defined what acts were prohibited on the Great Barrier Reef (GBR). The GBRMPA was pioneering legislation at the time because it provided for both 'conservation and reasonable use' of natural resources, introducing the concept of multiple-use spatial management through zoning and ecosystem-based management key management tools for the GBR.

The government of Australia manages the reef through the GBRMPA in partnership with the government of Queensland, to ensure that the GBR is widely understood and used in a sustainable manner. The Australian government recognised the ecological significance of GBR by its inclusion in the nation's Biodiversity Action Plan. A combination of zoning, management plans, permits, education and incentives (such as eco-tourism certification) are used in the effort to conserve the GBR.

Section 2A, Great Barrier Reef Marine Park Act 1975 specifies the objects of the GBRMPA which include EBM and partnerships with Indigenous people. Section 2A states:

> **2A Objects of this Act**
>
> (1) The main object of this Act is to provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region.
>
> (2) The other objects of this Act are to do the following, so far as is consistent with the main object:

[1451] Great Barrier Reef Marine Park Authority, *Reef Facts*, (2018). Online at: http://www.gbrmpa.gov.au/the-reef/reef-facts (Accessed May 2020).
[1452] Above.

(a) allow ecologically sustainable use of the Great Barrier Reef Region for purposes including the following:

(i) public enjoyment and appreciation;

(ii) public education about and understanding of the Region;

(iii) recreational, economic and cultural activities;

(iv) research in relation to the natural, social, economic and cultural systems and value of the Great Barrier Reef Region;

(b) encourage engagement in the protection and management of the Great Barrier Reef Region by interested persons and groups, including Queensland and local governments, communities, Indigenous persons, business and industry;

(c) assist in meeting Australia's international responsibilities in relation to the environment and protection of world heritage (especially Australia's responsibilities under the World Heritage Convention).

(3) In order to achieve its objects, this Act:

(a) provides for the establishment, control, care and development of the Great Barrier Reef Marine Park; and

(b) establishes the Great Barrier Reef Marine Park Authority; and

(c) provides for zoning plans and plans of management; and

(d) regulates, including by a system of permissions, use of the Great Barrier Reef Marine Park in ways consistent with ecosystem-based management and the principles of ecologically sustainable use; and

(e) facilitates partnership with traditional owners in management of marine resources; and

(f) facilitates a collaborative approach to management of the Great Barrier Reef World Heritage area with the Queensland government.

Section 3 the Interpretation section defines 'ecosystem-based management,' 'Indigenous person' and 'traditional owner' as the following:

ecosystem-based management means an integrated approach to managing an ecosystem and matters affecting that ecosystem, with the main object being to maintain ecological processes, biodiversity and functioning biological communities.

Indigenous person means a person who is:

(a) a member of the Aboriginal race of Australia; or

(b) a descendant of an Indigenous inhabitant of the Torres Strait Islands.

traditional owner means an Indigenous person:

(a) who is recognised in the Indigenous community or by a relevant representative Aboriginal or Torres Strait Islander body:

(i) as having spiritual or cultural affiliations with a site or area in the Marine Park; or

(ii) as holding native title in relation to that site or area; and

(b) who is entitled to undertake activities under Aboriginal or Torres Strait Islander custom or tradition in that site or area.

Section 3AA Ecologically sustainable use

For the purposes of this Act, *ecologically sustainable use* of the Great Barrier Reef Region or its natural resources is use of the Region or resources:

(a) that is consistent with:

(i) protecting and conserving the environment, biodiversity and heritage values of the Great Barrier Reef Region; and

(ii) ecosystem-based management; and

(b) that is within the capacity of the Region and its natural resources to sustain natural processes while maintaining the life-support systems of nature and ensuring that the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of future generations.

Section 32 Division 2—Zoning plans

32 Objects of Division

(1) The objects of this Division are:

(a) to regulate the use of the Marine Park so as to:

(i) protect the ecosystem within the Great Barrier Reef Region; and

(ii) ensure the use is ecologically sustainable use; and

(iii) manage competing usage demands; and

(b) to protect areas in the Marine Park that are of high conservation value; and

(c) to protect and conserve the biodiversity of the Marine Park, including ecosystems, habitats, populations and genes;

Section 54 Great Barrier Reef Outlook Report

(1) The Authority must prepare and give to the Minister a report in relation to the Great Barrier Reef Region every 5 years. The first report must be given to the Minister by 30 June 2009.

(2) The report must be prepared in accordance with the regulations (if any).

Content of report

(3) The report must contain the following matters:

(a) an assessment of the current health of the ecosystem within the Great Barrier Reef Region and of the ecosystem outside that region to the extent it affects that region;

(b) an assessment of the current biodiversity within that region;

(c) an assessment of the commercial and non-commercial use of that region;
(d) an assessment of the risks to the ecosystem within that region;
(e) an assessment of the current resilience of the ecosystem within that region;
(f) an assessment of the existing measures to protect and manage the ecosystem within that region;
(g) an assessment of the factors influencing the current and projected future environmental, economic and social values of that region;
(h) an assessment of the long-term outlook for the ecosystem within that region;
(i) any other matter prescribed by the regulations for the purposes of this paragraph

Pursuant to s. 54, Great Barrier Reef Marine Park Act 1975 then, a Great Barrier Reef Outlook Report must be published every five years examining the health, pressures, and likely future of the GBR, which aims to provide a regular and reliable means of assessing reef health and management in an accountable and transparent way.

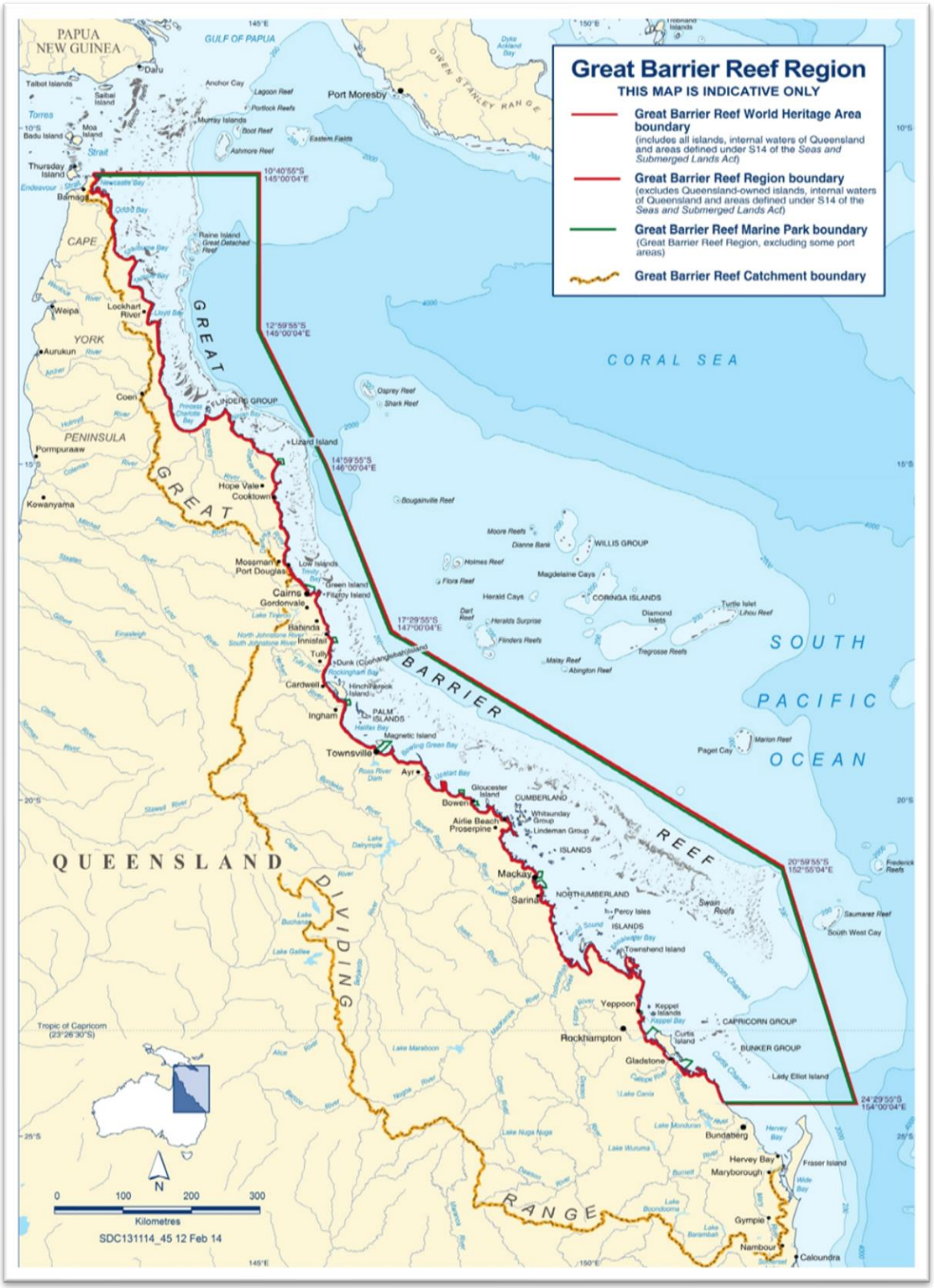
The *Great Barrier Reef Outlook Report 2014* found the greatest risks to the GBR are climate change, land-based run-off, coastal development, some fishing impacts, illegal fishing and poaching.[1453] The *Great Barrier Reef Outlook Report 2019* similarly reported that climate change is critical to slowing the deterioration of the GBR's ecosystem and heritage values and supporting recovery. The report further noted that achieving outcomes on the ground continues to be difficult for complex and spatially broad threats, such as climate change and land-based run-off.[1454]

Dobbs outlined in her 2011 report the processes and considerations included in producing the GBRMP s. 54 report from an EBM perspective taking into account findings in performance areas such as biodiversity, ecosystem health and commercial and non-commercial uses.[1455] Dobbs referred to assessments carried out in a number of ways, which included various ecological processes and evidence-gathering engagement with communities through workshops. Dobbs stated:

> To learn about changes in the GBR by listening to community members' stories of the past. … [through] oral history interviews … [were] conducted with 50 catchment residents with some extracts featured in the report. Inclusion of more historic and community information would have heightened the sense of 'what we have already lost' and to better recognise the extensive on-ground knowledge about the GBR held within the community.[1456]

[1453] Great Barrier Reef Marine Park Authority http://elibrary.gbrmpa.gov.au/jspui/bitstream/11017/2856/5 (Accessed May 2020).
[1454] Above.
[1455] Dobbs, K et al, 'Developing a Long-Term Outlook for the Great Barrier Reef, Australia: A Framework for Adaptive Management Reporting Underpinning an Ecosystem-based Management Approach,' in *Marine Policy,* (Vol. 35, 2011) 233 at 236.
[1456] Above.

Dobbs stressed the importance of engagement identifying key stakeholders in formulating broad-ranging engagement and advice mechanisms that inform the bases of the s. 54 report that included various state and federal government departments, reference groups and community engagement groups. Although the article stresses the importance of the involvement of the community in informing the direction of the report, a major concern was that the interest groups and communities did not, ironically include Aboriginal communities whose inclusion was never explicitly mentioned in the article.



Map 47: Great Barrier Reef Region Map[1457]

[1457] Great Barrier Reef Marine Park Authority http://elibrary.gbrmpa.gov.au/jspui/bitstream/11017/2856/5 (Accessed May 2020).

Furthermore, notwithstanding the original ecological sustainability objectives of the GBR, as early as 2011, the World Heritage Committee examined the state of conservation of the GBR and expressed extreme concern about the decline of its condition which led to the joint development by the Queensland and the Australian governments of the 'Reef 2050 Long Term Sustainability Plan' which is a shared strategy to secure the World Heritage values of the GBR. From 2016-2017, due to mass coral bleaching and the deteriorating outlook of the GBR, the Great Barrier Reef Ministerial Forum brought forward the scheduled mid-term review of the 'Reef 2050 Plan' which resulted in the updated 'Reef 2050 Plan' that outlines concrete management measures for 35 years that sets clear actions, targets, objectives and outcomes to drive and guide the short, medium and long term management of the GBR. At the core of the 'Reef 2050 Plan' is a shared vision:

> To ensure the Great Barrier Reef continues to improve on its Outstanding Universal Value every decade between now and 2050 to be a natural wonder for each successive generation to come.[1458]

The World Heritage Committee also required reports on the implementation of the 'Reef 2050 Plan' and the effectiveness of management in reducing threats. Since that time, there have been significant and emerging changes in recognition of Aboriginal and Torres Strait Islander 'Traditional Owner' rights and access to GBR Sea Country and new international requirements supporting Free, Prior and Informed Consent (FPIC), pursuant to UNDRIP 2007, for planning and management decisions, particularly in world heritage sites. Equally, Indigenous Traditional Owners of the GBR have become increasingly concerned about the ineffectiveness of governance and management of the GBR. These and other factors have meant that ongoing implementation, review and further development of the 'Reef 2050 Plan' require more focussed consideration of the aspirations and needs of the Indigenous Traditional Owners of the GBR.

In addition, the 'Reef 2050 Plan' prominently recognises that the Indigenous 'Aboriginal and Torres Strait Islander peoples' are the GBR's 'Traditional Owners' and have a continuing connection to their land and sea country. However, from a perspective of Indigenous Traditional Owners across the GBR, the strategies remain some way from turning recognition into meaningful participation in co-governance roles and management actions.[1459] A sound strategy going forward then is needed for durable GBR co-management partnerships and agreements to provide for Indigenous Traditional Owners to have greater ownership and to share actions based on the policy and management problems facing the GBR, and for them

[1458] Department of Agriculture, Water and Environment, Australian Government, 'Reef 2050 Plan,' online at: https://www.environment.gov.au/marine/gbr/long-term-sustainability-plan (Accessed May 2020).

[1459] Dale, A.P., George, M., Hill, R., Fraser, D. *Traditional Owners and Sea Country in the Southern Great Barrier Reef - Which Way Forward?* (Report to the National Environmental Science Program. Reef and Rainforest Research Centre Ltd., Cairns, Australia, 2016). Online: http://nesptropical.edu.au/wp-content/uploads/2016/05/NESP-TWQ-3.9-FINAL-REPORT.pdf. (Accessed May 2020).

to be empowered to deliver solutions, drawing on their own deep cultural knowledge and Indigenous land and sea governance institutions and organisations.[1460]

Aboriginal and Torres Strait Islander Peoples and Co-Governance of GBR

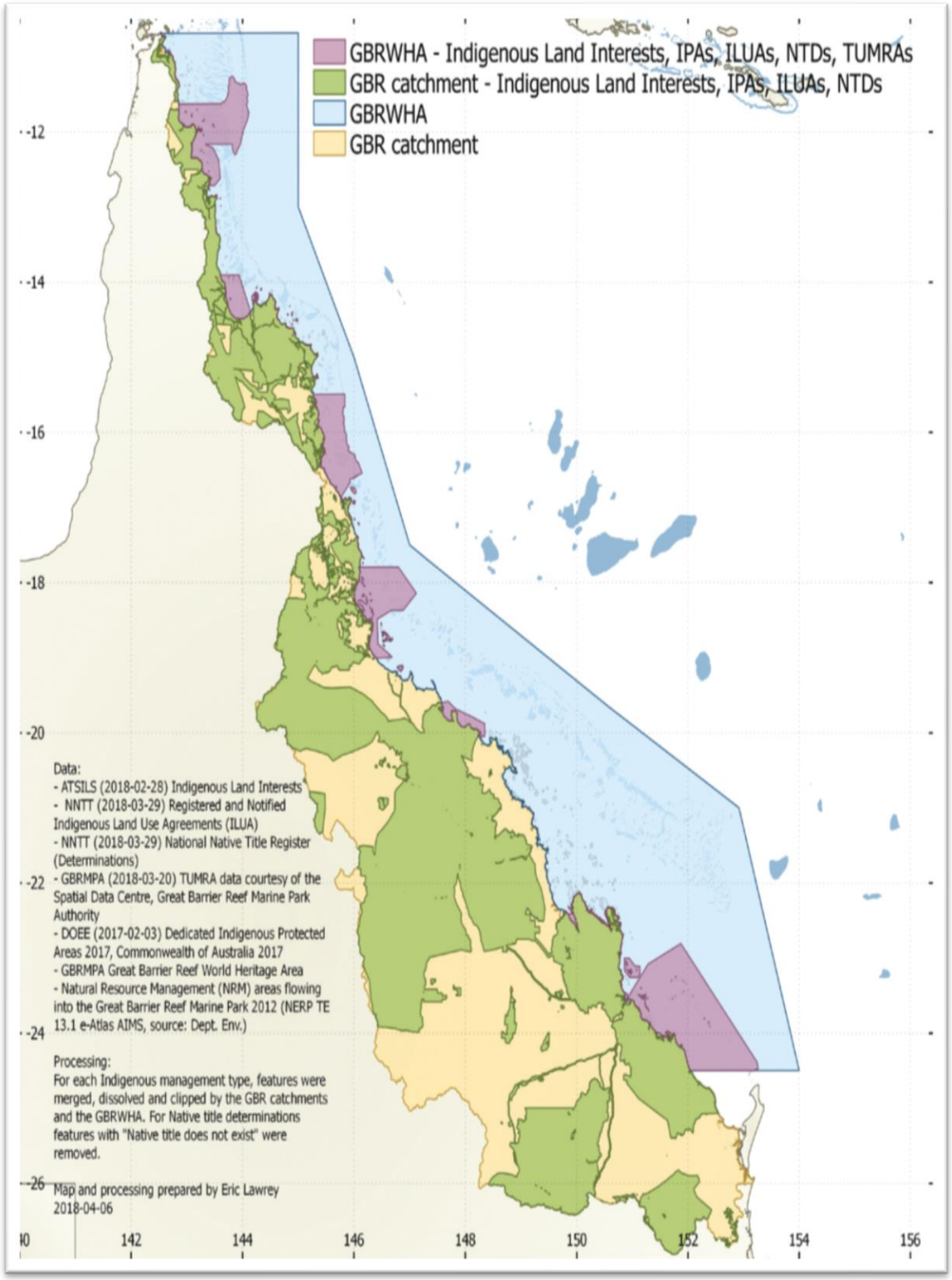
The Indigenous Aboriginal and Torres Strait Islander 'Traditional Owner' interests span the entire GBR with at least 70 Traditional Owner groups with rights and interests in Land and Sea Country across the GBR. These groups include but are not limited to the Erubam, Ugarem and Meriam Le; Kaurareg; Gudang; Yadhaigana; Wuthathi; Kuuku Ya'u; Kanthanumpun; Uutaalgnunu (Night Island); Umpila; Angkum; Lama Lama; Paal Paal; Guugu Yimithirr Warra; Ngulan; Yuku Baja Muliku; Eastern Kuku Yalanji; Wanyurr Majay; Yirrganydji; Gimuy Yidinji; Gurabana Gunggandji; Guru Gulu Gunggandji; Mandingalbay Yidinji; Lower Coastal Yidinji; Mamu; Djiru; Gulnay; Girramay; Bandjin; Warrgamay; Nywaigi; Manbarra; Wulgurukaba; Bindal; Juru; Gia; Ngaro; Yuibera; Dharumbal; Woppaburra; Taribelang Bunda; Bailai; Gooreng; and Gurang peoples.[1461] The 2018 *Traditional Owners of the Great Barrier Reef Report* on the GBR noted:

> The ocean currents that variously connected and separated the GBR's marine biodiversity did the same to social connections amongst Traditional Owners, who originally relied on traditional non-motorised vessels such as canoes and swim logs for marine transport. For example, the Erubam, Ugarem and Meriam Le people of eastern Torres Strait traditionally sailed large dugout canoes to Raine Island and used the islands, reefs and waters of the northern outer barrier reefs, and in doing so, maintained cultural and social contact with the Wuthathi people of Cape York. All four groups are recognised as the Traditional Owners of the region which is now the subject of an Indigenous Land Use Agreement (ILUA) between these groups and the Queensland government. Their cultural connectedness is reflected in traditional song lines and stories.[1462]

[1460] Above.

[1461] Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia, 2018) at 18-19.

[1462] Above.



Map 48: Traditional Owner land and sea interests in the GBR and catchments[1463]

[1463] Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia, 2018) at 11.

As noted above, the enabling legislation – The Great Barrier Reef Marine Park Act 1975 (GBRMPA) - established the GBRMP and focused on the long term protection and conservation of the environment of the GBR, through, inter alia, EBM which it defined as 'an integrated approach to managing an ecosystem and matters affecting that ecosystem, with the main object being to maintain ecological processes, biodiversity and functioning biological communities.'[1464] The GBRMPA in 1975 moreover, acknowledged Indigenous Traditional Owners in s. 2A Objects of the Act which states:

> (2) The other objects of this Act are to do the following, so far as is consistent with the main object:
>
> (b) encourage engagement in the protection and management of the Great Barrier Reef Region by interested persons and groups, including Queensland and local governments, communities, *Indigenous persons*, business and industry [emphasis added];
>
> (3) In order to achieve its objects, this Act:
>
> (a) provides for the establishment, control, care and development of the Great Barrier Reef Marine Park; and
>
> (b) establishes the Great Barrier Reef Marine Park Authority; and
>
> (c) provides for zoning plans and plans of management; and
>
> (d) regulates, including by a system of permissions, use of the Great Barrier Reef Marine Park in ways consistent with ecosystem-based management and the principles of ecologically sustainable use; and
>
> (e) *facilitates partnership with traditional owners in management of marine resources*; and
>
> (f) facilitates a collaborative approach to management of the Great Barrier Reef World Heritage area with the Queensland government [emphasis added].

Despite such strong fundamental historical, cultural and political connections of Traditional Owners, as well as GBRMPA legal prescriptions, the Traditional Owners were not consulted in the creation of the marine park in 1975 nor were they involved in the establishment of the World Heritage inscription, which did not address cultural criterion for World Heritage at the time. Consequently and as expected, non-Indigenous uses dominate human activities within the GBR, which are predominantly governed through the statutory and regulatory frameworks established to manage the GBR Marine Park and the GBR World Heritage Area (GBRWHA). Most of the GBRWHA occurs within the GBR Marine Park and is managed by GBRMPA for multiple uses including commercial and recreational uses.

The Indigenous Traditional Owner groups across the GBR have worked hard across several scales for increasing government recognition of Indigenous ownership of, and access to both

[1464] Great Barrier Reef Marine Park Act 1975, s. 3 Interpretation.

land and sea country since the original formation of the Marine Park in 1975.[1465] Indeed, since the mid-1990s, Indigenous Traditional Owners have been attempting to reach agreement about broad co-governance frameworks with the Australian and Queensland governments in an effort to attain genuine partnership in co-governing and co-managing GBR catchments and Sea Country. However, securing real Commonwealth and State commitment to such an approach has been difficult to achieve at all levels from GBR to regional, tribal and clan levels. Dale and others outlined the long struggle of Traditional Owners to secure better recognition of their rights and responsibilities in the management of Sea Country.[1466]

In addition, Indigenous Traditional Owner organisations generally have had very scanty resources to sustain the approaches necessary for negotiating genuine co-governance and co-management of the GBR. Many groups have instead needed to focus local efforts on securing rights and interests in the GBR. The recognition of native title in the Torres Strait in particular signals the need for reconsideration of the broad approach Australia has taken to Indigenous marine governance,[1467] especially with the litigation in the 2013 High Court of Australia decision of *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia*[1468] which was the largest native title claim to sea country in Australia's history in the Torres Strait. The native title claimants were successful in their appeal where the court unanimously upheld native title rights to commercial fishing. Accordingly, the latest report on Indigenous Traditional Owners and the GBR asserted:

> Overall, while the status of sea country claims across the balance of the GBR remains embryonic, there will be major future growth in the testing/expansion of Indigenous Sea Country rights over the coming decade. These developments all suggest that, for the future, all major policy and delivery agenda in catchments and Sea Country must embrace Traditional Owners as rights-holders, requiring action between the nation-state and first-nations to be framed on a negotiated basis.[1469]

Assessment of permit applications for activities in the remainder of the GBRMP for example, includes a native title notification process where relevant native title bodies are notified of the proposed activity and are invited to comment on the possible grant of the permission. According to its permit assessment and decision guidelines, GBRMPA must have regard of any comments made by the Native Title body. However, the GBRMPA is not obliged to include them in the decision process nor to provide any response to comments received,[1470] which

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[1465] Dale, A.P., George, M., Hill, R., Fraser, D. *Traditional Owners and Sea Country in the Southern Great Barrier Reef - Which Way Forward?* (Report to the National Environmental Science Program. Reef and Rainforest Research Centre Ltd., Cairns, Australia, 2016). Online: http://nesptropical.edu.au/wp-content/uploads/2016/05/NESP-TWQ-3.9-FINAL-REPORT.pdf. (Accessed May 2020).

[1466] Above.

[1467] Butterly, L. 'Native Title Rights, Regulations and Licences: The Torres Strait Sea Claim,' in *The Conversation,* (8 August 2013). Online at https://theconversation.com/native-title-rights-regulations-and-licences-the-torres-strait-sea-claim-16808 (Accessed May 2020).

[1468] [2013] HCA 33.

[1469] Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia, 2018) at 12.

[1470] See GBRMPA, *GBRMPA Guidelines - Assessment and Decision.* (2017). Online at: http://elibrary.gbrmpa.gov.au/jspui/bitstream/11017/3229/1/Assessment-and-Decision-Guidelines.pdf; and GBRMPA, *GBRMPA Guidelines - Traditional Owner Heritage Assessment.* (2017). Online

obviously limits any input from Traditional Owner groups that do not yet have the capacity or the resources to undertake such business. Consequently, Traditional Owners are marginalised given that most decision making about non-Indigenous use of GBR resources in their respective Sea Country territory are made without Traditional Owner groups substantive involvement.

In theory however, the decision-making context with Indigenous Traditional Owners apparently has been improving. In 2017, GBRMPA introduced additional guidelines for permit application assessments to consider impacts on Traditional Owner heritage values including those entwined with land and sea management and the need to consider the regulation of resource use based on cultural practices. However, whether or not Traditional Owner consultation and involvement in decision-making is required, decisions are made by a GBRMPA permit assessment officer and not necessarily by Traditional Owners themselves.[1471]

Real and substantive involvement in the co-governance of the GBRMPA then remains the exception, with very few statutory arrangements for mandatory and meaningful engagement and co-governance with Traditional Owners in decision making for reef research and management.[1472]

Indigenous Traditional Owner Governance Arrangements for the GBR

Indigenous Aboriginal and Torres Strait Islander cultural or customary governance is represented by cultural systems and methods that determine contemporary decision-making approaches, which at the local scales can vary between Traditional Owner groups throughout the GBR. For many GBR Traditional Owner groups, contemporary governance systems are founded upon their traditional laws, beliefs and customs developed over the millennia prior to colonisation, and that are handed down through generations.[1473] Akin to Māori and other Indigenous peoples, some distinguishing characteristics of Indigenous customary governance include:

- Consensus building (rather than majority) decision-making;
- The inclusion of clear roles for elders and cultural leaders;
- Resource-sharing, with a focus on families, group property, and social prestige (in contrast to more individualistic approaches);
- The recognition of land and sea tenure based on cultural and traditional ties, usually a kind of collective, common property ownership, (rather than private property ownership) and including sacred areas; and

at: http://elibrary.gbrmpa.gov.au/jspui/bitstream/11017/3241/5/Traditional-Owner-Heritage-Assessment-Guideline.pdf (Accessed May 2020).

[1471] Above.

[1472] Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia, 2018) at 22.

[1473] von der Porten, S., and de Loë, R.C. 'How Collaborative Approaches to Environmental Problem Solving View Indigenous Peoples: A Systematic Review,' in *Society & Natural Resources* (Vol. 27, No. 10, 2014) at 1040-1056.

- a focus on community cohesion based on relationships, often on kinship levels, with complex social categories determining reciprocal responsibility.[1474]

Like Māori and other Indigenous people globally, colonialism has displaced Traditional Owners governance vision, priorities, laws, structures and institutions that has had a devastating impact on Traditional Owners. In contemporary times, however, in addition to customary governance, Traditional Owners are involved in various ways in more formalised forms of corporate or organisational governance arrangements providing the basis under Australian/Queensland legislative and policy arrangements for them to formally progress and deliver on their collective self-determination aspirations. According to the 2018 *Traditional Owners of the Great Barrier Reef Report*, these post-colonial decision-making systems or organisational governance arrangements include:

- Informal and formal corporate and organisational entities (e.g. Registered Native Title Bodies Corporate (RNTBCs), Prescribed Body Corporates (PBCs), Land Trusts, Companies, Indigenous corporations and associations, etc.). These organisations meet a range of legal and statutory roles and responsibilities, including administrative and corporate administration, employment and financing. Some are Indigenous organisations with mixtures of influence from cultural and nation-state governance arrangements which emerged in response to the requirement for Aboriginal and/or Torres Strait Islander people to 'hold' tenure rights and to administer their responsibilities to land where native title and other rights have been recognised (Hunt, 2008).[1475] A large number of such entities have been established throughout the GBR region and facilitate ongoing consultations and negotiation between local Traditional Owners and other stakeholders such as development companies, industry corporations and governments (Talbot 2017).[1476] These organisations do not receive ongoing taxpayer funding to carry out their statutory and other functions;
- To carry out more formalised business activities, many Traditional Owner groups have also established other native title-related organisations, including charitable trusts, discretionary trusts, companies and associations under relevant state laws (Financial Services Council 2015).[1477] Some Traditional Owner groups, for example, have then been able to establish and operate Land and Sea Ranger Programs;
- Traditional Owners also engage through self-determined but aggregated organisational governance arrangements generally based on more geographically-defined (i.e. north, central and south) sections of the GBR region. For example,

[1474] Fenelon, J, & Hall, T, 'Revitalization and Indigenous Resistance to Globalization and Neoliberalism,' in *American Behavioural Scientist* (Vol. 51, No. 12, 2008) at 1867-1901.

[1475] Hunt, J. 'Between a Rock and a Hard Place: Self-determination, Mainstreaming and Indigenous Community Governance,' in Hunt, J, Smith, D, Garling, S, and Sanders, W, (Eds.), *Contested Governance Culture, Power and Institutions in Indigenous Australia*, (CAEPR Research Monograph No. 29, Canberra, ACT: Centre for Aboriginal Economic Policy Research (CAEPR) College of Arts and Social Sciences. The Australian National University (ANU) E Press, 2008) at 27-54.

[1476] Talbot, L.D. 'Indigenous Knowledge and Governance in Protected Areas in Australia and Sweden,' (PhD Thesis Submitted in the Division of Tropical Environments and Societies, JCU, Cairns, 2017).

[1477] Financial Services Council, *Valuing Native Title in Australia: Native Title Agreements and Trusts Research. Final Report*, (KPMG, Melbourne, Australia, 2015).

Girringun Aboriginal Corporation comprises an alliance of nine tribes and is based in Cardwell;

- Aboriginal and Torres Strait local governments administering Deeds of Grant in Trust (DOGIT) lands including on Cape York Peninsula. Aboriginal or Torres Strait Shire Councils within GBR catchments include Bamaga, Boigu, Cherbourg, Dauan, Erub, Eulo, Hammond Island, Hope Vale, Iama, Injinoo, Kubin, Lockhart River, Mabuiag, Masig, New Mapoon, Palm Island, Poruma, Saibai, Seisia, St Pauls, Ugar, Umagico, Warraber, Woorabinda, Wujal Wujal, and Yarrabah;
- Native Title Representative Bodies or NTRBs (Land Councils) are corporate entities established under specific legislation to consult with and represent Aboriginal and Torres Strait Islander peoples to regain rights to land and sea Country (by claim or purchase) and to achieve legal recognition of those rights in a Western legal system. There are four NTRBs (comprising 4 regions) working with Traditional Owners in the GBR: Cape York Land Council, North Queensland Land Council and Queensland South, while, in the Torres Strait region, the Torres Strait Regional Authority (TSRA) is the Native Title Representative Body;
- A variety of more informal committees, boards and taskforces also play a role in the organisational governance for Traditional Owners of the GBR. For example, the Cape York Turtle and Dugong Taskforce of Traditional Owners provided guidance on the implementation of the *Cape York Turtle and Dugong Strategy*, including the development of a united policy position on the culturally-appropriate management of hunting and other human activities. Also, in the past, Sea Country Forums were regular meetings for Sea Country Traditional Owners from the GBR to come together. A range of organisational governance structures also enable input from Traditional Owners from the Wet Tropics region (which falls within the GBR catchment) into decision-making related to the Wet Tropics World Heritage Area (WTWHA);[1478]
- Traditional Owners across the GBR region also often participate in the delivery of the National Landcare Program projects through formalized involvement with regional National Resource Management (NRM) groups; and
- The Northern Australian Indigenous Land and Sea Management Alliance (NAILSMA) demonstrates an even wider cross-national approach to supporting Traditional Owner land and sea management across northern Australia, particularly for the Northern Territory, Gulf of Carpentaria, Torres Strait, and Cape York Peninsula.[1479]

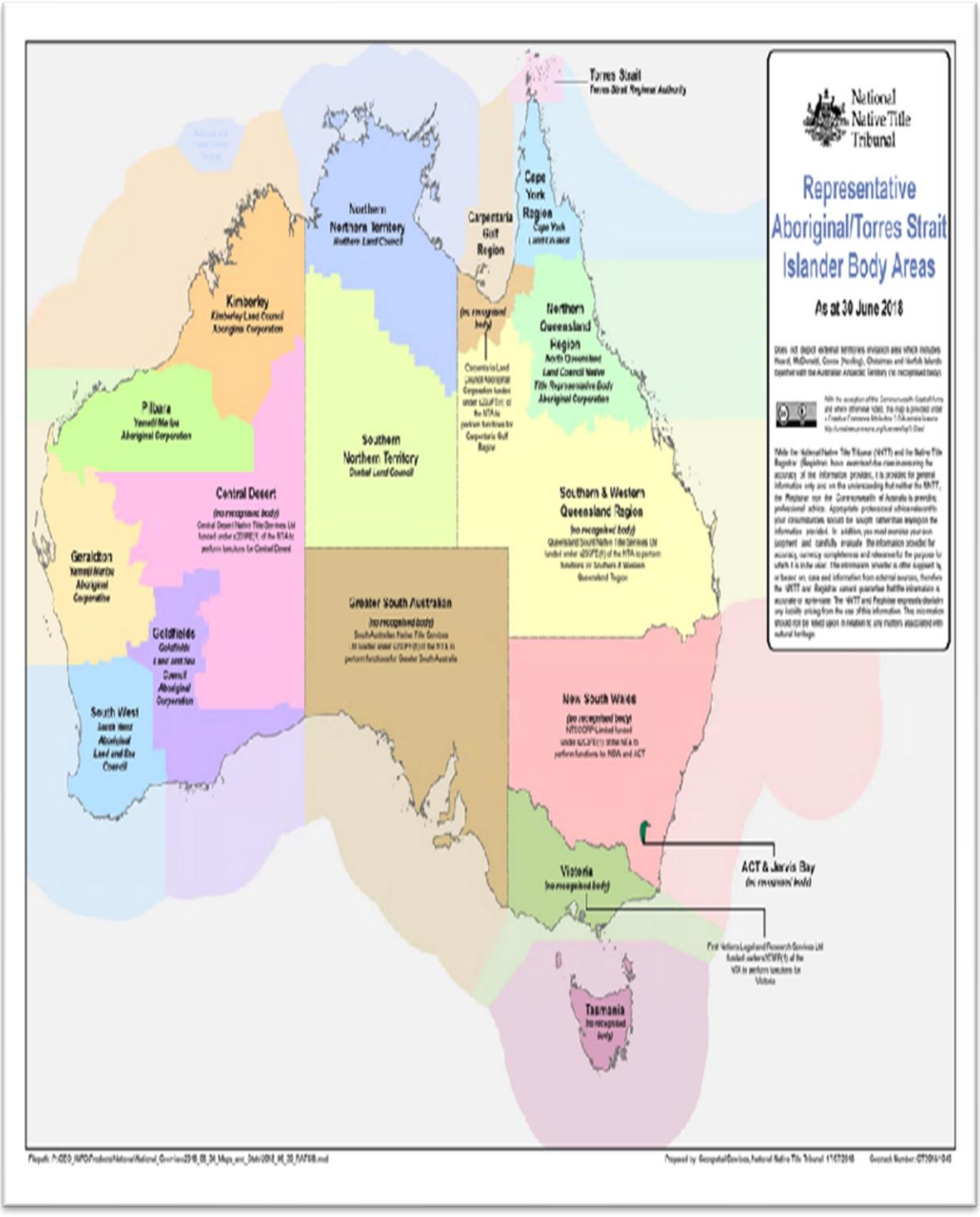
Under current management arrangements, the granting of a GBRMPA resource use permit is a future act under the Native Title Act 1993.[1480] Through emerging recognition, in 2005

[1478] Cultural Values Project Steering Committee, *Which Way Australia's Rainforest Culture: Relisting the Cultural Values for World Heritage*, (Compiled by Hill, R, Bock, E and Pert, P with and on behalf of the Rainforest Aboriginal Peoples and the Cultural Values Project Steering Committee, Cairns, Australia: Rainforest Aboriginal Peoples' Alliance and Project Partners, 2016).

[1479] Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia 2018) at 26-27.

[1480] GBRMPA, *GBRMPA Guidelines - Traditional Owner Heritage Assessment* (2017), Online at: http://elibrary.gbrmpa.gov.au/jspui/bitstream/11017/3241/5/Traditional-Owner-Heritage-Assessment-Guideline.pdf (Accessed May 2020).

GBRMPA established a program to resource and facilitate the development of co-management of resources with GBR Traditional Owners.



Map 49: Australian Native Title Representative Body Boundaries[1481]

[1481] Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia 2018) at 51.

Other formal local agreements also represent a form of Indigenous organisational governance in the GBR such as Traditional Use of Marine Resource Agreements (TUMRAs) .[1482]

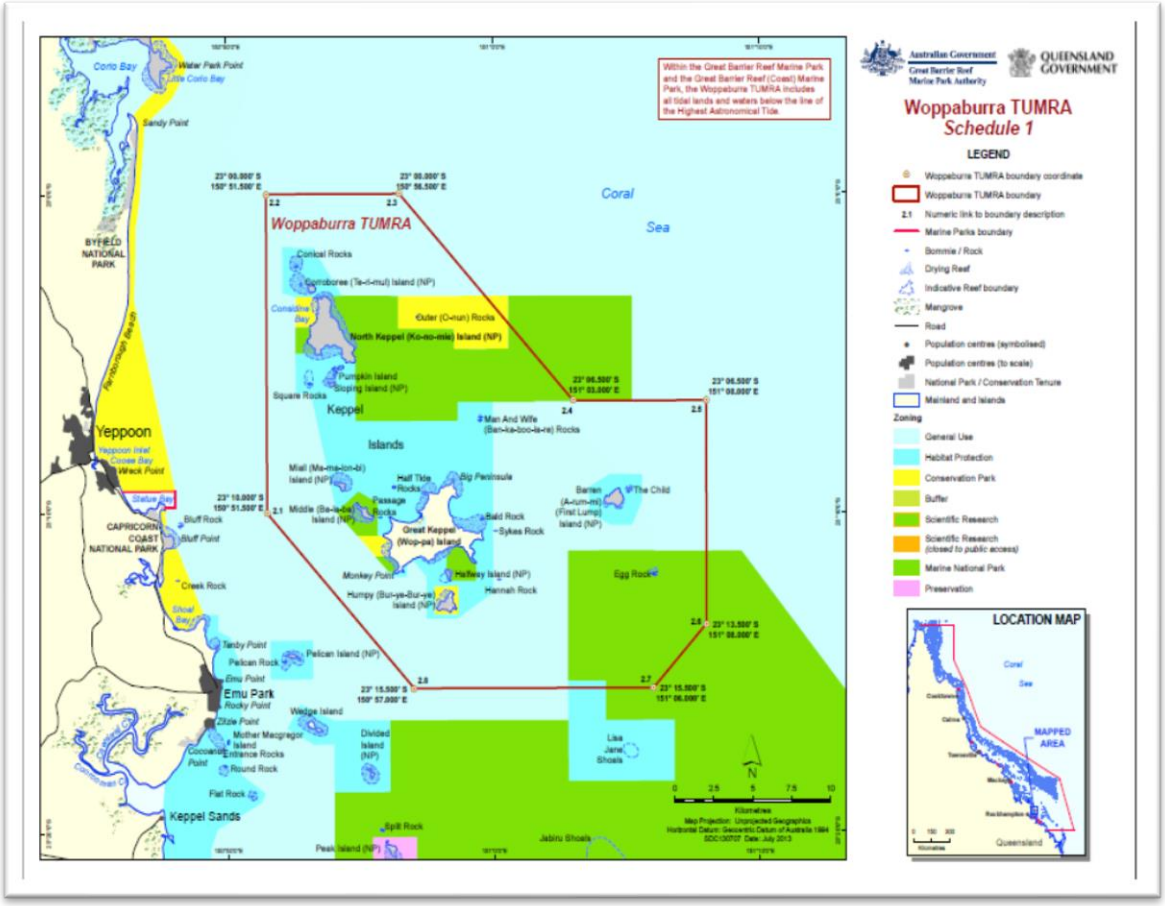
Since that time, nine Traditional Use of Marine Resource Agreements (TUMRAs) covering approximately 12.9% of the marine park have been implemented.[1483] TUMRAs describe how GBR Traditional Owner groups work in partnership with the Australian and Queensland governments to manage traditional use activities on their sea country, and are voluntary agreements developed by Traditional Owners and accredited by the GBRMPA and State Department of Environment and Science. TUMRAs set out details on management of sea country, including how groups aspire to manage natural resources, defining roles in monitoring, and determining actions relating to communication and education.

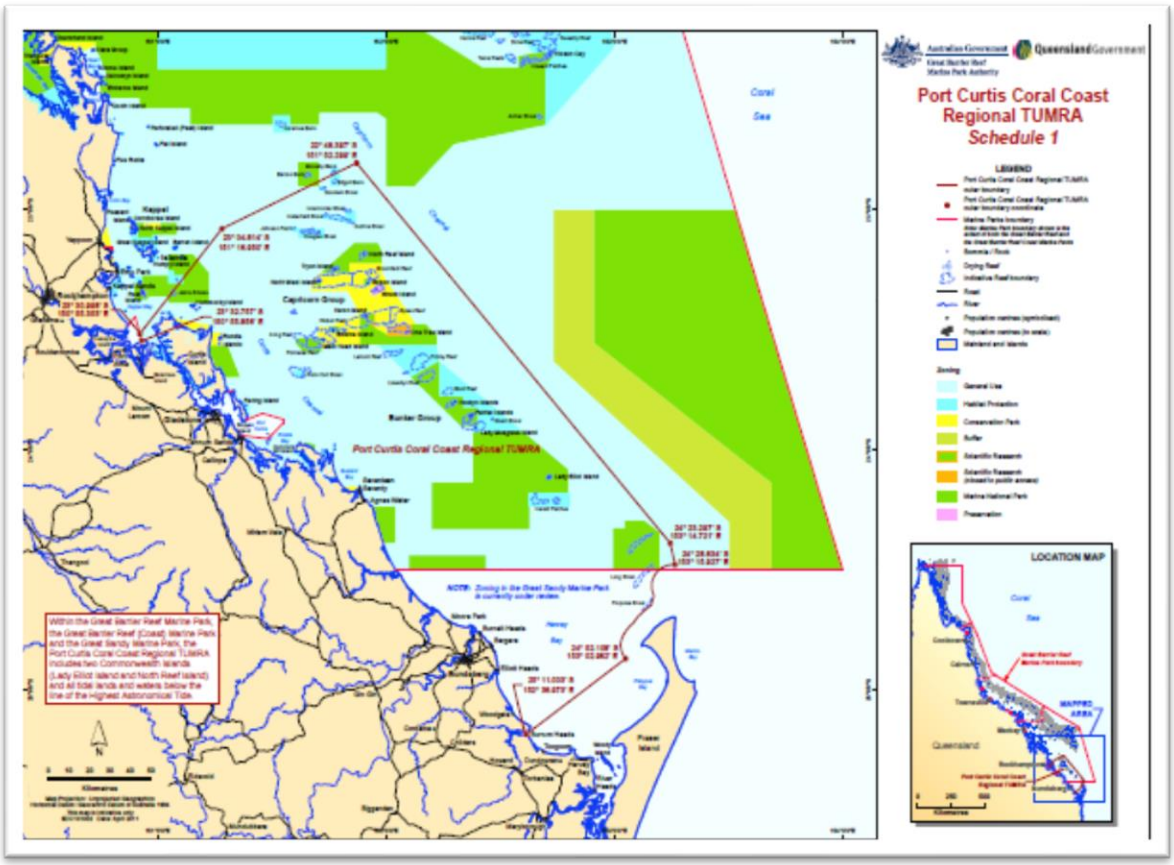
There are currently nine TUMRAs over the GBR (including with groups such as Girringun, Gunggandji, Lama Lama, Port Curtis Coral Coast, Woppaburra, Wuthathi, Yirrganydji, Mandubarra and Yuku Baja Muliku). A 2018 *Traditional Owners of the Great Barrier Reef Report* noted that at that time, the Woppaburra TUMRA is the only one requiring permit applicants to undertake direct and specific consultation with Traditional Owners through the Woppaburra TUMRA steering committee.[1484] The following maps illustrate the TUMRA areas for some of the Indigenous Traditional Owners of the GBI starting with the Woppaburra TUMRA.

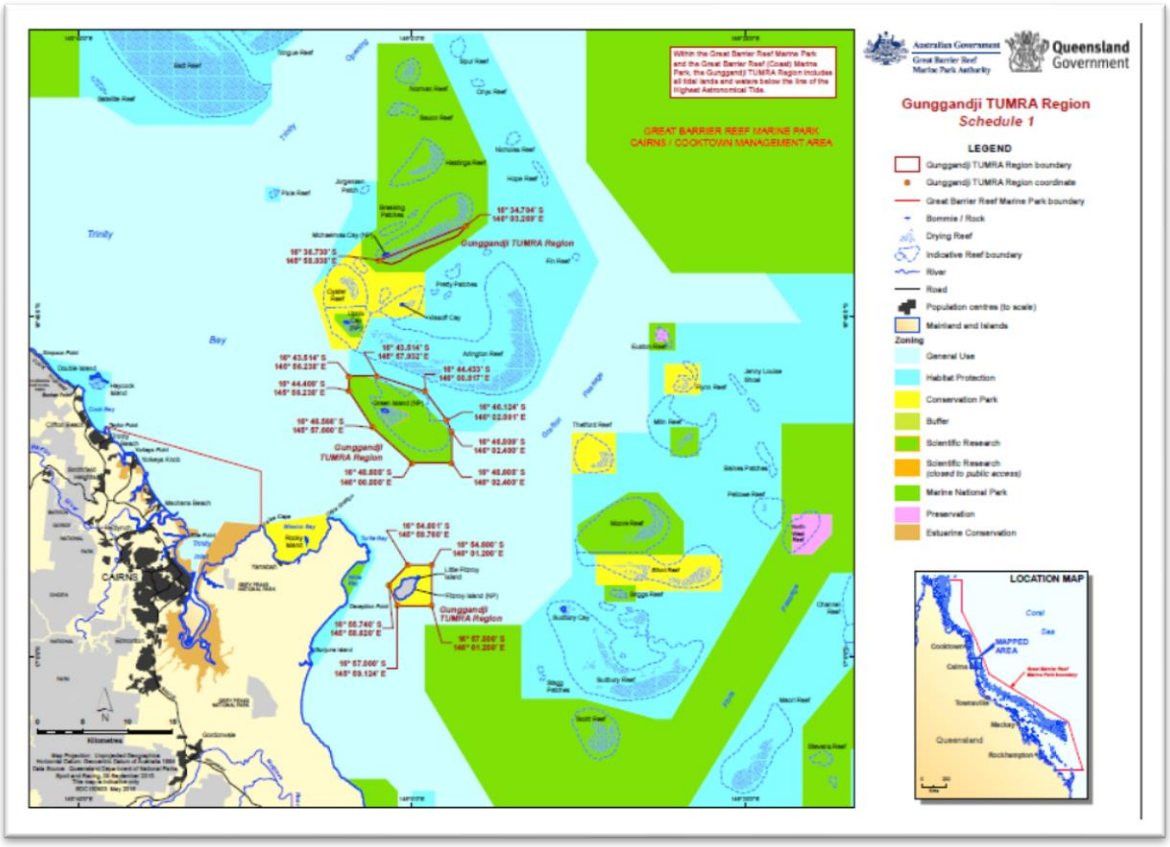
[1482] TUMRAs are formal agreements developed by Traditional Owner groups and accredited by the GBRMPA and the Department of National Parks, Recreation, Sport and Racing. Each agreement operates for a set time after which it is renegotiated. An agreement may describe how Traditional Owner groups wish to manage their take of natural resources (including protected species), their role in compliance, and their role in monitoring the condition of plants and animals, and human activities in the GBRMP. The TUMRA implementation plan may describe ways to educate the public about traditional connections to sea country areas, and ways to educate other members of a Traditional Owner group about the conditions of the agreement. Refer to Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia 2018) at ix.

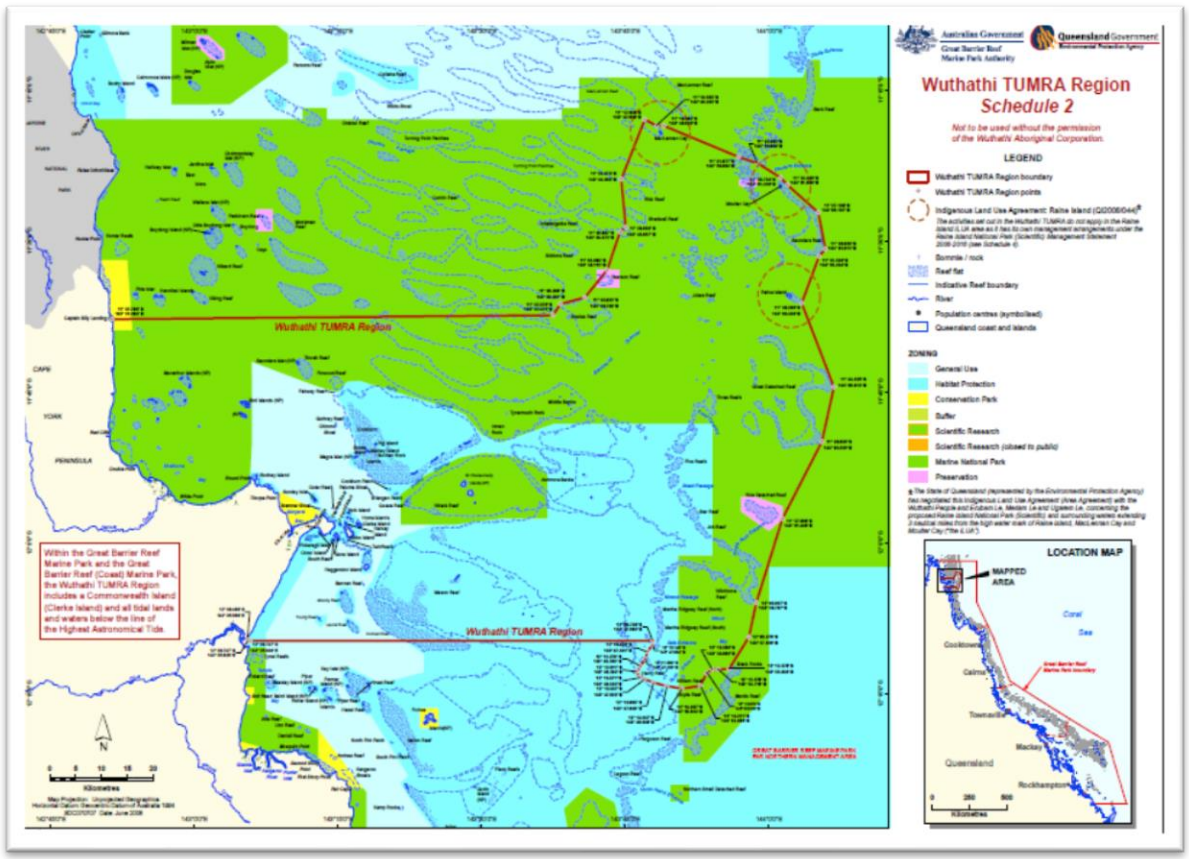
[1483] GBRMPA, *Traditional Use of Marine Resource Agreements,* (2018). Online at: http://www.gbrmpa.gov.au/our-partners/traditional-owners/traditional-use-of-marine-resources-agreements (Accessed May 2020).

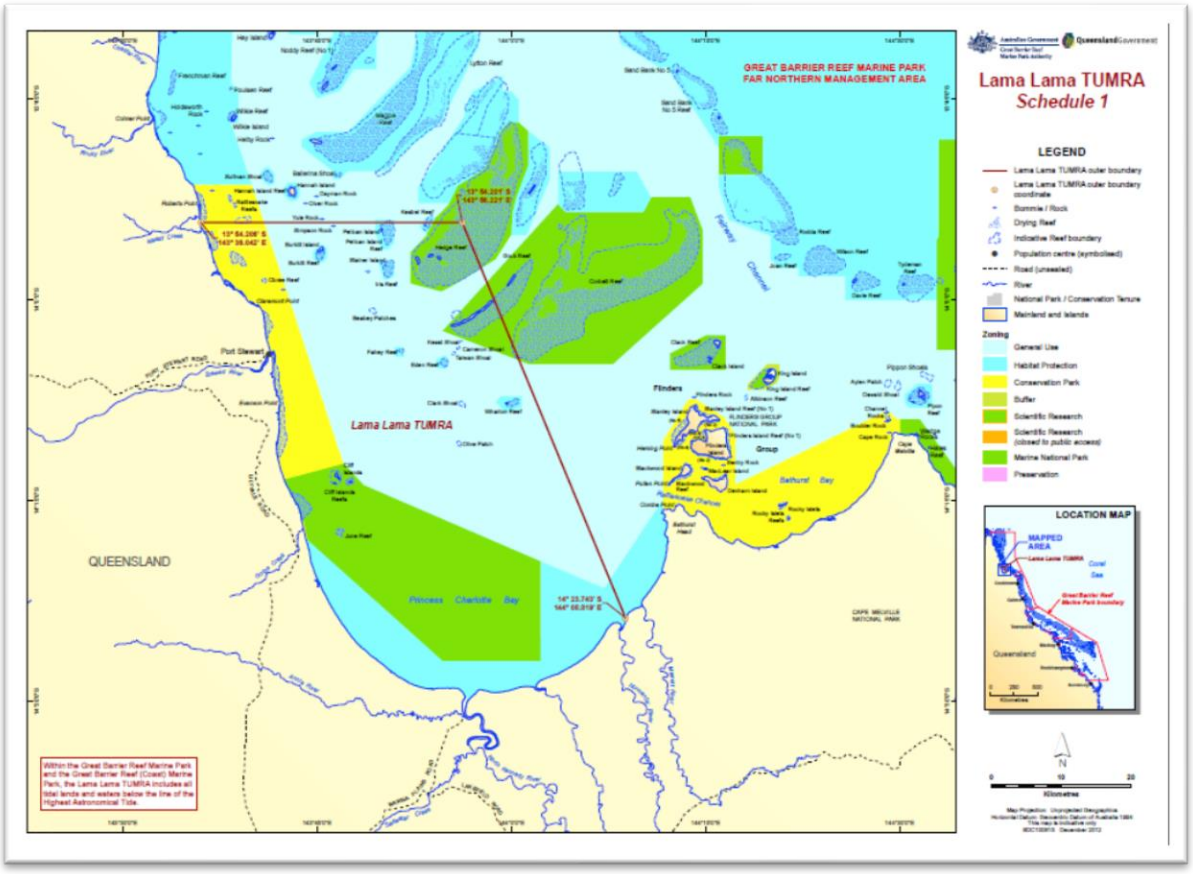
[1484] Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia 2018) at 22.

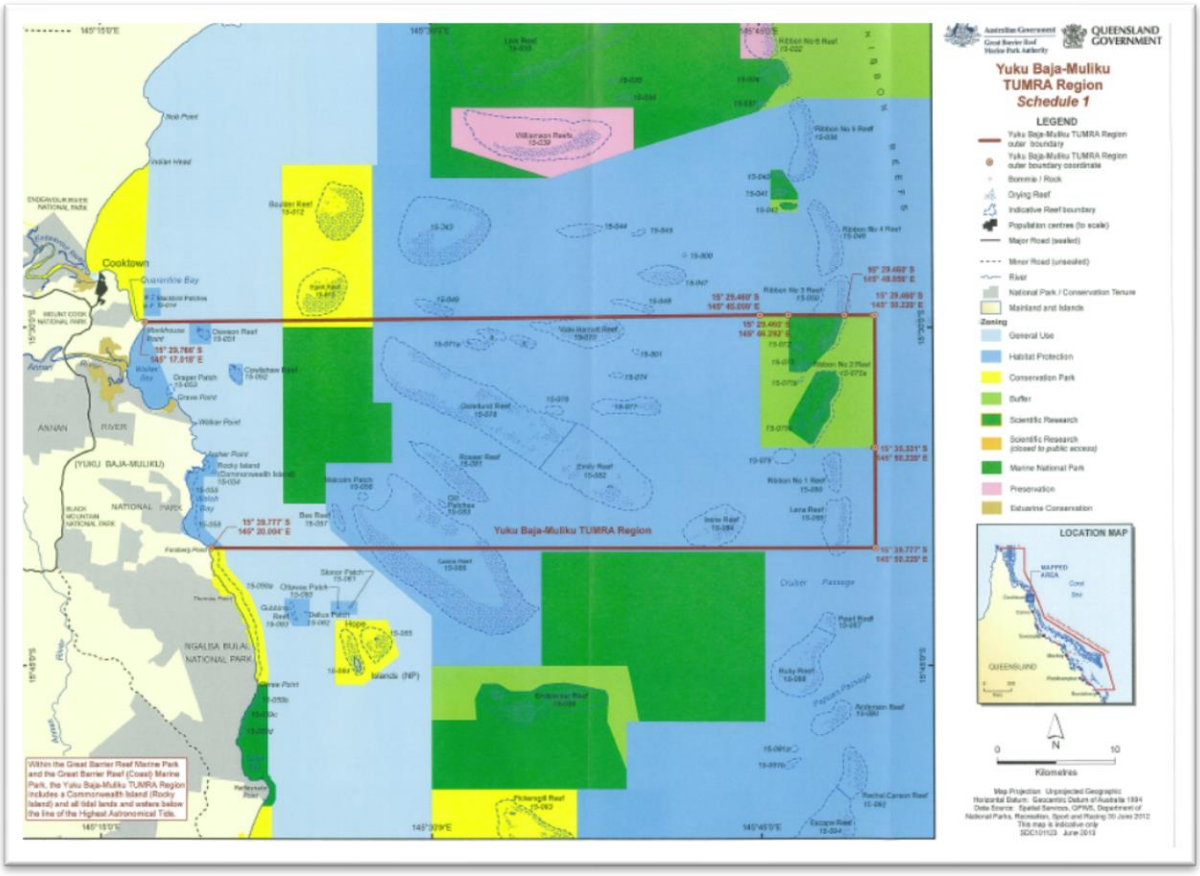

Woppaburra TUMRA
Schedule 1
LEGEND
Woppaburra TUMRA boundary coordinate
Woppaburra TUMRA boundary
Numeric link to boundary description
Marine Parks boundary
Bommie / Rock
Drying Reef
Indicative Reef boundary
Mangrove
Road
Population centres (symbolised)
Population centres (to scale)
National Park / Conservation Tenure
Mainland and Islands
Zoning
General Use
Habitat Protection
Conservation Park
Buffer
Scientific Research
Scientific Research (closed to public access)
Marine National Park
Preservation
LOCATION MAP
MAPPED AREA
Coral Sea
Keppel Islands
Yeppoon
Emu Park
Great Keppel (Wop-pa) Island
North Keppel (Ko-no-mie) Island (NP)
Pelican Island (NP)
Peak Island (NP)
Jabiru Shoals
Lisa Jane Shoals
Egg Rock
Spit Rock
Queensland

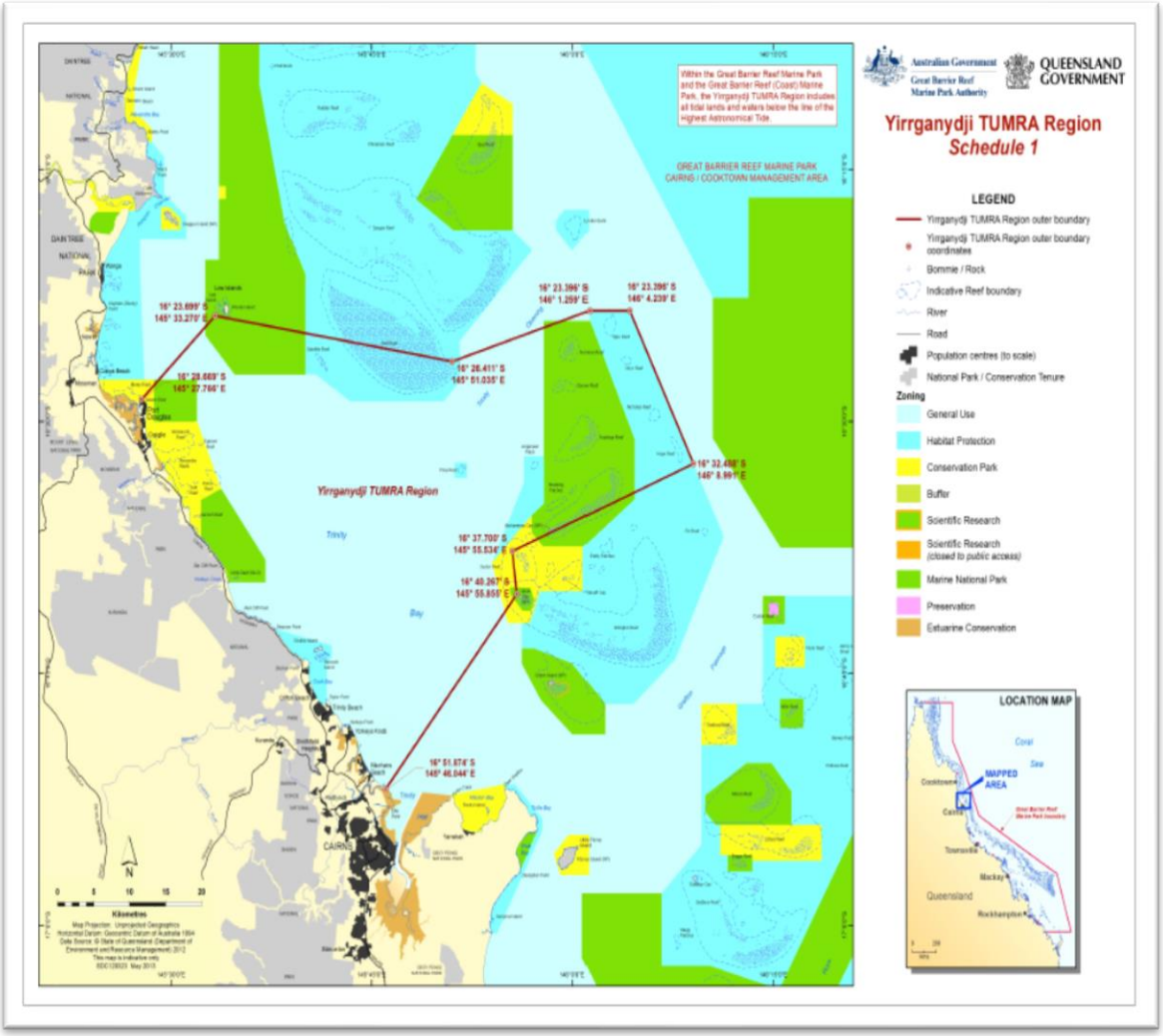

Port Curtis Coral Coast Regional TUMRA
Schedule 1
LEGEND
LOCATION MAP
MAPPED AREA
Coral Sea
Queensland


Gunggandji TUMRA Region
Schedule 1
LEGEND
Gunggandji TUMRA Region boundary
Gunggandji TUMRA Region coordinate
Great Barrier Reef Marine Park boundary
Bommie / Rock
Drying Reef
Indicative Reef boundary
River
Road
Population centres (to scale)
Mainland and Islands
Zoning
General Use
Habitat Protection
Conservation Park
Buffer
Scientific Research
Scientific Research (closed to public access)
Marine National Park
Preservation
Estuarine Conservation
LOCATION MAP
MAPPED AREA
GREAT BARRIER REEF MARINE PARK
CAIRNS / COOKTOWN MANAGEMENT AREA
Gunggandji TUMRA Region
CAIRNS
Trinity
Bay


Wuthathi TUMRA Region
Schedule 2
Not to be used without the permission of the Wuthathi Aboriginal Corporation.
LEGEND
Wuthathi TUMRA Region boundary
Wuthathi TUMRA Region points
Bommie / rock
Reef flat
Indicative Reef boundary
River
Population centres (symbolised)
Queensland coast and islands
ZONING
General Use
Habitat Protection
Conservation Park
Buffer
Scientific Research
Scientific Research (closed to public)
Marine National Park
Preservation
LOCATION MAP
MAPPED AREA
Wuthathi TUMRA Region
Within the Great Barrier Reef Marine Park and the Great Barrier Reef (Coast) Marine Park, the Wuthathi TUMRA Region includes a Commonwealth Island (Clerke Island) and all tidal lands and waters below the line of the Highest Astronomical Tide.


GREAT BARRIER REEF MARINE PARK
FAR NORTHERN MANAGEMENT AREA
Lama Lama TUMRA
Schedule 1
LEGEND
Lama Lama TUMRA outer boundary
Lama Lama TUMRA outer boundary coordinate
Bommie / Rock
Drying Reef
Indicative Reef boundary
Population centre (symbolised)
Road (unsealed)
River
National Park / Conservation Tenure
Mainland and islands
Zoning
General Use
Habitat Protection
Conservation Park
Buffer
Scientific Research
Scientific Research (closed to public access)
Marine National Park
Preservation
LOCATION MAP
MAPPED AREA
Lama Lama TUMRA
Coral Sea
Great Barrier Reef Marine Park boundary
Queensland
Kilometres
Lama Lama TUMRA
QUEENSLAND
Port Stewart
Princess Charlotte Bay
Bathurst Bay
Flinders Group
Within the Great Barrier Reef Marine Park and the Great Barrier Reef (Coast) Marine Park, the Lama Lama TUMRA includes all tidal lands and waters below the line of the Highest Astronomical Tide.


Yuku Baja-Muliku
TUMRA Region
Schedule 1
LEGEND
Yuku Baja-Muliku TUMRA Region outer boundary
Yuku Baja-Muliku TUMRA Region outer boundary coordinate
Bommie / Rock
Drying Reef
Indicative Reef boundary
Population centres (to scale)
Major Road (sealed)
Minor Road (unsealed)
River
National Park / Conservation Tenure
Mainland and Islands
Zoning
General Use
Habitat Protection
Conservation Park
Buffer
Scientific Research
Scientific Research (closed to public access)
Marine National Park
Preservation
Estuarine Conservation
LOCATION MAP
Kilometres
Cooktown
Quarantine Bay
ANNAN RIVER
(YUKU BAJA-MULIKU)
NATIONAL PARK
NGALBA BULAL NATIONAL PARK
Yuku Baja-Muliku TUMRA Region
Within the Great Barrier Reef Marine Park and the Great Barrier Reef (Coast) Marine Park, the Yuku Baja-Muliku TUMRA Region includes a Commonwealth Island (Rocky Island) and all tidal lands and waters below the line of the Highest Astronomical Tide.



Maps 50-56: Great Barrier Reef Traditional Owners' Traditional Use of Marine Resource Agreements (TUMRAs)[1485]

An Indigenous Land Use Agreement (ILUA) is another Indigenous organisational form in Australia, which is a voluntary agreement between an Aboriginal or Torres Strait Islander native title group and other third parties about the use of native title land and waters. Such agreements allow people to negotiate flexible, pragmatic and economic agreements to suit their particular circumstances. The native title group is represented by a Registered Native Title Body Corporate (RNTBC), which offers an alternative to making a native title determination application. An ILUA can cover:

- Areas where native title has or has not yet been determined;
- Entered into regardless of whether there is a native claim over the area or not;

[1485] Each of these maps were sourced from the website 'Traditional use of the Marine Park,' Great Barrier Reef Marine Park Authority, Australian Government, online at http://www.gbrmpa.gov.au/our-partners/traditional-owners/traditional-use-of-the-marine-park (Accessed May 2020).

- Part of a native title determination n or settled separately from a native claim.

ULUAs cover such topics as:

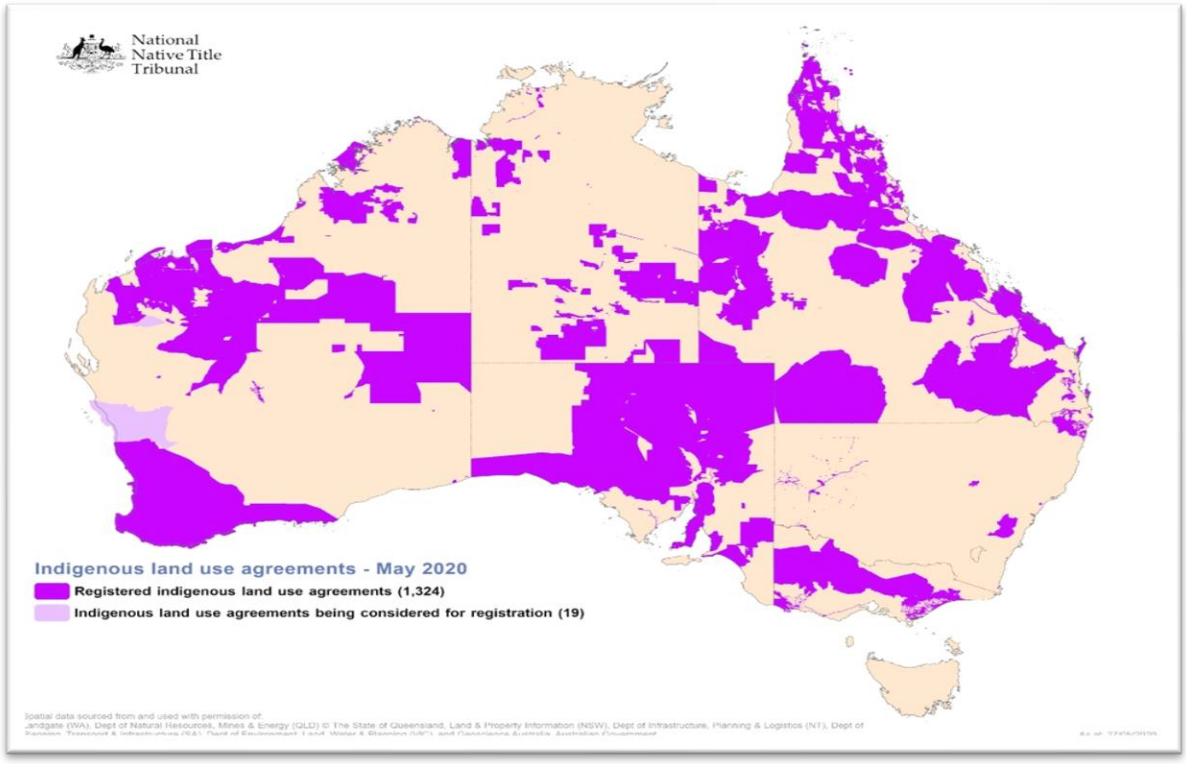
- How native title rights co-exist with the rights of other people;
- Native title holders agreeing to a future development;
- Access to an area;
- Compensation;
- Extinguishment of native title;
- Employment and economic opportunities for native title groups;
- Cultural heritage; and
- Mining.

There are three types of ILUAs:

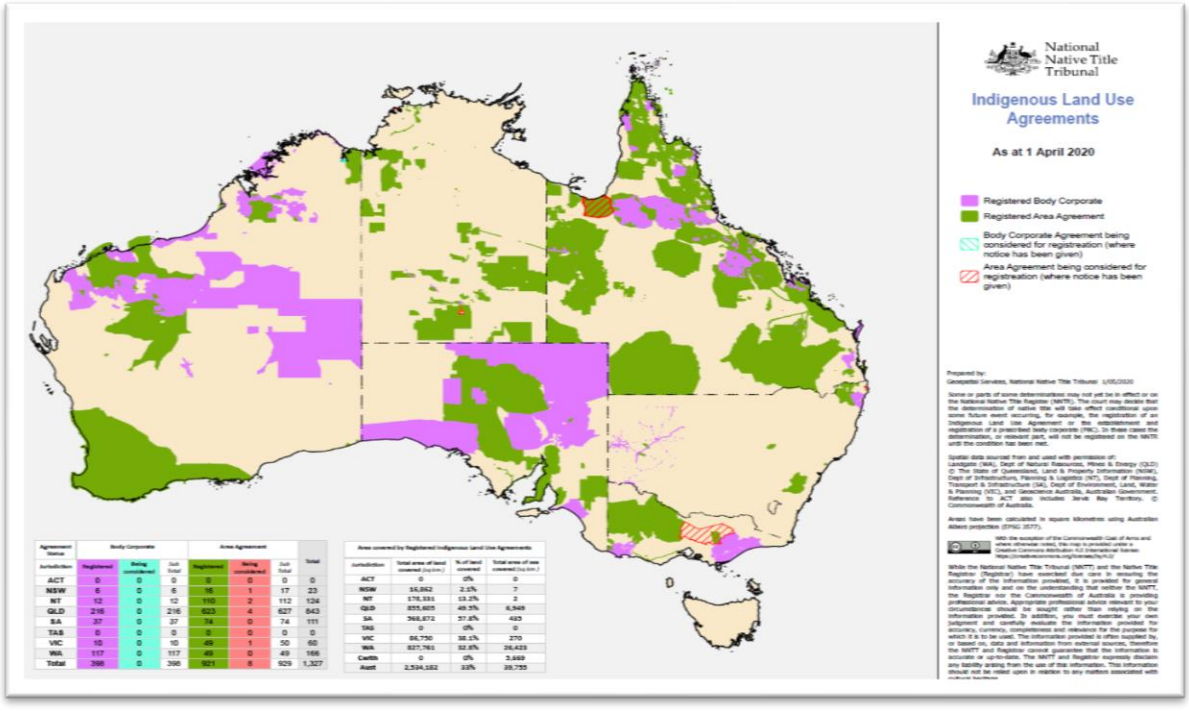
- Body Corporate Agreements;
- Area Agreements; and
- Alternative Procedure Agreement's.

Body Corporate Agreements are an agreement between the RNTBC for the agree area and other parties about native title matters. A Body Corporate Agreement can be made once a determination of native title has occurred over the entire agreement area. Area Agreements are agreements between native title groups and other parties about native title matters. An Area Agreement can be made with a registered native title claimant and or a RNTBC and any person who claims to hold a native title over the agreement area. Alternative Procedure Agreements are agreements between a native title group – RNTBC or a representative body, relevant governments and other parties about naïve title matters. Such as agreement cannot provide for the extinguishment of native title rights and interests.

When registered, ILUAs bind all parties and all native titleholders to the terms of the agreement.



Map 57: Native Title Indigenous Land Use Agreements (ILUAs) 2020[1486]



Map 58: Native Title Indigenous Land Use Agreements (ILUAs) 2020[1487]

[1486] National Native Title Tribunal http://www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx (Accessed May 2020).

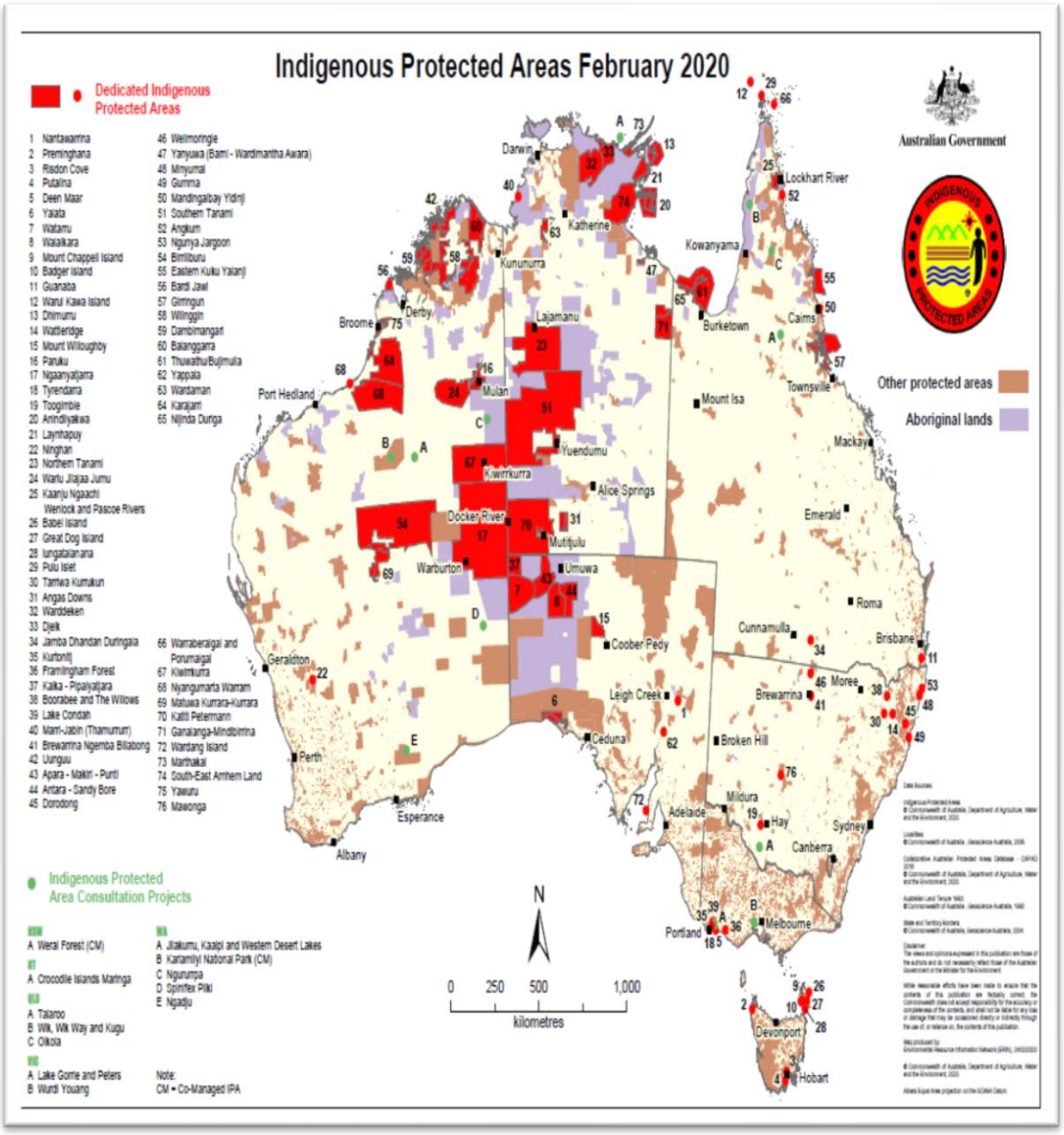
[1487] National Native Title Tribunal, Indigenous Land Use Agreements (ILUAs) http://www.nntt.gov.au/ILUAs/Pages/default.aspx (Accessed May 2020).

The Kuuku Ya'u Peoples Indigenous Land Use Agreement (ILUA) and the Raine Island National Park (Scientific) ILUA are voluntary agreements between native title groups and others, about native title matters, including the use of land and waters, in the GBR, which bind all parties holding native title in the agreement area to the terms of the agreement.

Federally-declared Indigenous Protected Areas (IPAs) represent another emerging new governance form within the GBR. IPAs are areas of land and sea country managed by Indigenous groups as protected areas for biodiversity conservation through voluntary agreements with the Australian government.[1488] There are at least 6 Indigenous Protected Areas in the GBR including the Girringum, Angkum, Kaanju Ngaachi Wenlock and Pascoe Rivers IPAs, the Pulu, Warul Kawa, Warraberalgal and Porumalgal IPAs.[1489]

[1488] See Indigenous Protected Areas, Department of Agriculture, Water and Environment, Australian Government, online at: https://www.environment.gov.au/land/indigenous-protected-areas (Accessed May 2020).

[1489] 'Indigenous Land and Sea Management Projects,' National Indigenous Australians Agency, Australian Government, online at: https://www.niaa.gov.au/indigenous-affairs/environment/indigenous-land-and-sea-management-projects_old (Accessed May 2020).



Map 59: Indigenous Protected Areas

From the above information, there are numerous corporate forms of governance promulgated by GBR Traditional Owners, which involves a range of organisations and structures in planning, management and decision-making business of the GBR catchments, coasts and reefs.

The contemporary GBR Traditional Owner governance organisations and advisory arrangements are moreover, very complex and fragmented which can represent significant challenges for Traditional Owners as well as government, industry and other third parties. However, what is clear is the definite need to support the development of stronger Indigenous Traditional Owner co-governance arrangements that reflect and meet the needs of not only government and EBM, but also Traditional Owner customary and organisational rights and responsibilities in decision-making at all levels including local, regional and broader

scales over the GBR. Furthermore, a 2018 *Traditional Owners of the Great Barrier Reef Report* concluded:

> At the whole of Reef level, there is a clear need and desire to develop a regional Traditional Owner organisational governance structure that would simplify and unite Traditional Owner voices throughout the GBR region. There would need to be careful consideration of the governance arrangements needed to support such an approach which should be explored with key Traditional Owners and other experts.[1490]

The table below highlights the plethora of Indigenous interests, rights and responsibilities within the GBR area with some of the associated Indigenous Traditional Owner governance organisations. There is a lot more to follow.

	GBR Catchments		**GBR World Heritage Area**	
	km²	**%**	**km²**	**%**
GBR World Heritage Area	**-**	**-**	**348,000**	**100.0**
GBR Catchments	**418,714**	**100.0**	**-**	**-**
Indigenous Land Interests (ILI) (e.g. A/TSI Freehold)	29,858	7.1	127	0.04
Indigenous Land Use Agreements (ILUA)	229,742	54.9	5,533	1.6
Native Title Determinations (NTD) (Native title exists in parts of or the entire determination area)	65,562	15.7	4,209	1.2
TUMRA	0	0.0	44,826	12.9
Indigenous Protected Areas (IPA)	5,515	1.3	12,464	3.6
Total Merged ILI, ILUA, NTD, TUMRA, IPAs	**240,594**	**57.5**	**54,337**	**15.6**

Table 4: Traditional owner land and sea rights and interests in the GBRWHA and GBR catchments[1491]

The same 2018 *Traditional Owners of the Great Barrier Reef Report* commented however, on how marginalised Indigenous Traditional Owners are in the current co-governance arrangements of the GBR when the authors asserted:

[1490] Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia 2018) at 28.
[1491] Above, at 44.

Despite decades of reports, recommendations, changing governments and changing GBRMPA management, there is still minimal Indigenous representation or influence in structured Reef governance and management. Resourcing and empowerment of Indigenous people in sea management has been minimal. The *Reef 2050 Plan* needs a structural and strategic response to this challenge:

- Resources and funding for the GBR has had an historical focus on non-Indigenous action in the central and southern GBR and as little as 5% of GBR funding goes north of Cairns and only a small fraction of that is allocated to Indigenous initiatives;
- Centralised reef management has resulted in nothing being tailored to the unique needs and societal dynamics of different regional sections of the GBR;
- Indigenous people represent only 4% of the national population and struggle to be heard over the clamour of powerful interest groups such as science organisations, conservation groups, universities, tourism groups and the mining sector;
- Indigenous governance systems get little recognition and can be disempowered by formalised governmental processes, interest groups and non-governmental organisations (NGOs). Formal representation remains delegated to a limited number and often token steering and advisory groups;
- Capacity and capability within and amongst Land Trusts, PBCs and NTRBs is inconsistent, hindering approaches to the building of a consistent Indigenous voice across the GBR; and
- The Traditional Owner ownership of future and potential environmental services rights needs clarification as competition for private sector funds increases.

Consequently, across the entire GBR, it is critical that Traditional Owners are properly engaged as primary land owners; not just as stakeholders. Despite being the largest single land-owning group in the northern GBR catchment and having emerging Native Title rights that will impact across the whole GBR, Indigenous people clearly remain under-represented in decision-making bodies.[1492]

[1492] Above, at 28-29.

Key GBR Stakeholders & Governing Bodies	Non-Indig Members	Indigenous Members
Great Barrier Reef Marine Park Authority – Board	4	1
Australian Institute of Marine Science - Council	7	0
Great Barrier Reef Foundation - Board	15	0
Reef Trust		
- Joint Steering Committee (government representatives)	3	0
- Reef 2050 Advisory Committee (interest groups)	16	1
- Independent Expert Panel	14	1
Australian Museum Foundation (Lizard Island) - Trustees	10	0

Table 5: Indigenous involvement in formal GBR Governance Structures[1493]

The insightful 2018 *Traditional Owners of the Great Barrier Reef Report* also commented on other governance and representation challenges hindering Indigenous Traditional Owners to co-govern effectively the GBR within an EBM context. The reported opined:

> Not only are Indigenous people rarely represented in formal decision making arrangements, they are mostly relegated to advisory positions devoid of reasonable power. Nor are they usually resourced to adequately report to or consult with their constituents. Indigenous people are also generally relegated to address an Indigenous issues box, despite having interests across all portfolios of Reef-relevant activity including tourism, mining, fishing, agriculture and land management. Current advisory systems and roles are insufficient. Key representation problems identified during our engagement with Traditional Owners have included:
>
> - Management of different marine jurisdictions is done through different agencies which each seek Traditional Owner involvement, and this causes a duplication and dilution of Traditional Owner effort and resources;
> - Traditional Owner representatives on Advisory Committees are often chosen by the agencies rather than being nominated via Indigenous governance structures. This means that Traditional Owner representatives may not have authority to speak on management issues, and may not have processes or

[1493] Table from Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia 2018) at 30.

resources for consulting with, taking advice from, and reporting back to other Traditional Owners;

- Traditional Owner participation is often limited to one or a few individuals who are considered by the agencies as a voice for Traditional Owners. Because of the size of the GBR, the diversity of Traditional Owner groups and the diversity of the marine and terrestrial environments, it is not possible for a few over-worked people to have capacity to speak authoritatively for the whole GBR region;
- Advisory roles and influence can often be dominated by a few privileged groups who have sufficient resources. Traditional Owners can speak for their own estate and a governance system or network, especially on issues of shared stock such as turtle and dugong, new regulatory legislation or actions and the fair distribution of government funding and resources;
- Traditional Owner legal rights and responsibilities emanate from native title and from being the holders of Aboriginal freehold tenure. Consequently, agencies should be making arrangements now to accommodate the growth of native title interests across the GBR; and
- There is also growing expectation from the international community and World Heritage bodies that the FPIC of Indigenous peoples is required in significant decision making, not only for new World Heritage listings but also for major management changes in established World Heritage Areas.[1494]

The 2018 *Traditional Owners of the Great Barrier Reef Report* moreover, commented on GBR Traditional Owner governance arrangements when the authors' asserted:

> Traditional Owners … participants particularly discussed current GBR governance arrangements as well as possible future models for Traditional Owner governance of the GBR. Workshop participants expressed that existing organisational governance structures enable Traditional Owners to be involved to some extent in management and key decision-making at multiple levels, including local, Traditional Owner group, sub-regional and regional levels, and at the reef-wide level. However, there is broadly a low level of satisfaction with many of the components related to Traditional Owner influence over the wider governance of the GBR. … At the whole of GBR level, Governance arrangements for Traditional Owner representation within *Reef 2050* are seen to be not coordinated well to enable an effective flow of information around strategic discussions between Indigenous representatives. More effective governance requires explicit linking up between Indigenous members from the Independent Expert Panel; Reef Advisory Committee, Indigenous Reef Advisory Committee and other informal working groups such as Reef Integrated Monitoring and Reporting Program Steering Committee, Indigenous Heritage Expert Group (IHEG) and GBRF Traditional Owner Working Group.

The 2018 Report continued:

[1494] Above, at 30-31.

> More importantly, there is a strong view that it is a requirement for the *Reef 2050 Plan* to recognise the explicit role of Traditional Owners, as prescribed under the World Heritage Convention, including Operational Guidelines and Management Principles; the *Environment Protection Biodiversity Conservation Act 1999* (EPBC), *Great Barrier Reef Marine Park Act 1975* (GBR) and the *Native Title Act 1993* (NTA), and their associated regulations [which] would ensure due consideration of the rights and interests of Traditional Owners in the management of the GBR and provides opportunities to use existing land and sea management capability in their organisations. It also would foster the development of a process to increase participation levels for existing, new and emerging Traditional Owner interests.[1495]

The 2018 added:

> During the GBR-wide Traditional Owner forum, participants were presented with two possible models of improved Traditional Owner governance for the GBR. All models are aimed at empowering Traditional Owner groups to determine cultural governance within their groups and in supporting more effective organisational governance through key themes … The first of these involves replication of the existing GBRMPA-led structure based on a Local Marine Advisory Committee (LMAC) … to enable local communities (including Traditional Owner communities) to have effective input into managing the GBR and to provide a community forum for interest groups, government and the community to discuss issues around marine resources. … These skills and experience-based committees represent 12 regions of the GBR … but [should] be revised to be based on Traditional Owner group representation within each of the local regions. Alteration to the regions may be needed to better align with Traditional Owner groups. It was also proposed that the Indigenous LMACs could work together and form a 'Big MAC' which would include one or more Traditional Owners from each of the LMACs, strengthening whole of GBR coordination through a network approach.[1496]

The Report continued:

> The second and preferred model … was based on a Traditional Owners cluster and hub type of network … based on existing Traditional Owner group communities and their areas, rather than on the GBRMPA-defined regions. Like the Big MAC proposal, a Traditional Owner cluster and hub network would be aimed at strengthening existing relationships, connections and linkages between individuals and between Traditional Owner groups. Benefits of the model over a modified LMAC model include that it:
>
> - Is based on aggregation upwards of self-defined Traditional Owner groups;
> - Would bring together Traditional Owners from across the GBR;
> - Would enable sub-regions or regions to pull clans together for discussion; and

[1495] Above, at 47-48.
[1496] Above.

- Would enable a Traditional Owner reference group (or Sea Country Alliance) to form across the GBR.[1497]

Important factors required for this model to improve Traditional Owner governance include:

- Traditional Owner groups/elders need to keep decision-making roles;
- Funding is needed (e.g. to establish sub-regional/regional forums, for meetings etc.); and
- Boundaries (of sub-regions) need discussion and determination by Traditional Owners.[1498]

The 2018 Report summarised:

> … Both improved governance models support Traditional Owners to come together in larger regional forums to discuss regional issues relevant to the Traditional Owners communities within the GBR. The consequent development of GBR-wide representation for GBR Traditional Owners (e.g. a GBR Traditional Owner Sea Country Alliance) which supports existing traditional decision-making structures (i.e. cultural governance) was strongly supported by all Traditional Owner groups engaged in the forum. Key elements of an effective alliance approach would be that it would:
>
> - Provide authority [jurisdiction] to GBR Traditional Owners from across the Reef;
> - Include members from all the Traditional Owner regions and cultures;
> - Deliver a united voice for GBR Traditional Owners;
> - Enable liaison between Traditional Owners;
> - Facilitate collaboration and resource-sharing and capacity sharing between Traditional Owner groups, including on funding bids;
> - Provide advice directly, cutting out the need for other, ad hoc Indigenous Advisory Groups;
> - Improve the ability for rapid reaction for emergencies (e.g. oil spills);
> - Create an opportunity for including a Traditional Owner Youth Alliance; and
> - Provide a go-to for Government for Traditional Owner business.[1499]

Some of the operational aspects of an alliance as envisaged would include:

- Year-round administrative support (perhaps through an agreed third party);
- Regular (e.g. quarterly) meetings of regional Traditional Owner Clusters;
- Less regular (e.g. twice yearly) meetings of the GBR Traditional Owner Sea Country Alliance; and

[1497] Above.
[1498] Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia 2018) at 48.
[1499] Above, at 50.

- May involve up to 12 subregions that then relate back to 4 regional scale clusters aligned to representative body boundaries.[1500]

The 2018 *Traditional Owners of the Great Barrier Reef Report* concluded with recommendations for improving Indigenous co-governance over the GBR:

> The Traditional Owners across the GBR have advised that there remain several critically important policy considerations that they would like to see resolved going forward:
>
> - ***Long Term Approaches to Lifting Traditional Owner Sea Country Governance and Capacity:*** Clear and long-term approaches are needed to partner Traditional Owners in the development of their capacities and opportunities to govern their sea country well at family, clan and tribal scales. This needs to start with enhancing cultural governance, growing to strong organisational governance that reflects it;
> - ***From Engaging Traditional Owners to Co-governing With Traditional Owners:*** Fundamental recognition that Traditional Owners hold rights that arise from customary law/lore, recognised by the Australian nation-state, including seeing all GBR planning and management (from *Reef 2050* down) being *with* rather than *for* Traditional Owners. In this context, there are management actions and priorities specific to Traditional Owners that they want to lead, implement or to have supported. There are often established Indigenous structures and processes that need to be recognised and/or spaces for Indigenous people to design and implement their own governance. There are also a number of parallel processes relating to sea country management and authority and Indigenous capability and capacity that need to be considered in the *Reef 2050* context;
> - ***Toward Co-design of Key Reef Initiatives:*** All stages of policy/program design and delivery needs to be co-designed/co-delivered with Traditional Owners from the start;
> - ***Long Term and Stable Sea Country Programs:*** Stable policies and programs supporting Traditional Owner governance, planning and management of sea country and catchments (e.g. IPA/ TUMRA/ WOC/ Indigenous Business). This particularly means providing a real focus on equity issues (across groups) within the design framework and ensuring a wide spectrum of appropriate support arrangements emerge. This means the design of programs that do not just focus on providing support to high capacity groups and that involves multiple layers of investment prioritisation;
> - ***Less Fragmentation Across Government and Private Sector Support Arrangements:*** Reef-focused policies and programs will need to be integrated, not just within the GBR space, but across the wider range of support opportunities in the Commonwealth, State and even local government and the private and philanthropic sectors. How might, for example, Indigenous specific programs in Prime Minister and Cabinet (e.g. such as the Indigenous Advancement Strategy) provide the foundation stones for Reef investment;

[1500] Above.

- ***Supporting Indigenous Leadership and Access to Emerging Environmental Services Markets:*** Internationally, high value environmental services markets (including those which deliver social and cultural co-benefits) can be fostered and targeted into Traditional Owner efforts in the GBR. Traditional Owners are looking for governmental support and enhancement of these emerging markets and to avoid governments becoming market gatekeepers or destroying such markets through ill-considered regulatory action. The emerging environmental services context provides a very positive narrative about future Traditional Owner governance;
- ***Towards a More Negotiated Approach to Resolving Sea Country Claims:*** With many GBR sea claims yet to be resolved, more resources and streamlined processes need to be in place to facilitate more progressive and positive resolution of sea country claims and ILUAs at various scales. Such approaches also need to support a more negotiated approach to deal making in the shorter term (among groups and within others) while positively supporting ongoing resolution of claims into the future;
- ***Towards a Longer-Term Focus on Building Cultural Values and The Economy:*** Much higher-level recognition, protection and promotion of the cultural values of the GBR is required;
- ***Building Indigenous Business Opportunities:*** Opportunity exists for Traditional Owners to play a central role in the GBR economy, so effort is needed to support them to access these opportunities; and
- ***Traditional Owners and Research Partnering:*** Traditional Owners need to become real partners and collaborative researchers in the progression of science within the GBR.[1501]

Of the overall recommendations of the 2018 *Traditional Owners of the Great Barrier Reef Report,* five are particularly relevant for our report:

Statement/Recommendation 1:

Resolve Sea Country Claims*: Those responsible for the management of the Reef ensure, through collaboration between relevant Federal and State agencies, that adequate resources are available to support the longer term, fair and efficient resolution of Sea Country native title claims across the GBR estate over the coming decade.*

Statement/Recommendation 2:

Get the Foundations Right: *Formalising and supporting the foundational rights and responsibilities of Traditional Owners in Sea Country by enhancing the governance capacities of families, clans, tribes, sub-regions and regions.*

[1501] Above, at 58-59.

Statement/Recommendation 3:

Normalise Rights-Based Agreement Making: *Embed policy, procedures and ongoing participation and support to mobilise long-term approaches for co-governance and co-management through agreement making, implementation and monitoring across the GBR at regional, sub-regional, and local scales.*

Statement/Recommendation 4:

Establish a GBR Traditional Owner Sea Country Alliance: *Resource and support Traditional Owners to establish a GBR-wide Sea Country Alliance and engagement framework as a basis for negotiating and implementing a Tripartite Agreement.*

Statement/Recommendation 5:

Negotiate a GBR-Wide Tripartite Agreement: *Australian and Queensland Governments (through Intergovernmental Agreement) to meet obligations for Free, Prior and Informed Consent (in accordance with UNDRIP) through the negotiation of a whole of GBR Tripartite Agreement with Traditional Owners.*[1502]

Summary

The original statutory provisions establishing the Great Barrier Reef Marine Park Act 1975 promised much in terms of long-term protection and conservation of the GBR through, inter alia, ecosystem-based management and by facilitating partnerships with Indigenous Aboriginal and Torres Strait Traditional Owners, but was light on delivery it appears in both areas. Both EBM and Indigenous Traditional Owners were marginalised over the years in the governance and management of the GBR. Simply including text in a statute or referring to important groups for partnerships and collaboration and drawing lines on a map, no matter how scientifically, politically and culturally well designed and intended, will not protect the ecosystem and Indigenous governance and participation in the absence of effective co-governance and co-management — an otherwise elegantly designed statute and plan may end up existing mainly 'on paper.'

The 2018 *Traditional Owners of the Great Barrier Reef Report* recommended genuine co-governance in the overarching governance of the GBR and far deeper ownership of, and participation in, its active day to day management thus imploring Australian governments to take a far more negotiated approach with Indigenous Aboriginal and Torres Strait Traditional Owners at the GBR-wide level down to local scales that apply the principles of Free Prior and Informed Consent from UNDRIP. We would add that the respective governments of the GBR – Commonwealth, Queensland and Indigenous governments - ought to reflect back on the original GBRMPA which focused on sustainable management of the GBR within an EBM context emphasising co-governance and co-designed structures that should acknowledge

[1502] Above, at 3-6.

partnerships of the Indigenous peoples and that effectively incorporate cultural governance over Land and Sea Country in Australia.

Smith described Australia's marine environment (including in the GBR) and the complexities in its governance and management and provided valuable insights into factors necessary for the successful implementation of EBM which included a clear and well-articulated sense of shared ownership and shared governance jurisdiction where marine regions are constrained by jurisdictional boundaries, and where difficulties emerge in gaining consensus over outcomes and in meeting Indigenous and environmental challenges in a consistent manner.[1503]

Vince concluded that in order to implement successful approaches to ocean governance in Australia, there must be 'broad agreement on basic objectives, priorities and standards such as EBM and Indigenous co-governance, the approach to policy must be clearly communicated and understood by all parties involved, and the imperative to develop tools to integrate across biophysical, economic and social dimensions are critical.[1504]

Olsson and Hughes referred to the need to establish a single entity to ensure the proper and efficient EBM of the GBR using an integrative approach. Olsson and Hughes moreover, referred to the ineffectiveness of Australia's Ocean Policy in bringing about desired EBM objectives and they articulated the necessary change of focus from preservation to one of stewardship in order to address the rapidly changing environmental conditions. The authors added that the GBRMPA implemented several key strategies to ensure EBM is successfully implemented that included internal organisational changes to align with strategic plans and environmental objectives such as EBM, and quality community engagement.[1505] However, Olsson and Hughes were silent on Indigenous Traditional Owners engagement, which, as this section has highlighted, is a flawed policy for the future co-governance and co-management of the GBR within an EBM context.

Finally, a major challenge of the 2018 *Traditional Owners of the Great Barrier Reef Report,* which this section quoted extensively*,* was that it omitted to refer to, let alone mention, ecosystem-based management throughout the report. Given that EBM is an appropriate international response for addressing the alarming global environmental degradation including over the GBR, it is designed and executed as an adaptive, learning-based process that applies the following common international principles:

- the connections and relationships within an ecosystem;
- the cumulative impacts that affect marine welfare;
- focus on maintaining the natural structure and function of ecosystems and their productivity;
- incorporate human use and values of ecosystems in managing the resources;
- recognise that ecosystems are dynamic and constantly changing;
- are based on a shared vision of all key participants; and

[1503] Smith, D, et al, 'Implementing Marine Ecosystem-based Management: Lessons from Australia,' in ICES *Journal of Marine Science*, (Vol. 74, 2017) at 1990.
[1504] Vince, J, 'Australia's Oceans Policy: Past, Present and Future,' in *Marine Policy,* (Vol. 57, 2015) at 1-6.
[1505] Olsson, C and Hughes, T, 'Navigating the Transition to Ecosystem-based Management of the Great Barrier Reef, Australia,' in *Proceedings of the National Academy of Sciences of the United States of America (PNAS)* (Vol. 105, No. 28, 2008) at 9489-9494.

- are based on scientific knowledge, adopted by continual learning and monitoring.[1506]

The Aotearoa New Zealand approach to EBM fundamentally acknowledges shared co-governance and concurrent jurisdiction with Māori as Treaty of Waitangi partners, and mātauranga and tikanga Māori – what Australians term cultural governance - and includes collaborative and participatory management throughout the whole process, considering all values and involving all interested parties from agencies and iwi to industries, whānau, hapū and local communities. Perhaps what may improve the position of Indigenous Aboriginal and Torres Strait Islander 'Traditional Owners' with the co-governance and co-management of the Great Barrier Reef is a collaborative focus by the Commonwealth, Queensland and Indigenous governments, as well as the plethora of stakeholders and others involved, on the shared vision and implementation of ecosystem-based management of the GBR as originally envisaged in the Great Barrier Reef Management Park Act 1975. Indeed, EBM is about shared co-governance power and jurisdiction to provide for the long-term protection and conservation of the GBR.

While the Australian and Queensland governments have a critical influence on many the issues of public concern for the long-term protection and conservation of the GBR, both governments with respect, are two of many stakeholders. As the governance, decision-making and accountability for the long-term protection and conservation of the GBR becomes more complex, and the limitations of these governments are more apparent, it is clear that government policy, programmes, initiatives and law reform are far from the sole determinants of repairing and restoring the environmental conditions within the GBR. As illustrated throughout this report and in this section, many political, social, cultural, economic and environmental issues are simply too complex to be addressed solely by the Australian and Queensland governments acting alone. What is urgently required is effective collaboration and genuine partnerships with other sectors of society including the Indigenous Traditional Owners of the GBR through co-governance structures that acknowledge them and that effectively incorporate Indigenous Aboriginal and Torres Strait Islander cultural governance within an EBM context over the GBR.

The next section will bring together many of the common threads and key themes of the report in terms of self-determination and shared governance jurisdiction with Māori groups over the coastal marine estate within this EBM context.

[1506] United Nations Environment Programme, *Ecosystem-based Management: Markers for assessing progress* (UNEP/GPA 2006); McLeod, K and Leslie, H, *Ecosystem Management for the Oceans* (Island Press, Washington DC, 2009) at 325; and World Wildlife Funds website at: http://wwf.panda.org/our_ambition/our_global_goals (Accessed November 2018).

W. Mana Whakahaere Tōtika – Shared Governance Jurisdiction Models

Self-Determination & Co-Governance Options - Degrees of Shared Jurisdiction

The debate about self-determination and self-government, as noted above, is a matter of perspective and degree. With greater political and public will, empathy and time, a clearer understanding and agreement may result. As noted above, through the UN Declaration on the Rights of Indigenous Peoples 2007, Indigenous communities are seeking space for their unique value systems and worldviews to operate within the legal and political systems of the nation-states in which they live. Indigenous peoples are seeking shared mana whakahaere tōtika - jurisdiction authority - power and resources to govern themselves effectively. Denise Henare declared that notwithstanding the ambiguity of process in New Zealand, it is clear among Māori that there is a shared goal of self-determination and autonomy – the advancement of Māori as Māori and the protection of the environment for future generations.[1507] Henare concluded that self-determination is a 'right of the peoples, not of the territory and it must afford equal opportunity for the unimpeded enjoyment of peoples' political freedoms, socio-economic rights and development of cultural heritage.'[1508]

Daes held that the UNDRIP acknowledges that Indigenous 'peoples' continue to possess a distinct collective legal character and that they tend to:

> … prefer partnerships over secure statehood to complete integration. To protect the integrity of these basic arrangements, indigenous peoples must continue to enjoy a legal status of their own and access to international forums.[1509]

UNDRIP makes it clear that the establishment of a sovereign and independent nation-state, the free association or integration with an independent nation-state or the emergence into any other political status freely determined by a people - constitute modes of implementing the right of self-determination but secession is an option of extreme last resort. It is the authors' views' that there are many other more appropriate options. Indeed, Durie discussed the 'shades of difference between Māori sovereignty, Māori autonomy, self-determination, self-governance, Māori nationhood, self-management and greater Māori representation.'[1510] Daes offered a further relevant option for Indigenous self-determination that she termed 'internal' self-determination when Daes opined:

> Self-determination may range from independence [secession] to a recognition of their separate and equal status as sovereign peoples falling short of political independence,

[1507] Henare, D 'A Case Study' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 110. For references on the advancement of Māori as Māori, see Durie, M *Ngā Kahui Pou: Launching Māori Futures* (Huia. Wellington, 2003); and Durie, M, *Ngā Tai Matatau: Tides of Māori Endurance* (Oxford University Press, Melbourne, 2005).

[1508] Above.

[1509] Daes, E-I, 'Equality of Indigenous Peoples under the Auspices of the United Nations – Draft Declaration on the Rights of Indigenous Peoples' in *St Thomas Law Review* (Vol. 7, 1995) 493 at 496-97.

[1510] Durie, M 'Representation, Governance and the Goals of Māori Self-determination' in *He Pukenga Korero* (Massey University, Palmerston North, 1 May 1997) at 6.

> through to levels of self-government and local control over a range of different social, political, economic and cultural matters.[1511]

Daes even attempted to recommend 'internal' self-determination to Māori when she recommended that:

> ... Māori people be given formal and substantive government over their local and internal affairs. The minimum goal should be sufficient protection of the groups' collective right to existence and for the preservation of their identities.[1512]

Shelley Wright similarly discussed the notion of 'internal' self-determination as including:

> A recognition of sovereignty which does not lead to independence as a nation-state – just as the province of British Columbia or the state of New South Wales enjoy legal and political sovereignty within their constitutional limits but are contained within the boundaries of the nation-state of Canada and Australia.[1513]

Kirgis provided a useful matrix with a number of macro-political self-determination options besides the right to secession:

[1511] Daes, E-I, 'Equality of Indigenous Peoples under the Auspices of the United Nations – Draft Declaration on the Rights of Indigenous Peoples' in *St Thomas Law Review* (Vol. 7, 1995) 493 at 496-97.

[1512] Daes, E-I, *Confidential Report, by Prof. Erica-Irene Daes,* (Chairman-Rapporteur of the United Nations Working Group on Indigenous Populations, on visit to New Zealand, 2-7 January, 1988) at 10. See also Hughes, H, *Environmental Management and the Principles of the Treaty of Waitangi* (A Report on the Crown Response to the Recommendations of the Waitangi Tribunal, 1983 - 1988, Wellington, 1988) at 71; and Erica-Irene Daes, Chairman-Rapporteur of the United Nations Working Group Populations, Visit to New Zealand, (2-7 January 1988).

[1513] Wright, S, 'Approaches to International Human Rights, Self-determination and Indigenous Cultural Sovereignty' (Conference Proceedings, Protecting Knowledge: Traditional Resource Rights in the New Millennium, UBCIC, Victoria, BC, February 2000) at 11.

Self-Determination Option	Example
1. The established right to be free from colonial domination - secession	Africa, Asia, India and the Caribbean
2. The converse of that – a right to remain dependent, if it represents the will of the dependent people who occupy a defined territory	Island of Mayotte in the Comoros, or Puerto Rico.
3. The right to dissolve a state, at least if done peacefully, and to form new states on the territory of the former one	Former Soviet Union and Czechoslovakia. The break-up of the former Yugoslavia, except for Serbia and Montenegro, might even be considered an example of this, after the initial skirmish in Slovenia ended and the Yugoslav Federal forces ceased operating as such in Croatia and Bosnia-Herzegovina
4. The disputed right to secede	Bangladesh and Eritrea
5. The right of divided states to unite	Germany, Italy, United States of America, Australia and Canada
6. The right to limited autonomy, short of secession, for groups defined territorially or by common ethnic, religious and linguistic bonds	Autonomous areas within confederations, for example, the Walloons and Flemish in Belgium. Perhaps also the Québécois in Quebec, Canada
7. Rights of minority groups within a larger political entity, as recognised in Article 27 of the International Covenant on Civil and Political Rights 1966 (ICCPR) and in the General Assembly's Declaration on the Rights of Persons Belonging to National and Ethnic, Religious and Linguistic Minorities.	Miskito Indians in Nicaragua, Yanomami of Brazil
8. The internal self-determination freedom to choose one's forms of government, or even more sharply, the right to a democratic form of government	Haiti

Table 6: Kirgis' Macro-Political Self-Determination Options[1514]

Kirgis provides some macro-political options for Indigenous peoples to consider when exercising their inherent right of self-determination. However, Indigenous peoples ought to at least have the freedom to choose not to have self-determination options imposed upon them. Option 8 internal self-determination - the freedom to choose one's forms of

[1514] Kirgis, F 'Degrees of Self-Determination in the United Nations Era' in *American Journal of International Law* (Vol. 88, 1994) 304 at 306-7.

government with authentic power sharing, mana whakahaere tōtika - shared personal, territorial, subject matter and concurrent jurisdiction through Indigenous self-government - is the preferred macro-political preference, although without the Haiti example given the civil and political strife that ensued.

Self-Determination, Autonomy Regimes and Accommodative Jurisprudence

Steiner and Alston discussed three specific options, in terms of self-determination forms and types of autonomy regimes, which are governmental systems or subsystems within a nation-state directed or administered by a minority or its members. Each of these regimes is an option for exercising the right of self-determination through self-government. Each governance regime depends on legal authorisation, be it customary, statutory or constitutional law. The nation-state in each case usually prescribes the powers and scope of the governance regime. Thus, autonomy regimes are instituted in law, and those governing or administering them exercise a form of self-governance power.[1515]

1) *Personal Law Regime* – This regime is similar to the personal jurisdiction regime discussed above which provides that members of a defined ethnic group will be governed with respect to matters of personal civil law – marriage, divorce, adoption, inheritance and so on – by a law that is distinctive to it, usually religious in character. Thus, all members of a religious community may be subject to a personal law applied by religious courts. Depending on the nation-state, members of such groups may or may not be able to 'opt out' by selecting a nation-wide secular law.[1516]

2) *Territorial Organisation Regime* – This regime is similar to the territorial jurisdiction model discussed above which may take the form of a component part of Federalism, or of a regional government to which powers have been devolved within a unitary state. The ethnic minority exercises one or another degree of political authority over the territory and to that degree governs its own affairs. Self-government, including regional elective government, can extend to matters ranging from regulation of natural resources or the tax system to control of regional schools. A territorial regime, however, is plausible only when the ethnic minority at issue is regionally concentrated – as is the case with the Kurdish minority in several nation-states. Contemporary examples include Catalonia in Spain or the states of India.[1517] An indigenous example is the Nunavut public government in Canada's north.

3) *Power Sharing Regimes* – These autonomy regimes assure that one or several ethnic groups will benefit from a particular form of participation in governance, economic activity, environmental management (such as EBM) and other fields. It may affect the composition of the national legislature, for example, through provision that members

[1515] Steiner, H & Alston, P *International Human Rights in Context: Law, Politics, Morals* (Clarendon Press, Oxford, 1996) at 991. For an analysis of how this type of regime operates in Africa, see Rumbles, W, *Africa: Co-Existence of Customary and Received Law: Review of the South African Law Commission's Project 90: The Harmonisation of the Common Law and the Indigenous Law: Report on Conflict of Laws* (Te Mātāhauariki Institute, Waikato Print, Hamilton, 2000).

[1516] Above.

[1517] Above.

of an ethnic minority are entitled to elect a stated percentage of legislators through the use of separate voting rolls specific to the minority. It may require approval by a majority of the legislative representatives of a minority group before certain changes can be made, for example, constitutional protection provisions. A certain percentage of the civil service, or the army officer corps, or of cabinet positions may be reserved for members of the minority. Belgium and Lebanon are examples of this type of autonomy regime.[1518] An Indigenous example could be the Sami Parliament in the Scandinavian countries and, to a lesser extent, Māori in New Zealand, although more sharing of power and jurisdiction authority is required as discussed extensively below.

	Personal Law Regime	**Territorial Organisation Regime**	**Power Sharing Regimes**
Characteristics	• Ethnic group governed by personal law • Mainly religious groups co-existing in same geo-political area • National secular law	• Component of Federalism or regional government • Devolved powers • Regional elective government with extensive powers • Ethnic minority must be regionally concentrated	• Assures ethnic group participation in politics • Potential for constitutional protection • Genuine sharing of both power and authority between groups
Examples	• Jews, Muslims in Israel • Hindus and Muslims in India	• Tamil minority in Sri Lanka • Catalonia, Spain • Nunavut Canada	• Belgium, Lebanon, • Sami Parliament Scandinavian nation-states • Nisga'a

Table 7: Steiner and Alston's Legal Forms of Autonomy Regimes[1519]

[1518] Above.

[1519] Steiner, H & Alston, P *International Human Rights in Context: Law, Politics, Morals* (Clarendon Press, Oxford, 1996) at 991.

Autonomy regimes differ in a number of ways. The regime may involve relatively slight group differentiation and barely affect outsiders (a personal, religious law of marriage and divorce), or it may separate groups with respect to political matters of vital significance for all members of the polity (separate voting rolls, quotas, and so on). Within a Federal nation-state, an autonomy scheme for a geographically concentrated ethnic minority may grant that minority modest self-government and may retain vital powers for the central government, or grant it extensive powers that border on self-rule. Those administering an autonomy regime may invite popular participation or may subject a population to decision-making power of, say, religious officials.[1520] There are, therefore, various jurisprudential precedents for Indigenous self-determination through self-government (autonomy regimes) around the world.

For Māori, the Treaty of Waitangi recognised and reaffirmed the right of Māori to self-determination - it did not create rights and responsibilities. Indigenous rights are inherent in Indigenous values, laws and institutions, and in concepts such as tino rangatiratanga (self-determination) and tangata whenua (people of the land) to Māori in Aotearoa (New Zealand); and kaienerekowa (Mohawk for the 'great law of peace') and Onkwehonwe (Mohawk for 'people of the land') the Iroquois Six Nations in 'Great Turtle Island' (North America). What makes Indigenous rights specific is the fact that the philosophical grounds from which they have arisen, and the means by which they can be pursued, are not those of international law but those of the law and culture of the Indigenous peoples themselves. Fundamental to these rights is the right of Indigenous peoples to self-determination - to govern themselves.

Stavenhagen provided a potent but amorphous definition of self-determination that, like many other international (and even national norms), is general and ambiguous:

> It does not help matters that 'self-determination' means different things to different persons. It is, as one international lawyer asserts, 'one of those unexceptionable goals that can be neither defined nor opposed.' Is it then, a goal, an aspiration, an objective? Or is it a principle, a right? And if the latter, is it only a moral and political right, or is it a legal right? It is enforceable? Should it be enforceable? Or is it none of these, or all of these at the same time, and more? … Self-determination has become, indeed is, a social and political fact in the contemporary world, which we are challenged to understand and master for what it is, an *idée-force* of powerful magnitude, a philosophical stance, a moral value, a social movement, a potent ideology, that may also be expressed, in one of its many guises, as a legal right in international law. Whereas for some the 'self' in self-determination can only be a singular, individual human being for others the right of collective self-determination, that is, the claim of a group of people to choose the form of government under which they will live, must be treated as a myth in the Levi-Straussian sense (that is, as a blueprint for living); not as an enforceable or enforced legal, political or moral right.[1521]

Although there is no precise definition of what is meant by self-determination in New Zealand, it is a fact of modern-day life that more and more peoples globally are seeking greater

[1520] Above, at 997.

[1521] Stavenhagen, R 'Self-Determination: Right or Demon?' in *Law and Society Trust* (Vol IV, Issue No. 67, November 1993) at 12.

freedom and choice in their own lives and the governance of their own affairs.[1522] This is particularly so for Indigenous peoples in New Zealand, Canada, the USA, Australia and elsewhere who, through processes of colonialism and imperialism, have been exploited, dispossessed, marginalised, and pauperised within the lands they have occupied for centuries, perhaps millennia.

Self-government, mana motuhake and tino rangatiratanga have been used synonymously with self-determination in New Zealand but none of these terms are precise either. Coxon defined self-determination by referring to tino rangatiratanga as 'the relative control that a group has over its operations and the decision-making process. Being able to 'name the world.'[1523] Solomon declared that self-determination conveys the right to greater Māori freedom and control within the political, legal, social and economic decision-making structures of the country from 'Parliament right down to the local body or tribal levels.'[1524] Solomon also held that self-determination conveys:

> … the right for Māori to exercise greater control and self-governance over their own affairs, doing so in a manner that recognises and incorporates their own customs and laws to suit the circumstances of today.[1525]

Alan Ward referred to tino rangatiratanga as tending towards 'self-determination' and 'autonomy.' Ward reached this conclusion when he held:

> On the basis of the Crown's actions being most deliberate and hurtful of most people, the most important issue is the loss of rangatiratanga, or legitimate scope for autonomous Māori action. This has two major aspects:
>
> i) the loss of resources which underpin autonomy and self-determination at the individual and tribal level; and
>
> ii) the exclusion of Māori from the decision-making institutions that affect their lives and resources.
>
> The establishment or re-establishment of mechanisms of consultation and empowerment will be as important as the restoration of a resource base.[1526]

The Waitangi Tribunal referred to the guarantee of Māori tino rangatiratanga in the 1989 *Muriwhenua Fishing Report:*

[1522] Solomon, M 'The Context for Māori' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 76.

[1523] Coxon, E, Jenkins, K, Ka'ai, T, Marshall, J & Massey, L *The Politics of Learning and Teaching in Aotearoa – New Zealand.* (Dunmore Press, Palmerston North, 1994) at 167-8. Coxon appeared to be referring to Friere in Friere, P *Pedagogy of the Oppressed* (Penguin Education, Baltimore, 1972).

[1524] Solomon, M 'The Context for Māori' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 63.

[1525] Above.

[1526] Waitangi Tribunal, *Rangahaua Whanui Series: National Overview* (GP Publications, Wellington, 1997) at 34 – 38.

> 'Tino rangatiratanga o ratou taonga' tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority of control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but [over] persons within the kinship group and their access to tribal resources.[1527]

Hence Article II of the Treaty of Waitangi highlights that the right of Māori governance flows from the undertaking to preserve for Māori the Māori way of life as 'confirmed' by the recognition that Māori retained the authority and jurisdiction – tino rangatiratanga – they had always had over their own affairs to govern themselves.[1528] The Waitangi Tribunal further noted:

> Māori autonomy is pivotal to the Treaty and to the partnership concepts it entails. Its more particular recognition is Article 2 of the Māori text. In our view, it is also the inherent right of the peoples in their native territories. Further, it is the fundamental issue in the Taranaki claims and appears to be the issue most central to the affairs of colonised indigenes throughout the world.
>
> The international term of 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as First Peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Māori words are 'tino rangatiratanga,' as used in the Treaty, and 'mana motuhake' as used in the 1860s.[1529]

In more recent times, there has been a shift from the partnership position - at least within the Waitangi Tribunal - with significant findings by the 2014 Waitangi Tribunal *Te Paparahi o te Raki Report* that northern Māori neither ceded sovereignty[1530] nor was such a cession in the contemplation of an ordinary reading of He Whakaputanga o te Rangatiratanga o Nu Tireni – the Declaration of Independence 1835.[1531] Both the Treaty of Waitangi 1840 and He Whakaputanga o te Rangatiratanga o Nu Tireni – The Declaration of Independence 1835 should be read together for a proper understanding of the context and preamble of Te Tiriti o Waitangi as noted by Lord Cooke of Thorndon who observed: 'In law, context is everything.'[1532]

[1527] Waitangi Tribunal, *Muriwhenua Fishing Report* (GP Publications, Wellington, 1989) at 179 - 181

[1528] Henare, D 'A Case Study' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 112.

[1529] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (GP Publications, Wellington, 1996) at 5.

[1530] Waitangi Tribunal, *He Whakaputanga me te Tiriti,* (Wai 1040, Waitangi Tribunal, 2014) at xxii.

[1531] Above.

[1532] Quote by Lord Steyn in *McGuire v Hastings District Council* [2001] UKPC 43 (Judicial Committee of the Privy Council); [2001] NZRMA 557 at 561.

The 2014 Waitangi Tribunal *Te Paparahi o te Raki Report* was concerned with exclusively determining the meaning and effect of four key documents:

1. He Whakaputanga o te Rangatiratanga o Nu Tireni – the Declaration of Independence first agreed to by a number of Ngāpuhi rangatira on 28 October 1835;
2. The English language text known as the Declaration of Independence of New Zealand drafted by the British Resident Busby prior to he Whakaputanga;
3. Te Tiriti o Waitangi adhered to by a number of Ngāpuhi rangatira at Waitangi on 6 February 1840, at Waimate on 10 February and at Mangungu on 12 February; and
4. The English language text known as the Treaty of Waitangi that came to be accepted as the official English text and now appears in the schedule to the Treaty of Waitangi Act 1975.

There was a wide range of evidence presented, and many conflicting threads within the evidence and submissions made, yet the Tribunal came to a number of clear and unambiguous findings and conclusions:

> Our essential conclusion, therefore, is that the rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories. Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis. But the rangatira did not surrender to the British the sole right to make and enforce law over Māori. It was up to the British, as the party drafting and explaining the treaty, to make absolutely clear that this was their intention. Hobson's silence on this crucial matter means that the Crown's own self-imposed condition of obtaining full and free Māori consent was not met.[1533]

The Tribunal added:

> This conclusion may seem radical. It is not. A number of New Zealand's leading scholars who have studied the treaty – Māori and Pākehā – have been expressing similar views for a generation. In that sense, our report represents continuity rather than change. Moreover, the conclusion that Māori did not cede sovereignty in February 1840 is nothing new to the claimants. Indeed, there is a long history of their tūpuna protesting about the Crown's interpretation of the treaty.[1534]

The Tribunal continued:

[1533] Waitangi Tribunal, *He Whakaputanga me te Tiriti,* (Wai 1040, Waitangi Tribunal, 2014) at 10.4.4.
[1534] Above.

> Though Britain went into the treaty negotiation intending to acquire sovereignty, and therefore the power to make and enforce law over both Māori and Pākehā, it did not explain this to the rangatira. Rather, in the explanations of the texts and in the verbal assurances given by Hobson and his agents, it sought the power to control British subjects and thereby to protect Māori. That is the essence of what the rangatira agreed to.[1535]

Regarding He Whakaputanga – the Declaration of Independence 1835, the Tribunal concluded that it was a declaration by rangatira in response to a perceived foreign threat to their mana whakahaere authority, in which they:

- emphatically declared the reality that rangatiratanga, kīngitanga, and mana in relation to their territories rested only with them on behalf of their hapū;
- declared that no one else could come into their territories and make laws, and nor could anyone exercise any function of government unless appointed by them and acting under their authority;
- agreed to meet annually at Waitangi and make their own decisions about matters such as justice, peace, good order and trade involving Europeans and Māori-European relationships in their territories;
- acknowledged their friendship with Britain and the trading benefits it brought; and
- renewed their request for British protection against threats to their authority, in return for their protection of British people and interests in their territories.

> To those rangatira who signed, none of this – including the agreement to meet annually – would have implied any loss of authority on the part of either themselves or their hapū, or any transfer of authority to a collective decision-making body. Rather, he Whakaputanga was an unambiguous declaration that hapū and rangatira authority continued in force – as, on the ground, it undoubtedly did – and that Britain had a role in making sure that state of affairs continued as Māori contact with foreigners increased.[1536]

The Tribunal did discuss the notion of British sovereignty in the British constitution as understood by William Blackstone whose influential Commentaries*,* first published in 1765, defined sovereignty as 'a supreme, irresistible, absolute and uncontrolled authority' lodged in Parliament.[1537] But the Tribunal balanced this notion with shared Māori mana whakahaere and tino rangatiratanga.

Hence, the rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain, they did not cede authority (mana) to make and enforce law over their people or their territories. The rangatira did, however, agree to share power and jurisdiction authority with Britain. The Tribunal concluded:

[1535] Above, at 10.5.
[1536] Waitangi Tribunal, *He Whakaputanga me te Tiriti,* (Wai 1040, Waitangi Tribunal, 2014) at chapter 4.
[1537] Above, at chapter 2, 2.3.4.

> They agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests. … The rangatira consented to the treaty on the basis that they and the Governor were to be equals, though they were to have different roles and different spheres of influence.[1538]

The Tribunal said that, having considered all of the evidence available to it, the conclusion that Māori did not cede sovereignty in February 1840 was inescapable.

The Tribunal said nothing about how and when the Crown acquired the sovereignty that it exercises today. However, it said, the Crown 'did not acquire that sovereignty through an informed cession by the rangatira who signed te Tiriti at Waitangi, Waimate, and Mangungu'.[1539] The Waitangi Tribunal then concluded that Māori and the Crown would share power including, implicitly within the context of this report, the shared jurisdiction, mana whakahaere tōtika and self-determination rights and responsibilities within an EBM context over the coastal marine estate.

Sanders acknowledged that most Indigenous groups seek to wield greater jurisdiction – authority and control - over key priority areas and matters such as natural resources, environmental preservation of homelands, economic well-being, education, use of language, and self-governance, in order to ensure their group's cultural preservation and integrity.[1540] What Māori and other Indigenous peoples are seeking is authentic power with shared jurisdiction within their respective National and Local Governments. Māori self-determination through self-governance jurisdiction *within* the New Zealand nation-state is even consistent with the views of the Waitangi Tribunal, who, in the 1996 *Taranaki Report,* did not regard 'Māori autonomy as conflicting with national governance.'[1541]

Biculturalism Options for Structural Change and Self-determination in New Zealand

The notion of biculturalism in the public service may provide further context for Indigenous Māori self-determination and self-government options in New Zealand. In addressing the functions of the Department of Social Welfare, the Ministerial Committee in its 1986 report (which although dated may still have some contemporary relevance), *Puao-Te-Ata-Tu,* considered that biculturalism was the 'appropriate policy direction of a multi-cultural society.' The Committee interpreted biculturalism as the 'sharing of responsibility and authority for decisions with appropriate Māori people', which is an option for self-determination in New Zealand. Granted, it may not be the most empowering option but it is still a viable option nonetheless. The Committee commented:

[1538] Above, at 10.4.4.

[1539] Above.

[1540] Sanders, D 'The U.N. Working Group on Indigenous Populations' in *Human Rights Quarterly* (Vol. 11, 1989) 406 at 429. See also Torres, R 'The Rights of Indigenous Peoples' in *Yale Journal International Law* (Vol. 16, 1991) at 142; and Stavenhagen, R 'Challenging the Nation-State in Latin America' in *Journal of International Law* (Vol. 45, 1992) at 436.

[1541] Waitangi Tribunal *Taranaki Report: Kaupapa Tuatahi* (WAI 143, GP Publishers, Wellington, 1996) chapter 2. See also 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, Wellington, 2014) and Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake,* (Wai 2417, Waitangi Tribunal Report, 2015).

> We perceive a social and cultural relationship here – not separatism [secession]. Biculturalism involves understanding and sharing the values of another culture, as well as understanding and/or preserving another language and allowing people the choice of the language in which they communicate officially.
>
> Biculturalism also means that an institution must be accountable to clients of all races for meeting their particular needs according to their cultural background, especially … Māori.[1542]

The Committee believed that the recognition of biculturalism was the first stage of change toward more culturally inclusive governance institutions. While recognising personal and cultural racism in society, the Committee was particularly concerned with the functioning of institutions:

> The most insidious and destructive form of racism though is institutional racism. It is the outcome of monocultural institutions which simply ignore and freeze out the cultures of those who do not belong to the majority. National structures are evolved which are rooted in the values, systems and viewpoints of one culture only. Participation by minorities is conditional on their subjugating their own values and systems to those of 'the system' of the power culture.[1543]

The Committee elaborated on its perception of institutional racism in government institutions, which is manifested in the dismal overrepresentation of Māori negatively in national social statistics:

> The persistent myth advanced to explain the cause of Māori disadvantage is that Māori have not 'adapted' or have 'failed' to grasp the opportunity that society offers. This is the notion that poverty is the fault of the poor.
>
> The fact is, though, that New Zealand institutions manifest a monocultural bias and the culture which shapes and directs that bias is Pākehātanga [mainstream non-Māori institutions]. The bias can be observed operating in law, government, the professions, health care, land ownership, welfare practices, education, town planning, the police, finance, business and spoken language. It permeates the media and our national economic life. If one is outside, one sees it as 'the system.' If one is cocooned within it, one sees it as normal conditions of existence.
>
> Institutional racism is the basic weapon that has driven the Māori into the role of outsiders and strangers in their own land. …
>
> Institutional racism can be combated only by a conscious effort to make our institutions more culturally inclusive in their character, more accommodating of cultural difference. This does not begin and end at 'the counter.' The change must penetrate to the recruitment and qualifications which shape the authority structures themselves. We are

[1542] Rangihau J, *Puao-Te-Ata-Tu* (Department of Social Welfare, Wellington, 1986) at 19-20.
[1543] Above, at 19.

not talking of mere redecorating of the waiting room so that clients feel more comfortable.[1544]

The notion of biculturalism has varying degrees that perhaps offer a form of internal self-government. Mason Durie provided a matrix on biculturalism in New Zealand at both the goal and structural levels that, although focusing on biculturalism in the New Zealand public service, may also provide options for Māori self-government and self-determination at one end of the spectrum. Durie noted, however, the lack of clarity, diverse meanings and significant differences in understandings over the concept of biculturalism. There is similar ambiguity with self-determination. Durie discussed the need to clarify the goals of biculturalism (and self-determination in this context) and suggested these could be described along a continuum:

> Bicultural goals may, for example, relate to improving race relations by celebrating cultural differences, or establishing New Zealand as a bilingual nation, all citizens being able to speak (with differing levels of competence) both English and Māori. Or, outside the sphere of culture, language and tradition, the goal of biculturalism may be to reduce socio-economic disparities or to ensure greater representivity in the workforce. Further, in the view of many Iwi, the most critical goal of biculturalism is the exercise of self-determination, tino rangatiratanga.[1545]

The bicultural continuum also offers options for self-determination and shared jurisdiction. Durie expressed the bicultural continuum in diagrammatic form as follows:[1546]

Bicultural Goals				
1. Cultural skills and knowledge	2. Better awareness of the other culture's position(s)	3. Greater cultural participation in all the country's institutions and activities	4. Parallel cultural deli-very systems alongside main-stream	5. Cultural self-determination, eg. Māori tino rangatiratanga

Table 8: Mason Durie's Bicultural Continuum – Bicultural Goals

[1544] Above.
[1545] Durie, M *Understanding Biculturalism* (Race Relations Conference Paper, Gisborne, New Zealand, 20 September, 1994) at 5-6.
[1546] Above, at 7, 8.

Durie explained that at one end the goals were about 'the acquisition of cultural skills and knowledge,' such as some awareness of Māori words, marae protocol, tribal history and tradition. The other end reflects 'aspirations for greater Māori independence.' These are 'two poles' within which 'integration (into a single framework) is the main goal.'[1547] Durie also commented that this distinction is important, and needs to be made very clear in determining the meaning of biculturalism within any institution:

> Between the poles are at least three levels of biculturalism. One has as its main objective the introduction of a Māori perspective within the culture of the institution but as an addition to the overall culture of the organisation rather than as an integral part to its core business. Taha Māori programmes in schools could be classified in that category. A second level has as its main objective a more representative Māori workforce and an opportunity for a Māori component to develop within the central mission of the institution. Bilingual units in schools or Māori units in Government departments are good examples. The third level accepts that a single organisation cannot comfortably accommodate two quite distinct cultural approaches and opts instead for parallel institutions, both committed to the same overall aims but using different approaches and separate vehicles. Kohanga Reo and Kura Kaupapa Māori illustrate the point. Though operating within educational frameworks prescribed by the State, they have a degree of autonomy which enables them to conduct their cultural activities entirely in the Māori language and according to Māori cultural preferences.[1548]

Durie also identified a continuum that applied to the structural arrangements that might arise out of bicultural goals, excluding secession:

Bicultural Structural Arrangements				
1. Unmodified mainstream institutions	2. A cultural perspective	3. Active cultural involvement	4. Parallel cultural institutions	5. Independent cultural institutions

Table 9: Mason Durie's Bicultural Continuum – Bicultural Structural Arrangements

The two poles of this continuum are unmodified monocultural (Pākehā) institutions and independent Māori institutions. Durie opined:

[1547] Above, at 7.
[1548] Above.

At one level, biculturalism implies an inclusion of Māori values and perspectives in the major institutions of the State; at another level it suggests the development of specific Māori institutions to provide for Māori needs.[1549]

Bicultural Goals				
1. Cultural skills and knowledge	2. Better awareness of the other culture's position(s)	3. Greater cultural participation in all the country's institutions and activities	4. Parallel cultural deli-very systems alongside main-stream	5. Cultural self-determination, eg. Māori tino rangatiratanga
Bicultural Structural Arrangements				
1.Unmodified mainstream institutions	2. A cultural perspective	3. Active cultural involvement	4. Parallel cultural institutions	5. Independent cultural institutions

Table 10: Mason Durie's Bicultural Continuum[1550]

Sharp described Durie's first level as 'bicultural reformism,' that is, the adaptation of Pākehā institutions to meet Māori requirements and concerns.[1551] The second type, the development of different and specifically Māori institutions to share the authority defined in the Treaty of Waitangi, was described as 'bicultural distributivism.[1552] Sharp also reviewed various earlier

[1549] Above, at 5-6.
[1550] Above, at 7, 8.
[1551] Sharp, A *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand Since the 1970s* (Oxford University Press, Auckland, 1997) at 227 – 236.
[1552] Above.

attempts to define biculturalism, in the context of and/or as opposed to multiculturalism.[1553] Jackson proposed a concrete example, with the establishment of a parallel legal system of criminal justice defined and administered by Māori according to tikanga Māori.[1554] This notion was firmly rejected, however, by the Minister of Justice, Geoffrey Palmer and others, as a separatist proposal, which would be in conflict with the current legal system that assures equality under the law for every citizen.

Still, the notion of self-determination and development ought to convey a right to greater freedom and control - authentic power sharing – in the political, legal, social, economic and cultural development of Indigenous peoples within the Canadian, Australian and New Zealand body politic. Authentic power sharing needs to occur between Indigenous peoples and the nation-state within the decision-making structures and governance institutions from Parliament right down to the local body and tribal levels. That is, the further right one goes on the bicultural continuum the more empowering in terms of shared mana whakahaere tōtika - personal, subject matter, territorial, concurrent and exclusive jurisdiction in self-determination terms for Indigenous peoples. As Solomon concluded, self-determination involves changing mainstream government structures and institutions to accommodate Māori aspirations.[1555] It conveys a right for Māori to exercise greater control and self-governance over their own affairs in a manner that recognises and incorporates Māori customary values, laws and institutions appropriately adapted to suit contemporary circumstances such as within an EBM context over the marine and coastal estate. Co-management and co-governance agreements may offer possible pathways forward.

Waitangi Tribunal Shared Governance Recommendations Protecting Māori Interests

In a similar manner, the 2011 *Wai 262 Waitangi Tribunal Report* provided a useful spectrum for what was in effect shared governance jurisdiction between Māori and the Crown over Conservation lands and resources. The Tribunal discussed this spectrum of possibilities in relation to Crown engagement with Māori from consultation to 'full-kaitiaki control,' which would vary depending on the degree of impact of a proposal on Māori.[1556]

After discussing quite extensively Māori involvement in conservation decision-making under the Conservation Act 1987 and other statutes, the Waitangi Tribunal referred to Māori being frustrated with the lack of progress under the RMA and how they turned to Treaty of Waitangi settlement processes as a path for recognition of kaitiaki governance rights and responsibilities.[1557] The Tribunal commented:

[1553] Above.

[1554] Jackson, M *He Whaipaanga Hou: Māori and the Criminal Justice System: A New Perspective* (2 Vols, Department of Justice, Wellington, 1987, 1988).

[1555] Solomon, M, 'The Context for Māori' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 63.

[1556] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Legislation Direct, Wellington, 2011) at 680-689.

[1557] Above, at 333.

> Treaty settlements … [and] the types of settlements reached cover a full spectrum, with full transfer of title to iwi at one end and obligations to consult at the other. Between those two poles lie other solutions such as statutory recognition of iwi interests in land, and co-governance or co-management arrangements.[1558]

The Tribunal continued:

> Each settlement is, of course, negotiated on a case-by case basis, between iwi negotiators and ministers, with its content depending on the specific circumstances for which iwi have sought redress, and also on the political context at the time. But, in general, it is Treaty settlements – not DOC [or RMA] policies or initiatives – that have led the way in sharing or transferring control over conservation taonga. While this has led to meaningful progress for some iwi, it has also meant that conservation redress is sought and delivered in an inconsistent and ad hoc fashion.[1559]

The Tribunal then referred to the spectrum of possibilities in relation to Crown engagement with Māori for shared governance jurisdiction, which include:

1) Full transfer of title with commitment to protect conservation values.

The situation occurred for some portions of conservation lands with the 2005 Ngāti Awa settlement where the Department of Conservation (DOC) transferred five DOC sites to Ngāti Awa subject to their continued management as reserves under the Reserves Act 1977, which meant the ongoing maintenance of public access. In one other case, title was transferred without rights of public access, but subject to Ngāti Awa's agreement to protect the land's conservation values.[1560]

2) Transfer of title and re-gifting to the nation:

For some significant sites, Treaty of Waitangi settlements have transferred title to iwi, who have then immediately gifted them back to the nation, for example, Aoraki/Mt Cook under the Ngāi Tahu Claims Settlement Act 1998, and Taranaki Maunga under the Mount Egmont Vesting Act 1978.[1561]

3) Iwi and DOC co-management or co-governance of land:

[1558] Above.

[1559] Above.

[1560] Above.

[1561] Above, at 334-335

Examples include the Te Urewera Act 2014 which acknowledges Ngāi Tūhoe as kaitiaki and tangata whenua of Te Urewera,[1562] Ngāti Porou with DOC lands within their rohe as discussed briefly above; and the 2012 Ngāti Whare settlement provides for co-management of Whirinaki Conservation Park through the development of a conservation management plan that is approved jointly by the east Coast Bay of Plenty Conservation Board and Te Rūnanga o Ngāti Whare.[1563]

4) Co-management of species subject to conservation legislation:

An example is the appointment (as provided under the Tainui Taranaki ki te Tonga Agreement) of Ngāti Koata as kaitiaki to provide advice directly to the Minister of Conservation on the management of threatened native species such as tuatara and Stephens Island green and striped geckos on Takapourewa Island scenic reserve, Whakaterepapanui.[1564]

5) Retention in the conservation estate but with an 'overlay classification' acknowledging the iwi's traditional, cultural, spiritual, and historical associations with a particular area:

An overlay classification requires DOC to have particular regard to iwi values in relation to the area and to manage it according to agreed principles that aim to avoid harm to those iwi values.
Some examples include Ngāti Koata interests in the Takapourewa and D'urville Island Scenic Reserves, and Ngāti Toa Rangatira interests in Kapiti Island.[1565] Similarly, the Te Uri o Hau settlement in 2002 provided overlay classifications for Manukapua Wildlife Management Reserve and Pouto stewardship area.[1566]

6) Recognition of iwi interests through statutory acknowledgement:

Some Treaty of Waitangi settlements provided for statutory acknowledgement of iwi interests in conservation land that require consenting authorities to forward resource consent applications over those areas to iwi, and to have regard to iwi interests in making decisions. The Historic Places Trust and the Environment Court are also having regard to iwi interests under statutory acknowledgements. Ngāti Koata have a statutory acknowledgement over

[1562] Urewera Act 2014, s. 11(1).
[1563] Ngāti Porou and Te Rūnanganui o Ngāti Porou Trustee Limited as Trustee of Te Rūnanganui o Ngāti Porou and the Crown, *Deed of Settlement of Historical Claims* (Office of Treaty Settlements], Wellington, 2010) at 51–52. See also *Ngāti Whare and the Sovereign in Right of New Zealand: Deed of Settlement of Historical Claims* (Office of Treaty Settlements, Wellington, 2009) at 23.
[1564] Above, (WAI 262 Report) at 335.
[1565] See *Tainui Taranaki ki te Tonga Letter of Agreement,* (Office of Treaty Settlements, Wellington, 2009) at 11–12; and the *Ngāti Toa Rangatira Letter of Agreement,* (Office of Treaty Settlements, Wellington, 2009) at 9–10.
[1566] Above, (WAI 262 Report) at 335.

Moawhitu Bay on D'urville Island and Ngāti Porou have acknowledgements over the Waiapu and Uawa Rivers as well as a range of conservation lands.[1567]

7) Customary harvest of species subject to conservation legislation:

The obvious example is the transfer of both ownership and management of the Tītī Islands from the Crown to Ngāi Tahu under the Ngāi Tahu Claims Settlement Act 1998. The islands are managed as if they are a nature reserve, except for maintaining Ngāi Tahu's rights to sustainably harvest tītī.[1568] The Kurahaupo ki te Waipounamu agreement acknowledges Ngāti Apa's customary harvest association with eels in the Nelson lakes National Park, and confirms that Ngāti Apa 'may apply to the Minister of Conservation for cultural take of eels' where (a) there is no alternative source of eels accessible; and (b) there are extraordinary cultural circumstances such as tangi of rangatira'.[1569]

8) Regular meetings between iwi leaders and the Minister:

An example is the annual meeting between Te Rarawa and the Minister of Conservation (or Director-General or senior delegate) to discuss conservation issues in Te Rarawa's area of interest, and an annual meeting between the Minister of Conservation and Ngāti Porou to discuss co-governance of conservation areas in the Ngāti Porou rohe.[1570]

9) Obligation to consult:

The Ngāi Tahu Claims Settlement Act 1998 requires DOC to consult and 'have particular regard to the views of' Ngāi Tahu about policies for protecting, managing, and conserving taonga species.[1571] Many Treaty of Waitangi settlements include deeds of recognition acknowledging the special relationships between iwi and particular sites, which similarly provide for iwi to be consulted and to have regard for their views.[1572]

The Waitangi Tribunal then stated of the spectrum:

[1567] Above.

[1568] Customary taking of tītī in other areas is by DOC permit only. To further extend the cultural management of the area, mātaitai reserves were approved by the Ministry of Fisheries in July 2010 for the waters around three of the islands. Mātaitai reserves allow tangata whenua to manage the fisheries in those areas. See 'Mataitai being Assessed,' in *Otago Daily Times*, (12 July 2010).

[1569] Above, (WAI 262 Report) at 335-337. See also *Kurahaupō ki Te Waipounamu Letter of Agreement* (Office of Treaty Settlements, Wellington 2009) at 30.

[1570] Above, (WAI 262 Report) at 337. See also *Te Rūnanga o Te Rarawa and Her Majesty the Queen in right of New Zealand: Agreement in Principle for the Settlement of the Historical Claims of Te Rarawa* (Office of Treaty Settlements, Wellington, 2007) at 8. See also *Crown Settlement Offer to Ngāti Porou* (Office of Treaty Settlement, Wellington 2009) at 3; and the earlier section on Ngāti Porou and DOC.

[1571] Ngāi Tahu Claims Settlement Act 1998, s 293.

[1572] Above, (WAI 262 Report) at 337.

> As we have explained, at the heart of this claim is the ability of tangata whenua to exercise kaitiakitanga in the full sense. This, the claimants argued, is what the Treaty guarantee of tino rangatiratanga means in the context of the environment: it obliges the Crown to protect their ability as kaitiaki to control and regulate their relationship with the environment. Kaitiakitanga does not mean merely a right to be informed or consulted; it means full expression of relationships and mātauranga that have developed over many hundreds of years. Though this expression is guaranteed by the Treaty, the claimants argued, it has not been honoured; rather, control and regulation of those relationships have been vested in the Crown.[1573]

The Waitangi Tribunal then reiterated that what is needed is:

> a *fundamental transformation* in the way the Crown and kaitiaki interact and share responsibilities for the management of the environment' … this transformation was consistent with the Crown's own goal of encouraging Māori participation in the protection of biodiversity, and that it would lead to a 'new relationship based on good will, trust, effective partnership, good faith and the Treaty guarantee of tino rangatiratanga' which would also enhance environmental objectives.[1574]

The Waitangi Tribunal then warned:

> When kaitiaki control and partnership are delivered only through historical settlements, this is a recipe for unfairness and inconsistency, both in terms of the forms of power-sharing that result and the environmental outcomes that follow. Iwi should not have to spend their Treaty settlement credits in this way, and nor should those who have not yet settled have to wait before they get a say in decision-making about environmental taonga. Nor, indeed, should smaller iwi have to settle for less in the way of influence over taonga simply because they lack political leverage to win seats on conservation boards or influence around the Cabinet table, nor iwi who reached settlements some time ago get less that those who have settled more recently. If innovative approaches to land ownership and power sharing can be achieved under the intense pressure of Treaty settlements, they ought also to be possible in the ordinary course of DOC's business.[1575]

The Waitangi Tribunal then referred to the importance of collaborative co-governance and co-management of the resources, which aligns with our report theme of co-governance structures that acknowledge the Māori constitutional partnership in the Treaty of Waitangi

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[1573] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Legislation Direct, Wellington, 2011) at 337-338.

[1574] Above, at 338.

[1575] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Legislation Direct, Wellington, 2011) at 341.

and that effectively incorporate tikanga and mātauranga Maori within an EBM context over the marine estate. In this respect, the Tribunal concluded:

> In summary, then, we see a Treaty-compliant framework for conservation management as being one that is based on partnership and shared decision-making; that provides for joint decisions about who should control and manage each taonga; and that places the interests of the environment first, while also providing for the ongoing resources and expertise are combined with widespread community support. … there is a general movement in the understanding of environmental management 'as necessarily involving and affecting the local community, and is therefore best developed through collaboration with this community.[1576]

[1576] Above, at 341-342.

9	Full transfer of title with commitment to protect conservation values.	Ngāti Awa, Waikato-Tainui, Ngāti Porou.
8	Transfer of title and regifting to the nation.	Aoraki/Mt Cook under Ngāi Tahu Claims Settlement Act 1998
7	Iwi and DOC co-management or co-governance of land.	Ngāti Porou, Ngāti Whare Whirinaki Conservation Park,
6	Co-management of species subject to conservation legislation.	Tainui Taranaki ki te Tonga Agreement - tuatara & green and striped geckos
5	Retention in conservation estate but with an 'overlay classification' acknowledging iwi traditional, cultural, spiritual, & historical associations with a particular area.	Ngāti Toa Rangatira interests Kapiti Island, Ngāti Koata interests Takapourewa & D'urville Island Scenic Reserve, Te Uri o Hau - Manukapua Wildlife Management Reserve.
4	Recognition of iwi interests through statutory acknowledgement.	Ngāti Koata, Ngāti Porou, Ngaa Rauru Kiitahi
3	Customary harvest of species subject to conservation.	Customary taking of tītī, mātaitai reserves approved Ministry of Fisheries 2010.
2	Regular meetings between iwi leaders and the Minister.	Ngāti Porou, Kurahaupō ki Te Waipounamu & Te Rarawa
1	Obligation to consult.	Ngāi Tahu Claims Settlement Act 1998, s 293.

Table 11: WAI 262 Crown Engagement Shared Governance Spectrum[1577]

[1577] Above, at 333-343.

Typologies of co-management arrangements

With respect to co-governance and co-management arrangements, many different types of arrangements are said to be available to implement co-management or co-governance. There have been several different typologies and frameworks for categorising these different types as discussed somewhat extensively earlier in section C of this report. To these ends, Iorns offers some structural examples of co-governance and co-management arrangements represented in the following diagram that is useful for our analyses on exploring co-governance and co-designed structures that acknowledge the Māori constitutional partnership in the Treaty of Waitangi and that effectively incorporate tikanga and mātauranga Māori within an EBM context over the marine estate:

8	**Devolution**	Full devolution of resource ownership and management to fully resourced iwi.
7	**Partnership / Community Control**	Partnership of equals, joint decision making institutionalised; power delegated to community where feasible
6	**Management Boards**	Community is given opportunity to participate in developing and implementing management plans
5	**Advisory Committees**	Partnership in decision-making starts; joint action of common objectives
4	**Communication**	Start of two-way information exchange; local concerns begin to enter management plans
3	**Co-operation**	Community starts to have input into management; e.g. use of local knowledge, research assistants
2	**Consultation**	Start face-to-face contact; community input heard but not necessarily heeded.
1	**Informing**	Community is informed about decisions already made

Table 12: Iorns Co-Governance and Co-Management Arrangements Spectrum[1578]

Wever similarly provided a useful power-sharing spectrum that is useful for our analyses on exploring co-governance and co-designed structures that acknowledge the Māori constitutional partnership in the Treaty of Waitangi and that effectively incorporate tikanga and mātauranga Māori within an EBM context over the marine estate which is explored next.

[1578] Iorns, C, 'Māori Co-Governance and/or Co-Management of Nature and Environmental Resources,' (Draft Paper, August 2019) at 16.

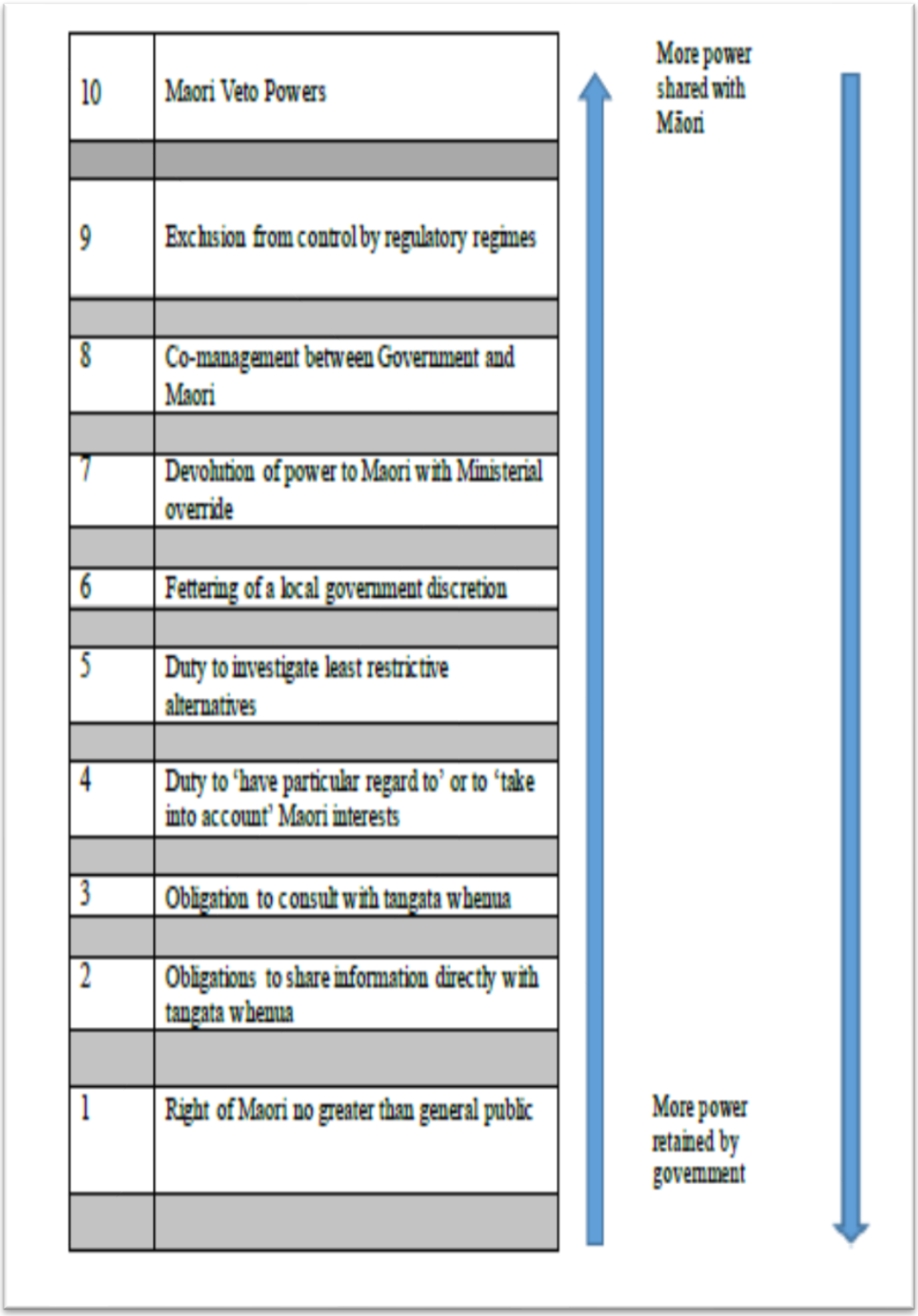

Table 13: Wever's Spectrum of Power Sharing in Resource Management[1579]

[1579] See Wever, S.G, 'Recognising Rangatiratanga: Sharing Power with Māori through Co-Management,' (Bachelors of Laws Honours Dissertation, Faculty of Law, University of Otago, 2011) at 22. Wever referred to

Right of Māori no greater than the General Public

Some New Zealand statutes treats Māori as having the same interests in the environment as any other citizens where mana whakahaere tōtika and shared jurisdiction are not apparent. As noted above, the RMA has such provisions. If an application for consent is publicly notified, any person may make a submission on that application, and then only those who make a submission may appeal a decision. [1580] Māori have an opportunity like others to provide input and for that input to be considered, but where applications for resource consents are not notified – which is the majority of the time – Māori would have no right of input. An example is the 2009 decision of *Ngā Tai o Kāwhia Regional Management Committee v Waikato Regional Council*[1581] where the hapū was unable to substitute itself into proceedings as a group having an interest greater than the public generally under s. 274(3), RMA, due to a failure to submit an initial resource consent application under s. 274(5), RMA.

Sharing Information Directly with Māori

Māori interests may be given some prominence with decision-makers exercising RMA powers that they must consider.[1582] In this situation, the Courts have placed Māori in a position above that of the general public.[1583] Māori may be able, for example, to give evidence in appeals given that tangata whenua status may grant an interest in proceedings greater than the general public.

Furthermore, some statutory Treaty of Waitangi settlement provisions have affirmed such a 'special interest' status requiring decision-makers in resource consent processes to share information with local Māori upon receipt of applications such as with Ngāi Tahu, Waikato and Te Arawa, among other tribes.[1584] Such Treaty settlement provisions acknowledge Māori rangatiratanga and kaitiakitanga over taonga. However, the practical application can be limited. Rangatiratanga is limited in terms of shared mana whakahaere – concurrent subject matter jurisdiction - with decision-making powers resting wholly with government similar to the GBI in Canada and the GBR in Australia.

Obligations to 'have particular regard to' or to 'take into account' Māori interests

Such requirements force decision-makers to follow certain processes and to consider Māori interests which provisions the Waitangi Tribunal has referred to as the 'effective influence' of kaitiaki. [1585] The Crown manages many natural resources for the benefit of all New

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then modified Sherry Arnstein's 'Ladder of Participation' in Arnstein, S, 'A Ladder of Participation,' in *Journal of the American Institute of Planners,* (Vol. 35, No. 4, 1969) at 216.

[1580] Resource Management Act 1991, ss. 96, 120. Above, (Wever) at 24.

[1581] [2009] NZRMA 184.

[1582] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 255. Above, (Wever) at 24.

[1583] Refer to *Purification Technologies Ltd v Taupo District Council,* [1995] NZRMA 197.

[1584] See Ngāi Tahu Claims Settlement Act 1998, s. 207; and Te Arawa Lakes Settlement Act 2006, s. 66.

[1585] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 272. Above, (Wever) at 25-28.

Zealanders[1586] with the primary purpose of the RMA being the sustainable management of resources.[1587]

As noted above, the Part 2 provisions of the RMA refer to Māori considerations. Section 6(e), RMA requires decision-makers to 'recognise and provide for' the relationship of Māori with their ancestral lands, other taonga and protection of recognised customary activities which matters are deemed to be of national importance alongside other environmental priorities. A lesser requirement is prescribed in s. 7(a), RMA that requires decision-makers to have 'particular regard to' kaitiakitanga. Section 8, RMA then prescribes that decision-makers 'take into account' the principles of the Treaty of Waitangi.

As emphasised above, in this statutory hierarchical regime, the Treaty of Waitangi appears to be the least important mandatory consideration under the RMA. Decision-makers do have a discretion whether to provide for the Treaty of Waitangi and kaitiakitanga that must be considered but may be subsumed by balancing other interests. Only s. 6(e), RMA obliges decision-makers to provide for the relationship of Māori with their lands.[1588] However, the Privy Council asserted that these Part 2 RMA provisions provide the 'strongest directions to be borne in mind at every stage of the planning process.'[1589]

Furthermore, s. 61(2A), RMA, requires regional councils to take into account relevant iwi planning documents when reviewing and changing its regional policy statements. Such documents allow iwi some active influence over resource management without further consent of government.[1590] However, Māori interests are still balanced against other economic and public interests.[1591] In this respect, the Waitangi Tribunal concluded that the kaitiakitanga interest is important 'but it is not a trump card.'[1592] Case law confirms that Māori interests are only one of many interests in ss. 6 and 7, RMA where Courts defer to the overall purpose of the RMA in s. 5(1).

Government then has the ultimate decision-making power where Māori interests can be outweighed again.[1593] Litigation challenges against such decision-making has been unsuccessful[1594] and where it is successful, government can simply make the same decision again after a more rigorous consideration of Māori interests.[1595]

[1586] Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies,* (Wai 26, Waitangi Tribunal, 1990) at 42.
[1587] Resource Management Act 1991, s. 5(1).
[1588] See *Bleakely v Environmental Risk Management Authority,* [2001] NZLR 213 (HC) at 73. See also *Ngāti Hokopu ki Hokowhitu v Whakatāne District Council* (2002) 9 ELRNZ 111 at 35 (NZEnvC).
[1589] *McGuire v Hastings District Council* [2001] UKPC 43 (Judicial Committee of the Privy Council); [2001] NZRMA 557 at 594.
[1590] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 116.
[1591] *Watercare Services Ltd v Minhinnick*, [1998] 294 (CA) at 305. See also *Friends of the Community of Ngawha v Minister of Corrections,* [2003] NZRMA 272; *Te Maru o Ngati Rangiwewehi v Bay of Plenty Regional Council,* [2008] NZRMA 395; and *McGuire v Hastings District Council* [2001] UKPC 43.
[1592] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 272.
[1593] *Marr v Bay of Plenty Regional Council,* [2010] NZEnv C 347.
[1594] Ruru noted that only 2 of 19 litigation cases by Māori for water rights were successful. See Ruru, J, 'Undefined and Unresolved: Exploring Indigenous Rights in Aotearoa New Zealand's Freshwater Regime,' in *The Journal of Water Law,* (Vol. 20, 2010) at 236.
[1595] *Te Runanga o Ngati Taumarere v Northland Regional Council,* [1996] NZRMA 77.

Statutory Treaty of Waitangi settlement provisions require special consideration of Māori interests on decision makers for example in s. 17(3), Waikato Tainui Raupatu Claims (Waikato River) Settlement Act 2010 which requires those exercising functions under conservation legislation must have particular regard, among other matters, to the restoration of Waikato-Tainui's relationship with the Waikato River.[1596] Section 241, Ngāi Tahu Claims Settlement Act 1998 similarly requires conservation boards to have particular regard to tōpuni – Ngāi Tahu cultural statutory overlays – in particular areas that outline specific Ngāi Tahu cultural values for those areas. Furthermore, s. 49, Coastal Marine (Takutai Moana) Act 2011 requires that particular regard be given to the views of affected tangata whenua in considering conservation applications.[1597]

The challenges with these statutory provisions are they may only influence procedural issues around resource consent notification and may not actually constrain the final decision.[1598] The other key challenge is the final decision-making power again rests with government. The Treaty of Waitangi requires the Crown to protect the continuing obligations of kaitiaki over the environment[1599], which flows from the need to protect tribal tino rangatiratanga including for resource management[1600] in the 'use of their lands and waters to the fullest extent practicable.'[1601]

Obligations upon decision-makers to consult tangata whenua

As noted elsewhere throughout this report, consultation requires decision-makers to undertake certain actions such as regional policy statements that must be prepared while consulting with iwi authorities under Schedule 1, cl 13(1)(d), RMA. Section 81, Local Government Act 2002 also requires local authorities to provide opportunities for Māori to contribute to decision-making processes. The Ngāi Tahu Claims Settlement Act 1998 requires certain public authorities to consult with Ngāi Tahu regarding Ngāi Tahu values and tikanga for given areas under s. 242. However, the Waitangi Tribunal concluded that justifications for Māori involvement in resource management should be based on the strength of kaitiakitanga relationships with the whenua not customary title or historical wrongs.[1602]

The duty to consult Māori has become a Treaty of Waitangi principle in its own right.[1603] Consultation is a means by which the Crown can act reasonably and in good faith with Māori but it falls short of acknowledging mana whakahaere jurisdiction by substituting for example, the transfer of authority under s. 33, RMA which has never been implemented as discussed

[1596] Schedule 2, Waikato Tainui Raupatu Claims (Waikato River) Settlement Act 2010 obliges decision-makers to have regard to the restoration of tangata whenua with the Waikato River and its tributaries.

[1597] Coastal Marine (Takutai Moana) Act 2011, s. 47(1) states: 'Affected tangata whenua are those who the Minister regards as exercising kaitiakitanga over a particular area.'

[1598] *Kemp v Queenstown Lakes District Council,* [2000] NZRMA 289.

[1599] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 284.

[1600] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River,* (Wai 4, Waitangi Tribunal, 1984) at 13.

[1601] *New Zealand Māori Council v Attorney-General,* [1987] 1 NZLR 641 at 664. Above, (Wever) at 25-28.

[1602] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 279. Above, (Wever) at 28-29.

[1603] Hayward, J, 'Flowing from the Treaty's words: The Principles of the Treaty of Waitangi,' in Wheen, N, & Hayward, J, (Eds.), *The Waitangi Tribunal – Te Roopu i te Tiriti o Waitangi,* (Bridget Williams Books, Wellington, 2004) at 29 and 37.

above. Although consultation is important, it is not mana whakahaere tōtika shared jurisdiction, with similar consultation challenges occurring in the GBI in Canada and the GBR in Australia.

Duty to investigate the least infringing alternative

The duty to investigate the least infringing alternative may require delays in decision-making and onerous processes more than consulting with tangata whenua. Such a situation occurred with the Far North District Council who were prompted to reconsider a decision to discharge effluent. Consultation with iwi occurred but was not enough to satisfy the Planning Tribunal regarding proper consideration that Māori values in the RMA were satisfied. An alternative option existed that was less offensive to iwi relationships with local waterways but was not fully investigated. The Council was required to investigate further the latter option that least infringed the cultural connection and relationship of the tangata whenua with the area.[1604] The duty has moreover, been cited as an appropriate option by the Privy Council.[1605]

Although this duty to investigate the least infringing alternative for iwi Māori is a more improved option than consultation, it is a concurrent territorial, personal and subject matter jurisdiction model albeit fragile.

Fettering a Local Government Discretion

Government discretion in resource management can be constrained procedurally through natural justice principles and due process. In limited situations, local government authority to issue resource consents can be limited substantively such as in the case of s. 55(2), Coastal Marine (Takutai Moana) Act 2011 (MACA) which section prevents a local authority from granting resource consents for an activity that will have more than minor effects on the exercise of a protected customary right (PCR).[1606] Given that very few if any PCRs have been determined yet under MACA as noted above – and the high likelihood of PCRs being very rare given the stringent legal tests pursuant to s. 52, MACA[1607] - in practice it is likely that the restriction will be of minimal utility for fettering local authority discretion.

Devolution of Power to Māori with Government Override

Most of the previous Indigenous self-governance and co-governance models – including in Canada with comprehensive and self-government agreements as well as the GBI, and in Australia with the GBR - have illustrated that co-governance decision-making power and shared governance jurisdiction is grand in theory but subject to government override – where Māori and other Indigenous peoples' interests are often marginalised by being outbalanced by other competing interests and imperatives – public interest. Still, genuine devolution of power provides an authentic option for shared mana whakahaere tōtika - jurisdiction - albeit

[1604] *Te Runanga o Ngati Taumarere v Northland Regional Council,* [1996] NZRMA 77. Above, (Wever) at 30-31.
[1605] *McGuire v Hastings District Council* [2001] UKPC 43 (Judicial Committee of the Privy Council); [2002] 2 NZLR 557.
[1606] Coastal Marine (Takutai Moana) Act 2011, s. 559(2). Above, (Wever) at 31-32.
[1607] Above, s. 52.

subject to Ministerial override. Under this model, co-governance and co-management are still viable options.

The Coastal Marine (Takutai Moana) Act 2011 (MACA), for example, allows for devolving power and authority to local Māori to exercise protected customary rights (PCRs) on land they do not own pursuant to ss. 51 and 52, MACA, which acknowledges kaitiakitanga, rangatiratanga and possibly shared territorial, personal and subject matter mana whakahaere tōtika. In this respect, s. 52, MACA states:

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.

Section 55(2) also states that a consent authority must not grant a resource consent for an activity (including a controlled activity) to be carried out in a protected customary rights area if the activity will, or is likely to, have adverse effects that are more than minor on the exercise of a protected customary right unless the relevant protected customary rights group gives its written approval for the proposed activity.

A PCR group then appears to have some territorial and subject matter jurisdiction to influence resource consents including stopping them if the proposed activity is likely to have adverse effects on the PCR.

Notwithstanding the opportunity for sharing power and for exercising shared territorial and subject matter jurisdiction over PCRs, the Minister of Conservation still retains the ability to impose controls if the exercise of PCRs has a significant adverse effect on the environment pursuant to s. 56(1) of the Act, which is similar to ss. 17A and 17B, RMA Ministerial overriding powers.[1608]

Co-Management Structures between Government and Māori

The RMA provided for the co-management of resources with Māori since its inception in 1991 – the provisions simply have not been taken up for various reasons in good and not so good faith. Section 33, RMA is one glaring example, which was discussed somewhat extensively earlier in section K of this report. Section 33, RMA allows a local authority to transfer power to another public authority including an iwi authority.[1609] The iwi and other public authority must satisfy certain criteria including efficiency and capability[1610] but s. 33, RMA is yet to be implemented in devolving power and mana whakahaere jurisdiction to Māori.[1611]

In addition, tangata whenua could be granted status as a heritage protection authority over places of spiritual and cultural significance, which would grant them power and jurisdiction to control the use and development of that place pursuant to s. 188[1612] which was also discussed above in section K of the report. Section 188, RMA states:

> **188 Application to become heritage protection authority**
> (1) Any body corporate having an interest in the protection of any place may apply to the Minister in the prescribed form for approval as a heritage protection authority for the purpose of protecting that place.
> (2) For the purpose of this section, and sections 189 and 191, place includes any feature or area, and the whole or part of any structure.
> (3) The Minister may make such inquiry into the application and request such information as he or she considers necessary.
> (4) The Minister may, by notice in the *Gazette*, approve an applicant under subsection (1) as a heritage protection authority for the purpose of protecting the place and on such terms and conditions (including provision of a bond) as are specified in the notice.
> (5) The Minister shall not issue a notice under subsection (4) unless he or she is satisfied that—

[1608] Above, (Wever) at 32-34.

[1609] Resource Management Act 1991, s. 33. Above, (Wever) at 34-38.

[1610] Above, s. 33(4)(c)(ii-iii).

[1611] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 258.

[1612] Resource Management Act 1991, s. 188.

(a) the approval of the applicant as a heritage protection authority is appropriate for the protection of the place that is the subject of the application; and

(b) the applicant is likely to satisfactorily carry out all the responsibilities (including financial responsibilities) of a heritage protection authority under this Act.

(6) Where the Minister is satisfied that—

(a) a heritage protection authority is unlikely to continue to satisfactorily protect the place for which approval as a heritage protection authority was given; or

(b) a heritage protection authority is unlikely to satisfactorily carry out any responsibility as a heritage protection authority under this Act,—

the Minister shall, by notice in the *Gazette*, revoke an approval given under subsection (4).

(7) Upon—

(a) the revocation of the approval of a body corporate under subsection (6); or

(b) the dissolution of any body corporate approved as a heritage protection authority under subsection (4)— all functions, powers, and duties of the body corporate under this Act in relation to any heritage order, or requirement for a heritage order, shall be deemed to be transferred to the Minister under section 192.

Like s. 33, RMA, s. 188, RMA has not been implemented for Māori given that the Minister is the only person permitted to grant such status.[1613]

Given s. 33, RMA was ignored by government, Parliament responded by enacting s. 36B, RMA to provide for a 'less empowering and conversely more palatable mechanism for local authorities to reach joint management agreements (JMAs) with iwi.'[1614] JMAs allow the parties to share concurrent personal, territorial and subject matter jurisdiction over local authority functions, powers and duties under the RMA.

Like s. 33 and s. 188, RMA shared jurisdiction models, the RMA does not require local authorities to use s. 36B JMAs. Consequently, few s. 36B JMAs have been entered into over the last decade.

In 1998, the bed of Te Waihora (Lake Ellesmere), a large lake in the South Island, was vested in the ownership of the Te Rūnanga o Ngāi Tahu, representing the large tribal federation Ngāi Tahu, pursuant to the Ngāi Tahu Claims Settlement Act 1998 which recognises Ngāi Tahu cultural, spiritual, historic, and traditional associations with many areas within much of the South Island. The Ngāi Tahu Claims Settlement Act 1998 provided for the possibility of a joint management plan for the lake[1615] that has since been developed and implemented.

The Te Waihora Joint Management Plan outlines a shared vision for the lake including 'Ngāi Tahu cultural identity is restored through the rejuvenation of the mauri and life-supporting

[1613] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 259.

[1614] Above.

[1615] Section 177, Ngāi Tahu Claims Settlement Act 1998.

capacity of Te Waihora.' The management plan established a Ngāi Tahu representative advisory board to jointly manage the lake alongside with relevant central and local governments. [1616]

Furthermore, in 2006, Parliament enacted the first settlement statutory agreement focused entirely on water – the Te Arawa Lakes Settlement Act 2006 - that recognises the significant relationship between the North Island tribal federation Te Arawa and fourteen lakes that lie within the Te Arawa traditional geographical boundaries. The Act recognises that the lakes are of spiritual, cultural, economic, and traditional importance to Te Arawa. The fee simple estate in each Te Arawa lakebed is vested in trust in the trustees of the Te Arawa Lakes Trust. Established through the statute is the legislated mandate for the new Rotorua Lakes Strategy Group whose purpose in law is to:

> … contribute to the promotion of the sustainable management of the Rotorua lakes and their catchments, for the use and enjoyment of present and future generations, while recognising and providing for the traditional relationship of Te Arawa with their ancestral lakes. [1617]

The Rotorua Lakes Strategy Group (RLSG) appears to share mana whakahaere tōtika jurisdiction given it consists of two members from the Rotorua District Council, the Bay of Plenty Regional Council and Te Arawa,[1618] and provides leadership by implementing the *Vision and Strategy of the Lakes of the Rotorua District*.[1619] Other mana whakahaere tōtika RLSG roles include identifying significant existing and emerging issues for the lakes, and preparing, approving, monitoring, evaluating, and reviewing agreements, policies, and strategies related to the lakes.

The Te Arawa Lakes Settlement Act 2006 also provides for four more shared governance jurisdiction through cultural redress tools. One concerns the new ability for the Department of Conservation, the Ministry for the Environment, and Minister of Fisheries to establish protocols on how to interact with the trustees of the Te Arawa Lakes Trust. A second tool concerns the statutory acknowledgement made by the Crown in acknowledging the Te Arawa associations with the lakes where local authorities, the Environment Court and the Historic Places Trust must 'have regard to' this statutory acknowledgement. [1620] The statement of association captures the vast relationships Te Arawa have with the lakes including the spirits in, cultural laws relating to, and uses of the lakes as food cupboards and main highways. The Te Arawa Lakes Settlement Act 2006 moreover, records official Māori place names for the lakes, and it provides for customary and commercial fisheries redress.

In addition, the New Zealand Crown enacted the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, as discussed earlier, that implemented a cooperative

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[1616] Te Rūnanga o Ngāi Tahu and Department of Conservation, *Te Waihora Joint Management Plan. Mahere Tukutahi o Te Waihora* (Christchurch, Te Rūnanga o Ngāi Tahu and Department of Conservation, 2005) at 3.
[1617] Te Arawa Lakes Settlement Act 2006, s. 49.
[1618] Rotorua Te Arawa Lakes Strategy Group Terms of Reference (2010) online at http://www.boprc.govt.nz/media/73612/rotorua%20te%20arawa%20lakes%20strategy%20group.pdf (Accessed May 2020).
[1619] Above.
[1620] Te Arawa Lakes Settlement Act 2006, s. 61(1).

management regime for the Waikato River, premised on a shared vision that seeks to restore the health and wellbeing of the Waikato River through providing for cooperative management with those multiple tribal groups that link to the River.[1621] The shared vision is embedded in the view that the Waikato River is an ancestor, for example:

> The Waikato River is our tupuna which has mana and in turn represents the mana and mauri of Waikato-Tainui. … Our relationship with the Waikato River, and our respect for it, gives rise to our responsibilities to protect te mana o te Awa and to exercise our mana whakahaere in accordance with long established tikanga to ensure the wellbeing of the river. Our relationship with the river and our respect for it lies at the heart of our spiritual and physical wellbeing, and our tribal identity and culture.[1622]

The Waikato Raupatu River Trust and Waikato District Council Joint Management Agreement (JMA) was signed in 2010 - along with similar agreements with the other tribal groups along the Waikato River - and provides the principles for 'an enduring relationship between the parties through the shared exercise of functions, duties and powers.'[1623] Tikanga Māori is a pivotal component of the guiding principles that requires respect of tikanga Māori to ensure balance and that the mauri (life-force) of the Waikato River are maintained.

The Ngā Wai o Maniapoto (Waipa River) Act 2012 moreover, provides a long list of guiding shared mana whakahaere tōtika principles that empower Ngāti Maniapoto with co-governing the Waipa River. Section 4(13) states:

> A guiding principle is kaitiakitanga, which is integral to the mana of Maniapoto and requires—
>
> > (a) restoration of the relationship of Maniapoto with the wai; and
> > (b) restoration and maintenance of the ability of ngā wai o Maniapoto to provide for the practice of manaakitanga; and
> > (c) recognition and respect for the kawa, tikanga, and kaitiakitanga of the marae, whānau, hapū, and iwi of the Waipa River; and
> > (d) encouragement and empowerment of active involvement by Maniapoto in the expression of their kaitiaki responsibilities.

Furthermore, in 2017 the New Zealand government provided legal personality status to the Whanganui River and all its tributaries, streams, lakes and wetlands pursuant to Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. Consequently, Te Awa Tupua (the face of the

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[1621] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010. See also Te Aho, L, 'Indigenous Challenges to Enhance Freshwater Governance and Management in New Zealand - The Waikato River Settlement,' in *Journal of Water Law,* (Vol. 20, 2010) at 285-292; and Te Aho, L, 'Ngā Whakatunga Waimāori: Freshwater Settlements, in Wheen, N, and Hayward, J, (eds.) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) at 102; Ruru, J. 'The Flow of Laws: The Trans-Jurisdictional Laws of the Longest River in Aotearoa, New Zealand,' in: Gray J, Holley C, and Rayfuse R (eds.) *Trans-Jurisdictional Water Law and Governance* (Oxon/UK, Routledge, 2016) at 175-191.

[1622] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s. 8(3).

[1623] Joint Management Agreement, The Waikato Raupatu River Trust – Waikato District Council (23 March 2010) at 4. Available at: https://www.waikatodistrict.govt.nz/your-district/iwi-in-our-district/iwi-working-together (Accessed May 2020).

Whanganui River) became a legal entity with 'all the rights, powers, duties and liabilities of a legal person,'[1624] which appears to be robust legal recognition of the mana whakahaere tōtika of Te Awa Tupua over the Whanganui River. Tikanga Māori is explicitly acknowledged in s. 69(2), Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 that states:

> The Crown acknowledges that to Whanganui Iwi the enduring concept of Te Awa Tupua—the inseparability of the people and the River—underpins the responsibilities of the iwi and hapū of Whanganui in relation to the care, protection, management, and use of the Whanganui River in accordance with the kawa and tikanga maintained by the descendants of Ruatipua, Paerangi, and Haunui-a-Paparangi.[1625]

A formal Te Pou Tupua (guardian) has been created to 'provide the human face of Te Awa Tupua'[1626] with two people fulfilling this kaitiaki guardian role – one appointed by the Crown, the other by the Whanganui iwi. The primary functions of the Te Pou Tupua are to promote and protect the health and wellbeing of Te Awa Tupua and to speak on behalf of Te Awa Tupua. The guardians perform the landowner functions for and on behalf of Te Awa Tupua.

In 2018, the Tūwharetoa Māori Trust Board, which administers Lake Taupo on behalf of beneficiaries, entered into a co-management arrangement with the Waikato Regional Council through a JMA pursuant to s. 36B, RMA. The announcement was welcomed by the Trust Board as a milestone and as a further step towards 'realising tino rangatiratanga and mana motuhake over our taonga tuku iho.'[1627]

Another key feature of co-management agreements is the ability to enfranchise different groups in the governance of natural resources by pooling together experience and expertise from local sources in collaboration with government.[1628] Indeed, Kooiman asserted that co-management agreements could involve some or all of the key individuals and groups of a resource because there is no rigid form or set makeup. [1629]

Māori then appear to have much more shared authority and jurisdiction over plans and resource consent processes in some negotiated Treaty of Waitangi settlement co-management structures than they do in the general RMA provisions. Co-management agreements, where decisions are made jointly between local councils and Māori tribal groups, represent a significant shift in terms of acknowledging and sharing mana whakahaere tōtika – concurrent, personal, territorial and subject matter jurisdiction.

[1624] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s. 14(1).

[1625] Above, s. 69(2).

[1626] Above, s. 18(2); see also Te Aho, L, 'Legislation – Te Awa Tupua (Whanganui River Claims Settlement) Bill – the endless quest for justice,' in *Māori Law Review* (Aug 2016) at 1.

[1627] 'New Era in Lake Taupo Management' in *Rotorua Daily Post* (22 May 2018). Available at https://www.nzherald.co.nz/rotorua-daily-post/news/article.cfm?c_id=1503438&objectid=12056107. (Accessed May 2020).

[1628] Alfonso, P & Nielsen, E, 'Indigenous People and Co-Management: Implications for Conflict Management,' in *Environmental Science and Policy,* (Vol. 4, No. 4/5, August 2001) at 232.

[1629] Kooiman, J & Bolvink, M, 'The Governance Perspective,' in Kooiman, J, Bolvink, M, Jentoft, S and Pullin, R, (Eds), *Fish for Life: Interactive Governance for Fisheries* (Amsterdam University Press, Amsterdam, 2005) at 15.

Similar themes of the potential for sharing co-governance jurisdiction powers with similar real politik challenges resonate for First Nations and Inuit with comprehensive Treaty settlement and self-government agreements as well as the GBI in Canada, and with the co-governance of the Great Barrier Reef in Australia with Aboriginal and Torres Strait Islander peoples.

Exclusion of Regulatory Regimes

Under the exclusion of regulatory regime, Māori may exercise customary rights outside of normal regulatory frameworks that apply to the use of a resource. Where Māori groups can determine how to carry out customary practices, they may recognise local rangatiratanga. For example, customary rights are exercisable pursuant to Part 9, Fisheries Act 1996 and are placed outside of normal regulatory regimes insofar as regulations made for customary fishing take precedence over other regulations for the same area of fishery.[1630] However, a Ministerial overriding power still exists with this regime.

On te other hand, s. 57(1), 57(3)(a)-(d), Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, excludes customary activities from regulatory regimes, which excludes the Ministerial overriding authority. Section 57(1), 57(3)(a)-(d) states:

> **57 Authorised customary activities**
>
> (1) Members of Waikato-Tainui may carry out authorised customary activities on the Waikato River.
>
> (2) Subsection (1) applies whether or not the Trust gives notice under section 58.
>
> (3) Subsection (1) applies despite—
>
> (a) sections 9 to 17 of the Resource Management Act 1991:
>
> (b) a rule in a regional or district plan:
>
> (c) a navigation bylaw:
>
> (d) a requirement for a permit or authorisation under the Reserves Act 1977:
>
> (e) a requirement for a permit or authorisation under any other enactment, with the following qualifications:
>
> (i) a requirement for a permit or authorisation in an enactment relating to health and safety must be observed, unless the enactment is described in any of paragraphs (a) to (d):
>
> (ii) a requirement for a permit or authorisation in an enactment about the safety of traditional whitebait stands or eel weirs must be observed.
>
> (4) A person complying with regulations described in section 93(2) does not require a permit or other authorisation under the conservation legislation.

Health and safety requirements appear to be the only statutory requirements in this section that may be imposed.[1631] Nevertheless, no Ministerial authority appears to be exercisable over s. 57 customary activities, which may render the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 a stronger concurrent but, in some respects, exclusive jurisdiction-sharing regime.

[1630] Fisheries Act 1996, s. 186(2)(a).

[1631] Above, (Wever) at 38-39.

Māori Veto Powers

At this place on the power-sharing spectrum, a Māori veto power appears to be the strongest mana whakahaere tōtika – shared jurisdiction – mechanism – besides being sovereign themselves - given that Māori have the final decision-making authority for use of resources rather than government.

Wevers contrasted two different types of veto powers – those arising from property – private power – and those arising from authority – public power.[1632] For example, Māori who are able to pass the challenging customary marine title statutory tests pursuant to s. 58, Coastal Marine (Takutai Moana) Act 2011 are awarded status as customary marine title (CMT) holders. Under CMT, certain minerals are vested in the customary marine title group (CMTG) who has exclusive jurisdiction to prevent others from exploiting those resources, which arises from the statutory vesting of property rather than from an explicit conferral of public authority.

The Te Arawa Lakes Settlement Act 2006 is an example with the vesting of the fee simple estate of the lakes in trust in the trustees of the Te Arawa Lakes Trust. The Rotorua Lakes Strategy Group moreover, implements the shared vision and identifies significant existing and emerging issues for the lakes, preparing, approving, monitoring, evaluating, and reviewing agreements, policies, and strategies related to the lakes. Such mana whakahaere tōtika authority grants Te Arawa a veto right over limited activities that would usually require the consent of landowners.

A further example of possible Māori veto powers is s. 66(2), Coastal Marine (Takutai Moana) Act 2011 which states:

> **66 Scope of Resource Management Act 1991 permission right**
>
> (1) An RMA permission right applies to activities that are to be carried out under a resource consent, including a resource consent for a controlled activity, to the extent that the resource consent is for an activity to be carried out within a customary marine title area.
>
> (2) A customary marine title group may give or decline permission, on any grounds, for an activity to which an RMA permission right applies.
>
> (3) Permission given by a customary marine title group cannot be revoked.
>
> (4) An RMA permission right does not apply to the grant or exercise of a resource consent for an accommodated activity.
>
> (5) An RMA permission right, or permission given under such a right, does not limit the discretion of a consent authority—
>
> (a) to decline an application for a resource consent; or
>
> (b) to impose conditions.
>
> (6) In this section, consent authority includes the Minister of Conservation and the Minister for the Environment exercising the powers of a consent authority under the Resource Management Act 1991.

The RMA permission right pursuant to s. 66(2), Coastal Marine (Takutai Moana) Act 2011 is in contrast, a public power not connected to an explicit conferral of property. Section 66(2)

[1632] Above, (Wever).

allows a CMTG to 'give or decline permission, on any grounds, for an activity to which an RMA permission right applies.' Although a CMTG has a form of property title, their property rights are distinct from this additional owner, which appears then to be more public in nature rather[1633] than a private property right.

The activities, over which an RMA permission right extends however, are in reality very narrow given the stringent CMT statutory tests pursuant to s. 58, Coastal Marine (Takutai Moana) Act 2011 that states:

> **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.
>
> (3) For the purposes of subsection (1)(b)(ii), a transfer is a customary transfer if—
>
> (a) a customary interest in a specified area of the common marine and coastal area was transferred—
>
> (i) between or among members of the applicant group; or
>
> (ii) to the applicant group or some of its members from a group or some members of a group who were not part of the applicant group; and
>
> (b) the transfer was in accordance with tikanga; and
>
> (c) the group or members of the group making the transfer—
>
> (i) held the specified area in accordance with tikanga; and
>
> (ii) had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and
>
> (d) the group or some members of the group to whom the transfer was made have—
>
> (i) held the specified area in accordance with tikanga; and
>
> (ii) exclusively used and occupied the specified area from the time of the transfer to the present day without substantial interruption.
>
> (4) Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law.

[1633] Refer to the Resource Management Act 1991, ss. 9-17 which prevents people from committing certain actions regarding resources even on one's own land such as adhering to national environmental standards – s. 9; draining any foreshore or seabed, building, excavating, drilling or tunnelling on the foreshore – s. 12; disturbing the bed of a river or lake – s. 13; to take, use or dam any coastal water – s. 14; or discharging contaminants into the environment – s. 15.

The conservation permission right is similarly limited in application pursuant to s. 71(6), Coastal Marine (Takutai Moana) Act 2011. Consequently, the actual powers of CMTG's to veto resource consents or to prevent a Minister from considering a conservation proposal[1634] will be very limited due to these stringent statutory tests.[1635] In theory, Māori have strong veto powers under these statutory provisions, but in practice, like much of the other legislative provisions such as ss. 33 and s. 188, RMA shared jurisdiction models, the actual powers and jurisdiction provisions are very limited in practice for various reasons.

X. Some Formative Conclusions

What can be gleaned from our analyses of natural resources law in New Zealand, internationally and briefly in Canada and Australia, over the coastal marine estate? A key challenge for national, regional, territorial and local governments is sharing power and jurisdiction – mana whakahaere tōtika - with Māori and other Indigenous tribal groups. The irony for New Zealand, Canada and Australia is that past government stewardship practices and laws at all levels have failed dismally. The status quo has not worked given the dramatic degradation and destruction of waterways, terrestrial and coastal marine estates. The resounding reality of repairing, restoring and sustaining the environment for future generations highlights the need to profoundly challenge the status quo by adopting and adapting EBM over coastal marine estates.

A new shared resource governance and management vision in New Zealand, based on EBM and mātauranga and tikanga Māori, urgently needs to be embraced that is backed by matching policy, practices, laws and institutions that are more collective, inclusive, targeted, effective and cohesive across the New Zealand marine and coastal estate. One clear policy that may be disruptive at first but will be more effective in the long run is internal self-determination, which includes the political, legal and practical sharing of power and governance jurisdiction with Māori groups within this EBM context over the coastal marine estate.

There is domestic and international precedent for such a shift:

1. that a colonising state will, within bounds, respect the colony's Indigenous laws and institutions;
2. that the property rights of the Indigenous people will be determined in accordance with the Indigenous law; and
3. that sharing power and jurisdiction with Indigenous people over the coastal marine estate is advantageous for implementing EBM.

Indigenous peoples globally are seeking to exercise their common inherent right to internal self-determination by claiming the political, economic, social, environmental and cultural

[1634] Such is the effects of a s. 71 conservation permission right, Coastal Marine (Takutai Moana) Act 2011.

[1635] Wever, S.G, 'Recognising Rangatiratanga: Sharing Power with Māori through Co-Management,' (Bachelors of Laws Honours Dissertation, Faculty of Law, University of Otago, 2011) at 39-41.

jurisdiction, resources and capability to co-govern effectively. Internal self-determination is synonymous with development, which includes this right to participate in, contribute to, and enjoy political, economic, cultural, environmental and social development, where all human rights and fundamental freedoms can be fully recognised and realised. In this respect, many Indigenous groups seek to wield greater control over local matters - natural resources, environmental preservation of their homelands, education, use and preservation of language, and self-governance in order to ensure the group's cultural preservation and integrity while participating effectively in the sustainable development of their territory, regionally, nationally and perhaps even internationally.

Numerous self-determination options are available to realise such aspirations. In practice, the New Zealand government has permitted a degree of internal self-determination and self-governance to Māori through some legislative provisions in the RMA for example, but mostly through negotiated Treaty of Waitangi settlements, co-governance agreements and more recently, other self-governance arrangements such as Ngāti Porou's shared governance model over the coastal marine estate pursuant to the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

The internal self-determination freedom to choose one's forms of governance with authentic power sharing is key. International law, which New Zealand is bound by, requires that Indigenous peoples are entitled to their cultural integrity, perhaps even self-government, under Articles 3-5, UNDRIP 2007 and nation-states are bound to take affirmative measures to help achieve these goals. Several international law scholars even support the idea of self-government as justified by UNDRIP. Anaya for example, asserted that 'customary international law currently recognises a right of cultural self-determination for Indigenous peoples.'[1636]

Thus, self-government may be seen as a human right of Indigenous peoples to an appropriate remedial measure in some circumstances to achieve internal self-determination, both constitutive and ongoing. Anaya opined:

> International law does not require or allow for any one particular form of structural accommodation for all indigenous peoples – indeed, the very fact of diversity of indigenous cultures and their surrounding circumstances belies a single formula. The underlying objective of self-government, however, is that allowing indigenous peoples to achieve meaningful self-government through political institutions that reflect their specific cultural patterns and that permit them to be genuinely associated with all decisions affecting them on a continuous basis. Constitutive self-determination, furthermore, requires that such political institutions in no case be imposed upon indigenous peoples but rather be the outcome of procedures that defer to their preferences among justifiable options.[1637]

UNDRIP and other international instruments recognise Indigenous communities' aspirations for place and space for their unique worldviews, laws and institutions to operate fully and effectively within the legal and political systems of the nation-state.

[1636] Anaya, J *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996) at 2.
[1637] Above, at 111.

The nexus between internal self-determination, self-government and development is the right to greater freedom and control - authentic jurisdiction and power sharing – within the economic, social, cultural, political and cultural decision-making structures and institutions that affect the modern governance and development of Indigenous peoples from Parliament right down to the provincial, local body and tribal levels.

Such an initiative includes fundamentally changing mainstream government structures, laws and institutions (and attitudes where possible) to accommodate Māori aspirations to exercise greater self-governance over their own affairs in a manner that appropriately recognises and incorporates tikanga Māori customary values, laws and institutions with mainstream New Zealand values, laws and institutions adapted to suit contemporary circumstances. Furthermore, self-determination is rarely a zero-sum situation – it concerns not only the community in search of self-governance or co-governance and its relations with the central government but frequently also with other communities and regions within the nation-state. As Chief Judge Eddie Durie (as he was then) noted:

> … looking at matters historically, respect for others appears to be an important part. This has included respect for the government and other communities, both Māori and Pākehā.[1638]

A reasonable approach must be a compromise, otherwise it has no chance of winning local, national or even international acceptance. But there is room for compromise only if the ideas of self-governance, shared jurisdiction and internal self-determination are accepted as a viable solution, albeit disruptive at first. In many cases, Māori Treaty of Waitangi and aboriginal rights and even democratic and human rights are insufficient to solve the problem – even a democracy can become a dictatorship of the majority and can lead to civil war. Authentic power sharing through decentralization and shared jurisdiction may often be the only way to bring decisions nearer to the people and to make the nation-state itself more efficient. Graduated levels of autonomy, self-governance and internal self-determination can give the nation-state and Māori time to adapt to a new co-governance and shared self-governance era.

Moreover, many nation-states have already recognised group political rights as a legitimate way of meeting the concerns of particular groups that fear that they would be neglected or assimilated if all the decisions were made by majority governments. Examples include Switzerland, the Netherlands and Belgium, which Arend described as 'consociational' democracies where the group has been given autonomy in matters that concern it, where possible. When autonomy is not possible because of the interests of the other groups or the nation-state as a whole also have to be met, the necessary arrangements are required to be the subject of agreement, backed by a veto power. The sharing of power through the devolution of Parliamentary authority has moreover occurred in many Westminster systems from the Scottish Parliament to the Welsh Assembly in the UK which is significant given this Westminster tradition is the basis for New Zealand's entrenched unitary state dogma. Given such precedents, could not similar options be applied to Māori as nations within a nation in New Zealand?

[1638] Durie, E, 'Governance' in School of Māori and Pacific Development, *Strategies for the Next Decade: Sovereignty in Action* (University of Waikato, Hamilton, 1996) at 116.

Furthermore, although Indigenous self-governance through self-determination may be a *right* at international law, it may not impel the governments of New Zealand to recognise and realise this right. Indeed, Judge Durie of the Māori Land Court noted that a rights-based argument:

> … [focuses] the debate on the developing international law for indigenous peoples. While this is important, and while indigenous peoples' self-government is an inherent right, albeit conditioned by certain state imperatives, this approach may not be the most helpful.[1639]

Judge Durie's rationale was that on the one hand the concern is not just for rights but also for reconciliation. On the other, a rights-based argument may not win.

> Framed as a right of self-determination, the argument falls to the control of lawyers, with debate on whether self-determination rights are limited by law, to states. Whether Māori win or lose that argument, they lose control of the case.[1640]

However, the response of other nation-states to such inaction, negligence, internal or moral discomfort, and the potential for Indigenous peoples to adopt more aggressive means to achieve their aspirations, may generate the good sense and political pressure to recognise Indigenous self-governance through authentic power sharing. In a Māori context, Judge Eddie Durie noted the importance of settling Māori grievances given that Pākehā continue to decide Māori matters for Māori such as mandating assumptions, the absence of agreed claims resolution policies, and Māori appointments:

> These sorts of grievances compounded over time, are threats to world peace … for they show a state of powerlessness that may develop to widespread dissatisfaction.[1641]

Indigenous peoples globally have been vehemently searching for the recognition and realisation of their rights to self-determination and self-governance, justice and redress for past and present grievances, political recognition of their unique status, protection of Treaty and aboriginal rights, protection of their often (but not always) miniscule remaining lands and coastal marine resources, and protection against continued human rights violations.

To these ends, there is a vast array of macro-political self-governance options for Indigenous peoples to choose from in exercising their internal right and responsibility to self-determination depending on geographic, political, social, economic and cultural contexts. There are diverse options with varying 'degrees' of self-determination and self-governance ranging from Indigenous sovereignty to autonomy, nationhood, co-governance, self-management and greater representation. In this respect, McNeil's 'Jurisdiction Spectrum of the Inherent Right of Aboriginal Governments' referred to seven options that are relevant for

[1639] Above, at 111.
[1640] Above.
[1641] Above, at 113.

internal self-determination, self-governance and co-governance over the coastal marine estate for Māori which include:

- Territorial;
- Personal;
- Subject matter;
- Exclusive;
- Concurrent;
- Inherent; and
- Delegated jurisdiction.[1642]

Furthermore, some of the specific self-governance options for Indigenous peoples to choose from, according to Kirgis, include:

- the established right to be free from colonial domination;
- a right to remain dependent if it represents the will of the dependent people who occupy a defined territory;
- the right to dissolve a state peacefully and to form new states on the territory of the former one;
- the right of divided states to unite;
- the right to limited autonomy for groups defined territorially or by common ethnic, religious and linguistic bonds;
- the rights of minority groups within a larger political entity as recognised in Article 27 of the ICCPR; and
- the internal self-determination freedom to choose one's functions and forms of self-government, or even more sharply, the right to a democratic form of government.[1643]

Steiner and Alston similarly referred to three legal forms of autonomy that include personal law, territorial organisation and power sharing regimes.[1644] Durie on the other hand provided five structural arrangements for implementing biculturalism within New Zealand that are relevant as viable options for internal self-determination, self-governance and co-governance over the coastal marine estate for Māori:

- Unmodified mainstream institutions;
- A cultural perspective;
- Active cultural involvement;
- Parallel cultural institutions; and
- Independent cultural institutions.[1645]

[1642] McNeil, K, 'The Jurisdiction of Inherent Right Aboriginal Governments' (Research Paper for the National Centre for First Nations Governance, 11 October 2007).

[1643] Kirgis, F 'Degrees of Self-Determination in the United Nations Era' in *Am. J. Int L* (Vol. 88, 1994) 304 at 306-7.

[1644] Steiner, H & Alston, P *International Human Rights in Context: Law, Politics, Morals* (Clarendon Press, Oxford, 1996) at 991.

[1645] Durie, M, *Understanding Biculturalism* (Race Relations Conference Paper, Gisborne, New Zealand, 20 September, 1994) at 5-8.

Iorns similarly referred to a co-governance and co-management spectrum in New Zealand that included eight arrangement options as further viable options for internal self-determination and co-governance over the coastal marine estate for Māori:

- Information sharing;
- Consultation;
- Co-operation;
- Communication;
- Advisory Committees;
- Management Boards;
- Partnership/Community Control; and
- Devolution.[1646]

Wever also referred to his power sharing in resource management spectrum that included ten options for internal self-determination and co-governance over the coastal marine estate for Māori:

- Right of Māori no greater than the general public;
- Obligations to share information directly with tangata whenua (local people);
- Obligation to consult with tangata whenua;
- Duty to 'have particular regard to' or to 'take into account' Māori interests;
- Duty to investigate least restrictive alternatives;
- Fettering of a local government discretion;
- Devolution of power to Māori with Ministerial override;
- Co-management between government and Māori;
- Exclusion from control by regulatory regimes; and
- Māori veto powers.[1647]

For any of the self-determination, self-governance and co-governance options to be effective for implementing EBM over the coastal marine estate, a robust collaboration vision and relationship is vital. As noted above, ecosystem-based management (EBM) is New Zealand's response for addressing this alarming environmental degradation of the coastal marine estate, and is the shared vision for all participants.

All New Zealanders have an important role to play in this shared goal and vision. For EBM to be effective, we need to collaborate successfully. Collaboration and strong relationships will be key success factors for shared collaborative EBM co-governance and co-management implementation over the coastal marine estate.

Collaboration is highly dependent on relationships given that collaborations are a negotiation of how a relationship is structured to deliver on our collective EBM strategy. Consequently, collaboration is underpinned by respect, trust and communication. It must manage power

[1646] Iorns, C, 'Māori Co-Governance and/or Co-Management of Nature and Environmental Resources,' (Draft Paper, August 2019) at 16.

[1647] See Wever, S.G, 'Recognising Rangatiratanga: Sharing Power with Māori through Co-Management,' (Bachelors of Laws Honours Dissertation, Faculty of Law, University of Otago, 2011) at 22; and Arnstein, S, 'A Ladder of Participation,' in *Journal of the American Institute of Planners,* (Vol. 35, No. 4, 1969) at 216.

asymmetries in a way that shares power between organisations and groups; does not dilute the objectives that each organisation seeks from the collaboration; and should empower the group as a whole.

The relationship moreover, should be seen as sharing power at the start of the collaboration, rather than the outcome. Furthermore, the relationships should be considered paramount to the collaboration, so that if collaboration puts the relationship under strain, then the collaboration, as a project should be reconsidered.

To these ends, Kania and Kramer's reference to collective impact will be critical, which comprises five key elements:

1. a common agenda or purpose,
2. a series of mutually reinforcing activities,
3. continuous and open communication;
4. a backbone infrastructure; and
5. shared framework for measuring results.[1648]

Collective impact and collaboration require more frequent communication, more frequent reflection opportunities and adaptability, while also increasing communication to build trust and engage public will.[1649]

A catalyst often drives collaboration relationships which in this situation is the degradation of New Zealand's marine ecosystems and the opportunity of restoring and sustaining our environment through shared EBM that all New Zealanders must embrace, not just Māori and government.

Proximity is another important factor for collaboration relationships which is the degradation of marine ecosystems that affects all New Zealanders. For Māori, the constitutional partnership in the Treaty of Waitangi provides additional political, historical, geographic and ideological proximity for engaging as partners in implementing EBM over the environment.

Managing EBM collaboration expectations are also important to accomplish the lofty intergenerational goal of sustaining our coastal marine estate which is going to be a colossal challenge that will require strong effective communication across all disciplines, sectors, cultures, interest groups and worldviews. Effective communication requires collective shared long-term views, intergenerational vision and balance, which also demands compromise from all collaboration partners.

Good governance and robust leadership from the Crown and Māori community as well as all other participants will moreover, be critical for effective collaboration to co-govern and co-design EBM over the marine estate.

[1648] Kania, J. & M. Kramer, 'Embracing Emergence: How Collective Impact Addresses Complexity,' in *Stanford Social Innovation Review,* (January 2, 2013); Kania, J., & Kramer, M, 'Collective Impact,' in *Stanford Social Innovation Review*, (Vol. 9, No. 1, 2011) at 36-41; and Wood, D. J. and B. Gray, 'Toward a Comprehensive Theory of Collaboration,' in *The Journal of Applied Behavioural Science,*(Vol. 27, No. 2, 1991) at 139-162.

[1649] Kania, J. & M. Kramer, 'Embracing Emergence: How Collective Impact Addresses Complexity,' in *Stanford Social Innovation Review,* (January 2, 2013); Kania, J., & Kramer, M, 'Collective Impact,' in *Stanford Social Innovation Review*, (Vol. 9, No. 1, 2011) at 36-41; and Turner, S., Merchant, K., Kania, J., & Martin, E. Understanding the Value of Backbone Organizations in Collective Impact: Part 2,' in *Stanford Social Innovation Review*, (2012).

Clear co-governance and co-management leadership roles and responsibilities will also be key for the collaboration relationship. Active co-management and increased participation for all participating organisations and at all levels are important.

Professional, sectoral, cultural and adaptive capacity and capability building are also acute for the collaboration relationship to deal with the diverse partnership priorities on how, who, when and where to implement EBM over the coastal marine estate, and in all organisations from national government to iwi, industry to local government, recreational to commercial and customary fisheries, and all stakeholders and interest groups.

The collaboration relationship will moreover, require fit for purpose institutionalised arrangements – what Kania and Kramer refer to with collective impact as a backbone infrastructure - not just ad hoc public participation and consultation practices. Additional fit for purpose collaborative co-governing and co-managing subsidiary organisations will also be required at the different levels – national, regional and within local communities.

Given the diversity and complexity of the various groups involved in participating and implementing EBM over the marine and coastal estate and the associated and varied differences in worldviews, values, objectives, laws, regulations, expectations and priorities – relationship tensions and disputes will be inevitable. However, what will be key is establishing appropriate dispute resolution fora and processes to mitigate the differences and tensions to maintain trust in the collaboration relationships, shared vision and investment.

It is equally important that whatever the co-governance and shared jurisdiction options, that they be politically empowering of Māori and Indigenous groups. Self-determination, self-government and co-governance are mere words without the wherewithal to achieve them.

The unilateral confiscation of natural resources, and similar laws and policies that neglect or marginalise shared Māori governance jurisdiction over the marine estate, continue to undermine Māori self-determination in process, form, substance and spirit. If the basic right to self-determination, as outlined in UNDRIP, was respected and implemented, then human rights breaches such as the unilateral confiscation of the Foreshore and Seabed Act 2004 and the more recent Kermadecs Sanctuary Proposal 2016, would have been avoided.

Such Treaty of Waitangi and human rights breaches moreover, illustrate that recognised Māori proprietary and self-governance rights impact significantly on non-Indigenous peoples' rights. The coastal marine area and the conservation estate are politically challenging in New Zealand because of issues of public access, navigation and public fishing rights. New Zealanders are anxious about the prominent role of Treaty of Waitangi settlements and co-governance agreements and their potential to entrench ethnic divisions, to undermine civil unity and create what some perceive to be 'special rights.'[1650]

Still, it is highly unlikely that Māori rangatira (chiefs) would have signed the Treaty of Waitangi in 1840 had they not been guaranteed that the Crown would protect their rangatiratanga

[1650] See for example, Minogue, K, *Treaty of Waitangi Morality and Reality* (New Zealand Business Roundtable, Wellington, N.Z, 1998); Round, D, *Truth or Treaty? Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, 1998); and Don Brash, 'Nationhood,' (An address by Leader of the National Party to the Orewa Rotary Club, 27 January 2004). Nevertheless, see also Morgan, G, 'Returning to Orewa – The Treaty and Don Brash (Speech),' (Unpublished Presentation, Orewa, Auckland, 4 February 2015) online at: http://morganfoundation.org.nz/returning-to-orewa-the-treaty-and-don-brash-speech/ (Accessed May 2020).

(authority) over their valued taonga (natural resources) for as long as they wished, and that the taonga would continue to be available in perpetuity. In return, Māori shared governance authority, which was the reciprocal acknowledgment of the mana of both Treaty partners. The Crown is under a clear legal duty under the Treaty of Waitangi then to ensure that Māori claimants' mana over taonga are protected including over the marine and coastal estate. The exercise of mana for Māori communities on the other hand includes, inter alia, the mātauranga and tikanga Māori right and responsibility to secure the protection and perpetuation of natural resources for future generations.

Mātauranga and tikanga Māori philosophy, laws, institutions and methodologies over natural resource governance and management were guaranteed in the Treaty of Waitangi. Furthermore, mātauranga and tikanga Māori appear to be congruent with contemporary ecosystem-based management principles and best practices over natural resources and should be embraced in all EBM policy and laws in Aotearoa New Zealand. In fact, mātauranga and tikanga Māori offer an alternative view of what is sustainable EBM and postulates the need to constrain economic development and growth in the interests of human survival and the survival of the natural world.

Māori traditionally possessed territory, or areas over which they had mana whakahaere tōtika – jurisdiction - and the territory they possessed was not just land but included the whole of the territorial resources of land, lakes, rivers, springs, swamps inland seas as well as the coastal marine estate.

The coastal marine estate was held by or for the hapū, as the autonomous, political unit along with the related hapū along the coastline, with whom associations were made from time to time for defence, trade and social intercourse. The coastal marine estate was moreover, symbolic of the identity and authority of the hapū and of the iwi of the combined hapū. The evidence of occupation and uses of the coastal marine estate was also evidence of their mana whakahaere tōtika authority over the coastal marine estate.

In mātauranga and tikanga Māori, Māori had the tino rangatiratanga and mana whakahaere tōtika of their lands, and coastal marine estates that is, the absolute power and jurisdiction. That covers not only the private rights to own but also the public rights to control. It includes, but is not limited to kaitiakitanga. Kaitiakitanga is an incident of mana whakahaere jurisdiction, not an alternative to it. The emphasis in the RMA for Māori however, is on a right to culture model and not shared political jurisdiction or proprietary rights to exercise full kaitiakitanga tikanga rights and responsibilities over natural resources.

In addition, current New Zealand resource management policy and regulatory and legislative regimes recognise Māori rights, interests, values and concepts in the RMA and other statutes, but they are neither provided for fully nor are they given substantive effect in practice. Translating sections in a statute into practical and positive substantive outcomes for Māori resource governance and management do not necessarily follow each other. The practical implementation of the RMA statutory provisions has been a key challenge for Māori such as balancing the specific purpose and Māori provisions in ss. 5, 6, 7 and 8, RMA due to the elusive balancing acts tipping against Māori aspirations, rights and responsibilities.

The Waitangi Tribunal even acknowledged as early as 1993 that the role and significance of the Treaty of Waitangi principles in s.8, RMA 1991 were modest given that decision-makers

are neither required nor are they obliged to act in conformity with, and to apply, relevant Treaty principles. The RMA devolves powers and rights on local authorities but it does not paradoxically, devolve Treaty of Waitangi responsibilities with this transfer which the Waitangi Tribunal acknowledged when it prophetically concluded at the time that the RMA is itself inconsistent with the principles of the Treaty.

The challenge of practical implementation of other specific RMA statutory provisions for Māori is also evident and needs to be urgently addressed including, inter alia, ss. 33 (transfer of powers to iwi), 36B (joint management agreements), 66(2)(c)(ii) (reference to iwi planning documents), 171 (recommendations by territorial authorities to consider ss. 5-8) and 188 (potential iwi heritage management authorities), and more recently, ss. 58M-58U (Mana Whakahono a Rohe) but it is still early to assess the Mana Whakahono a Rohe provisions that were enacted in 2017.

McCrossin referred to the notion of 'institutional bricolage'[1651] to explain the gap between the creation of s 33, RMA, and the lack of its implementation due to council fears of relinquishing power to Māori, and unfamiliarity surrounding Māori culture.[1652] It is suspected the lack of implementation of the other sections above is for similar reasons.

Still, these provisions should be monitored more closely now given the recent s. 33 transfer of authority to the Tuwharetoa Māori Trust Board by the Waikato Regional Council in July 2020 - the first s. 33, RMA agreement since the RMA was enacted in 1991 – 29 years!

The neglect in implementing these RMA provisions has some strong historic and political precedent in the Treaty of Waitangi articles themselves as well as in significant early colonial legislation such as s. 71, Constitution Act 1852, which was analysed extensively in this report. Māori sought to abide by the law in establishing early co-governing organisations, pursuant to s. 71, Constitution Act 1852, with shared governance power and jurisdiction such as the Kīngitanga in 1858 and Te Kotahitanga Paremata Māori in the late 19th century. Of the Kīngitanga and s. 71, Constitution Act 1852, Wi Maihi Te Rangikaheke of Ngāti Rangiwewehi, Te Arawa, made a submission to a Parliamentary Select Committee in 1857-8 where he shared some interesting observations on the New Zealand legal system and shared governance. Te Rangikaheke opined:

> The Maoris have said let there be one law for the two races; had the administration of justice by the Government been clear, the mana would have been one, but the Pākehā system went contrary to the Māori. The Māori chiefs proposed to elect a chief for themselves, but still to have one law … if the law was administered by Pākehā magistrates in conjunction with Māori magistrates and rūnanga there would be two manas united in that mode of administering justice and the chiefs would not feel aggrieved. Land disputes should be settled by joining of the two systems, if the magistrates and rūnanga could not settle the dispute, influential chiefs and a tohunga who had command of the genealogies and history of the land should be involved.[1653]

[1651] Cleaver, F, 'Reinventing Institutions: Bricolage and the Social Embeddedness of Natural Resource Management,' in *The European Journal of Development Research,* (Vol. 14, No. 2, 2002) at 11-30.

[1652] McCrossin, N, 'Intention and Implementation: Piecing Together Provisions for Māori in the Resource Management Act 1991,' (Master of Arts, Thesis, University of Otago, 2010).

[1653] *AJHR*, 1860, F-3, at 24.

Te Rangikaheke referred to shared mana or perhaps co-governance over land disputes at the time, which could have also applied to the coastal marine estate. There is much to learn from our fascinating history to enlighten a path forward for implementing EBM over the coastal marine estate.

Returning back to the present, Māori commercial, customary fisheries and aquaculture legislation regulates Māori commercial, customary fishing and aquaculture responsibilities in New Zealand and appear to be enabling regimes for recognising mātauranga and tikanga Māori and Treaty partnerships with some shared governance authority and jurisdiction. The challenges however, are the competitive corporate nature of Māori commercial fisheries that have pitted Māori against each other in vying for recognition as *the* Treaty partner based on mātauranga and tikanga Māori for group identity and representation, not to mention good Māori governance and kaitiakitanga over fisheries.

Furthermore, Māori communities have to incorporate into legal entities that represent group interests in both commercial fisheries and aquaculture, which tend to favour (but not always!) corporate interests over environmental and cultural interests. Similar mātauranga and tikanga Māori legal challenges have emerged with ascertaining traditional tribal boundaries, coastal entitlements and fisheries management areas, and such vexatious areas and the fora for resolving such disputes in the High Court may not necessarily be conducive to tikanga Māori and EBM governance of the marine and coastal estate let alone the whenua (land).

The Fisheries Act 1996 and other Māori fisheries regulations do provide generously in some areas for Māori customary forms of environmental governance and management such as in taiāpure and mātaitai reserves. Taiāpure and mātaitai reserves have management committees who pass bylaws that provide scope for mātauranga and tikanga Māori governance and management, which is significant in terms of acknowledging the Treaty partnership and sharing power and jurisdiction. The process of establishing reserves and the bylaws themselves however, are heavily scrutinised and are even controlled in many respects by the Minister of Fisheries, which, again, undermines tribal rangatiratanga and mana whakahaere tōtika as originally envisaged in the Treaty of Waitangi and early statutory provisions such as s. 71, Constitution Act 1852.

The Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) similarly states that its purpose is, inter alia, to acknowledge the Treaty of Waitangi – Te Tiriti o Waitangi, and it provides for decision makers to 'take into account' the Treaty of Waitangi. MACA moreover, recognises and promotes the exercise of Māori customary interests in the common marine and coastal area by providing for customary marine title, wāhi tapu protection and protected customary rights, which are theoretically very enabling provisions in terms of recognising tikanga and mātauranga Māori and for empowering the Treaty partnership with shared governance jurisdiction. Consequently, hundreds of Māori groups are currently negotiating with the Crown for recognition of customary interests over the marine estate based on aboriginal title, which is itself determined, by mātauranga and tikanga Māori.

The challenges of MACA in the first instance though are the slowness in processing claims as well as inadequate funding to process claims. In addition, what appears to have emerged from the few claims that have been processed to date are a lack of good faith negotiations and the enormous power imbalance between the Treaty partners, passing the nearly impossible

MACA statutory tests, and the Crown's very conservative interpretation of MACA generally, which challenges are deeply concerning for Māori.

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) similarly does not give full regard to the principles of the Treaty of Waitangi. The Courts have not been willing to require more than the stated legislative requirements under s. 12, EEZ Act to fulfil the principles of the Treaty. Although s. 59(m), EEZ Act provides the Courts with the broad power to consider 'any other matter,' a recent High Court decision[1654] affirmed that s. 59(m), EEZ Act was not intended to supplement existing legislative provisions provided to serve the same objective. Thus, if a decision-making committee is unwilling to go beyond s 12, EEZ Act matters, Māori who have interests outside the s. 12 matters will be adversely affected, which may limit the Environmental Protection Authority's ability to incorporate the Treaty principles into its decision-making processes to the same extent it is enabled under other legislation such as the RMA.

Marine Protected Areas (MPAs), it appears, also naturally align with tikanga Māori practices such as rāhui, along with internationally recognised conservation approaches including EBM best practices of flexibility to achieve ecological, social, cultural and commercial objectives that determine successful environmental initiatives. The creation of MPAs in New Zealand requires, as a minimum, transparency and appropriate acknowledgement of mātauranga and tikanga Māori as well inclusion of Māori as a Treaty partner not a bystander or another stakeholder. The former National Government's mistreatment of the Kermadec Ocean Sanctuary in 2016 however, illustrates the potential for ulterior political motives to undermine the Treaty partnership and tikanga responsibilities of Māori within the Kermadec Ocean Sanctuary.

A similar government approach would also derail the implementation of EBM in Aotearoa New Zealand. While it is a mute truism that the marine estate deserves protection particularly in an EBM context, the unilateral enactment of the KOS Bill was the impetus for its failure. The KOS Bill does not enable the exercise of tikanga Māori either directly or through the proposed Kermadec governance structure which is not only disappointing and out of touch with other conservation initiatives such as co-management models, but it may also demonstrate a failure on the part of the Crown to act in good faith, share power and jurisdiction, and to honour its Treaty partnership obligations.

For long-term sustainability in Aotearoa New Zealand, the Government must ensure that the processes for creating MPAs are inclusive and that they reflect the commitments that the Crown is obliged to honour from the Treaty partnership. The Kermadec Ocean Sanctuary Bill 2016 in seeking environmental sustainability sought to renege on these cultural obligations, which was its undoing. The Kermadec Ocean certainly deserves protection but not at the cost of Māori involvement and negotiated Treaty of Waitangi settlement mana whakahaere tōtika, proprietary, and cultural rights and responsibilities. Environmental protection and tikanga Māori are symbiotic, align with EBM best practices, and therefore should be recognised at all levels of governance decision-making over the marine estate in local, regional and national government as well as with industry and other stakeholders.

[1654] *The Taranaki-Whanganui Conservation Board and Others v The Environmental Protection Authority,* [2018] NZHC 2217.

Treaty of Waitangi settlements, rather than the RMA, MACA, EEZ Act, MPAs, and the Kermadec Ocean Sanctuary Bill, are proving to be the major catalysts for recognising and protecting mātauranga, tikanga and taonga Māori environmental interests and for sharing governance power and jurisdiction. It is clear that government prefers to negotiate agreements to address Māori claims to natural resources. For the coastal marine estate, the government asserts that the process of rights definition is best left to collaboration between iwi and the Crown. The challenge with this approach is Māori must seek leverage in negotiations by obtaining some *prima facie* legal right to the natural resource.

Still, Treaty settlements are realising new partnerships between Māori organisations and the Crown including local authorities. The co-management agreements with the Waikato-Tainui, Te Urewera and Whanganui tribes are important recent examples. The efforts to introduce iwi participation arrangements (IPAs), Mana Whakahono a Rohe in the RMA, and special legislation initiatives such as the Sea Change – Tai Timu Tai Pari marine spatial plan also go some way towards promoting effective iwi participation in RMA processes and provide much scope for EBM collaboration.

But again, like the co-management agreements in Treaty settlements such as the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Te Urewera Act 2014 and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, the emphasis is on consultation and effective participation in decision-making under the RMA – a right to culture model - not rangatiratanga, collaborative ecosystem-based management and shared mana whakahaere tōtika - governance jurisdiction - over natural resources.

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

There is no legitimate reason under existing legislation such as the RMA, Conservation Act 1987, Māori Fisheries Act 2004, Māori Commercial Aquaculture Claims Settlement Act 2004, Marine and Coastal Area (Takutai Moana) Act 2011, Exclusive Economic Zone and Continental Shelf Act 2012, and Marine Protected Areas under the Marine Reserves Act 1971, why central government and local authorities cannot involve the tangata whenua in 21st century Aotearoa New Zealand as authentic Treaty of Waitangi partners in the sustainable ecosystem-based co-governance and co-management of natural resources, except perhaps a lack of political will, institutional inadequacies, organisational capacity and a lack of resources for both local authorities and Māori communities. Yet authentic bicultural partnerships in decision-making processes should be substantively and procedurally normative.

Given the increasing frequency of Treaty of Waitangi settlements, co-management and joint management agreements, iwi planning arrangements, the new Mana Whakahono a Rohe arrangements and other special legislative initiatives such as the Hauraki Sea Change Tai Timu Tai Pari marine spatial plan 2013, and the Auckland Unitary Plan 2017, a feasible option to empower the Treaty partnership, and as a show of utmost good faith, is to transfer official governance jurisdiction to iwi and hapū authorities, at least in part initially, and then more over time to allow Māori to effectively co-govern and co-manage a particular area of the

coastal marine estate within the tribal rohe under this overarching EBM framework as one Te Tau Ihu informant suggested:

> Kotahitanga [unity] is the way forward in my view. You cannot actually have that on a hierarchal structure, otherwise people see it as a domination factor and that's really what's happened around the country.[1655]

Another Te Tau Ihu informant implicitly opined:

> Starting from the top there is the international legal framework which is the Treaty, so the Treaty and the UNDRIP [2007 UN Declaration on the Rights of Indigenous Peoples] are at the top, and then we come down to the RMA, and also running alongside that the LGA [Local Government Act] and Conservation Act. We would like the Minister for MPI [Ministry for Primary Industries] to exercise his powers of discretion … so that we can do whatever we want to do without having to jump through [too many] hoops.[1656]

Such radical or perhaps disruptive (for some) options have been possible since the enactment of the RMA in 1991 under ss. 33, and 188, and more recently in ss. 36B[1657] and 58M-58U, RMA,[1658] as well as with Māori customary fishing responsibilities with taiāpure and mātaitai reserves for example. Such radical options were also available as far back as 1840 with the Treaty of Waitangi articles and in s. 71, Constitution Act 1852, which were actually normative options at the time!

One such radical option was adopted in 2019 by the New Zealand Government with the enactment of the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 which provides very broad scope (at least on paper) for sharing co-governance powers and concurrent jurisdiction for Ngāti Porou over the costal marine estate within their extensive rohe. The new statute appears to forge a path of authentic power sharing and concurrent jurisdiction which will be a fascinating case study to closely monitor over the coming years for co-governance and co-designed structures that acknowledge the Ngāti Porou constitutional partnership based on the Treaty of Waitangi and that effectively incorporate Ngāti Porou tikanga and mātauranga within an EBM context over the marine estate. Watch this space.

In a broader international context, the debate about internal self-determination and self-government and their applicability to Indigenous peoples is a matter of perspective and degree. The precise measures required will depend on the circumstances of the Indigenous peoples and the nation-state concerned. But the best method for achieving self-governance measures appears to be through direct negotiations by way of contemporary Treaty settlements and other constructive agreements such as co-governance JMAs. Political will, a disposition to compromise, a climate of trust, good faith, empathy, resources and time may result in understanding and agreement on the various functions and forms for realising

[1655] MIGC, Tūhonohono Project Interview Series, (Te Tau Ihu Interviewee, September 2018).
[1656] Above.
[1657] As amended on 10 August by s. 18, Resource Management Amendment Act 2005.
[1658] As amended on 19 April 2017 by s. 51, Resource Legislation Amendment Act 2017.

Indigenous internal self-determination, self-governance and co-governance aspirations, rights, responsibilities and relationships.

Some compelling international models exist in Canada and Australia. Many Indigenous groups in Canada have negotiated a limited form of shared self-government and co-governance jurisdiction over the environment that includes the coastal marine estate through comprehensive Treaty settlement and self-government agreements. The federal government's self-government negotiations include comprehensive self-government negotiations (i.e. a range of territorial, subject matter, personal, exclusive and concurrent jurisdiction), sectoral negotiations (i.e. subject matter jurisdiction like education, child welfare) and self-government negotiations that are proceeding with a large number of communities in conjunction with their comprehensive land claims negotiations. In 2020, many Indigenous communities were negotiating different forms of self-government covering every province and the Canadian territories (excluding Nunavut).

Many of these comprehensive and self-government agreements include scope for co-governance and co-management over the environment within the respective Indigenous territories, which includes the coastal marine estate with the James Bay Cree and Inuit in Northern Quebec, the Inuit in Nunavut, Inuvialuit, Labrador and Nunavik, and the Nisga'a in northern B.C. Although the settlement agreements do not mention EBM explicitly, the Indigenous cultures themselves adhere to EBM sustainability principles such as:

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

Many of the co-governance laws, policies, institutions and priorities of Indigenous comprehensive and self-government agreements in Canada then are very extensive as compared to New Zealand and Australia with what appears to be more scope for exercising shared co-governance jurisdiction particularly with the Inuit agreements in the far north such as Nunavut and Labrador. But comprehensive and self-government agreements are not without their challenges either which include, inter alia, increased governance structures and bureaucracy in small communities, capacity and capability building, insufficient resourcing for self-government and co-governance, balancing the economic and commercial with the environmental, social and cultural objectives, and co-governing power sharing tipping in the favour of federal and provincial governments.

On the other hand, the Great Bear Initiative (GBI) and Marine Planning Partnership frameworks over the BC terrestrial and marine estate, are compelling case studies for effective co-governance and partnership collaboration models between diverse groups – Government, industry, community and Indigenous people - to manage the natural resources in an EBM context. From the outset, the establishment of the GBI and Marine Planning Partnership in 2005 was based on implementing EBM over the Great Bear forest and marine

estate. The GBI is important as a radical mechanism for recognising and realising First Nations co-governance aspirations over traditional territories, for bridging and integrating traditional ecological knowledge and stewardship laws and institutions with western science and mainstream law when governing coastal resources, and for building genuine partnerships through power sharing, collective jurisdiction, resource sharing and capacity building at all levels in the policies, laws and institutions of the Province.

The recent enactment of the Declaration on the Rights of Indigenous Peoples Act 2019 in B.C, Canada that incorporates UNDRIP into B.C domestic law is also pivotal for providing free, prior and informed consent for any projects on Indigenous lands and it provides a framework for decision-making between Indigenous Governments and the Province of B.C on matters that impact their citizens. The Declaration on the Rights of Indigenous Peoples Act 2019 then could be utilised to enhance opportunities with the GBI for example, for implementing EBM over the marine estate more effectively through, inter alia, shared authentic governance jurisdiction which warrants close monitoring going forward.

In Australia, the original Great Barrier Reef Marine Park Act 1975 (GBRMPA) promised much in terms of long-term protection and conservation of the Great Barrier Reef (GBR) through, inter alia, ecosystem-based management and by facilitating partnerships with Indigenous Aboriginal and Torres Strait Traditional Owners. Like the GBI in Canada, the establishment of the GBR marine park in 1975 was premised on the conservation and sustainability of the GBR within an EBM context. But the GBRMPA has been light on delivery of both EBM and facilitating partnerships with Indigenous Aboriginal and Torres Strait Traditional Owners. Both EBM and Indigenous Traditional Owners appeared to be marginalised over the years in the governance and management of the GBR.

The 2018 *Traditional Owners of the Great Barrier Reef Report* recommended genuine co-governance in the overarching governance of the GBR and far deeper ownership of, and participation in, its active day to day management thus imploring Australian governments to take a far more negotiated approach with Indigenous Aboriginal and Torres Strait Traditional Owners at the GBR-wide level down to local scales that apply the principles of Free Prior and Informed Consent from UNDRIP.

Perhaps what may improve the position of Indigenous Aboriginal and Torres Strait Islander 'Traditional Owners' with the co-governance and co-management of the Great Barrier Reef is a collaborative focus by the Commonwealth, Queensland and Indigenous governments, as well as the plethora of stakeholders and others involved, on the shared vision and implementation of ecosystem-based management of the GBR as originally envisaged in the GBRMPA. Indeed, EBM is about shared co-governance power and jurisdiction to implement the shared long-term protection and conservation vision of the GBR.

What is urgently required is effective collaboration and genuine partnerships with other sectors of society in both the GBI in B.C, Canada, and with Indigenous Traditional Owners in the GBR, in Queensland, Australia, through co-governance structures that acknowledge them and that effectively and equitably incorporates Indigenous self-determination and cultural co-governance within this EBM context.

In a similar manner, the contemporary Treaty of Waitangi relationship between the Crown and Māori ought to be characterised by the original principles of the Treaty of Waitangi of power sharing - which are incidentally similar to the GBI and GBR co-governance principles - as an attempt to achieve an authentic partnership between both groups in a modern, post-colonial constitutional climate that is conducive to EBM. Given that the current resource management status quo is ad hoc, disparate, inadequate and is literally destroying the environment, as a country we need to make some sweeping radical changes.

Environmental law in New Zealand was comprehensively reformed in the mid-1980s which reflected a major ideological shift in approach to New Zealand's natural resources from one that was primarily exploitative to one more focused on environmental well-being. Perhaps the current climate is conducive to making another major ideological shift up that embraces mātauranga and tikanga Māori and enhances the Treaty partnership in more procedural and substantive ways within an EBM context over the marine and coastal estate.

To this end, given that the RMA is currently under review, perhaps another appropriate amendment is to ensure that local authorities and decision-makers act in a manner that *is* consistent with the principles of the Treaty. In 1993, two years after the enactment of the RMA, the Waitangi Tribunal even recommended an appropriate - yet radical for the time - amendment to the RMA. The Tribunal recommended that all persons exercising functions and powers under the RMA *shall* act in a manner that is consistent with the principles of the Treaty of Waitangi,[1659] which is a mandatory, not discretionary, provision that would certainly strengthen the Treaty partnership and, it is hoped, the well-being of the environment.

The adoption of authentic Māori rangatiratanga - power-sharing - and mana whakahaere tōtika – jurisdiction sharing - arrangements based on the Treaty of Waitangi as well as international instruments and precedent such as the UNDRIP provisions and the compelling Great Bear Initiative, comprehensive self-government co-governance agreements, and the recently enacted Declaration on the Rights of Indigenous Peoples Act 2019 that adopts UNDRIP into B.C domestic law in Canada; and the Great Barrier Reef case study in Australia, the effective implementation of statutory provisions already in the RMA, Conservation Act 1987, Māori Fisheries Act 2004, Māori Commercial Aquaculture Claims Settlement Act 2004, Marine and Coastal Area (Takutai Moana) Act 2011, Exclusive Economic Zone and Continental Shelf Act 2012, Marine Protected Areas, and other legislation and regulations such as effective taiāpure and mātaitai reserves, as well as initiatives such as the Auckland Unitary Plan 2017 and Hauraki Sea Change – Tai Timu Tai Pari marine spatial plan, and the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 are prudent options going forward.

Either way, there is a need to modify mainstream institutions to implement EBM over the coastal marine estate by providing alternatives for Māori and other groups that would assist with sustaining the coastal marine estate for future generations, enrich national life, and to facilitate a genuine unity of people based on mutual respect. There is a pressing need to focus not only on managing cultural differences but also on acknowledging common ground.

The essence of any successful collaboration relationship is in unity or oneness, not sameness, or assimilation, but in complementarity. Each group needs to respect the 'other(s)', to seek

[1659] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity,* (Wai 262, Legislation Direct, Wellington, 2011) at 280.

and embrace common-ground affinities, accommodate differences, and to work to change our own prejudices.

Also as an expression of political will and utmost good faith, adopting and adapting ecosystem-based management integration, constructed on international best practices but fit for purpose for Aotearoa New Zealand that appropriately acknowledges the Treaty of Waitangi constitutional partnership and that integrates mātauranga and tikanga Māori, it is asserted, are further radical but measured options to consider as possible ways forward for improving sustainable resource management in Aotearoa New Zealand that are suitable and sustainable for Māori, suitable and sustainable for the environment, and are therefore suitable and sustainable for the nation.

> Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tūpuna. - Beneath the herbs and plants are the writings of our ancestors.[1660]

[1660] Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Legislation Direct, Wellington, 2011) at 237. Available online at www.waitangitribunal.govt.nz (Accessed September 2018). The paragraph where the above *whakatauki* (proverb) appears elaborates further: 'The environment, therefore, cannot be viewed in isolation. There is an old saying: *Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tūpuna.'* (Beneath the herbs and plants are the writings of our ancestors). *Mātauranga Māori* [Māori traditional knowledge] is present in the environment: in the names imprinted on it; and in the ancestors and events those names invoke. The *mauri* [spirit or life-force] in land, water, and other resources, and the *whakapapa* [genealogy] of species, are the building blocks of an entire world view and of Māori identity itself. The protection of the environment, the exercise of *kaitiakitanga* [guardianship], and the preservation of *mātauranga* [knowledge] in relation to the environment then are all inseparable from the protection of Māori culture itself.

Y. Glossary

ahi kaa	occupation
aroha	charity, generosity
aituā	misfortune
haka	dance, war dance performed before battle.
hapū	descent group with local base on a marae, section of a tribe, sub-tribe, also to be pregnant
hara	committing a crime
hau	respect for the vital essence of a person, place or object
hē	committing a formal wrong, crime
hegemony	political domination
hui	formal meeting, ceremonial gathering.
iwi	tribe or people, also bones
kāinga	home, village
Kaienerekowa	Kanien'kehaka (Mohawk) for the 'great law of peace.'
kai moana	seafood, including shell fish, seaweed and fish
kaitiakitanga	stewardship and protection, often used in relation to natural resources.
karakia	prayer, incantations, prayer-chant, Church service
karanga	chant
kaumātua	respected elder, old man, can be both sexes
kaupapa	rule, basic idea, topic, plan, foundation
kawa	protocol of the marae, varies among the tribes, ceremonial, dedication.
Kïngitanga	powerful pan-tribal Kingship movement, spiritually based political movement uniting tribes stemming from the Tainui waka.
koha	gift exchange
koroua	male elders
Kotahitanga	Māori political unity movement at the end of the 19th century.
kuia	elderly woman
mana	ascribed and achieved authority, honor, status and prestige of an individual and group, spiritually endowed and maintained
manaakitanga	hospitality, enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honor requires

mana tupuna	ascribed authority inherited from ancestors, inherited rights and responsibilities
Marae	place of ceremonial greeting and gathering, meeting place, village courtyard, spiritual and symbolic centre of Māori community affairs
Māori	literally ordinary person, native or Indigenous to Aotearoa New Zealand
Māoritanga	Māori culture and identity
mauri	recognition of the life-force of persons and objects
noa	free from tapu or any other restriction; liberating a person or situation from tapu restrictions, usually through karakia and water
Nga taonga tuku iho no nga tupuna	treasures, heirlooms, traits inherited handed down from the ancestors
Onkwehonwe	Kanien'kehaka ('people of the flint' or Mohawk), Six Nations, term for the original people of the land
Pākehā	New Zealander of non-Māori descent, non-Māori, literally stranger, newcomer
paki waitara	stories
pepeha	tribal sayings, proverbs, tribal mottoes
poroporoaki	farewell
powhiri	to wave, welcoming ceremony
rangatira	chief, both male and female leaders
rangatiratanga	chieftainship, authority, kingdom, principality, appreciation of the attributes of leadership
ritenga	ritual
rohe	tribal territory, boundary, district, area
rūnanga	council, assembly, debate
take tūpuna	rights to natural resources by right of discovery
take tukua	rights to natural resources by right of gift
take raupatu	rights to natural resources by right of confiscation
takiwā/rohe	tribal territory, area, space, place
tangata whenua	people of the land, Indigenous people of a given place
taonga katoa	all treasured possessions – precious objects, cultural norms, customs, values, institutions, property, treasure
tauparapara	chant

tautuutu	reciprocity and balance
Te Reo Māori	Māori language
tika	correct, straight, right ways
tikanga	'right ways', custom, from *tika* (adj.) straight, right, correct, fair, just, rules, principles
tino rangatiratanga	traditional authority, self-determination
tapu	restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose – to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects
tohunga	expert, specialist, priest
tupuna	ancestor
tūrangawaewae	a place to stand, basis of rights of the tangata whenua
ture	law, authorised by government, passed by formal legislature
utu	reciprocity, compensation, involved the initiation and maintenance of relationships both hostile and friendly
wāhi tapu	sacred places, cemetery, reserved ground
waiata	song, to sing, psalm
wairua	spirit, metaphysical world
wairuatanga	acknowledging the metaphysical world - spirituality - including placating the departmental Gods respective realms
whakaaro	think, opinion, feelings, concept
whānau	extended family, usually 4 generations, also to give birth
whānau kua hē	the family or community in the wrong for committing a crime
whānaungatanga	maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group
whaikōrero	formal oratory ceremonies
whakapapa	genealogy, genealogical recitations
whakatauki	proverbs
Wharenui	large ceremonial house, located on the marae complex
whenua	land, also umbilical chord

Z. Appendices

Appendix 1: He Wakaputanga o Te Rangatiratanga O Nu Tireni - The Declaration of Independence of New Zealand 28 October 1835[1661]

He Wakaputanga o te Rangatiratanga o Nu Tireni

1. Ko matou, ko nga Tino Rangatiratanga o nga iwi o Nu Tireni i raro mai o Hauraki kua oti nei te huihui i Waitangi i Tokerau i te ra 28 o Oketopa 1835, ka wakaputa i te Rangatiratanga o to matou wenua, a, ka meatia ka wakaputaia e matou he Wenua Rangatira, kia huaina ko te Wakaminenga o nga Hapū o Nu Tireni.

2. Ko te Kīngitanga ko te mana i te wenua o te wakaminenga o Nu Tireni ka meatia nei kei nga Tino Rangatira anake i to matou huihuinga. A, ka mea hoki e kore e tukua e matou te wakarite ture ki te tahi hunga ke atu, me te tahi Kawanatanga hoki kia meatia i te wenua o te wakaminenga o Nu Tireni. Ko nga tangata anake e meatia nei e matou e wakarite ana ki te ritenga o o matou ture e meatia nei e matou i to matou huihuinga.

3. Ko matou ko nga Tino Rangatira ka mea nei kia huihui ki te runanga ki Waitangi a te ngahuru i tenei tau i tenei tau ki te wakarite ture, kia tika ai te wakawakanga, kia mau ki te rongo, kia mutu te he, kia tika te hokohoko. A, ka mea hoki ki nga tauiwi o runga, kia wakarerea te wawai, kia mahara ai ki te wakaoranga o to matou wenua, a, kia uru ratou ki te wakaminenga o Nu Tireni.

4. Ka mea matou kia tuhituhia he pukapuka ki te ritenga o tenei o to matou wakaputanga nei ki te Kingi o Ingarani hei kawe atu i to matou aroha nana hoki i wakaae ki te Kara mo matou. A, no te mea ka atawai matou, ka tiaki i nga Pākehā e noho nei i uta, e rere mai ana ki te hokohoko, koia ka mea ai matou ki te Kingi kia waiho hei matua ki a matou i to matou Tamarikitanga kei wakakahoretia to matou Rangatiratanga.

Kua wakaaetia katoatia e matou i tenei ra, i te 28 Oketopa 1835, ki te aroaro o te Reireneti o te Kingi o Ingarani.

The Codicil
Ko matou ko nga Rangatira ahakoa kihai i tae ki te huihuinga nei no te nuinga o te Waipuke no te aha ranei – ka wakaae katoa ki te waka putanga Rangatiratanga o Nu Tirene a ka uru ki roto ki te Wakaminenga.

He Wakaputanga o te Rangatiratanga o Nu Tireni

1. We the hereditary chiefs and heads of tribes of the Northern parts of New Zealand, being assembled at Waitangi in the Bay of Islands, on this 28th day of October, 1835, declare the independence of our country which is hereby constituted and declared to be an independent State under the designation of the United Tribes of New Zealand.

[1661] Declaration of Independence 1835 taken off the internet at https://nzhistory.govt.nz/media/interactive/the-declaration-of-independence (Accessed May 2020).

2. All sovereign power and authority within the territories of the united tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves in their collective capacity, nor any function of government to be exercised within the said territories, unless by persons appointed by them and acting under the authority of laws regularly enacted by them in Congress assembled.

3. The hereditary chiefs and heads of tribes agree to meet in Congress at Waitangi in the autumn of each year for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade. They also cordially invite the southern tribes to lay aside their private animosities and to consult the safety and welfare of our common country by joining the Confederation of the United Tribes.

4. They also agree to send a copy of this Declaration to His Majesty the King of England to thank him for his acknowledgment of their flag. In return for the friendship and protection that they have shown and are prepared to show to such of his subjects as have settled in their country or resorted to its shores for the purposes of trade, they entreat that he will continue to be the parent of their infant State, to protect it from all attempts upon its independence.

Agreed to in its entirety by us on this 28th day of October, 1835, in the presence of His Britannic Majesty's Resident.[1662]

The Codicil

We are the rangatira who, although we did not attend the meeting due to the widespread flooding or other reasons, fully agree with He Whakaputanga Rangatiratanga o Nu Tirene and join the sacred Confederation.

[1662] The Declaration of Independence 1835 had no legal effect in contemporary New Zealand law. See *Warren v The Police* (AP 133/99, High Court, Hamilton, 9 February 2000) per Penlington J. However, Declaration of Independence 1835 was recently acknowledged in 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, Waitangi Tribunal Report 2014). In 2014, the Waitangi Tribunal concluded that the rangatira who signed te Tiriti o Waitangi in February 1840 did not cede sovereignty to the British Crown. The Declaration of Independence 1835 acknowledged Māori tribal sovereignty in Article 2 that preceded the Treaty of Waitangi. See https://waitangitribunal.govt.nz/news/report-on-stage-1-of-the-te-paparahi-o-te-raki-inquiry-released-2/ (Accessed May 2020).

Appendix 2: Te Tiriti o Waitangi/The Treaty of Waitangi 1840

Māori Text of the Treaty of Waitangi 1840[1663]

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapū o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata Māori o Nu Tirani kia wakaaetia e nga Rangatira Māori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Māori ki te Pākehā e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amoa atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapū o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

KO TE TUATAHI

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o ratou wenua.

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapū ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini Ka tiakina e te Kuini o Ingarani nga tangata Māori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] William Hobson Consul & Lieutenant Governor

[1663] Taken from the internet website at https://nzhistory.govt.nz/politics/treaty/read-the-treaty/ (Accessed August 2018).

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapū o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

ENGLISH TEXT OF THE TREATY OF WAITANGI 1840

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands.

Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Pre-emption over such lands as the

proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[Signed] W Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

Appendix 3: Resource Management Act 1991, ss. 5, 6, 7, 8, 33, 34, 36B, 58M-58U, 66, 171 and 188

Part 2

5. Purpose

a. The purpose of this Act is to promote the sustainable management of natural and physical resources.
b. In this Act, sustainable management means managing the use, development, and protection of natural and resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –
    1. sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generation
    2. safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
    3. avoiding, remedying, or mitigating any adverse effects of activities on the environment.

6. Matters of National Importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognize and provide for the following matters of national importance:

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development:
(b) The protection of outstanding natural features and landscapes fro in appropriate subdivision, use, and development
(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
(d) The maintenance and enhancement of public access to and along the coastal marine areas, lakes and rivers:
(e) The relationship of Māori and their culture and traditions with their ancestral lands, waters, sites, waahi tapu, and other taonga:
(f) The protection of historic heritage from in appropriate subdivision, use and development:
(g) The protection of protected customary rights:
(h) The management of significant risks from natural hazards.

7 Other Matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have regard to –

(a) Kaitiakitanga:

(aa) the ethic of stewardship:

(b) The efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) The maintenance and enhancement of the quality of the environment
(d) Any finite characteristics of natural and physical resources
(e) The protection of the habitat of trout and salmon
(f) The effects of climate change
(g) The benefits to be derived from the use and development of renewable energy.

8 Treaty of Waitangi

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

33 Transfer of powers

(1) A local authority may transfer any 1 or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority in accordance with this section.

(2) For the purposes of this section, public authority includes—
(a) a local authority; and
(b) *an iwi authority*; [emphasis added] and
(c) *[Repealed]*
(d) a government department; and
(e) a statutory authority; and
(f) a joint committee set up for the purposes of section 80; and
(g) a local board.

(3) *[Repealed]*

(4) A local authority shall not transfer any of its functions, powers, or duties under this section unless—
(a) it has used the special consultative procedure set out in section 83 of the Local Government Act 2002; and
(b)before using that special consultative procedure it serves notice on the Minister of its proposal to transfer the function, power, or duty; and
(c) both authorities agree that the transfer is desirable on all of the following grounds:
(i) the authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty:
(ii) efficiency:

(iii) technical or special capability or expertise.

(5) *[Repealed]*

(6) A transfer of functions, powers, or duties under this section shall be made by agreement between the authorities concerned and on such terms and conditions as are agreed.

(7) A public authority to which any function, power, or duty is transferred under this section may accept such transfer, unless expressly forbidden to do so by the terms of any Act by or under which it is constituted; and upon any such transfer, its functions, powers, and duties shall be deemed to be extended in such manner as may be necessary to enable it to undertake, exercise, and perform the function, power, or duty.

(8) A local authority which has transferred any function, power, or duty under this section may change or revoke the transfer at any time by notice to the transferee.

(9) A public authority to which any function, power, or duty has been transferred under this section, may relinquish the transfer in accordance with the transfer agreement.

34 Delegation of functions, etc, by local authorities

(1) A local authority may delegate to any committee of the local authority established in accordance with the Local Government Act 2002 any of its functions, powers, or duties under this Act.

(2) A territorial authority may delegate to any community board established in accordance with the Local Government Act 2002 any of its functions, powers, or duties under this Act in respect of any matter of significance to that community, other than the approval of a plan or any change to a plan.

(3) Subsection (2) does not prevent a local authority delegating to a community board power to do anything before a final decision on the approval of a plan or any change to a plan.

(3A) A unitary authority may delegate to any local board any of its functions, powers, or duties under this Act in respect of any matter of local significance to that board, other than the approval of a plan or any change to a plan.

(3B) Subsection (3A) does not prevent a unitary authority delegating to a local board power to do anything before a final decision on the approval of a plan or any change to a plan.

(4) *[Repealed]*

(5) *[Repealed]*

(6) *[Repealed]*

(7) Any delegation under this section may be made on such terms and conditions as the local authority thinks fit, and may be revoked at any time by notice to the delegate.

(8) Except as provided in the instrument of delegation, every person to whom any function, power, or duty has been delegated under this section may, without confirmation by the local authority, exercise or perform the function, power, or duty in like manner and with the same effect as the local authority could itself have exercised or performed it.

(9) Every person authorised to act under a delegation under this section is presumed to be acting in accordance with its terms in the absence of proof to the contrary.

(10) A delegation under this section does not affect the performance or exercise of any function, power, or duty by the local authority.

(11) In subsections (3A) and (3B), **Auckland Council** and **local board** have the meanings given in section 4(1) of the Local Government (Auckland Council) Act 2009.

Powers and duties of local authorities and other public authorities

36B Power to make joint management agreement

(1) A local authority that wants to make a joint management agreement must—

(a) notify the Minister that it wants to do so; and

(b) satisfy itself—

(i) that each public authority, iwi authority, and group that represents hapū for the purposes of this Act that, in each case, is a party to the joint management agreement—

(A) represents the relevant community of interest; and

(B) has the technical or special capability or expertise to perform or exercise the function, power, or duty jointly with the local authority; and

(ii) that a joint management agreement is an efficient method of performing or exercising the function, power, or duty; and

(c) include in the joint management agreement details of—

(i) the resources that will be required for the administration of the agreement; and

(ii) how the administrative costs of the joint management agreement will be met.

(2) A local authority that complies with subsection (1) may make a joint management agreement.

Purpose and guiding principles

Heading: inserted, on 19 April 2017, by section 51 of the Resource Legislation Amendment Act 2017 (2017 No 15).

58M Purpose of Mana Whakahono a Rohe

The purpose of a Mana Whakahono a Rohe is—

(a) to provide a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under this Act; and

(b) to assist local authorities to comply with their statutory duties under this Act, including through the implementation of sections 6(e), 7(a), and 8.

58N Guiding principles

In initiating, developing, and implementing a Mana Whakahono a Rohe, the participating authorities must use their best endeavours—

(a) to achieve the purpose of the Mana Whakahono a Rohe in an enduring manner:

(b) to enhance the opportunities for collaboration amongst the participating authorities, including by promoting—

(i) the use of integrated processes:

(ii) co-ordination of the resources required to undertake the obligations and responsibilities of the parties to the Mana Whakahono a Rohe:

(c) in determining whether to proceed to negotiate a joint or multi-party Mana Whakahono a Rohe, to achieve the most effective and efficient means of meeting the statutory obligations of the participating authorities:

(d) to work together in good faith and in a spirit of co-operation:

(e) to communicate with each other in an open, transparent, and honest manner:

(f) to recognise and acknowledge the benefit of working together by sharing their respective vision and expertise:

(g) to commit to meeting statutory time frames and minimise delays and costs associated with the statutory processes:

(h) to recognise that a Mana Whakahono a Rohe under this subpart does not limit the requirements of any relevant iwi participation legislation or the agreements associated with that legislation.

58O Initiation of Mana Whakahono a Rohe

Invitation from 1 or more iwi authorities

(1) At any time other than in the period that is 90 days before the date of a triennial election under the Local Electoral Act 2001, 1 or more iwi authorities representing tangata whenua

(the *initiating iwi authorities*) may invite 1 or more relevant local authorities in writing to enter into a Mana Whakahono a Rohe with the 1 or more iwi authorities.

Obligations of local authorities that receive invitation

(2) As soon as is reasonably practicable after receiving an invitation under subsection (1), the local authorities—

(a) may advise any relevant iwi authorities and relevant local authorities that the invitation has been received; and

(b) must convene a hui or meeting of the initiating iwi authority and any iwi authority or local authority identified under paragraph (a) (the *parties*) that wishes to participate to discuss how they will work together to develop a Mana Whakahono a Rohe under this subpart.

(3) The hui or meeting required by subsection (2)(b) must be held not later than 60 working days after the invitation sent under subsection (1) is received, unless the parties agree otherwise.

(4) The purpose of the hui or meeting is to provide an opportunity for the iwi authorities and local authorities concerned to discuss and agree on—

(a) the process for negotiation of 1 or more Mana Whakahono a Rohe; and

(b) which parties are to be involved in the negotiations; and

(c) the times by which specified stages of the negotiations must be concluded.

(5) The iwi authorities and local authorities that are able to agree at the hui or meeting how they will develop a Mana Whakahono a Rohe (the *participating authorities*) must proceed to negotiate the terms of the Mana Whakahono a Rohe in accordance with that agreement and this subpart.

(6) If 1 or more local authorities in an area are negotiating a Mana Whakahono a Rohe and a further invitation is received under subsection (1), the participating iwi authorities and relevant local authorities may agree on the order in which they negotiate the Mana Whakahono a Rohe.

Other matters relevant to Mana Whakahono a Rohe

(7) If an iwi authority and a local authority have at any time entered into a relationship agreement, to the extent that the agreement relates to resource management matters, the parties to that agreement may, by written agreement, treat that agreement as if it were a Mana Whakahono a Rohe entered into under this subpart.

(8) The participating authorities must take account of the extent to which resource management matters are included in any iwi participation legislation and seek to minimise duplication between the functions of the participating authorities under that legislation and those arising under the Mana Whakahono a Rohe.

(9) Nothing in this subpart prevents a local authority from commencing, continuing, or completing any process under the Act while waiting for a response from, or negotiating a Mana Whakahono a Rohe with, 1 or more iwi authorities.

58P Other opportunities to initiate Mana Whakahono a Rohe

Later initiation by iwi authority

(1) An iwi authority that, at the time of receiving an invitation to a meeting or hui under section 58O(2)(b), does not wish to participate in negotiating a Mana Whakahono a Rohe, or withdraws from negotiations before a Mana Whakahono a Rohe is agreed, may participate in, or initiate, a Mana Whakahono a Rohe at any later time (other than within the period that is 90 days before a triennial election under the Local Electoral Act 2001).

(2) If a Mana Whakahono a Rohe exists and another iwi authority in the same area as the initiating iwi wishes to initiate a Mana Whakahono a Rohe under section 58O(1), that iwi authority must first consider joining the existing Mana Whakahono a Rohe.

(3) The provisions of this subpart apply to any initiation under subsection (1).

Initiation by local authority

(4) A local authority may initiate a Mana Whakahono a Rohe with an iwi authority or with hapū.

(5) The local authority and iwi authority or hapū concerned must agree on—

(a) the process to be adopted; and

(b) the time period within which the negotiations are to be concluded; and

(c) how the Mana Whakahono a Rohe is to be implemented after negotiations are concluded.

(6) If 1 or more hapū are invited to enter a Mana Whakahono a Rohe under subsection (4), the provisions of this subpart apply as if the references to an iwi authority were references to 1 or more hapū, to the extent that the provisions relate to the contents of a Mana Whakahono a Rohe (*see* sections 58M, 58N, 58R, 58T, and 58U).

58Q Time frame for concluding Mana Whakahono a Rohe

If an invitation is initiated under section 58O(1), the participating authorities must conclude a Mana Whakahono a Rohe within—

(a) 18 months after the date on which the invitation is received; or

(b) any other period agreed by all the participating authorities.

58R Contents of Mana Whakahono a Rohe

(1) A Mana Whakahono a Rohe must—

(a) be recorded in writing; and
(b) identify the participating authorities; and
(c) record the agreement of the participating authorities about—
(i) how an iwi authority may participate in the preparation or change of a policy statement or plan, including the use of any of the pre-notification, collaborative, or streamlined planning processes under Schedule 1; and
(ii) how the participating authorities will undertake consultation requirements, including the requirements of section 34A(1A) and clause 4A of Schedule 1; and
(iii) how the participating authorities will work together to develop and agree on methods for monitoring under this Act; and
(iv) how the participating authorities will give effect to the requirements of any relevant iwi participation legislation, or of any agreements associated with, or entered into under, that legislation; and
(v) a process for identifying and managing conflicts of interest; and
(vi) the process that the parties will use for resolving disputes about the implementation of the Mana Whakahono a Rohe, including the matters described in subsection (2).

(2) The dispute resolution process recorded under subsection (1)(c)(vi) must—
(a) set out the extent to which the outcome of a dispute resolution process may constitute an agreement—
(i) to alter or terminate a Mana Whakahono a Rohe (*see* subsection (5)):
(ii) to conclude a Mana Whakahono a Rohe at a time other than that specified in section 58Q:
(iii) to complete a Mana Whakahono a Rohe at a later date (*see* section 58T(2)):
(iv) jointly to review the effectiveness of a Mana Whakahono a Rohe at a later date (*see* section 58T(3)):
(v) to undertake any additional reporting (*see* section 58T(5)); and

(b) require each of the participating authorities to bear its own costs for any dispute resolution process undertaken.

(3) The dispute resolution process must not require a local authority to suspend commencing, continuing, or completing any process under the Act while the dispute resolution process is in contemplation or is in progress.

(4) A Mana Whakahono a Rohe may also specify—

(a) how a local authority is to consult or notify an iwi authority on resource consent matters, where the Act provides for consultation or notification:
(b) the circumstances in which an iwi authority may be given limited notification as an affected party:
(c) any arrangement relating to other functions, duties, or powers under this Act:
(d) if there are 2 or more iwi authorities participating in a Mana Whakahono a Rohe, how those iwi authorities will work collectively together to participate with local authorities:
(e) whether a participating iwi authority has delegated to a person or group of persons (including hapū) a role to participate in particular processes under this Act.

(5) Unless the participating authorities agree,—
(a) the contents of a Mana Whakahono a Rohe must not be altered; and
(b) a Mana Whakahono a Rohe must not be terminated.

(6) If 2 or more iwi authorities collectively have entered into a Mana Whakahono a Rohe with a local authority, any 1 of the iwi authorities, if seeking to amend the contents of the Mana Whakahono a Rohe, must negotiate with the local authority for that purpose rather than seek to enter into a new Mana Whakahono a Rohe.

58S Resolution of disputes that arise in course of negotiating Mana Whakahono a Rohe

(1) This section applies if a dispute arises among participating authorities in the course of negotiating a Mana Whakahono a Rohe.

(2) The participating authorities—
(a) may by agreement undertake a binding process of dispute resolution; but
(b) if they do not reach agreement on a binding process, must undertake a non-binding process of dispute resolution.

(3) Whether the participating authorities choose a binding process or a non-binding process, each authority must—
(a) jointly appoint an arbitrator or a mediator; and
(b) meet its own costs of the process.

(4) If the dispute remains unresolved after a non-binding process has been undertaken, the participating authorities may individually or jointly seek the assistance of the Minister.

(5) The Minister, with a view to assisting the participating authorities to resolve the dispute and conclude a Mana Whakahono a Rohe, may—
(a) appoint, and meet the costs of, a Crown facilitator:
(b) direct the participating authorities to use a particular alternative dispute resolution process for that purpose.

58T Review and monitoring

(1) A local authority that enters into a Mana Whakahono a Rohe under this subpart must review its policies and processes to ensure that they are consistent with the Mana Whakahono a Rohe.

(2) The review required by subsection (1) must be completed not later than 6 months after the date of the Mana Whakahono a Rohe, unless a later date is agreed by the participating authorities.

(3) Every sixth anniversary after the date of a Mana Whakahono a Rohe, or at any other time by agreement, the participating authorities must jointly review the effectiveness of the Mana Whakahono a Rohe, having regard to the purpose of a Mana Whakahono a Rohe stated in section 58M and the guiding principles set out in section 58N.

(4) The obligations under this section are in addition to the obligations of a local authority under—

(a) section 27 (the provision of information to the Minister):
(b) section 35 (monitoring and record keeping).

(5) Any additional reporting may be undertaken by agreement of the participating authorities.

58U Relationship with iwi participation legislation

A Mana Whakahono a Rohe does not limit any relevant provision of any iwi participation legislation or any agreement under that legislation.

66 Matters to be considered by regional council (plans)

(1) A regional council must prepare and change any regional plan in accordance with—

(a) its functions under section 30; and
(b) the provisions of Part 2; and
(c) a direction given under section 25A(1); and
(d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
(e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
(ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and
(f) any regulations.

(2) In addition to the requirements of section 67(3) and (4), when preparing or changing any regional plan, the regional council shall have regard to—

(a) any proposed regional policy statement in respect of the region; and
(b) the Crown's interests in the coastal marine area; and

(c) any—

(i) management plans and strategies prepared under other Acts; and

(ii) *[Repealed]*

(iia) relevant entry on the New Zealand Heritage List/Rārangi Kōrero required by the Heritage New Zealand Pouhere Taonga Act 2014; and

(iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Māori customary fishing); and

(iv) *[Repealed]* to the extent that their content has a bearing on resource management issues of the region; and

(d) the extent to which the regional plan needs to be consistent with the regional policy statements and plans, or proposed regional policy statements and proposed plans, of adjacent regional councils; and

(e) to the extent to which the regional plan needs to be consistent with regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; and

(2A) When a regional council is preparing or changing a regional plan, it must deal with the following documents, if they are lodged with the council, in the manner specified, to the extent that their content has a bearing on the resource management issues of the region:

(a) the council must take into account any relevant planning document recognised by an iwi authority; and

(b) in relation to a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, the council must, in accordance with section 93 of that Act,—

(i) recognise and provide for the matters in that document, to the extent that they relate to the relevant customary marine title area; and

(ii) take into account the matters in that document, to the extent that they relate to a part of the common marine and coastal area outside the customary marine title area of the relevant group.

(3) In preparing or changing any regional plan, a regional council must not have regard to trade competition or the effects of trade competition.

171 Recommendation by territorial authority

(1A) When considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.

(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and

(d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

(1B) The effects to be considered under subsection (1) may include any positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from the activity enabled by the designation, as long as those effects result from measures proposed or agreed to by the requiring authority.

(2) The territorial authority may recommend to the requiring authority that it—

(a) confirm the requirement:

(b) modify the requirement:

(c) impose conditions:

(d) withdraw the requirement.

(3) The territorial authority must give reasons for its recommendation under subsection (2).

188 Application to become heritage protection authority

(1) Any body corporate having an interest in the protection of any place may apply to the Minister in the prescribed form for approval as a heritage protection authority for the purpose of protecting that place.

(2) For the purpose of this section, and sections 189 and 191, place includes any feature or area, and the whole or part of any structure.

(3) The Minister may make such inquiry into the application and request such information as he or she considers necessary.

(4) The Minister may, by notice in the *Gazette*, approve an applicant under subsection (1) as a heritage protection authority for the purpose of protecting the place and on such terms and conditions (including provision of a bond) as are specified in the notice.

(5) The Minister shall not issue a notice under subsection (4) unless he or she is satisfied that—

(a) the approval of the applicant as a heritage protection authority is appropriate for the protection of the place that is the subject of the application; and

(b) the applicant is likely to satisfactorily carry out all the responsibilities (including financial responsibilities) of a heritage protection authority under this Act.

(6) Where the Minister is satisfied that—

(a) a heritage protection authority is unlikely to continue to satisfactorily protect the place for which approval as a heritage protection authority was given; or

(b) a heritage protection authority is unlikely to satisfactorily carry out any responsibility as a heritage protection authority under this Act,—

the Minister shall, by notice in the *Gazette*, revoke an approval given under subsection (4).

(7) Upon—

(a) the revocation of the approval of a body corporate under subsection (6); or

(b) the dissolution of any body corporate approved as a heritage protection authority under subsection (4)—

all functions, powers, and duties of the body corporate under this Act in relation to any heritage order, or requirement for a heritage order, shall be deemed to be transferred to the Minister under section 192.

Appendix 4: Fisheries Act 1999, ss. 185, 186, 186A

185 Power to recommend making of regulations

(1) A committee of management appointed for a taiāpure-local fishery may recommend to the Minister the making of regulations under section 186 or section 297 or section 298 for the conservation and management of the fish, aquatic life, or seaweed in the taiāpure-local fishery.

(2) Regulations made under any section referred to in subsection (1) (other than section 186), and made pursuant to a recommendation under that subsection, may override the provisions of any other regulations made under section 297 or section 298.

(3) Except to the extent that any regulations made under any section referred to in subsection (1), and made pursuant to a recommendation under that subsection, override or are otherwise inconsistent with the provisions of any other regulations made under that section, those provisions shall apply in relation to every taiāpure-local fishery.

(4) Any provision of regulations made under any section referred to in subsection (1), and made pursuant to a recommendation under that subsection, that relates only to a taiāpure-local fishery may be made only in accordance with subsection (1).

(5) No regulations made under any section referred to in subsection (1), and made pursuant to a recommendation under that subsection, shall provide for any person—

(a) to be refused access to, or the use of, any taiāpure-local fishery; or

(b) to be required to leave or cease to use any taiāpure-local fishery,—

because of the colour, race, or ethnic or national origins of that person or of any relative or associate of that person.

186 Regulations relating to customary fishing

(1) The Governor-General may from time to time, by Order in Council, make regulations recognising and providing for customary food gathering by Māori and the special relationship between tangata whenua and places of importance for customary food gathering (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.

(2) Without limiting the generality of subsection (1), regulations made under that subsection may—

(a) regulations relating to taiāpure-local fisheries; and declare that the first-mentioned regulations are to prevail over the other regulations:

(b) empower the Minister to declare, by notice in the *Gazette*, any part of New Zealand fisheries waters to be a mataitai reserve; and any such regulations shall require that, before any such notice is given, the Minister and the tangata whenua shall consult with the local community and the Minister shall have regard to the need to ensure sustainability in relation to the reserve:

(c) provide for such matters as may be necessary or desirable to achieve the purpose of this Act in relation to mataitai reserves, including general restrictions and prohibitions in respect of the taking of fish, aquatic life, or seaweed:

(d) empower any Māori Committee constituted by or under the Māori Community Development Act 1962, any marae committee, or any kaitiaki of the tangata whenua to make bylaws restricting or prohibiting the taking of fish, aquatic life, or seaweed:

(e) empower any such Māori Committee, marae committee, or kaitiaki to allow the taking of fish, aquatic life, or seaweed to continue for purposes which sustain the functions of the marae concerned, notwithstanding any such bylaws.

f) bylaws shall not come into force until they have been approved by the Minister and have been published in the *Gazette*:

(g) the publication in the *Gazette* of bylaws purporting to have been approved under this subsection shall be conclusive evidence that the bylaws have been duly made and approved under this section.

(3) The following provisions apply in relation to bylaws made under regulations made under subsection (2)(d):

(a) every restriction and every prohibition imposed on individuals by such bylaws shall apply generally to all individuals: declare the relationship between such regulations and general fishing regulations.

186A Temporary closure of fishing area or restriction on fishing methods

(1) The Minister may from time to time, by notice in the *Gazette*,—

(a) temporarily close any area of New Zealand fisheries waters (other than South Island fisheries waters as defined in section 186B(9)) in respect of any species of fish, aquatic life, or seaweed; or

(b) temporarily restrict or prohibit the use of any fishing method in respect of any area of New Zealand fisheries waters (other than South Island fisheries waters as defined in section 186B(9)) and any species of fish, aquatic life, or seaweed.

(2) The Minister may impose such a closure, restriction, or prohibition only if he or she is satisfied that it will recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing rights by—

(a) improving the availability or size (or both) of a species of fish, aquatic life, or seaweed in the area subject to the closure, restriction, or prohibition; or
(b) recognising a customary fishing practice in that area.

(3) Before imposing a fishing method restriction or prohibition under subsection (1)(b), the Minister must be satisfied that the method is having an adverse effect on the use and management practices of tangata whenua in the exercise of non-commercial fishing rights.

(4) A notice given under subsection (1) must be publicly notified.

(5) A notice given under subsection (1)—
(a) may be in force for a period of not more than 2 years and, unless sooner revoked, is revoked at the end of that 2-year period:
(b) subject to paragraph (a), may be expressed to be in force for any particular year or period, or for any particular date or dates, or for any particular month or months of the year, week or weeks of the month, or day or days of the week.

(6) Nothing in subsection (5)(a) prevents a further notice being given under subsection (1) in respect of any species and area before or on or about the expiry of an existing notice that relates to that species and area.

(7) Before giving a notice under subsection (1), the Minister must—
(a) consult such persons as the Minister considers are representative of persons having an interest in the species concerned or in the effects of fishing in the area concerned, including tangata whenua, environmental, commercial, recreational, and local community interests; and
(b) provide for the input and participation in the decision-making process of tangata whenua with a non-commercial interest in the species or the effects of fishing in the area concerned, having particular regard to kaitiakitanga.

(8) A person commits an offence who, in contravention of a notice given under subsection (1),—
(a) takes any fish, aquatic life, or seaweed from a closed area; or
(b) takes any fish, aquatic life, or seaweed using a prohibited fishing method.

(9) A person who commits an offence against subsection (8)—
(a) is liable to the penalty specified in section 252(6) if—
(i) the person is an individual other than a commercial fisher; and
(ii) the person satisfies the court that the fish, aquatic life, or seaweed was taken otherwise than for the purpose of sale:
(b) is liable to the penalty specified in section 252(5) in every other case.

Section 186B, Fisheries Act 1999 is similar to s. 186 only it permits the chief executive to impose a temporary closure of fisheries.

Appendix 5: Table 14: Treaty of Waitangi Settlement Co-Management and Co-Governance Redress Models over the Coastal Marine Space

TREATY SETTLEMENT CO-MANAGEMENT, CO-GOVERNANCE OF MARINE AREAS[1]			
REGION	**HAPŪ**	**NAME OF PROTECTED AREA**	**REDRESS DESCRIPTION**
HAUAURU	1. Ngāti Mutunga (Taranaki)		Statutory Acknowledgements (SAs) are recognised under the Resource Management Act 1991 and the Historic Places Act 1993. The acknowledgements also require that consent authorities provide Ngāti Mutunga with summaries of all resource consent applications that may affect the areas named in the acknowledgements. These include Part of Mimi – Pukearuhe Coast Marginal Strip; Waitoetoe Beach Recreation Reserve, Onaero Coast Marginal Strip, Coastal Marine Area adjoining the Area of Interest. Deeds of Recognition (DoRs) oblige the Crown to consult with Ngāti Mutunga and have regard for their views regarding the special association Ngāti Mutunga have with a site. They also specify the nature of the input of Ngāti Mutunga into management of those areas by the Department of Conservation and/or the Commissioner of Crown Lands. There will be 12 Deeds of Recognition covering: Part of Mimi – Pukearuhe Coast Marginal Strip, Waitoetoe Beach Recreation Reserve, Mimi Scenic Reserve
TAI TOKERAU	2. Ngāti Rehua-Ngātiwai ki Aotea	AOTEA/GREAT BARRIER ISLAND, RAKITU ISLAND/ARID ISLAND AND MOKOHINAU ISLANDS	Ngāti Rehua will have an enhanced role in parts of the Auckland Conservation Management Strategy that cover Aotea/Great Barrier Island, Rakitu Island/Arid Island and the Mokohinau Islands.
TAI TOKERAU	3. Ngāti Rehua-Ngāti Wai ki Aotea		A statutory acknowledgement area recognises the association between Ngāti Rehua and a particular site or area and enhances the iwi's ability to participate in specified Resource Management Act 1991 processes. The Crown offers statutory acknowledgement areas over the following areas. Overtons Beach Marginal Strip, Sandy Bay Marginal Strip, S.S. Wairarapa Graves (Tapuwai Point) Historic Reserve, Whakatautuna Point Marginal Strip.
HAUAURU	4. Ngāti Tama (Taranaki)		Statutory Acknowledgements are recognised under the Resource Management Act 1991 and the Historic Places Act 1993. The acknowledgements also require that consent authorities provide Ngati Tama with summaries of all resource consent applications that may affect the areas named in the acknowledgements. Part of the Mimi-Pukearuhe Coast Marginal Strip, Mohakatino Coastal Marginal Strip, Marginal Strip, the Coastal Marine Area adjoining the Ngati Tama area of interest. Deeds of Recognition oblige the Crown to consult Ngati Tama and have regard for its views regarding Ngati Tama's special association with a site and specifies the nature of Ngati Tama's input into management of those areas by the Department of Conservation and the Commissioner of Crown Lands. These include Part of the Mimi-Pukearuhe Coast Marginal Strip.

[1] The above Treaty of Waitangi Settlement Co-Management of Marine Areas Table comes from the literature review of Takuira, J, 'Treaty of Waitangi Settlement Redress Options Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).

HAUAURU	5. Taranaki Whānui ki Te Upoko o Te Ika	THE KOROKORO GATEWAY SITE (HARBOUR AT PETONE)	The Korokoro Gateway site (on the harbour at Petone), The settlement legislation will provide for the establishment of a Harbour Islands Kaitiaki Board to administer Makaro Scientific Reserve, Mokopuna Scientific Reserve, Matiu Scientific Reserve and Matiu Historic Reserve. The Board will consist of an equal number of representatives from both the Department of Conservation, who will continue to carry out the day to day management of the islands, and Taranaki Whanui ki Te Upoko o Te Ika.
HAURAKI	6. Te Patukirikiri		The settlement does not provide for redress in relation to Tikapa Moana/ the Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Te Patukirikiri have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas.
HAURAKI	7. Ngāti Maru		A statutory acknowledgement recognises the association between Ngāti Maru and a particular area and enhances the ability of the iwi to participate in specified resource management processes. The Crown offers a statutory acknowledgement over the following areas: Mercury Islands;
HAURAKI	8. Ngāti Maru	Tīkapa Moana/ Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine	The settlement does not provide for redress in relation to Tīkapa Moana/ Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Ngāti Maru have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas.
HAURAKI	9. Pare Hauraki Collective	Harbours and Hauraki Gulf/Tīkapa Moana	The Deed does not provide for cultural redress in relation to these harbours at this time. Harbours redress will be developed in separate negotiations as soon as practicable. Iwi of Hauraki have recognised interests in Tauranga Moana. The Deed acknowledges the Iwi of Hauraki and the Tauranga Moana Iwi Collective have agreed to discuss through a tikanga-based process how Tauranga Moana is to be protected and enhanced. The Tauranga Moana Framework will be provided for in separate legislation if agreement is reached between the Tauranga Moana Iwi Collective, the Hauraki Collective and the Crown on certain items.
HAURAKI	10. Marutūāhu Iwi	Ngāti Maru, Ngāti Pāoa, Ngāti Tamaterā, Ngāti Whanaunga and Te Patukirikiri	A statutory acknowledgement recognises the association between the Marutūāhu Iwi and a particular area and enhances the ability of the iwi to collectively participate in specified resource management processes. The Deed includes coastal statutory acknowledgement to the Marutūāhu Iwi over: a statutory acknowledgement being Ngā Tai Whakarewa Kauri Marutūāhu Iwi.
HAURAKI	11. Ngāti Whanaunga	Harbours and Hauraki Gulf	The settlement does not provide for redress in relation to Tikapa Moana/the Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Ngāti Whanaunga have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas.

HAURAKI	12. Ngāti Hei	Otama Beach	A statutory acknowledgement recognises the association between Ngāti Hei and a particular site or area and enhances the ability of the iwi to participate in specified resource management processes. The Crown offers a statutory acknowledgement over the following areas: Otama Beach
HAURAKI	13. Ngāti Hei	Ohinau Island	The settlement legislation will enact a Māori Land Court order and will vest Ohinau Island in the Ngāti Hei governance entity as if the property were a cultural redress property
HAURAKI	14. Ngāti Porou ki Hauraki	Harbours and Hauraki Gulf/Tīkapa Moana	The Deed does not provide for cultural redress in relation to these harbours at this time. Harbours redress will be developed in separate negotiations as soon as practicable.
HAURAKI	15. Ngāti Rāhiri Tumutumu	Harbours and Hauraki Gulf	The settlement does not provide for redress in relation to Tikapa Moana/ the Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Ngāti Rāhiri Tumutumu have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas.
HAURAKI/TAMAKI MAKAURAU	16. Ngāti Paoa	Harbours and Hauraki Gulf	The settlement does not provide for redress in relation to Tikapa Moana/ the Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Ngāti Paoa have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas
HAURAKI/TAMAKI MAKAURAU	17. Ngāti Tamaterā	Harbours and Hauraki Gulf	The settlement does not provide for redress in relation to Tīkapa Moana/ Hauraki Gulf or Te Tai Tamawahine. The Crown and Ngāti Tamaterā have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas
HAURAKI/TAMAKI MAKAURAU	18. Ngāti Tara Tokanui	Harbours and Hauraki Gulf	The settlement does not provide for redress in relation to Tīkapa Moana/ the Hauraki Gulf and Te Tai Tamahine/Te Tai Tamawahine. The Crown and Ngāti Tara Tokanui have agreed to conduct separate negotiations in the future to discuss potential cultural redress in relation to these areas.
MANAWATU	19. Ngāti Apa (North Island)	PUKEPUKE LAGOON, OMARUPAPAKO, RUAKIWI	There will be Statutory Acknowledgements over three sites, five waterways, and the coastal marine area within Ngāti Apa's area of interest, including: Pukepuke Lagoon, Omarupapako, Ruakiwi. Deeds of Recognition oblige the Crown to consult with Ngāti Apa and have regard to their views regarding the special association Ngāti Apa have with a site. They also specify the nature of the input by Ngāti Apa into management of those areas by the Department of Conservation and/or the Commissioner of Crown Lands. There will be five Deeds of Recognition which include Pukepuke Lagoon, Omarupapako, Ruakiwi.

MATAATUA	20. Ngāti Awa		Statutory Acknowledgements of Part of Ohiwa Harbour. The Deed of Settlement provides for the establishment of protocols to promote good working relationships between Ngāti Awa and the Ministry of Fisheries, the Department of Conservation and the Ministry of Culture and Heritage on matters of cultural importance to Ngāti Awa. The Department of Internal Affairs has undertaken to consult Ngāti Awa should the Department conduct a review of the administration by local government of the following: Motiti Island, Tokata Island, Rurima Island, Moutoki Island, Moutohora Island, Whakaari/White Island and Te Paepae o Aotea (Volkner Rocks). Ngāti Awa will also be able to express their views to the Ministry for the Environment on the application of the Treaty and relevant parts of the Resource Management Act in Ngati Awa's area of interest. The Ministry will monitor the performance of local authorities in Ngati Awa's area of interest in relation to these matters. In addition, the Crown has written to a number of third parties, such as Environment Bay of Plenty, inviting them to consider meeting with Ngāti Awa to discuss matters of importance to the iwi.
MATAATUA	21. Ngāti Awa		Statutory Acknowledgements register the special association Ngāti Awa has with an area including Part of Ohiwa Harbour. A Deed of Recognition requires the Crown to consult Ngāti Awa and have regard for their views about Ngāti Awa's special association with a particular Crown-owned site. The Deed specifies the nature of Ngāti Awa's input into management of those areas by the Department of Conservation and Commissioner of Crown Lands. There will be four Deeds of Recognition covering the Crown-owned parts including Whakatane, Uretara Island.
TAITOKERAU	22. Ngāti Kuri	TE ONEROA-A-TŌHĒ	The settlement will create the Te Oneroa-a-Tohe Board to manage the beach - a new permanent joint committee between iwi, Northland Regional Council and Far North District Council. The Te Oneroa-a-Tohe Board will have 50% iwi members and 50% local authority members. It will be chaired by iwi and make decisions by a 70% majority. The Board will provide governance and direction in order to promote the use, development and protection of the Te Oneroa-a-Tohe/Ninety Mile Beach management area and its resources in a manner which ensures its environmental, economic, social, spiritual and cultural wellbeing for present and future generations. The Board is responsible for developing a Beach Management Plan. It will publicly advertise the plan and seek submissions on it. The Plan will be recognised and provided for in the next revisions of the relevant Regional Policy Statement, Regional Plan and District Plan. The Board will consult with communities through the Beach Management Plan regarding any changes to beach access (eg by changing access points and reducing environmental damage on and to the beach). The feedback from this consultation will influence the Plan which the Board will then implement. The iwi members of the Board will appoint up to half of the hearing panel for consent applications within the beach management area.
TAITOKERAU	23. Ngāti Kuri		A statutory acknowledgement recognises the association between Ngati Kuri and a particular site and enhances Ngati Kuri's ability to participate in specified resource management processes. The Crown offers statutory acknowledgements over Paxton Point Conservation Area (including Rarawa Beach camp ground), Motuopao Island, Three Kings Islands (Manawatawhi) and Kermadec Islands (Rangitahua).

TAITOKERAU	24. Ngāi Takoto	TE ONEROA-A-TŌHĒ	The settlement will create the Te Oneroa-a-Tohe Board to manage the beach - a new permanent joint committee between iwi, Northland Regional Council and Far North District Council. The Te Oneroa-a-Tohe Board will have 50% iwi members and 50% local authority members. It will be chaired by iwi and make decisions by a 70% majority. The Board will provide governance and direction in order to promote the use, development and protection of the Te Oneroa-a-Tohe/Ninety Mile Beach management area and its resources in a manner which ensures it's environmental, economic, social, spiritual and cultural wellbeing for present and future generations. The Board is responsible for developing a Beach Management Plan. It will publicly advertise the plan and seek submissions on it. The Plan will be recognised and provided for in the next revisions of the relevant Regional Policy Statement, Regional Plan and District Plan. The Board will consult with communities through the Beach Management Plan regarding any changes to beach access (eg by changing access points and reducing environmental damage on and to the beach). The feedback from this consultation will influence the Plan which the Board will then implement. The iwi members of the Board will appoint up to half of the hearing panel for consent applications within the beach management area.
TAITOKERAU	25. Te Aupōuri	TE ONEROA-A-TŌHĒ	The settlement will create the Te Oneroa-a-Tohe Board to manage the beach - a new permanent joint committee between iwi, Northland Regional Council and Far North District Council. The Te Oneroa-a-Tohe Board will have 50% iwi members and 50% local authority members. It will be chaired by iwi and make decisions by a 70% majority. The Board will provide governance and direction in order to promote the use, development and protection of the Te Oneroa-a-Tohe/Ninety Mile Beach management area and its resources in a manner which ensures its environmental, economic, social, spiritual and cultural wellbeing for present and future generations. The Board is responsible for developing a Beach Management Plan. It will publicly advertise the plan and seek submissions on it. The Plan will be recognised and provided for in the next revisions of the relevant Regional Policy Statement, Regional Plan and District Plan. The Board will consult with communities through the Beach Management Plan regarding any changes to beach access (eg by changing access points and reducing environmental damage on and to the beach). The feedback from this consultation will influence the Plan which the Board will then implement. The iwi members of the Board will appoint up to half of the hearing panel for consent applications within the beach management area.
TAITOKERAU	26. Te Aupōuri		A statutory acknowledgement recognises the association between Te Aupōuri and a particular site and enhances Te Aupōuri's ability to participate in specified resource management processes. The Crown offers statutory acknowledgements over Paxton Point Conservation Area (including Rarawa Beach camp ground), Motuopao Island, Three Kings Islands (Manawatawhi), Kermadec Islands (Rangitahua), Simmonds Islands, North Cape Scientific Reserve

TAKITIMU	27. Ahuriri Hāpu	TE WHANGANUI-Ā-OROTU	In the Deed of Settlement the Crown acknowledges that Te Whanganui- ā-Orotu and the islands in it were prized taonga of Ahuriri Hapū and remain valued today. The Crown also recognises the role of Ahuriri Hapū as Kaitiaki of Te Muriwai o Te Whanga (the Ahuriri Estuary and catchment areas). In recognition of this, the settlement legislation will also establish a permanent statutory committee called Te Komiti Muriwai o Te Whanga. The purpose of the Komiti is to promote the protection and enhancement of the environmental, economic, social, spiritual, historical and cultural values of Te Muriwai o Te Whanga (Ahuriri Estuary) for present and future generations. Mana Ahuriri Trust will hold the permanent chair position and four of the eight seats. Other seats are held by the Department of Conservation, Hawke's Bay Regional Council, Napier City Council and Hastings District Council. Te Komiti Muriwai o Te Whanga will provide guidance and co-ordination in the management of Te Muriwai o Te Whanga to local authorities and Crown agencies that exercise functions in relation to Te Muriwai o Te Whanga. The Komiti will prepare and approve a plan for Te Muriwai o Te Whanga called the Te Muriwai o Te Whanga Plan. To assist Ahuriri Hapū to engage in management of Te Muriwai o Te Whanga, on the settlement date the Crown will provide Ahuriri Hapū with a $500,000 kaitiaki fund.
TAKITIMU	28. Maungaharuru-Tangitū Hapū		A Statutory Acknowledgement recognises the association between the Maungaharuru-Tangitū Hapū and a particular site or area and enhances the ability of the Hapū to participate in specified Resource Management processes. Deeds of Recognition oblige the Crown to consult with the Maungaharuru-Tangitū Hapū on specified matters and have regard to their views regarding their special associations with certain areas. The Crown offers the Maungaharuru-Tangitū Hapū Statutory Acknowledgements and Deeds of Recognition over the following areas:, the Hapū coastal marine area, rocks and reefs of Tangitū (coastline), Tangoio marginal strip, Waipātiki Beach marginal strip, Whakaari Landing Place Reserve.
TAKITIMU	29. Te Rohe o Te Wairoa		The settlement legislation will provide for the establishment of a joint board known as Te Rohe o Te Wairoa Reserves Board-Matangirau to jointly administer and manage the Ngamotu Lagoon Wildlife Management Reserve, the Whakamahi Lagoon Government Purpose (Wildlife Management) Reserve, the Rangi-houa/Pilot Hill Historic Reserve and two Local Purpose (Esplanade) Reserves. The board will comprise three members appointed by Tātau Tātau o Te Wairoa Trust and three members appointed by the Wairoa District Council.

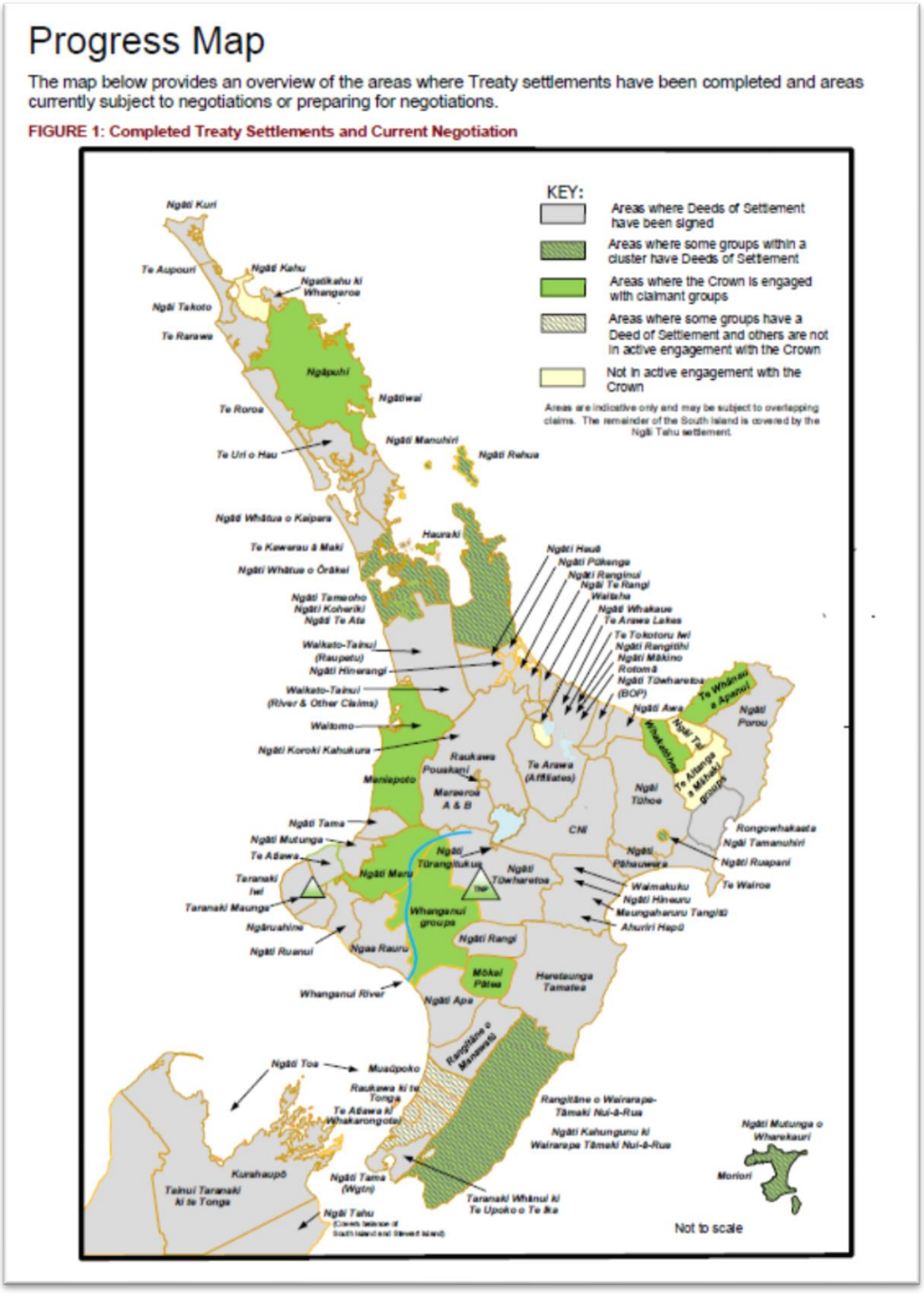
TAKITIMU	30. Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua	Wairarapa Moana Statutory Board	Joint redress legislation will provide for the establishment of a Wairarapa Moana Statutory Board (the Board). The Board will comprise 4 members appointed by the Settlement Trust (including two members representing Papawai Marae and Kohunui Marae), one member appointed by the Rangitāne Tū Mai Rā Trust, 2 members appointed by the Minister of Conservation, 2 members appointed by Wellington Regional Council and one member appointed by South Wairarapa District Council. The Board will act as a guardian of the Wairarapa Moana and the Ruamahanga River catchment for the benefit of the present and future generations by: administering the Wairarapa Moana reserves for the purposes set out in the Reserves Act 1977 and the joint redress legislation including to protect and enhance their cultural, spiritual and ecological values being the manager of the Wairarapa Moana marginal strips providing leadership on the sustainable management of the Wairarapa Moana and the Ruamahanga River catchment promoting the restoration, protection and enhancement of the social, economic, cultural, environmental and spiritual health and wellbeing of Wairarapa Moana and the Ruamahanga River catchment as they relate to natural resources.
TAMAKI MAKAURAU	31. Ngāti Manuhiri		Statutory Acknowledgements recognise the association between Ngāti Manuhiri and ability to participate in specified Resource Management Act processes. The Crown offers Statutory Acknowledgements over Ngāti Manuhiri coastal area of interest; the Hoteo, Puhoi, Pakiri, Matakana, Waiwerawera and Poutawa Rivers; Ngaroto lakes (Spectacle, Slipper, Tomarata and Ngaroto lakes); Tohitohi o Reipae (The Dome); Pohuehue Scenic Reserve; and Kawau Island.
TAMAKI MAKAURAU	32. Te Kawerau ā Maki	TAMAKI COLLECTIVE	Te Kawerau ā Maki will also receive cultural redress through Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed (the Tāmaki Collective), including: vesting of particular Crown-owned portions of maunga in Tāmaki Makaurau and motu of the inner Hauraki Gulf governance arrangements relating to four motu of the inner Hauraki Gulf
TAMAKI MAKAURAU	33. Ngāti Whātua o Kaipara	Te Kawenata Taiao o Ngāti Whātua o Kaipara	Te Kawenata Taiao o Ngāti Whātua o Kaipara (a Co-management Agreement) will be entered into on settlement between the Department of Conservation and Ngā Maunga Whakahii o Kaipara Development Trust. Te Kawenata Taiao o Ngāti Whātua o Kaipara provides a framework for how Ngāti Whātua o Kaipara and the Department of Conservation will establish and maintain a positive and enduring partnership regarding public conservation land within the Ngāti Whātua o Kaipara area of interest.

TAMAKI MAKAURAU	34. Ngāi Tai ki Tāmaki		The Statutory Acknowledgements are acknowledgements by the Crown of statements by Ngāi Tai ki Tāmaki of Ngāi Tai ki Tāmaki's special cultural, historical, or traditional association with certain areas of Crown-owned land. Relevant consent authorities (ie local authorities), the Environment Court and Heritage New Zealand Pouhere Taonga must have regard to these statements for certain purposes, in particular resource consent applications under the Resource Management Act 1991 for an activity within, adjacent to, or directly affecting a statutory acknowledgement area and certain applications under the Heritage New Zealand Pouhere Taonga Act 2014. The acknowledgements also require that the local authorities provide Ngāi Tai ki Tāmaki with summaries of all resource consent applications that may affect the areas named in these acknowledgements prior to any decision being made on those applications - a specified coastal marine area.
TAMAKI MAKAURAU	35. Ngāti Whātua o Kaipara		A Coastal Statutory Acknowledgement area - Kaipara Harbour. The Deed does not provide for cultural redress in relation to Kaipara Harbour, as that is to be developed in negotiations with the Crown that will include Ngāti Whātua o Kaipara at a future date.
TAURANGA MOANA	36. Ngāi Te Rangi and Ngā Pōtiki	WAIOROORO KI MAKETU	Coastal Statutory Acknowledgment - Waiorooro ki Maketu
TAURANGA MOANA	37. Ngāti Pūkenga		A Statutory Acknowledgement recognises the association between Ngāti Pūkenga and a particular site or area and enhances the iwi's ability to participate in specified resource management processes. The Crown offers a statutory acknowledgement over the following areas, Te Tumu to Waihi Estuary, Manaia Harbour
TE ARAWA	38. Ngāti Tuwharetoa (Bay of Plenty)	Matatā Scenic Reserve, Matatā Wildlife Refuge Reserve	A Joint Advisory Committee will be established over the Matatā Scenic Reserve and the Matatā Wildlife Refuge Reserve. The committee will be made up of equal numbers of members nominated by Ngāti Tuwharetoa (Bay of Plenty) and the Department of Conservation and will provide for the exchange of advice regarding each body's management of land under its respective ownership .
TE ARAWA	39. Waitaha		A Statutory Acknowledgement recognises the association between Waitaha and a particular site or area and enhances the ability of Waitaha to participate in specified Resource Management Act processes. The settlement provides statutory acknowledgements over the coastal area from Maketū to Mauao
TE MOANA O RAUKAWA	40. Ngāti Toa Rangātira	KAPITI ISLAND	Kapiti Island was, and is, a place of immense significance to Ngati Toa Rangatira. The Kapiti Island redress will continue to protect the high conservation values of Kapiti Island. Public access to the island will continue to be restricted. The Kapiti Island redress package includes: A Strategic Advisory Committee will be established with governance responsibilities over the Kapiti Island North Nature Reserve site and the Kapiti Island Nature Reserve site. The Committee will include Ngati Toa Rangatira and the Department of Conservation with provision for other iwi to be included in the future. Reserve site and the Kapiti Island Nature Reserve site will be jointly approved by the Strategic Advisory Committee and the Wellington/ Hawke's Bay Conservation Board.

TE MOANA O RAUKAWA	41. Ngāti Toa Rangātira	KAPITI ISLAND	A Statutory Acknowledgement recognises the association between Ngati Toa Rangatira and a particular site or area and enhances the iwi's ability to participate in specified Resource Management processes. Deeds of Recognition oblige the Crown to consult with Ngati Toa Rangatira on specified matters and have regard to their views regarding their special associations with certain areas. The Crown offers a Coastal Statutory Acknowledgement over the following areas, Te Tau Ihu coastal marine area, Cook Strait, Te Awarua-o-Porirua Harbour, Thoms Rock/Tokahaere, Kapukapuariki Rocks, Toka-a-Papa Reef, Tawhitikurī/Goat Point, Wellington Harbour (Port Nicholson).
TE MOANA O RAUKAWA	42. Ngāti Toa Rangātira	POUTIAKI	Poutiaki is the Ngati Toa Rangatira word for guardianship of an area. The redress recognises the role of Ngati Toa Rangatira as a kaitiaki of Cook Strait and the coastal marine area in Porirua Harbour, Port Underwood and Pelorus Sound. The Poutiaki redress primarily focuses on iwi identification of values, principles and issues in a Poutiaki plan which is to be produced by Ngati Toa Rangatira. The Poutiaki Plan will be considered by Regional Councils within the regional planning framework. Ngati Toa Rangatira will also be one of the interested parties invited to participate in a Cook Strait Forum to be chaired by the Wellington Regional and Marlborough District Councils. The forum will bring together Local and Central Government, iwi and other entities with interests in the Cook Strait to discuss issues of concern about the Cook Strait coastal marine area and share information.
TE MOANA O RAUKAWA	43. Ngāti Toa Rangātira		The Crown offers Statutory Acknowledgements (SA) and Deeds of Recognition (DoR) in relation to the following areas within Ngati Toa Rangatira's area of interest of Mana Island (SA, DoR), Red Rocks Scientific Reserve (SA, DoR), Pukerua Bay Scientific Reserve (SA, DoR), Oteranga Bay Marginal Strip (SA)
TE TAI RAWHITI	44. Ngai Tāmanuhiri		Statutory Acknowledgement recognise the association between Ngai Tāmanuhiri and a particular site or area and enhances Ngai Tāmanuhiri's ability to participate in specified Resource Management Act processes. The Crown offers Statutory Acknowledgements over the Ngāi Tāmanuhiri coastal marine area.
TE TAI RAWHITI	45. Ngai Tāmanuhiri		A Statutory Acknowledgement recognises the association between Ngai Tāmanuhiri and a particular site or area and enhances Ngai Tāmanuhiri's ability to participate in specified Resource Management Act processes. The Crown offers Statutory Acknowledgements over Waipaoa River, and the Ngāi Tāmanuhiri coastal marine area.
TE TAI RAWHITI	46. Ngai Tāmanuhiri		The settlement includes an undertaking to establish a Central Leadership Group, which will also include Rongowhakaata and Te Whakarau, to provide a forum for Tūranga iwi to engage with central government. The settlement will also establish through legislation a Local Leadership Body with members appointed by Ngai Tāmanuhiri, Rongowhakaata, Te Whakarau and the Gisborne District Council to enhance the engagement of Tūranga iwi in local decision making.

TE TAU IHU	47. Ngāti Apa ki te Rā Tō		The Crown offers a Coastal Statutory Acknowledgment over all the Te Tau Ihu coastal marine area north of the Ngāi Tahu takiwā. Acknowledgements and deeds in the agreement relate to the Marine Reserve and Westhaven (Whanganui Inlet)
TE TAU IHU	48. Ngāti Kōata	TE TAU IHU COASTAL MARINE AREA	The Crown offers a Coastal Statutory Acknowledgement over the following area: Te Tau Ihu coastal marine area. Statutory Acknowledgments and Deeds of Recognition are non-exclusive redress, meaning more than one iwi can have a Statutory Acknowledgment or Deed of Recognition over the same site.
TE TAU IHU	49. Ngāti Kōata	RURUKU NGĀI TAI	The Deed of Settlement provides for Ruruku Ngā Tai, a statement of the maritime association of Ngāti Kōata. It includes an Iwi Management Plan lodged with Tasman District Council, Nelson City Council and Marlborough District Council.
TE TAU IHU	50. Ngāti Kuia	TE TAU IHU COASTAL MARINE AREA	The Crown offers a Coastal Statutory Acknowledgement over the following area: Te Tau Ihu coastal marine area. Statutory Acknowledgments and Deeds of Recognition are non-exclusive redress, meaning more than one iwi can have a Statutory Acknowledgment or Deed of Recognition over the same site.
TE TAU IHU	51. Ngāti Kuia		The Crown offers Statutory Acknowledgements and Deeds of Recognition in relation to the following Titi Island Nature Reserve and Chetwode Islands Nature Reserve and associated rocks Pelorus Sound, Takapourewa (Stephens Island), Parikarearea (Maungatapu) Tîtîrangi Bay, Marlborough Sounds, Te Matau (Separation Point) and Jointly with other iwi Tarakaipa Island, Paroroirangi (Kenepuru Sound), Te Ope o Kupe (Anamahanga/Port Gore), Puhikereru/Mt Furneaux, The Brothers Islands, Kohi te Wai (Nelson)
TE TAU IHU	52. Ngāti Rārua	TE TAU IHU COASTAL MARINE AREA	The Crown offers a Coastal Statutory Acknowledgment over all the Te Tau Ihu coastal marine. Statutory Acknowledgments and Deeds of Recognition are non-exclusive redress, meaning more than one iwi can have a Statutory Acknowledgment or Deed of Recognition over the same site.
TE TAU IHU	53. Ngāti Tama ki Te Tau Ihu	TE TAU IHU COASTAL MARINE AREA	The Crown offers a Coastal Statutory Acknowledgment over all the Te Tau Ihu coastal marine. Statutory Acknowledgments and Deeds of Recognition are non-exclusive redress, meaning more than one iwi can have a Statutory Acknowledgment or Deed of Recognition over the same site.
TE TAU IHU	54. Rangitāne o Wairau	TE TAU IHU COASTAL MARINE AREA	The Crown offers a Coastal Statutory Acknowledgment over all the Te Tau Ihu coastal marine area north of the Ngāi Tahu takiwā. Acknowledgements and deeds in the agreement relating to Wairau Lagoons, Paroroirangi, Te Ope a Kupe, Puhikereru, The Brothers Islands, Kohi te Wai
TE TAU IHU	55. Te Ātiawa o Te Waka-a-Māui		Kaitiaki The settlement provides for the appointment of Te Ātiawa as statutory kaitiaki with the ability to provide advice in relation to the restoration of native flora and fauna in the following areas: Matapara/Pickersgill Island, Blumine Island, Allports Island, Mabel Island, Amerikiwhati Island. The Crown also acknowledges the role of Te Ātiawa as kaitiaki over the coastal marine area in Queen Charlotte Sound. Te Ātiawa will produce a kaitiaki plan which will be taken into account by the Marlborough District Council.

TE TAU IHU	56. Te Ātiawa o Te Waka-a-Māui		Waikawa Bay and Waikawa Marina The settlement provides for the Crown to provide Te Ātiawa with advice and/or expertise to undertake a study evaluating the options to improve the quality of the marine environment in Waikawa Bay.
TE TAU IHU	57. Te Ātiawa o Te Waka-a-Māui		Memorandum of Understanding. The settlement provides for a Memorandum of Understanding to be created between Te Ātiawa and the Department of Conservation. The Memorandum of Understanding will require that when the Department of Conservation undertake certain activities within Matapara/Pickersgill Island and Otuwhero (Motueka), the trustees of Te Ātiawa Trust will be consulted.



Map 59: Completed Treaty Settlements & Current Negotiations 2020[1664]

[1664] Te Arawhiti, Office for Māori Crown Relations, *Te Kahui Whakatau (Treaty Settlements) Year-to-date Progress Report 1 July 2019-31 March 2020,* (Te Arawhiti, Office for Maori Crown Relations, Wellington, 2020)

Claimant Group Status Summary by Stages in the Negotiation Process

The following table indicates the progress and status of claimant groups in negotiations. It includes settlements that have been implemented. The table is broken down into regional groupings.

GROUP	Mandate recognised by Crown	Terms of Negotiation	Agreement in Principle signed	Deed of Settlement signed	Enacted through legislation	Negotiation status
Te Tai Tokerau						
Te Uri o Hau	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 17 October 2002*
Te Roroa	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 25 September 2008*
Te Rarawa	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 9 September 2015*
Te Aupōuri	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 9 September 2015*
Ngāi Takoto	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 9 September 2015*
Ngāti Kuri	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 9 September 2015*
Ngāti Kahu	✓	✓	✓			*A collective Agreement in Principle for Te Hiku iwi was signed on 16 January 2010*
Ngāpuhi	✓	✓				*Terms of Negotiation were signed on 22 May 2015*
Ngatikahu ki Whangaroa	✓	✓	✓	✓		*Legislation for this settlement was passed on 16 August 2017*
Ngātiwai						*A Deed of Mandate was recognised by the Crown on 21 October 2015*
Tāmaki Makaurau						
Ngāti Whātua Ōrākei	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 19 November 2012*
Ngāti Whātua o Kaipara	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 6 June 2013*
Te Kawerau ā Maki	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 9 September 2015*
Ngāti Manuhiri	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 19 November 2012*
Ngāti Rehua-Ngātiwai ki Aotea	✓	✓	✓			*A Deed of Settlement was initialled on 19 December 2016*
Tāmaki Collective	✓		✓	✓	✓	*Legislation for this settlement was passed on 24 July 2014*
Ngāti Tamaoho	✓	✓	✓	✓	✓	*Legislation for this settlement was passed on 5 July 2018*
Ngāti Koherīki	✓	✓	✓			*Terms of Negotiation were signed on 6 June 2013*
Ngāti Te Ata	✓	✓	✓	✓		*Terms of Negotiation were signed on 29 June 2011*
Te Ākitai Waiohua	✓	✓	✓	✓		*An Agreement in Principle was signed on 16 December 2016*
Ngāti Whātua remaining and Kaipara Harbour	✓	✓	✓	✓		*An Agreement in Principle was signed on 18 August 2017*

Table 14: Treaty Settlement Negotiations 2018

at 5. Online at: https://www.govt.nz/assets/Documents/OTS/Quarterly-reports/Quarterly-report-to-31-Mar-2020.pdf (Accessed May 2020).

Hauraki						
Hauraki Collective						*A Deed of Settlement was initialled on 22 December 2016*
Marutūāhu Collective						*A Record of Agreement was signed on 17 May 2013*
Ngāi Tai ki Tāmaki						*Legislation for this settlement was passed on 28 June 2018*
Ngāti Rahiri Tumutumu						*A Deed of Settlement was initialled on 13 July 2017*
Hako						*An Agreement in Principle was signed on 22 July 2011*
Ngāti Hei						*A Deed of Settlement was signed on 17 August 2017*
Ngāti Paoa						*A Deed of Settlement was initialled on 18 August 2017*
Ngāti Porou ki Harataunga ki Mataora						*An Agreement in Principle was signed on 22 July 2011*
Ngāti Tara Tokanui						*A Deed of Settlement was initialled on 1 June 2017*
Ngaati Whanaunga						*A Deed of Settlement was initialled on 25 August 2017*
Te Patukirikiri						*A Deed of Settlement was initialled on 8 September 2017*
Ngāti Tamaterā						*A Deed of Settlement was initialled on 8 September 2017*
Ngāti Maru (Hauraki)						*A Deed of Settlement was initialled on 8 September 2017*
Waikato						
Waikato-Tainui (Raupatu Claim)						*Legislation for this settlement was passed on 3 November 1995*
Waikato-Tainui (River interests)						*Legislation for this settlement was passed on 6 May 2010*
Raukawa (River interests)						*Legislation for this settlement was passed on 21 October 2010*
Te Arawa Affiliates (River interests)						*Legislation for this settlement was passed on 21 October 2010*
Ngāti Tūwharetoa (River interests)						*Legislation for this settlement was passed on 21 October 2010*
Ngāti Maniapoto (River interests)						*Legislation for this settlement was passed on 28 March 2012*
Maniapoto						*An Agreement in Principle was signed on 15 August 2017*
Raukawa (Comprehensive)						*Legislation for this settlement was passed on 12 March 2014*
Ngāti Koroki Kahukura						*Legislation for this settlement was passed on 10 December 2014*
Ngāti Hauā						*Legislation for this settlement was passed on 10 December 2014*
Maraeroa A and B Blocks (Rereahu)						*Legislation for this settlement was passed on 31 July 2012*
Ngāti Hinerangi						*An Agreement in Principle was signed on 12 December 2015*
Te Moana a Toi						
Ngāti Tūwharetoa (Bay of Plenty)						*Legislation for this settlement was passed on 23 May 2005*
Ngāti Awa						*Legislation for this settlement was passed on 24 March 2005*
Ngāti Ranginui						*Legislation for this settlement was introduced on 30 October 2015*
Ngāti Pūkenga						*Legislation for this settlement was passed on 10 August 2017*
Ngāi Te Rangi						*Legislation for this settlement was introduced on 2 May 2016*
Tauranga Moana Iwi Collective						*Legislation for this settlement was introduced on 30 October 2015*
Ngāitai (ki Tōrere)						*A Deed of Mandate was recognised by the Crown on 4 June 2014*
Whakatōhea						*An Agreement in Principle was signed on 18 August 2017*

Te Whānau a Apanui						*Terms of Negotiation were signed on 7 September 2017*
CNI						
Central North Island Collective						*Legislation for this settlement was passed on 25 September 2008*
Ngāti Manawa						*Legislation for this settlement was passed on 28 March 2012*
Ngāti Whare						*Legislation for this settlement was passed on 28 March 2012*
Ngāi Tūhoe						*Legislation for this settlement was passed on 24 July 2014*
Ngāti Tūwharetoa						*Legislation for this settlement was introduced on 1 August 2017*
Te Arawa						
Te Arawa Lakes						*Legislation for this settlement was passed on 25 September 2006*
Te Arawa Affiliates						*Legislation for this settlement was passed on 25 September 2008*
Ngāti Mākino						*Legislation for this settlement was passed on 31 July 2012*
Waitaha						*Legislation for this settlement was passed on 6 June 2013*
Pouakani						*Legislation for this settlement was passed on 12 December 2000*
Ngāti Tūrangitukua						*Legislation for this settlement was passed on 14 October 1999*
Ngāti Rangiteaorere (Te Tokotoru)						*Legislation for this settlement was passed on 9 April 2014*
Tapuika (Te Tokotoru)						*Legislation for this settlement was passed on 9 April 2014*
Ngāti Rangiwewehi (Te Tokotoru)						*Legislation for this settlement was passed on 9 April 2014*
Ngāti Whakaue						*Terms of Negotiation were signed on 3 April 2014*
Ngāti Rangitihi						*Terms of Negotiation was signed on 31 October 2015*
Te Tairāwhiti						
Tūranganui-a-Kiwa						*An Agreement in Principle was signed on 29 August 2008*
Rongowhakaata						*Legislation for this settlement was passed on 31 July 2012*
Ngāi Tamanuhiri						*Legislation for this settlement was passed on 31 July 2012*
Ngāti Porou						*Legislation for this settlement was passed on 29 March 2012*
Takitimu						
Ngāti Pāhauwera						*Legislation for this settlement was passed on 29 March 2012*
Maungaharuru Tangitū Hapū						*Legislation for this settlement was passed on 9 April 2014*
Ngāti Hineuru						*Legislation for this settlement was passed on 29 June 2016*
Ahuriri Hapū						*A Deed of Settlement was signed on 2 November 2016*
Ngāti Kahungunu ki Heretaunga Tamatea						*Legislation for this settlement was passed on 21 June 2018*
Te Tira Whakaemi o Te Wairoa						*Legislation for this settlement was passed on 6 September 2018*
Rangitāne o Wairarapa-Tāmaki Nui ā Rua						*Legislation for this settlement was passed on 10 August 2017*
Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua						*A Deed of Settlement was initialled on 22 March 2018*
Hawkes Bay Regional Planning Committee Bill						*Legislation was passed on 12 August 2015*

Te Tai Hauāuru						
Ngāti Ruanui						*Legislation for this settlement was passed on 5 May 2003*
Ngāti Tama						*Legislation for this settlement was passed on 25 November 2003*
Ngaa Rauru Kiitahi						*Legislation for this settlement was passed on 27 June 2005*
Ngāti Mutunga						*Legislation for this settlement was passed on 21 November 2006*
Ngāti Apa (North Island)						*Legislation for this settlement was passed on 9 December 2010*
Te Iwi o Whanganui (River Claim)						*Legislation for this settlement was enacted on 15 March 2017*
Rangitāne o Manawatū						*Legislation for this settlement was passed on 7 December 2016*
Te Ātiawa (Taranaki)						*Legislation for this settlement was passed on 30 November 2016*
Ngāruahine						*Legislation for this settlement was passed on 30 November 2016*
Taranaki Iwi						*Legislation for this settlement was passed on 30 November 2016*
Ngāti Rangi						*Legislation for this settlement was introduced on 21 June 2018*
Ngāti Maru						*An Agreement in Principle was signed on 20 December 2017*
Te Korowai o Wainuiārua						*Terms of Negotiation were signed on 2 February 2017*
Taranaki Maunga						*A Record of Understanding was signed on 20 December 2017*
Whanganui iwi – Ngāti Hāua						*Terms of Negotiation were signed on 24 July 2017*
Whanganui Lands – Southern Groups						*Terms of Negotiation were signed on 24 July 2017*
Te Whanganui ā Tara / Te Waipounamu						
Ngāi Tahu						*Legislation for this settlement was passed on 1 October 1998*
Taranaki Whānui ki Te Upoko o Te Ika						*Legislation for this settlement was passed on 30 July 2009*
Muaūpoko						*Terms of Negotiation were signed on 14 December 2013*
Ngāti Kuia						*Legislation for this settlement was passed on 17 April 2014*
Ngāti Apa ki te Rā Tō						*Legislation for this settlement was passed on 17 April 2014*
Rangitāne o Wairau						*Legislation for this settlement was passed on 17 April 2014*
Ngāti Toa Rangātira						*Legislation for this settlement was passed on 17 April 2014*
Ngāti Kōata						*Legislation for this settlement was passed on 17 April 2014*
Te Ātiawa o Te Waka-ā-Maui						*Legislation for this settlement was passed on 17 April 2014*
Ngāti Rārua						*Legislation for this settlement was passed on 17 April 2014*
Ngāti Tama ki Te Tau Ihu						*Legislation for this settlement was passed on 17 April 2014*
Ngāti Tama (Wellington)						*Terms of Negotiation were signed on 28 March 2014*
Moriori						*An Agreement in Principle was signed on 16 August 2017*
Ngāti Mutunga o Wharekauri						*Terms of Negotiation were signed on 16 March 2015*

A. Bibliography

PRIMARY SOURCES

Statutes

New Zealand

1. Conservation Act 1987.
2. Crown Minerals Act 1991.
3. Education Act 1964.
4. Environment Canterbury (Transitional Governance Arrangements) Act 2016.
5. Environmental Protection Authority Act 2011.
6. Environmental Reporting (Topics for Environmental Reports) Regulations 2016.
7. Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
8. Fiordland (Te Moana o Atawhenua) Marine Engagement Act 2005.
9. Fisheries Act 1983.
10. Fisheries Act 1996.
11. Fisheries (Amateur Fishing) Regulations 1986.
12. Fisheries (Customary Fishing) Regulations 1998.
13. Fisheries (Kaimoana Customary Fishing) Regulations 1998.
14. Fisheries (South Island Customary Fishing) Regulations 1999.
15. Foreshore and Seabed Act 2004
16. Game Animal Council Act 2013.
17. Hauraki Gulf Marine Park Act 2000.
18. Hazardous Substances and New Organisms Act 1986.
19. Iwi and Hapū of Te Rohe o Te Wairoa Claims Settlement Act 2018.
20. Kaikoura (Te Tai o Marokura) Marine Management Act 2014.
21. Kaimoana Customary Fishing Regulations 1998.
22. Kermadec Ocean Sanctuary Bill 2016.
23. Local Government Act 2002.
24. Māori Commercial Aquaculture Claims Settlement Act 2004.
25. Māori Fisheries Act 1989.
26. Māori Fisheries Act 2004.
27. Maraeroa A and B Blocks Claims Settlement Act 2012.
28. Marine Coastal Area (Takutai Moana) Act 2011.
29. Native Land Act 1909..
30. New Zealand Constitution Act 1852.
31. Ngaa Rauru Kiitahi Claims Settlement Act 2005.
32. Ngāi Tahu Claims Settlement Act 1998.
33. Ngāti Awa Claims Settlement Act 2005.
34. Ngāti Hauā Claims Settlement Act 2014.
35. Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014.
36. Ngati Kahu ki Whangaroa Claims Settlement Act 2017.
37. Ngāti Koroki Kahukura Claims Settlement Act 2014.

38. Ngāti Kuri Claims Settlement Act 2015.
39. Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.
40. Ngāti Manuhiri Claims Settlement Act 2012.
41. Ngāti Pūkenga Claims Settlement Act 2017.
42. Ngāti Tamaoho Claims Settlement Act 2018.
43. Ngati Toa Rangatira Claims Settlement Act 2014.
44. Ngati Tuwharetoa, Ruakawa and Te Arawa River Iwi Waikato River Act 2010
45. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019
46. Nga Wai o Maniapoto (Waipa River) Act 2012.
47. Protected Objects Act 1975.
48. Rangitāne Tū Mai Rā (Wairarapa Tamaki nui-ā-Rua) Claims Settlement Act 2017,
49. Raukawa Claims Settlement Act 2014,
50. Resource Management Act 1991.
51. Resource Management Amendment Act 1997.
52. Resource Legislation Amendment Act 2017.
53. Resource Management Legislation Bill 2015.
54. Resource Management Amendment Act 2005.
55. Tapuika Claims Settlement Act 2014.
56. Te Arawa Lakes Settlement Act 2006.
57. Te Aupouri Claims Settlement Act 2015.
58. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
59. Te Uri o Hau Claims Settlement Act 2002.
60. Treaty of Waitangi Act 1975.
61. Treaty of Waitangi (Fisheries Claims Settlement) Act 1992.
62. Urewera Act 2014.
63. Whanganui River in Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
64. Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.
65. Waitakere Ranges Heritage Area Act 2008.

UK and Wales

1. An Act to Suspend the New Zealand Government Act 1846, Charter and Instructions 1848 (U.K) Vict. 11, c.5.
2. English Laws Act 1908.
3. New Zealand Government Act 1846, (U.K).
4. New Zealand Constitution Act 1852, (U.K).

Canada

1. Act Respecting the Cree Regional Authority, R.S.Q., c. A-6.1.
2. British North America Act 1867
3. Canada Corporations Act, R.S.C. 1970, c. C-32.
4. Constitution of Canada 1982
5. First Nations Governance Act (2002) Bill C-61.
6. Indian Act 1876, S.C 1876.

7. Indian Act 1970, R.S.C I.C-6, s. 88 as amended.
8. Indian Act 1990.
9. Indian Act, R.S.C 1985.
10. Municipalities Act 1999.
11. Sechelt Indian Band Self-Government Act SC 1986 – C-93.
12. The Nunavut Act 1993 (Statutes of Canada 1993, Ch. 28).
13. Sechelt and Indian Government District Enabling Act 1987, S.B.C c. 16.
14. Cree-Naskapi (of Quebec) Act 1984
15. Act Concerning Northern Villages and the Kativik Regional Government 1978.

Australia

1. Environment Protection and Biodiversity Conservation Act 1999
2. Fisheries Act 1994
3. Great Barrier Reef Marine Park Act 1975
4. Marine Parks Act 1982,
5. National Strategy for the Conservation of Australian Species and Communities Threatened with Extinction, the Nature Conservation Act 1992,
6. Native Title Act 1993 (Commonwealth), No.110 of 1993.
7. Queensland Nature Conservation (Wildlife) Regulation 1994.

Case Law

USA

1. *Jones v Meehan* (1899) 175, US 1
2. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).
3. *Worcester v State of Georgia* 31 U.S (6 Pet.) 515 (1832) at 542-43.

England and Wales

1. *Oxonica Energy Ltd v Neuftec Ltd,* (2008) EWHC 2127 (Pat) items 88-93
2. *The Case of Tanistry* (1608) Davies 28 (K.B); *Memorandum* (1722) 2 P Wms 75 (P.C);
3. *Campbell v Hall* (1774) 1 Cowp 204 (K.B);

Nigeria

1. *Amodu Tijani v Secretary, Southern Nigeria*, (1921), 2 AC 399

Australia

1. *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia,* [2013] HCA 33.
2. *Mabo v Queensland,* (1992) 175 C.L.R 1, 41-2
3. *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998), Federal Court.
4. *Western Australia v Ward* [2002] HCA 28, (2002) 191 ALR 1.

5. *Wik Peoples v The State of Queensland* [1996] HCA 40, (1996) 187 CLR 1 (23 December 1996), High Court.
6. *Yanner v Eaton* [1999] HCA 53, (1999) 201 CLR 351 at 365-366.

Canada

1. *Afton Band of Indians v A.G* (N.S) [1978] 3 R.P.R 298 (N.S.S.C., T.D);
2. *Attorney-General of Ontario v Bear Island,* [1985] 1 CNLR 1, 31-2 Ont .S.C.
3. *British Columbia Terms of Union,* R.S.C 1985, Appropriate II, No.
4. *Cache Creek Motors Ltd v Porter* (1980), 14 B.C.L.R 13 (B.C.S.C).
5. *Calder v Attorney-General of British Columbia* (1973) 34 D.L.R. (3rd) 145.
6. *Campbell v B.C (A.G),* [2000] 4 C.N.L.R. 1 (B.C.S.C).
7. *Clow Darling Ltd v Big Trout Lake Band of Indians* [1990] 4 C.N.L.R 7 (Ont. D.C).
8. *Daniels* v *The Queen*, [1968] S.C.R. 517;
9. *Delgamuukw v British Columbia* [1993] 5 C.N.L.R 1, 104 D.L.R 470 at 517 (B.C.C.A) reversing [1991] 5 C.N.L.R 1, 79 D.L.R (4th) 185 (B.C.S.C) at 641.
10. *Delgamuukw* v *British Columbia*, [1997] 3 S.C.R. 1010;
11. *Guerin v R* [1984] 2 S.C.R. 335, 336; [1985] 1 CNLR 120.
12. *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 S.C.R 511 (Supreme Court of Canada).
13. *Isolation Sept-Iles Inc. v Montagnais de Sep-Iles ef Maliotenam* [1989] 2 C.N.L.R 49 (Que. S,C).
14. *Logan v Styres* (1959), 20 D.L.R (2d) 416 (Ont. H.C).
15. *Mathias v Findlay* (sub.nom. *Joe v Findlay*) (1978) 4 W.W.R 653 (B.C.S.C); (1980), 109 D.L.R (3rd) 747 (B.C.S.C);
16. *Mintuck v Valley River Band* 63A [1976] 4 W.W.R 543 (Man. Q.B); [1977] 2 W.W.R 309 (Man.C.A);
17. *Mohawks of the (Bay of Quinte) Tyendinega Mohawk Territory (Re),* [2001] 1 C.N.L.R. 195 (Can. Indust. Rels. Bd) at paras. 28-9.
18. *Pawis v R* [1979] 2.C.N.L.R 52 (F.C.T.D).
19. *R v Adams,* (1996) 137 D.L.R (4th) 289.
20. *R v Cochrane*, [1997] 3 W.W.R 660 (Man. Co. Ct)
21. *R v Côtē* (1996) 138 DLR 385 at 405.
22. *R*. v *Derricksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.).
23. *R*. v *Gladstone*, [1996] 2 S.C.R. 723;
24. *R.* v. *George*, [1966] S.C.R. 267;
25. *R.* v *Marshall [No. 2]*, [1999] 3 S.C.R. 533.
26. *R v Pamajewon* [1996] 2 S.C.R 821.
27. *R v Peter Ballantyne Band* [1987] 1 C.N.L.R 67 (Sask. Q.B).
28. *R v Sparrow* [1990] 1 SCR 1075, at 1099.
29. *R v Van der Peet* (1996) 2 SCR 507, at 538-9; 137 DLR (4th) at 634 – 35
30. *R v. Syliboy* [1929] 1 D.L.R 307 (N.S.C.C).
31. *R.* v *Sikyea*, [1964] S.C.R. 642;
32. *Simon v The Queen* [1985] 2 SCR 401.

33. *Springhill Lumber v Lake St. Martin Indian Band* [1986] 2 C.N.L.R 179 (Man.Q.B)
34. *St Catherines Milling and Lumber Co. v The Queen* (1887) 14 A.C. 46.

Peru

1. *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009.

Belize

1. *Cal & Ors v Attorney-General of Belize & Ors,* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct.) at 132.

New Zealand

1. *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).
2. *Attorney-General v The Trustees of the Motiti Rohe Moana Trust and New Zealand Māori Council* [2017] NZHC 1429.
3. *Attorney-General v The Trustees of the Motiti Rohe Moana Trust and New Zealand Māori Council* [2017] NZHC 1429.
4. *Baldick v Jackson* (1910) 30 NZLR 343 (HC).
5. *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 178.
6. *Bleakely v Environmental Risk Management Authority,* [2001] NZLR 213 (HC) at 73.
7. *Burkett v Tauranga District Court* [1992] 3 NZLR 206,
8. *Confederation of Chiefs of the United Tribes of Nu Tireni (New Zealand) v Director-General of Fisheries* (HC, 29 April 1999, M298-SD/99 Unreported);
9. Duncan, C.J, *Hoani Te Heu Tukino v Aotea District Māori Land Board: Māori Land Administration in West Taupo 1906-41* (LLB (Hons) Research Paper, Law Faculty, Victoria University of Wellington, 1994)
10. *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 (New Zealand Supreme Court of New Zealand) at 619.
11. *Fitzgerald v Muldoon* (1976) 2 NZLR 616 at 617
12. *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 273.
13. *Friends and Community of Ngawha Inc v Minister of Corrections* (2002) 9 ELrNZ, [2003] NZRMA 272 (CA).
14. *Gill v Rotorua District Council* [1993] 2 NZRMA 604 (New Zealand Planning Tribunal) at 616–617.
15. *Greensil v Waikato Regional Council* (W17/95, 6 March 1995).
16. *Haddon v Auckland Regional Council*, [1994] NZRMA 49 at 60–61.
17. *Hauraki Māori Trust Board v Waikato Regional Council* (High Court Auckland CIV-2003-485-999, 3 April 2004) at [28].
18. *Hauraki Native Land Court* (MB 1 186) at 49.
19. *Heneiti Rirerire Arani v Public Trustee* (1919) [1840-1932] NZPCC 1;
20. *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308.
21. *Hokio Trusts v Manawatu-Wanganui Regional Council* [2017] NZHC 1355 (New Zealand High Court) at [35–36].
22. *Huakina Development Trust v Waikato Valley Authority* [1987] NZHC 130.
23. *Kauwaeranga Judgment* (1870) Chief Judge F.D Fenton.
24. *Kemp v Queenstown Lakes District Council,* [2000] NZRMA 289.

25. *MMainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 (New Zealand Environment Court) at 466.
26. *Marr v Bay of Plenty Regional Council,* [2010] NZEnv C 347.
27. *McGuire v Hastings District Council* [2001] NZRMA 557 at 561.
28. *McGuire v Hastings District Council* [2001] UKPC 43 (Judicial Committee of the Privy Council); [2001] NZRMA 557 at 594.
29. *McIntyre v Christchurch City Council* [1996] NZRMA 289 at 307.
30. *Ministry of Transport v Noort* [1992] 3 NZLR 260, at 277
31. *New Zealand Māori Council v Attorney-General* [1987] 1NZLR 641 (CA) at 682.
32. *New Zealand Māori Council v Attorney-General* [1994] [1992] 1 NZLR 513 per Lord Wolf at 516.
33. *New Zealand Māori Council v Attorney-General,* [1987] 1 NZLR 641.
34. *New Zealand Māori Council v Attorney-General,* [1994] 1 NZLR 513 at 517 (Judicial Committee of the Privy Council).
35. *Ngai Tahu Māori Trust Board v Director General of Conservation,* [1995] 3 NZLR 553 (CA) at 560, 663.
36. *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.
37. *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*, [2017] NZEnvcC 73, at 108–111.
38. *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*, [2017] NZEnvcC 73, at 107.
39. *Ngakorokoro,* Auckland Māori Appellate Court Minute Book, 1942) at 137.
40. *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA)
41. *Ngāti Hokopu ki Hokowhitu v Whakatāne District Council* (2002) 9 ELRNZ 111 (NZEnvC).
42. *Ngāti Makino Heritage Trust v Bay of Plenty Regional Council* [2014] NZEnvC 25 (New Zealand Environment Court) at [19].
43. *Ngāti Ruahine v Bay of Plenty Regional Council*, [2012] NZHC 2407 (New Zealand High Court).
44. *Ngāti Ruahine v Bay of Plenty Regional Council*, [2012] NZHC 2407.
45. *Nireaha Tamaki v Baker* (1901) NZPCC 371, 382
46. *Norris v Northland Regional Council* [2012] NZEnvC 124 (New Zealand Environment Court) at [8–12].
47. *Paihia & District Citizens Association Inc v Northland Regional Council (*A71/95).
48. *Paki v Attorney-General (No 1)* [2012] NZSC 50, [2012] 3 NZLR 277 at para 18.
49. *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 at para 67.
50. *Proprietors of Wakatu v Attorney-General,* [2017] NZSC 17 (Supreme Court of New Zealand).
51. *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC);
52. *Purification Technologies Ltd v Taupo District Council,* [1995] NZRMA 197.
53. *R v Côtē* (1996) 138 DLR 385 at 405.
54. *R v Kaihau* (AP 5/2000, High Court, Palmerston North,
55. *R v Knowles* (12 October 1998; CA 146/98; Unreported);
56. *R v Mason,* (High Court, CRI 2011 – 070-1249, 3 May 2012).
57. *R v Symonds* (1847) NZPCC 387
58. *Re 'The Lundon and Whitaker Claims Act 1871* (1871) 2 N.Z (C.A) 41, 49.
59. *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 at 671.
60. *Re the Ninety-Mile Beach,* (1957) 85 Northern Minute Books, No 85, 1957) at 126.
61. *Re Tipene,* [2016] NZHC 3199.

62. *Re Tipene,* [2016] NZHC 3199.
63. *Sustainable Matatā v Bay of Plenty Regional Council*, [2015] NZEnvC 90.
64. *Takamore v Clarke* (Court of Appeal, CA525/2009, 23 November 2011);
65. *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at para 73.
66. *Te Heu Tukino v Aotea District Māori Land Board* [1941] AC 308 at 324.
67. *Te Maru o Ngati Rangiwewehi v Bay of Plenty Regional Council,* [2008] NZRMA 395;
68. *Te Runanga o Muriwhenua Inc v Attorney- General* [1990] 2 NZLR 641.
69. *Te Rūnanga o Muriwhenua v Te Rūnanganui o Te Upoko o Te Ika* [1996] 3 NZLR 10, 16).
70. *Te Rūnanga o Ngāti Pikiao v Minister for the Environment,* (Unreported Judgment, High Court, Wellington, 15 June 1999, CP113/96).
71. *Te Runanga o Ngati Taumarere v Northland Regional Council,* [1996] NZRMA 77.
72. *Te Rūnanga o te Ika Whenua v Attorney- General* [1990] 2 NZLR 641.
73. *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (4 August 1998)(Unreported, High Court, Auckland Registry, CP 395/93 (Wgtn) Anderson J.
74. *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680)
75. *Thames-Coromandel District Council v Pemberton* [2016] NZEnvC 221 (New Zealand Environment Court).
76. *The Marine and Coastal Area (Takutai Moana) Act 2011 v Ngāti Pāhauwera Development Trust*, (CIV 2011 485 821, Unreported, High Court Decision, Wellington, 15 March 2017).
77. *The Taranaki Fish and Game Council v McRitchie,* (Wanganui District Court, unreported, 27 February 1997, ORN: 5083006813-14, per Becroft J (overturned by the High Court, 1998).
78. *The Taranaki-Whanganui Conservation Board and Others v The Environmental Protection Authority,* [2018] NZHC 2217.
79. *Treaty Tribes Coalition v Urban Māori Authorities* [1997] 1 NZLR 513, 517 (PC).
80. *Waikato Maniapoto Minute Book*. (No.28, National Archives of New Zealand, Wellington, New Zealand) at 66-67.
81. *Wakatu Inc v Tasman District Council* [2012] NZRMA 363 at para 70.
82. *Wallis v Solicitor-General for New Zealand* [1903] AC 173 (PC).
83. *Warren v The Police* (AP 133/99, High Court, Hamilton, 9 February 2000)
84. *Watercare Services Ltd v Minhinnick* (1997) 3 ELRNZ 511 (New Zealand Court of Appeal).
85. *Watercare Services Ltd v Minhinnick*, [1998] 294 (CA) at 305.
86. *Wi Parata v Bishop of Wellington* (1877) 3 N.Z Jur. (N.S) S.C 79.

International Court of Justice

1. *Western Sahara Advisory Opinion*, 1975 ICJ Representative 12 (Oct 16).

Inter-American Court of Human Rights Cases

2. *Case of the Indigenous Community Sawhoyamaxa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006);
3. *Case of the Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 125 (17 June 2005).

4. I/A HR Court, *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua,* Series C (No. 79) (2001) (Awas Tingni).
5. The Awas Tingni community's Indigenous tenure was deserving of the same equal protection as non-Indigenous tenures. See I/A HR Court, *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua,* Series C (No. 79) (2001) (Awas Tingni). *Saramaka People v. Suriname*, Judgment of the Inter-American Court of Human Rights, 28 November 2007.

United Nations Human Rights Committee Cases

1. *Apirana Mahuika et al v New Zealand* Communication No 547/1993 (Views adopted 27 October 2000), UNGA 'Report of the Human Rights Committee Vol II' 56th Session Supp No 40 UN Doc A/56/40.
2. *Case of the Indigenous Community Sawhoyamaxa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006);
3. *Case of the Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 125 (17 June 2005).
4. *Lansmann et al v Finland No 1* Communication No 511/1992 (Views adopted 26 October 1994) UN Doc CCPR/C/52/D/511/1992, UN General Assembly 'Report of the Human Rights Committee Vol II', 50th Session Supp No 40 UN Doc A/50/40 at pp 66-76;
5. Report of the Human Rights Committee *Lubicon Lake Band v Canada,* Communication No 167/1984 (26 March 1990) UN Doc Supp No 40 A/45/40, at 1 para 2.3. UN Human Rights Committee (UNHRC), *Lubicon Lake Band v Canada* Communication No 167/1984 (26 March 1990), UN Doc Supp No 40 (A/45/40);
6. UN Human Rights Committee 'CCPR General Comment 23 Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5 para 7.
7. UNHRC *Länsman et al v Finland* Communication No 511/1992 (1992) UN Doc CCPR/C/52/D/511/1992 para 9.2–9.3 (land-related reindeer herding protected by art 27 ICCPR).

Treaties

1. Agreement of Colonel Clive, Nabob, Serajah, Dowla (Moghul Empire, Bengal) 1757,
2. Alofi Agreement 1900.
3. American Bill of Rights 1791 (USA)
4. American Declaration of Independence and Constitution 1776 (USA)
5. Apia Treaty 1879
6. British Bill of Rights 1689 (UK)
7. British Magna Carta 1215 (UK)
8. Canada British North America Act 1867 (Canada)
9. Canadian 11 Numbered Treaties from 1871 - 1921.
10. Canadian Constitution Act and Charter of Fundamental Rights and Freedoms 1982 (France)
11. Convention of Sherbo, Bendo, Bullom, Bagroo, Bompey, Char, Jenkins, Plantain Islands, Sherbo Island, Tasso and Ya Comba (Sierra Leone) Plantain Isles 1824
12. European Treaty of Westphalia 1684 (Europe)
13. Fiji Islands Agreement 1859

14. French Declaration of the Rights of Man and of Citizens 1790 (France)
15. Geneva Conventions 1864
16. Geneva Conventions 1906
17. Hawaii Lahaina Agreement 1844,
18. New Zealand Bill of Rights Act 1990 (NZ)
19. New Zealand Constitution Act 1846 (NZ)
20. New Zealand Constitution Act 1852 (NZ)
21. New Zealand Constitution Act 1986 (NZ)
22. Royal Proclamation 1763
23. The Hague Conventions 1899
24. The Hague Conventions 1907
25. Treaty of Hyerabad 1768.
26. Treaty of Illiabad, Bengal 1765
27. Treaty of Kafir Chiefs of Gaika 1835
28. Treaty of Kafir Chiefs of T'Slambie 1835.
29. Treaty of Paris 1763
30. Treaty of Surat 1752
31. Treaty of Versailles 1919
32. Treaty of Waitangi 1840 – Te Tiriti o Waitangi 1840
33. Treaty of Washington 1862 (USA)

UN and International Treaties

1. United Nations Declaration on the Rights of Indigenous Peoples 2007 (United Nations, General Assembly, 107th Plenary Meeting, Official Records of the General Assembly, Sixty-First Session, Supplement No. 53 (A/61/53), Part One, Chapt, 11, Sect. A, 13 September 2007).
2. United Nations Declaration of Human Rights 1948
3. United Nations Charter of the United Nations 1945, Can. T.S. 1945 No. 76; [1976]
4. United Nations International Covenant on Civil and Political Rights (1966),
5. United Nations International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16), 49, U.N. Doc. A/6319 (1966)
6. United Nations Declaration 1963
7. Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965
8. United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971).
9. Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act),
10. Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity, 21 November 1990
11. The African Charter on Human and Peoples' Rights, 1981.
12. United Nations International Labour Organisation (ILO), Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989,
13. International Labour Organisation (ILO), Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations

in Independent Countries, 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) [ILO Convention No. 107].
14. Inter-American Commission on Human Rights (IACHR) of the Organisation of American States (OAS)
15. Treaty of Waitangi 1840 – Te Tiriti o Waitangi 1840
16. World Summit Johannesburg Declaration on Sustainable Development 2002 A/CONF.199/20
17. UN Declaration on the Right to Development 1986
18. UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971).
19. UN Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government* (E/CN.4/1992/42, Nuuk, Greenland, September 24 – 28, 1991

Deeds of Settlement

1. Te Rūnanganui o Ngati Porou, *Mana Moana – Nga Hapu o Ngati Porou Foreshore and Seabed Deed of Agreement. A guide to understanding the process to ratify amendments to the Deed,* (Te Rūnanganui o Ngati Porou, Gisborne, 2016).
2. Protocol Issued by the Crown through the Minister of Conservation Regarding Ngati Porou and the Department of Conservation, (22 May 2012)
3. New Zealand and Waikato-Tainui, *Deed of Settlement in Relation to the Waikato River*, (Her Majesty the Queen in Right of New Zealand and Waikato-Tainui, 17 December 2009).

Settlement Agreements

1. Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada, (Tungavik and the Department of Indian and Northern Affairs, Ottawa, 1993).
2. Council for Yukon Indians Umbrella Final Agreement (Yukon) (1993)
3. Cree-Naskapi (of Quebec) Act 1984
4. Eeyou Marine Region Land Claims Agreement (2012)
5. Gwich'in Comprehensive Land Claim Agreement (Northwest Territories) (1992)
6. Inuvialuit Final Agreement (Northwest Territories) (1984)
7. James Bay and Northern Quebec Agreement (Quebec) (1977)
8. Labrador Inuit Land Claims Agreement (Newfoundland and Labrador) (2005)
9. Maa-nulth First Nations Final Agreement (British Columbia) (2011)
10. Māori Commercial Aquaculture Claims Settlement Act 2004.
11. Mi'kmaq Education Agreement (Nova Scotia) (1997)
12. Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.
13. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019
14. Nga Wai o Maniapoto (Waipa River) Act 2012.
15. Ngaa Rauru Kiitahi Claims Settlement Act 2005.
16. Ngāi Tahu Claims Settlement Act 1998.

17. Ngāti Awa Claims Settlement Act 2005.
18. Ngāti Hauā Claims Settlement Act 2014.
19. Ngati Kahu ki Whangaroa Claims Settlement Act 2017.
20. Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014.
21. Ngāti Koroki Kahukura Claims Settlement Act 2014.
22. Ngāti Kuri Claims Settlement Act 2015.
23. Ngāti Manuhiri Claims Settlement Act 2012.
24. Ngāti Pūkenga Claims Settlement Act 2017.
25. Ngāti Tamaoho Claims Settlement Act 2018.
26. Ngati Toa Rangatira Claims Settlement Act 2014.
27. Ngati Tuwharetoa, Ruakawa and Te Arawa River Iwi Waikato River Act 2010
28. Nisga'a Final Agreement (British Columbia) (2000)
29. Northeastern Quebec Agreement (Quebec) (1978)
30. Nunavik Inuit Land Claims Agreement (2008)
31. Nunavut Land Claims Agreement (Nunavut) (1993)
32. Rangitāne Tū Mai Rā (Wairarapa Tamaki nui-ā-Rua) Claims Settlement Act 2017,
33. Raukawa Claims Settlement Act 2014,
34. Sahtu Dene and Métis Comprehensive Land Claim Agreement (Northwest Territories) (1994)
35. Sechelt and Indian Government District Enabling Act 1987, S.B.C c. 16.
36. Sechelt Indian Band Self-Government Act (British Columbia) (1986)
37. Sioux Valley Dakota Nation (Manitoba) (2014)
38. Tapuika Claims Settlement Act 2014.
39. Te Arawa Lakes Settlement Act 2006.
40. Te Aupouri Claims Settlement Act 2015.
41. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
42. Te Uri o Hau Claims Settlement Act 2002.
43. Tla'amin Nation Final Agreement (British Columbia) (2016
44. Tlicho Agreement (Northwest Territories) (2005)
45. Treaty of Waitangi (Fisheries Claims Settlement) Act 1992.
46. Tsawwassen First Nation Final Agreement (British Columbia) (2009)
47. Urewera Act 2014.
48. Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.
49. Westbank First Nations Self-Government Agreement (British Columbia) (2005)
50. Whanganui River in Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

SECONDARY SOURCES

Books

1. Aboriginal and Torres Strait Islander Commission (ATSIC), *The Importance of Indigenous Governance and its Relationship to Social and Economic Development* (Indigenous Studies, AIATSIS, Canberra, 2002).
2. Adams, P *Fatal Necessity: British Intervention in New Zealand 1830 - 1847* (Oxford University Press, Auckland, 1977).

3. Ajwani, S, Blakely, T, Robson, B, Tobias, M & Bonne, M, *Decades of Disparity: Ethnic Mortality Trends in New Zealand, 1980-1999*, (Ministry of Health and University of Otago, 2003).
4. Alexandrowicz, C.H *An Introduction to the History of the Law of Nations in the East Indies* (Clarendon Press, 1967);
5. Anaya, J *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996).
6. Anaya, J, *Indigenous Peoples in International Law* (2nd Ed, Oxford University Press, Oxford, 2004);
7. Anaya, J, *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996)
8. Argyris, C. & Schön, D.A. *Organizational Learning: A Theory of Action Perspective*, (Reading: Addison-Wesley, 1978).
9. Armitage, A *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (Vancouver: UBC Press, 1995).
10. Asch, M, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Methuen Publications, Ontario, 1984).
11. Asher, G & Naulls, D, *Māori Land* (New Zealand Planning Council, Wellington, 1987).
12. Asher, G & Naulls, D, *Māori Land,* (Planning Paper 29, New Zealand Planning Council, Wellington, 1987),
13. Avruch, K, *Culture and Cultural Conflict* (United States Institute of Peace, Washington D.C, 1998).
14. Ballara, A, *The King Movements First One Hundred Years,* (Auckland University Press, Auckland, 1996);
15. Ballara, A, *Taua: 'Musket Wars', Land Wars' or Tikanga?: Warfare in Māori Society in the Early Nineteenth Century*, (Penguin, Auckland, 2003);
16. Barber, B *Jihad v McWorld* (New York: Ballantyne Books, 1996).
17. Bartlett, R.H, *The Indian Act of Canada* (2nd ed)(University of Saskatchewan Native Law Centre, Saskatoon, 1988).
18. Battiste, M, *Reclaiming Indigenous Voice and Vision* (UBC Press, Vancouver, 2000)
19. Belich, J, *Making Peoples: a History of the New Zealanders* (Penguin, Auckland, 1996).
20. Bentham, J, *Deontology together with A Table of the Springs of Action and Article on Utilitarianism* (Vol. 1, Athlone Press, 1983).
21. Benton R, Frame A, and Meredith P, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*. (Wellington: Victoria University Press, 2013).
22. Benton, R, *The Māori Language: Dying or Reviving?* (Reprinted, New Zealand Council for Educational Research, Wellington, 1997),
23. Benton, R, *Who Speaks Māori in New Zealand?* (New Zealand Council for Educational Research, Wellington, 1979);
24. Berkes, F., & Social, A. *Coasts for People: Interdisciplinary Approaches to Coastal and Marine Resource Management*, (New York: Routledge, 2015).
25. Boast, R, *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005).
26. Boldt, M & Long, J.A (eds) *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985).

27. Boldt, M, *Surviving as Indians: The Challenge of Self-Government* (University of Toronto, Toronto, 1993).
28. Borrini-Feyerabend, G, Farvar, MT Nguinguiri, JC and Ndangang, V. A, *Co-Management of Natural Resources: Organising, Negotiating and Learning-by-Doing* (Kasparek Verlag, Heidelberg, Germany, 2000).
29. Borrows, J, *Statute Law in New Zealand* (Butterworths of New Zealand, Wellington, 1999).
30. British Columbia, *B.C Treaty Commission: Annual Report 1995 - 96* (B.C Government, 1996).
31. Brookfield, F.M *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999).
32. Brownlie, I, *Basic Documents on Human Rights* (Clarendon Press, Oxford, 1992).
33. Brownlie, I, *Principles of International Law,* (7th Ed., Oxford University Press, Oxford, 2008).
34. Buick, L, *The Treaty of Waitangi,* (3rd ed, Avery Press, Auckland, 1936)
35. Campbell, K, Menzies, C & Peacock, B, *B.C First Nations Studies,* (British Columbia Ministry of Education, Victoria, Canada, 2003).
36. Canada, *Indian Self-Government in Canada: Report of the Special Committee,* (Penner Report, Queen's Printer, Ottawa, 1983).
37. Cassese, A, *The International Law of Self-determination* (Cambridge University Press, 1998).
38. Cassesse, A *Self-determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995).
39. Cassidy, F (ed) *Aboriginal Self-Determination* (Co-published Lantzville, B.C; Halifax, Nova Scotia; Oolichan Books; The Institute for Research on Public Policy, 1991).
40. Cassidy, F (ed) *Aboriginal Title in B.C: Delgamuukw v. The Queen* (The Institute for Public Policy, Montreal, 1992).
41. Caveen, A, Polunin, N, and Gray, T, *The Controversy over Marine Protected Areas* (Springer, London, 2015).
42. Charters, C and Erueti, A, *Māori Property Rights and the Foreshore and Seabed* (Victoria University Press, 2007).
43. Charters, C and Stavenhagen, R, *Making the Declaration Work* (IWGIA, 2009).
44. Christie, G, *Aboriginal Nationhood and the Inherent Right to Self-Government,* (Research paper for the National Centre for First Nations Governance, May 2007).
45. Claude, R & Weston, B (eds.) *Human Rights in the World Community: Issues and Action* (University of Pennsylvania Press, Philadelphia, 1992);
46. Clifford, J, & Marcus, G, (Eds), *Writing Culture: The Poetics and Politics of Writing Ethnography* (University of California Press, 1986).
47. Colenso, W, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Government Printer, Wellington, 1890).
48. Commission on Global Governance, *Our Global Neighbourhood: Report of the Commission on Global Governance* (Oxford University Press, USA, 1995).
49. *Control of the Firm*, (Research Report 31, The Social Affairs Unit, UK, 1999).
50. Corkery, J, (ed), *Governance: Concepts and Applications* (IIAS Working Group, International Institute for Administrative Studies, Brussels, 1999).

51. Cornell, S. & Kalt, J. *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't*, (Harvard University Press, 2006);
52. Cowan, J, *The Māori Yesterday and Today* (Whitcombe and Tombs Ltd, Christchurch, 1930).
53. Cox, L *Kotahitanga: The Search for Māori Political Unity* (Oxford University Press, Auckland, 1993).
54. Coxon, E, Jenkins, K, Ka'ai, T, Marshall, J & Massey, L *The Politics of Learning and Teaching in Aotearoa – New Zealand.* (Dunmore Press, Palmerston North, 1994).
55. Cree Nations of Eeyou Istchee, *Cree Vision of Plan Nord,* (Cree Nations of Eeyou Istchee, James Bay, Canada, 2011).
56. Crosby, R. D, *The Musket Wars: A History of Inter-Iwi Conflict, 1806–45*, (Reed, Auckland, 1999)
57. Crowe, K, *A History of the Original Peoples of Northern Canada* (McGill University Press, Montreal, 1974);
58. Cserne, P, *Policy Considerations in Contract Interpretation: The Contra Proferentum Rule from a Comparative Law and Economics Perspective,* (Hungarian Association for Law and Economics, 2007).
59. Dalton, B *War and Politics in New Zealand 1855 - 1870* (Sydney University Press, 1967) .
60. Damen, L. *Culture Learning: The Fifth Dimension on the Language Classroom.* (Reading, MA: Addison-Wesley, 1987).
61. Deloria, V, *Custer Died for Your Sins: An Indian Manifesto* (University of Oklahoma Press, Oklahoma, 1988);
62. Dickason, O.P, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Oxford University Press, Ontario, 2002)
63. Durie, M *Ngā Kahui Pou: Launching Māori Futures* (Huia. Wellington, 2003);
64. Durie, M *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998).
65. Durie, M, *Ngā Tai Matatau: Tides of Māori Endurance* (Oxford University Press, Melbourne, 2005).
66. Durie, M, *Whaiora: Māori Health Development,* (2nd Ed, Oxford University Press, 1998).
67. Dworkin, R *Law's Empire* (Belknap Press, Cambridge, Massachusetts, 1986).
68. Engle, K, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, Durham, 2010).
69. Erueti, A, *The UN Declaration on the Rights of Indigenous peoples: Implementation in Aotearoa*, (Victoria University Press, 2017).
70. Farrar, J, *Corporate Governance: Theories, Principles and Practice,* (Melbourne, Oxford University Press, 3rd Edition, 2008) at 3.
71. Foner, E & Garraty, J (eds) *The Reader's Companion to American History* (Houghton-Miflin, Boston, 1991).
72. Frame, A, *A Journey Overland to Taupo in 1849 by Governor Grey and Te Heu Iwikau* (Te Mātāhauariki Research Institute, University of Waikato, 1988).
73. Friere, P *Pedagogy of the Oppressed* (Penguin Education, Baltimore, 1972).
74. Frame, A *Salmond: Southern Jurist*, (Victoria University Press, Wellington, 1995).
75. Friere, P, *Pedagogy of the Oppressed,* (Penguin, London, 1996).
76. Geertz, C, *The Interpretation of Cultures* (Basic Books, New York, 1973)

77. Glover, K, *The Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal,* (Te Puni Kokiri, Wellington, 2002).
78. Gorst, J, *The Māori King or, the Story of Our Quarrel with the Natives of New Zealand* (MacMillan & Co., London, 1864).
79. Gray, B. *Collaborating: Finding Common Ground for Multiparty Problems*, (Jossey-Bass, San Francisco: 1989);
80. Grey, G, *Polynesian Mythology* (Whitcombe & Tombs, Wellington, 1956).
81. Hallowell, A, 'Ojibway Ontology, Behaviour and World View' in Hallowell, A *Contributions to Anthropology* (University of Chicago Press, Chicago, 1976).
82. Hannum, H, *Autonomy, Sovereignty and Self-Determination,* (Philadelphia, University of Pennsylvania Press, 1990).
83. Harris D, '*The Concept of Possession in English Law*,' (Oxford Essays in Jurisprudence, 1968).
84. Held, D, *Democracy and the Global Order* (Polity Press, Cambridge, 1995).
85. Henderson, J Y, *Treaty Rights in the Constitution of Canada* (Thomson Carswell, Scarborough, 2007).
86. Higgins, R *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994).
87. Hill, R, *State Authority, Indigenous Autonomy: Crown-Māori Relations in New Zealand/Aotearoa 1900-1950* (Victoria University Press, Wellington, 2004);
88. Hogg, P, *Constitutional Law of Canada,* (Carswell, Toronto, 2019).
89. Hylton, J, *Aboriginal Self-Government in Canada* (Purich, Saskatoon, 1994).
90. Isaac, T, *Aboriginal Law: Cases and Materials: Cases and Materials* (Purich, Saskatoon, 2004).
91. Jain, T (2nd ed) *Outlines of Indian Legal History* (Tripathi Private Ltd, New Mexico, 1966); Ward, J.M *British Policy in the South Pacific (1786-1893)* (Australian Publishing Co, 1948);
92. Jeness, D, *The Indians of Canada*, (Acland, Ottawa, 1932);
93. Joachim, C, *Marine Protected Areas: A Multidisciplinary Approach* (Cambridge University Press, Cambridge, 2011).
94. Jones, C, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* (UBC Press, Vancouver, 2016).
95. Jones, P, *King Potatau: An Account of the Life of Potatau Te Wherowhero the First Māori King* (Polynesian Society, Wellington, 1959);
96. Joseph, P, *Constitutional and Administrative Law in New Zealand,* (4th Ed., Thomson Reuters, Brookers Ltd, Wellington, 2014).
97. Joseph, R, *The Government of Themselves: Case Law, Policy and Section 71, Constitution Act 1852,* (Te Matahauariki Research Institute Monograph Series, University of Waikato Press, 2002).
98. Jull, P & Roberts, S *The Challenge of Northern Regions* (Australian National University North Australia, Darwin, 1991);
99. Jung, C, *The Moral Force of Indigenous Politics* (Cambridge University Press, New York, 2008);
100. Kapellas, K & Jamieson, L, *Historical Consequences of Colonialism, Disempowerment and Reactionary Government Decisions in Relation to Imprisonment Rates in Australia's Northern Territory: A Potential Solution,* (1 Suppl, J Health Care Poor Undeserved, Australia, 27 February 2016)

101. Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989).
102. Kawharu, H, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977).
103. Kawharu, H, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977).
104. King, M, *Te Puea: A Biography,* (Hodder & Stoughton, Auckland, 1977);
105. Kirkwood, C, *Tawhiao – King or Prophet* (Turongo House, Hamilton, 2000).
106. Kroeber, A.L., & Kluckhohn, C. *Culture: A Critical Review of Concepts and Definitions* (Harvard University Peabody Museum of American Archeology and Ethnology Papers, 1952).
107. Lederach, J.P. *Preparing for Peace: Conflict Transformation Across Cultures,* (Syracuse University Press, Syracuse, New York, 1995).
108. Lippmann, L, *Generations of Resistance: The Struggle for Justice,* (Longman Cheshire, 1981).
109. Lloyd, D, *The Law Relating to Unincorporated Associations* (London, 1938).
110. Lutz, E, Hannum, H & Burk, K (eds.) *New Directions in Human Rights* (University of Pennsylvania Press, Philadelphia, 1989);
111. Macklem, P, *The Sovereignty of Human Rights* (Oxford University Press, New York, 2015).
112. Majurey, P and Beverley, P, *Tai Timu Tai Pari Sea Change Hauraki Gulf Marine Spatial Plan: An Introduction and Overview,* (Hauraki Gulf Forum, MPI, DOC, Waikato Regional Council and Auckland Council, May 2017).
113. Mawhiney, A-M, *Towards Aboriginal Self-Government: Relations Between Status Indian Peoples and the Government of Canada, 1969-1984*, (Garland, New York, 1994).
114. McHugh, P 'Constitutional Theory and Māori Claims' in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989)
115. McHugh, P, *The Māori Magna Carta: New Zealand and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).
116. McHugh, P, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi,* (Oxford University Press, 1992).
117. McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971)
118. McLeod, K and Leslie, H, *Ecosystem Management for the Oceans* (Island Press, Washington DC, 2009).
119. McLintock, A.H, *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958)
120. McMillan, A, *Native Peoples and Cultures in Canada: An Anthropological Overview* (Douglas & McIntyre, Vancouver, 1988);
121. McNab, R (ed) *Historical Records of New Zealand* (Government Printer, Wellington, 1908).
122. Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003).

123. Miller, H, *Race Conflict in New Zealand 1814 - 1865* (Blackwood & Janet Paul, Auckland, 1960).
124. Miller, J & Eastman, C (eds) *Tsimshian and Their Neighbours of the North Pacific Coast* (Seattle, 1984).
125. Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, (Federal Policy Guide, Ottawa, 1995).
126. Minogue, K, *Treaty of Waitangi Morality and Reality* (New Zealand Business Roundtable, Wellington, N.Z, 1998);
127. Mintzberg, H. *The Structuring of Organizations*, (Englewood Cliffs, NJ, 1979);
128. Morse, B, (ed) *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Carleton University Press, Ottawa, 1985).
129. New Zealand, *New Zealand Handbook of International Human Rights* (Ministry of Foreign Affairs and Trade, Wellington, 1998).
130. Ngata, H, *English-Māori Dictionary* (Learning Media, Wellington, 1993).
131. Nisga'a Lisims Government, *'Prosper' - Nisga'a Final Agreement 2002 Annual Report*, (Published under the authority of the Nisga'a Nation, the Province of British Columbia and the Government of Canada, 2002).
132. Nisga'a Tribal Council, *Nisga'a Society: Ayuukhl Nisga'a Study* (Nisga'a Tribal Council, Wilp Wilxo'oskwhl Nisga'a Publications, 1995).
133. Nisga'a Tribal Council, *Nisga'a: People of the Nass River*, (Douglas & McIntyre, Vancouver, 1993); Nisga'a Language and Culture Department, *From Time Before Memory: The People of K'amligihahlhaahl* (Nisga'a Language and Culture Department, New Aiyanch, B.C, 1996)
134. O'Malley, V, *Agents of Autonomy: Māori Committees in the Nineteenth Century* (Huia, Wellington, 1998),
135. Orange, C *The Treaty of Waitangi* (Bridget Williams Books Ltd, Wellington, 1987).
136. Orange, C, The *Turbulent Years 1870 - 1900 - The Māori Biography from the Dictionary of New Zealand Biography* (Vol. 2, Bridget Williams Books, Wellington, 1994)
137. Palmer, G *New Zealand's Constitution in Crisis: Reforming our Political System* (John McIndoe Ltd, Dunedin, 1992)
138. Parson, T. *Essays in Sociological Theory* (Glencoe, Illinois, 1949).
139. Paton, G & Derham, D (eds) A *Textbook of Jurisprudence* (4th Ed) (Oxford, 1972) at 428.
140. Patterson, J, *Exploring Māori Values* (Dunmore Press, 1992).
141. Peters, E, *Aboriginal Self-Government Arrangements in Canada* (Institute of Intergovernmental Relations, Queens University, Kingston, Ontario, 1987).
142. Pinkerton, E, (ed) *Co-operative Management of Local Fisheries* (University of British Columbia Press, Vancouver, 1989).
143. Plumptre, T and Graham, T, *Governance and Good Governance: International and Aboriginal Perspectives* (Institute for Governance, Ottawa, Canada, 1999).
144. Pritchard, S *Indigenous Peoples, the United Nations and Human Rights* (Zed Books, Australia, 1998).
145. Reynolds, H, *Frontiers: Aborigines, Settlers and Land* (Allen & Unwin, Sydney, 1987).

146. Reynolds, H, *The Law of the Land* (Penguin Books, Melbourne, 1988)
147. Ricketts, M, *The Many Ways of Governance: Perspectives on the Control of the Firm*, (Research Report 31, The Social Affairs Unit, UK, 1999).
148. Rouland, N, *Legal Anthropology,* (The Athlone Press, London, 1994)
149. Round, D, *Truth or Treaty? Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, 1998).
150. Royal, C.T, *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Estate of Rev. Māori Marsden, 2003).
151. Rumbles, W, *Africa: Co-Existence of Customary and Received Law* (Te Mātāhauariki Institute, University of Waikato Press, 1999).
152. Rutherford, J *Sir George Grey* (Cassel & Co. Ltd, Auckland, 1961).
153. Ryan, P M, *Dictionary of Modern Māori,* (Pearson, New Zealand, 1997)
154. Scott, K.J *The New Zealand Constitution* (Oxford Clarendon Press, London, 1962)
155. Sen, A, *Development as Freedom* (New York: Knopf, 2000).
156. Sharp, A *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand Since the 1970s* (Oxford University Press, Auckland, 1997).
157. Shaw, M *Title to Territory in Africa International Legal Issues* (Clarendon Press, 1986);
158. Shaw, M. *International Law,* (3rd ed.) (Grotius Publications, Cambridge, 1994).
159. Shoemaker, N, *Native American Whalemen and the World: Indigenous Encounters and the Contingency of Race,* (University of North Carolina Press, North Carolina, USA, 2015);
160. Simon, J, *Nga Kura Māori: The Native Schools System, 1867-1969,* (Auckland University Press, Auckland, 1998).
161. Simpson, T *Te Riri Pākehā The White Man's Anger* (Alister Taylor, Martinborough, 1979).
162. Sir E Hertslet, *The Map of Africa by Treaty,* (Frank Cass & Co Ltd, 1967).
163. Slattery, B *The Land Rights of Indigenous Canadian Peoples* (PhD Thesis, University of Oxford, 1979);
164. Smith, G.H, (Ed) *Nga Kete Wānanga Readers* (Vol. 2, Auckland College of Education, Auckland, 1987).
165. Smith, L, *Decolonizing Methodologies: Research and Indigenous Peoples (*Zed Books, London, University of Otago Press, 1999).
166. Smith, N *Native Origins of European Settlement in Kenya* (Oxford, 1967);
167. Spencer-Oatey, H, *Culturally Speaking: Culture, Communication and Politeness Theory,* (2nd Ed, Continuum, London, 2008);
168. Spoonley, P, *The Politics of Nostalgia: Racism and the Extreme Right in New Zealand*, (Dunmore Press, Palmerston North, 1987).
169. Steiner, H & Alston, P *International Human Rights in Context: Law, Politics, Morals* (Clarendon Press, Oxford, 1996).
170. Stephenson, M.A. & Ratnapala, S (eds) *Mabo: A Judicial Revolution* (University of Queensland Press, St. Lucia, Queensland, 1993).
171. Stokes, E *Wiremu Tamihana Te Waharoa: A Study of His Life and Times* (Geography Department, University of Waikato, 2000).
172. Surtees, R, *The Original People* (Holt, Rinehart & Winston, 1971);

173. Te Ahukaramū Charles Royal (ed.) *The Woven Universe: Selected Writings of Re Māori Marsden*, (Otaki, Estate of Rev. Māori Marsden, 2003).
174. Te Puni Kokiri & Gover, K, *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal,* (Te Puni Kokiri, Wellington, 2001).
175. Tyrrell, A, *The Reception of the 1852 Constitution Act in New Zealand, And the Settlers' Demands for the Introduction of Responsible Government to the End of 1854* (Hocken Library, University of Otago, 1957).
176. Van Dyke, V *Human Rights, Ethnicity and Discrimination* (Greenwood Press, Connecticut, 1985);
177. Walker, R *Ka Whawhai Tonu Matou: Struggle Without End,* (Auckland: Penguin Books, 1990).
178. Walker, R, *Ka Whawhai Tonu Matou: Struggle Without End,* (2nd Ed. Penguin Books, New Zealand, 2004);
179. Ward, A *Show of Justice: Racial Amalgamation in the Nineteenth Century* (Auckland University. Press, 1973).
180. Ward, A, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand* (Reprinted with Corrections, Auckland University Press, 1995).
181. Webster, P *Rua and the Māori Millennium* (Price Milburn for Victoria University Press, Wellington, 1979).
182. Wherrett, J, *Aboriginal Self-Government*. (Law and Government Division CIR 96-2E. Political and Social Affairs Division, Parliamentary Research Branch, Library of Parliament, Ottawa, 27 September 1999, Revised 1 August 2000).
183. Williams, D, *Te Kooti Tango Whenua: The Native Land Court 1864 – 1909* (Huia, Wellington, 1999).
184. Williams, H, A *Dictionary of the Māori Language*. (Reprint of 7th ed. A R Shearer, Government Printer, Wellington, 1975, 7th ed first published in 1971).
185. Williams, H.W. *Dictionary of the Māori Language* (GP Publications, Wellington, 1992).
186. Williams, R, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, Oxford, 1990).
187. Williams, S *International Legal Effects of Secession by Quebec* (York University Centre for Public Law and Public Policy, North York, Ontario, 1992).
188. Williston, W & Rolls, R, *The Law of Civil Procedure* (Vol. 1, Toronto, 1970).
189. Woodward, J, *Native Law* (Carswell, Toronto, 1989).
190. Wright, M, *Guns and Utu: A Short History of the Musket Wars*. Penguin, Auckland, 2011).
191. Youngblood Henderson, J, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society,* (University of Saskatchewan Native Law Centre, Saskatoon, 2006);

Journal Articles

1. 'Claim to the Pacific,' in *Journal of the Polynesian Society,* (Vol. 64, 1955) at 162.
2. Agardy, T and others, 'Mind the Gap: Addressing the Shortcomings of Marine Protected Areas through Large Scale Marine Spatial Planning,' in *Marine Policy,* (Vol. 35, 2011) at 226 at 228.

3. Alfonso, P & Nielsen, E, 'Indigenous People and Co-Management: Implications for Conflict Management,' in *Environmental Science and Policy,* (Vol. 4, No. 4/5, August 2001) at 232.
4. Amburgey, T. L., & Dacin, T. 'As the Left Foot Follows the Right? The dynamics of Strategic and Structural Change,' in *Academy of Management Journal*, (Vol. 37, No. 6, 1994) at 1427-1452.
5. Anaya, J 'A Contemporary Definition of the International Norm of Self-determination' in *TCLP* (Vol. 3, 1993) 131 at 143.
6. Arnstein, S, 'A Ladder of Participation,' in *Journal of the American Institute of Planners,* (Vol. 35, No. 4, 1969) at 216.
7. Asch, M, & Macklem, P, 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*,' in *Alberta Law Review,* (Vol. 29, 1991).
8. Astley, W. G., & Fombrun, C. J, 'Collective Strategy: Social Ecology of Organizational Environments,' in *Academy of Management Review*, (Vol. 8, No. 4, 1983) at 576-587;
9. Cyert, R.M. and March, J.G. *A Behavioural Theory of the Firm,* (Englewood Cliffs: Prentice Hall, 1963).
10. Aswani, S, 'The way Forward with Ecosystem-based Management in Tropical Contexts: Reconciling with Existing Management Systems,' in *Marine Policy* (Vol. 36, 2012) at 1.
11. Barsh, R.L, and Henderson, J.Y, 'Aboriginal Rights, Treaty Rights and Human Rights: Indian Tribes and Constitutional Renewal' in *Journal of Canadian Studies* (Vol. 2, No. 55, 1982) at 17.
12. Bene, C. & Neiland, A.E. 'Empowerment Reform, Yes… but Empowerment of whom? Fisheries decentralization reforms in developing countries: a critical assessment with specific reference to Poverty Reduction,' in *Aquatic Resources, Culture and Development*, (Vol. 1, 2004) at 35-49.
13. Berkes, F, 'Implementing ecosystem-based Management: Evolution or Revolution?' in *Fish and Fisheries*, (Vol. 13, 2011) at 465.
14. Berq, L, 'Let Them Do as They Have Promised,' in *Hastings West-Northwest Journal of Environmental Law and Policy,* (Vol. 3, No. 1, 1995) 7 at 8.
15. Berq, L, 'Let Them Do as They Have Promised,' in *Hastings West-Northwest Journal of Environmental Law and Policy,* (Vol. 3, No. 1, 1995) 7 at 17.
16. Bess, R and Rallapudi, R 'Spatial conflicts in New Zealand fisheries: The rights of fishers and protection of the marine environment,' in *Marine Policy* (2007) Vol. 31, 2007) 719.
17. Boast, R 'Treaty Rights or Aboriginal Rights?' in *New Zealand Law Journal* (1990) 32 at 33.
18. Brookfield, F.M 'Kelsen, the Constitution and the Treaty' in *New Zealand University Law Review* (Vol. 15, 1992) 163;
19. Brookfield, F.M 'Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach' in *New Zealand Law Review* 5 (1984) No.4 at 603;
20. Burton, S.J, 'Normative legal theories: The case for pluralism and balancing,' in *Iowa Law Review,* (Vol. 98, 2012-2013) 535 at 537.
21. Butt, P 'Mabo Revisited - Native Title Act' in *Journal of International Banking Law* (Vol. 9, 1994) at 75;
22. Carlsson, L. & Berkes, F, 'Co-Management: Concepts and Methodological Implications,' in *Journal of Environmental Management,* (Vol. 75, 2005). 65-76.
23. Cassesse, D 'Rethinking Self-Determination: A Critical Analysis of Current International Law Theories,' in *Syracuse Int'l L. & Com.* (Vol. 18, 1992) 21, at 24.

24. Charters, C, 'The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples,' in *New Zealand Yearbook of International Law,* (Vol. 4, 2007);
25. Cleaver, F, 'Reinventing Institutions: Bricolage and the Social Embeddedness of Natural Resource Management,' in *The European Journal of Development Research,* (Vol. 14, No. 2, 2002) at 11-30.
26. Coates, N, 'Joint Management Agreements in New Zealand: Simply Empty Promises?' in *Journal of South Pacific Law,* (Vol. 13, No. 1, 2009) at 32–39.
27. Cooke, R, 'Introduction' in *New Zealand University Law Review* (Vol. 14, No. 1, June 1990) at 1.
28. Coombes, B & Hill, S, 'Na whenua, Na Tuhoe. Ko D.o.C te partner – Prospects for co-management of Te Urewera National Park' in *Society & Natural Resources: An International Journal* (Vol. 18, Issue 2, 2005);
29. Cornell, S., & Kalt, J. P. 'Sovereignty and Nation-Building: The Development Challenge in Indian Country Today' in *American Indian Culture and Research Journal*, (Vol. 22, No. 3, 1998) at 187-214.
30. Craig, D 'Recognising Indigenous Rights through Co-Management Regimes: Canadian and Australian Experiences' in *New Zealand Journal of Environmental Law* (Vol. 199, 2002) at 25-28;
31. Daes, E.I 'Some Considerations on the Rights of Indigenous Peoples to Self-Determination' in *Transnational Law & Contemporary Problems* (Vol. 3, 1993) at 5.
32. Daes, E-I, 'Equality of Indigenous Peoples under the Auspices of the United Nations – Draft Declaration on the Rights of Indigenous Peoples' in *St Thomas Law Review* (Vol. 7, 1995) 493 at 496-97.
33. Daes, E-I, 'Equality of Indigenous Peoples under the Auspices of the United Nations – Draft Declaration on the Rights of Indigenous Peoples' in *St Thomas Law Review* (Vol. 7, 1995) 493 at 496-97.
34. Daes, E-I. 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' in *Transnat'l L. & Contemp. Probs.* (Vol. 3, 1993) 1 at 4-5
35. Dobbs, K et al, 'Developing a Long-Term Outlook for the Great Barrier Reef, Australia: A Framework for Adaptive Management Reporting Underpinning an Ecosystem-based Management Approach,' in *Marine Policy,* (Vol. 35, 2011) 233 at 236.
36. Dolsak, N. & Prakash, A. 'Government Contractors as Civil Society?' in *Stanford Social Innovation Review*, (Vol. 9, Nov. 2015);
37. Durie, E *Custom Law,* (Address to the New Zealand Society for Legal and Social Philosophy, 1994) 24 V.U.W.L.R. at 3.
38. Durie, M 'Representation, Governance and the Goals of Māori Self-determination' in *He Pukenga Korero* (Massey University, Palmerston North, 1 May 1997) at 6.
39. Durie, M 'Tino Rangatiratanga: Māori Self-Determination' in *He Pukenga Korero* (Spring, Vol. 1, No. 1, 1995) at 48.
40. Emerson, K, Nabatchi, T & Balogh, S, 'An Integrative Framework for Collaborative Governance,' in *Journal of Public Administration Research and Theory,* (Vol. 22, No. 1, Jan. 2002) at 1-29;
41. Erueti, A, 'Comparing Domestic Principles of Demarcation with Emerging Principles of International Law,' in *Arizona Journal of International and Comparative Law*, (Vol. 23, No. 3, 2006) at 543.
42. Fanny, D, 'The Importance of Marine Spatial Planning in Advancing Ecosystem-based Sea Use Management,' in *Marine Policy* (Vol. 32, 2008) 762 at 763.

43. Fenelon, J, & Hall, T, 'Revitalization and Indigenous Resistance to Globalization and Neoliberalism,' in *American Behavioural Scientist* (Vol. 51, No. 12, 2008) at 1867-1901.
44. Frame, A 'Colonising Attitudes Towards Māori Custom' in *New Zealand Law Journal* (17 March 1981) at 109.
45. Frame, A, 'Kauwaeranga Judgment,' in *Victoria University of Wellington Law Review,* (Vol. 14, 1994) at 227-229.
46. Frame. A, 'Hoani Te Heu Heu's Case in London 1940-41: An Explosive Story' in *New Zealand Universities Law Review* (Vol. 22, No. 1, 2006) at 148-180.
47. Graham, G, 'Whangai Tamariki,' in *Journal of the Polynesian Society (JPS)* (Vol 57, No. 276, 1948) note 10.
48. Green, O, Garmestani, A, Allen, C, Gunderson, L, Ruhl, J, Arnold, C, Graham, N, Cosens, B, Angeler, D, Chaffin, B & Holling, C, 'Barriers and Bridges to the Integration of Social-Ecological Resilience and Law,' in *Frontiers in Ecology and the Environment,* (Vol. 13, No 6, Aug 2015) at 332-337.
49. Gunningham, N, 'The New Collaborative Environmental Governance: The Localization of Regulation,' in *Journal of Law and Society,* (Vol. 36, No. 1, Economic Globalization and Ecological Localization: Socio-legal Perspectives, March 2009) at 145-166;
50. Hannum, H 'Rethinking Self-determination' in *Virginia Journal of International Law* (Vol. 34, 1993).
51. Hart H, 'Definition and Theory of Jurisprudence,' in *LQR* (Vol. 70, 1954) at 37.
52. Havemann, P & Turner, K 'The Waitangi Tribunal: Theorising its Place in the Redesign of the New Zealand State' in *Australian Journal of Law & Society* (Vol. 10, 1994) at 165-93.
53. Hawley, A. *Human Ecology*, (New York: Ronald Press Company, 1950); and Astley, W. G., & Fombrun, C. J. 'Collective Strategy: Social Ecology of Organizational Environments,' in *Academy of Management Review*, (Vol. 8, No. 4, 1983) at 576-587.
54. Hayes, S, 'Defining Kaitiakitanga and the Resource Management Act 1991,' in *Auckland University Law Review* (Vol 8 1996-1999 No 3) at 893.
55. Hogg, P & Turpel, M, 'Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues,' in *Canadian Bar Review,* (Vol. 74, 1995) at 187-199;
56. Holling, C, Meffe, G, 'Command and Control and the Pathology of Natural Resource Management' in *Conservation Biology* (Vol. 10, 1996) at 328-337.
57. Hunt, P & Bedggood, M 'The International Dimension of Human Rights Law in New Zealand' in *Rights and Freedoms: International Human Rights Law* (New Zealand, 1999) at 37 – 69.
58. Iorns, C, 'Access to Environmental Justice for Māori,' in *Yearbook of NZ Jurisprudence* (2017) at 141-181.
59. Iorns, C, 'Improving the Global Environmental Rule of Law by Upholding Indigenous Rights: Examples from Aotearoa New Zealand,' in *Global Journal of Comparative Law,* (Vol. 7, 2018) at 61-90.
60. Iorns, C, 'Māori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment,' in *Widener Law Review,* (Vol. 21, 2015) at 1-55
61. Iorns, C, 'Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand,' in *Hors serie VertigO - la revue électronique en sciences de l'environnement* (Vol. 22, 2015) at 1-15

62. Iorns, C, ‘Permitting Poison: Pesticide Regulation in Aotearoa New Zealand,’ in *EPLJ* (Vol. 35, 2018) 456, at 474.
63. Iorns, CJ ‘Indigenous Peoples and Self-determination: Challenging State Sovereignty’ in *Case Western Reserve Journal of International Law* (Vol. 24, 1992) 199 at 250-2.
64. Isaac, T, ‘The Storm over Aboriginal Self-Government: Section 35 of the Constitution Act 1982 and the Redefinition of the Inherent Right to Aboriginal Self-Government’ *C.N.L.R* (Vol. 2, 1992) 6 at 8.
65. Jackson, W, & Wood, G, ‘The New Zealand Parliament and Māori Representation’ in *Historical Studies: Australia and New Zealand,* (Vol. 11, Issue 43, 1964) at 384
66. Jones, Pei Te Hurinui, ‘Māori Genealogies’, in *The Journal of the Polynesian Society* (Volume 67, No. 2, 1958) at 162.
67. Joseph, R, ‘Contemporary Māori Governance: New Era or New Error?,’ in *New Zealand Universities Law Review*, (Vol. 22, 2007) at 682 – 709
68. Joseph, R, ‘Frozen Rights? The Right to Develop Māori Treaty and Aboriginal Rights,’ in *Waikato Law Review,* (Vol. 19, Issue 2, 2011) at 117-133.
69. Joseph, R, ‘Legal Challenges at the interface of Māori Custom and State regulatory systems: Wāhi Tapu,’ in Yearbook of New Zealand Jurisprudence, (Vol. 14, No. 13-14, 2010-2011).
70. Joseph, R, ‘Re-Creating Space for the First Law of Aotearoa-New Zealand,’ in *Waikato Law Review: Taumauri,* (Vol. 17, 2009) at 74-97.
71. Jull, P ‘Reconciliation and Northern Territories, Canadian Style: The Nunavut Process and Product’ in *Indigenous Law Bulletin* (Vol. 4, No. 20, 1999) at 4-7;
72. Jull, P, ‘New Deal for Canada’s North’ in *North* (Vol. 1, 1999) at 5-10;
73. Jull, P, ‘Nunavut: The Still Small Voice of Indigenous Governance’ in *Indigenous Affairs,* (Vol. 3, 2001) at 42-51.
74. Juviler, P *Contested Ground: Rights to Self-Determination and the Experience of the Former Soviet Union* (Vol. 3, 1993) 71 at 72.
75. Kahui, V and Richards, A, 'Lessons from Resource Management by Indigenous Māori in New Zealand: Governing the Ecosystems as a Commons,' in *Ecological Economics,* (Vol. 102, No. 1, 2014) at 1.
76. Kania, J. & M. Kramer, ‘Embracing Emergence: How Collective Impact Addresses Complexity,’ in *Stanford Social Innovation Review,* (January 2, 2013);
77. Kania, J., & Kramer, M, ‘Collective Impact,’ in *Stanford Social Innovation Review*, (Vol. 9, No. 1, 2011) at 36-41;
78. Karkkainen, B, ‘Collaborative Ecosystem Governance: Scale, Complexity and Dynamism,’ in *Virginia Environmental Law Journal,* (Vol. 21, No. 2, 2002) at 189-243;
79. Kawharu, M, ‘Kaitiakitanga: A Māori Anthropological Perspective of the Māori Socio-Environmental Ethic of Resource Management,’ *JPS* (Vol 109, 2000) at 366-367.
80. Kearney, J, Berkes, F, Charles, A, Pinkerton, E and Wiber, M, ‘The Role of Participatory Governance and Community-Based Management in Integrated Coastal and Ocean Management in Canada’ in *Coastal Management*, (Vol. 79, No. 35, 2007) at 86.
81. Kevin Gray, ‘Property in Thin Air,’ in *Cambridge Law Journal*, (Vol. 50, 1991) at 252.
82. Kingsbury, B, ‘Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law,' in *NYUJIntl Law & Pol,* (Vol. 34, 2001) at 189.;
83. Kirgis, F ‘Degrees of Self-Determination in the United Nations Era’ in *American Journal of International Law* (Vol. 88, 1994) 304 at 306-7.

84. Ladbury, R & Chin, J 'Legislative Responses to the Mabo Decisions: Implications for the Australian Resources Industry' in *Journal of Energy and Natural Resources Law* (Vol. 12, 1994) at 207.
85. Lord Cooke of Thorndon, 'Introduction,' Special Waitangi Issue,' in *New Zealand University Law Review,* (Vol. 14, 1990-1991) at 1.
86. Love, T, 'Incorporating Māori Approaches to Ecosystem Management in Marine Management,' in *Māori Law Review,* (July 2018).
87. Low, M and Shaw, K, 'First Nations Rights and Environmental Governance: Lesson from the Great Bear Rainforest,' in *B.C Studies,* (Vol, 172, 2011) at 9-33.
88. Marriot, L & Sim, D, 'Indicators of Inequality for Māori and Pacific Peoples,' in *Journal of New Zealand Studies,* (Issue 20, 2015) at 24-50.
89. Martinez-Moyano, I. 'Exploring the Dynamics of Collaboration in Interorganizational Settings,' in *Creating a Culture of Collaboration: The International Association of Facilitators Handbook*, (Vol. 4, No. 69, 2006).
90. McCreanor, T, 'When Racism Stepped Ashore: Antecedents of Anti-Māori discourse in New Zealand, in *New Zealand Journal of Psychology,* (Vol. 26, 1997) at 43-57.
91. McHugh, P, 'Sovereignty this Century – Māori and the Common Law Constitution,' in *Victoria University Law Review,* (Vol. 31, 2000) at 1-28;
92. McHugh, P 'Native Land Development' in *Saskatchewan Law Review* (Vol. 47, No. 1) at 141.
93. Memon, P.A & Kirk, N, 'The Role of Indigenous Māori People in Collaborative Water Governance in Aotearoa/New Zealand,' in *The Journal of Environmental Planning and Management,* (Vol. 55, No. 7, 2012) at 941-959.
94. Mintzberg, H. 'The Design School: Reconsidering the Basic Premises of Strategic Management,' in *Strategic Management Journal*, (Vol. 11, 1990) at 171-195;
95. Munro, J 'The Treaty of Waitangi and the Sealord Deal' in *Victoria University of Wellington Law Review,* (Vol. 24, 1994) 389, at 421-422.
96. O'Connor, P, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking" *Monash University Law Review* (Vol. 36, 2011) 50 at 54–56.
97. O'Leary, B and others, 'Effective Coverage Targets for Ocean Protection,' in *Conservation Letters* (Vol. 9, 2016) at 398.
98. Olsson, C and Hughes, T, 'Navigating the Transition to Ecosystem-based Management of the Great Barrier Reef, Australia,' in *Proceedings of the National Academy of Sciences of the United States of America (PNAS)* (Vol. 105, No. 28, 2008) at 9489-9494.
99. Pinkerton, E, 'Toward Specificity in Complexity: Understanding Co-management from a Social Science Perspective,' in Wilson, DC, Nielson, JR, Degnbol, P, (eds) *The Fisheries Co-Management Experience,* (Kluwer Academic Publishers, Dordrecht, 2003) at 62.
100. Pita, C and others 'An overview of commercial fishers' attitudes towards marine protected areas",' in *Hydrobiologia,* (Vol. 670, 2011) at 289.
101. Price, K, Roburn, A and MacKinnon, A, 'Ecosystem-Based Management in the Great Bear Rainforest,' in *Journal of Forest Ecology and Management* (Vol. 258, 2009) at 495-503
102. Price, K, Roburn, A and MacKinnon, A, 'Ecosystem-Based Management in the Great Bear Rainforest,' *For. Ecol. Man*. (Vol. 258, 2009) at 495.
103. Priestly, R, 'Fire and water,' in *New Zealand Geographic,* (Vol. 119, 2013) (Online ed, 2013, Auckland).

104. Reynolds, H 'The Mabo Judgment in Light of Imperial Land Policy' in *UNSWLJ* (Vol. 1, 1993) at 16;
105. Roberts, M and others, 'Kaitiakitanga: Māori perspectives on conservation,' in *Pacific Conservation Biology* (Vol. 2 1995) at 7.
106. Robinson, C.J and Wallington, TJ, 'Boundary Work: Engaging Knowledge Systems in Co-Management of Feral Animals on Indigenous Lands,' in *Ecology and Society*, (Vol. 17, No. 2, 2012) at 16.
107. Ruru, J, 'Indigenous restitution in settling water claims: The developing cultural and commercial redress opportunities in Aotearoa,' in *New Zealand Pacific Rim Law & Policy Journal,* (Vol. 22, No. 2, March 2013) at 311-342.
108. Ruru, J, 'Undefined and Unresolved: Exploring Indigenous Rights in Aotearoa New Zealand's Freshwater Regime,' in *The Journal of Water Law,* (Vol. 20, 2010) at 236
109. Sanders, D 'The U.N. Working Group on Indigenous Populations' in *Human Rights Quarterly* (Vol. 11, 1989) 406 at 429.
110. Sehring, J, 'Path Dependencies and Institutional Bricolage in Post-Soviet Water Governance,' in *Water Alternatives*, (Vol. 2, No. 12, 2009) at 61-81, at 64.
111. Sharp, A, Blood, custom and consent: Three kinds of Māori groups and the challenges they present to governments' in *University of Toronto Law Journal* (Vol. LII, No. 1, Winter 2002) at 20-1.
112. Slattery, B 'Understanding Aboriginal Rights' in 66 *Can Bar Rev* (727, 1987) at 737- 8.
113. Smith, D, et al, 'Implementing Marine Ecosystem-based Management: Lessons from Australia,' in ICES *Journal of Marine Science*, (Vol. 74, 2017) at 1990.
114. Sorrenson, M.P.K 'Land Purchase Methods and Their Effect on Māori Population, 1865-1901' in *Journal of the Polynesian Society,* (Vol. 14, No. 3, 1956) at 183-199;
115. Stavenhagen, R 'Challenging the Nation-State in Latin America' in *Journal of International Law* (Vol. 45, 1992) at 436.
116. Stavenhagen, R 'Self-Determination: Right or Demon?' in *Law and Society Trust* (Vol IV, Issue No. 67, November 1993) at 12.
117. Sullivan, A 'Self-determination and Redistributive Justice: the New Zealand Māori' in *He Pukenga Kōrero* (Ngahuru (Autumn) Vol. 3, No. 2, 1998) at 57.
118. Taiepa, T, Lyver, P, Horsley, J, Davis, M, Bragg, M & Moller, H, 'Co-Management of New Zealand's Conservation Estate by Māori and Pākehā: A Review,' in *Foundation for Environmental Estate,* (Vol. 24, No. 3, 1997) 236 at 237.
119. Te Aho, L, 'Indigenous Challenges to Enhance Freshwater Governance and Management in New Zealand - The Waikato River Settlement,' in *Journal of Water Law,* (Vol. 20, 2010) at 285-292;
120. Te Aho, L, 'Legislation – Te Awa Tupua (Whanganui River Claims Settlement) Bill – the endless quest for justice,' in *Māori Law Review* (Aug 2016) at 1.
121. Thornberry, P. 'Self-Determination, Minorities, Human Rights: A Review of International Instruments', in *Int'l & Comp. L. Q.* (Vol. 38, 1989) 867 at 878.
122. Tiakiwai, S, Kilgour, J and Whetu, A, 'Indigenous Perspectives of Ecosystem-Based Management and Co-governance in the Pacific Northwest: Lessons for Aotearoa,' in *Alter Native,* (An International Journal of Indigenous Peoples, Vol. 13, No. (2), 2017) at 69-79.

123. Tipa, G and Welch, R, 'Co-Management of Natural Resources: Issues of Definition From an Indigenous Community Perspective,' in *Journal of Applied Behavioral Science,* (Vol. 42, No. 3, 2006) 373 at 380.
124. Tomas, N, 'Māori Land Law: The Coastal Marine (Takutai Moana) Act 2011,' in *New Zealand University Law Review*, (Vol. 381, 2011) at 401-404.
125. Torres, R 'The Rights of Indigenous Peoples' in *Yale Journal International Law* (Vol. 16, 1991) at 142.
126. Turner, S., Merchant, K., Kania, J., & Martin, E. Understanding the Value of Backbone Organizations in Collective Impact: Part 2,' in *Stanford Social Innovation Review*. (2012).
127. Turpel, M 'Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies and Cultural Differences' in *Canadian Human Rights Yearbook* (Vol. 6, 1989-90) at 3.
128. Vince, J, 'Australia's Oceans Policy: Past, Present and Future,' in *Marine Policy,* (Vol. 57, 2015) at 1-6.
129. von der Porten, S., and de Loë, R.C. 'How Collaborative Approaches to Environmental Problem Solving View Indigenous Peoples: A Systematic Review,' in *Society & Natural Resources* (Vol. 27, No. 10, 2014) at 1040-1056.
130. Weissner, S, 'Indigenous Sovereignty: A Reassessment in the Light of the UN Declaration on the Rights of Indigenous peoples,' *Vanderbilt Journal of Transnational Law,* (Vol. 41, 2008) at 1141.
131. Whelan, A, 'Wilsonian Self-determination and the Versailles Settlement' in *ICLQ* (Vol. 43, 1999) at 100.
132. White, P, 'The New Zealand Māori Council claim to the Waitangi Tribunal and Water management in New Zealand,' in *New Zealand Science Review,* (Vol. 69, 2012)
133. Williams, J, 'Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law,' in *Waikato Law Review: Taumauri,* (Vol. 21, 2013) at 2.
134. Wollenberg, E., Iwan, R., Limberg, G., Moeliono, M., Rhee, S., & Sudana, M. 'Facilitating Cooperation During Times of Chaos: Spontaneous Orders and Muddling through in Malinau District, Indonesia,' in *Ecology and Society*, (Vol. 12, No. 1, 2007) at 65.
135. Wood, D. J. and B. Gray, 'Toward a Comprehensive Theory of Collaboration,' in *The Journal of Applied Behavioural Science,* (Vol. 27, No. 2, 1991) at 139-162.
136. Youngblood Henderson, J, 'Empowering Treaty Federalism,' in *Saskatchewan Law Review,* (Vol. 58, 1994) 241 at 247-248.

Chapters

1. 'How the Environmental Protection Authority incorporates the principles of the Treaty of Waitangi into its regulatory practice,' in *Report for the New Zealand Productivity Commission* (February 2014).
2. 'Poia atu tāku poi' He Patere Ara He Rangi: An Action Song or Poi Accompaniment,' Nā, Erenora Taratoa, Ngāti Raukawa, in Ngata, A & Jones, P.T, '*Ngā Mōteatea: The Songs: Scattered Pieces from Many Canoe Areas Collected by Sir Apirana Ngata and Translated by Pei Te Hurinui*,' (Auckland University Press, Auckland, Part 2, 2006) at 202-209.
3. 'The Constitution Act 1852', and Chapter 18: 'The Aftermath of the Act: Political Frustration,' in McLintock, A.H, *Crown Colony Government in* New Zealand (Government Printer, Wellington, 1958).

4. 'The Statutory Framework for Management of the Exclusive Economic Zone and Continental Shelf - Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012,' in *Environmental and Resource Management Law Online* (Lexis Nexis, September, 2017).
5. Aikman, C 'Parliament,' in Robson, J (eds.) *New Zealand: The Development of its Laws and Constitution,* (Stevens & Sons Ltd, London, 1954) at 59-60.
6. Allen, G, Snarch & Allen Law Firm, 'The Sechelt Indian Band and Self-Government' in British Columbia Treaty Commission *Speaking Truth to Power III: Self-Government Options and Opportunities'* (BC Treaty Commission, Vancouver, 2002) at 47.
7. Bargh, M, 'Māori Wards and Advisory Boards, in Drage J and Cheyne, C, *Local Government in New Zealand: Challenges and Choices* (Dunmore Publishing Ltd, 2016) at 80.
8. Barsh, R, 'Aboriginal Peoples and the Right to Self-Determination in International Law,' in Hocking, B, (Ed.), *International Law and Aboriginal Human Rights,* (Carswell Co, Agincourt, 1988) at 68-69;
9. Bennett, A, 'Change and Inertia: 40 Years of Māori Struggle to Protect the Environment,' in Bell, R et al, *The Treaty on the Ground – Where we are Headed and Why it Matters,* (Massey University Press, Auckland, 2017) at 202.
10. Biggs, B, 'Humpty Dumpty and the Treaty of Waitangi,' in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989).
11. Boast, R, 'Māori Customary Law and Land Tenure,' in Boast, R, Erueti, A, McPhail, D and Smith, N, *Māori Land Law,* (Butterworths, Wellington, 1999) at 2-37.
12. Brookfield, F.M 'The New Zealand Constitution: the Search for Legitimacy' in Kawharu, I.H, *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 13.
13. Connelly, R, Regional Director of Inuvik Region, (Department of Executive, GNWT, 1995) cited in 'Yukon Umbrella Final Agreement, 1993' in ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis* (Ministry of Aboriginal Affairs, BC, Federal Treaty Negotiations Office, December 1995).
14. Cooke, R 'The Suggested Revolution Against the Crown' in Joseph, P (ed) *Essays on the Constitution* (Brookers Ltd, Wellington, 1995);
15. Da Cunha, M.C, 'The Case of Brazilian Indians,' in Stephens, S., (ed), *Children and the Politics of Culture,* (Princeton University Press, 1995) at 282-291.
16. Dalziel, K 'The Politics of Settlement' in Rice, G.W (ed.) *The Oxford History of New Zealand* (2nd Ed.) (Oxford University Press, Auckland, 1992) at 91.
17. Department of Conservation Te Papa Atawhai, *Annual Report for the Year Ended 30 June 2019*, (Department of Conservation Te Papa Atawhai, Wellington, October 2019).
18. Department of Conservation Te Papa Atawhai, *Operational Report for Te Rūnanganui o Ngāti Porou: Department of Conservation Annual Business Planning*, (Annual Meeting with Te Rūnanganui o Ngāti Porou, Department of Conservation Te Papa Atawhai, Gisborne, November 2018).
19. Etkin, C.E, 'The Sechelt Indian Band: An Analysis of a New Form of Native Self-government,' in *Canadian Journal of Native Studies* (Vol. 8, No. 1, 1988) at 73-105;

20. Godfery, M, 'Māori and Local Government,' in Drage, J and Cheyne, C, *Local Government in New Zealand: Challenges and Choices* (Dunmore Publishing Ltd, 2016);
21. Hannum, H 'Rethinking Self-determination' in *Virginia Journal of International Law* (Vol. 34, 1993) at 19; Rosas, A. 'Internal Self-Determination' in Tomuschat, I (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Boston, 1993);
22. Havemann, P 'Enmeshed in the Web? Indigenous Peoples' Rights in the Network Society' in Cohen, R & Rai, S.M *Global Social Movements* (The Althone Press, London, 2000) at 18 – 32.
23. Hawke, D & Maslove, A 'Fiscal Arrangements for Aboriginal Self-Government' in Hawke, D (ed) *Aboriginal Peoples and Government Responsibility* (Carleton University Press, Ottawa, 1989).
24. Hayward, J, 'Flowing from the Treaty's Words: The Principles of the Treaty of Waitangi,' in Hayward, J, & Wheen, N, (Eds), *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi,* (Bridget Williams Books, Wellington, 2004) at 29-40.
25. Heke, H 'Bill for a Māori Parliament' in McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971) at 164-5.
26. Heke, H, 'The Māori Parliament Movement' in McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971) at 162-4
27. Henare, D 'A Case Study' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 110.
28. Hofstede, G. 'National Cultures and Corporate Cultures' in L.A. Samovar & R.E. Porter (Eds.), *Communication Between Cultures*. (Belmont, CA: Wadsworth, 1984) at 51.
29. Hunt, J. 'Between a Rock and a Hard Place: Self-determination, Mainstreaming and Indigenous Community Governance,' in Hunt, J, Smith, D, Garling, S, and Sanders, W, (Eds.), *Contested Governance Culture, Power and Institutions in Indigenous Australia*, (CAEPR Research Monograph No. 29, Canberra, ACT: Centre for Aboriginal Economic Policy Research (CAEPR) College of Arts and Social Sciences. The Australian National University (ANU) E Press, 2008) at 27-54.
30. Joseph, R., 'Contemporary Māori Governance: New Error' in Farrar, J and Watson, S, (eds) *Contemporary Issues in Corporate Governance* (The Centre for Commercial & Corporate Law Inc, University of Canterbury, Christchurch, 2011) at 327 – 368.
31. Karetu, T 'Language and Protocol of the Marae', in King, M (ed) *Te Ao Hurihuri: The World Moves On* (3rd Ed)(Longman Paul Press, Auckland, 1981).
32. Kaufmann, D, Kraay, A, and Mastruzzi, M, 'Governance Matters V,' in Lewis, M & Peterson, G, *Governance in Education: Raising Performance,* (World Bank, 2009) at 3-4.
33. Kelsey, J 'Legal Imperialism and the Colonisation of Aotearoa' in Spoonley, P *Tauiwi: Racism and Ethnicity* (Dunmore Press, Palmerston North, 1984) at 32-43;
34. Kooiman, J & Bolvink, M, 'The Governance Perspective,' in Kooiman, J, Bolvink, M, Jentoft, S and Pullin, R, (Eds), *Fish for Life: Interactive Governance for Fisheries* (Amsterdam University Press, Amsterdam, 2005) at 15.

35. Mahuika, A, 'Whakapapa is the Heart' in Coates, K & McHugh, P, *Living Relationships: the Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 214.
36. Mahuta, R, 'The Kingitanga,' in King, M, *Te Ao Hurihuri: Aspects of Maoritanga,* (Reed, Auckland, 1992);
37. Mahuta, R.T, 'Afterword,' in McCann, D, *Whatiwhatihoe: The Waikato Raupatu Claim,* (Huia Publishers, Wellington, 2001) at 332-333.
38. McHugh, P, 'Constitutional Theory and Māori Claims' in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 159.
39. Miller, J, 'People, Berdaches and Left-Handed Bears' in *Journal of Anthropological Research* (Vol. 38, No. 3, 1982) at 272-87.
40. Ministry for the Environment, *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (25 February 2016) at 8.
41. Ministry of Justice, *Recognising Customary Rights under the Marine and Coastal Area (Takutai Moana) Act 2011,* (Ministry of Justice, Wellington, no date).
42. Molloy, T, Government of Canada, 'Nunavut – Opportunities through Public Government' in BCTC, *Speaking Truth to Power III: Self-Government: Options and Opportunities* (B.C Treaty Commission, Vancouver, 14-15 March 2002).
43. Muru-Lanning, M, 'At Every Bend a Chief, At Every Bend a Chief, Waikato of a Hundred Chiefs: Mapping the Socio-Political Life of the Waikato River,' in Wagner, J & Jacka, J, *Island Rivers: Fresh Water and Place in Oceania*, (Australian National University Press, Australia, 2018) at 137-164.
44. Oliver, P 'Cutting the Imperial Link - Canada and New Zealand,' in Joseph, P (ed) *Essays on the Constitution* (Brookers Ltd, Wellington, 1995).
45. Oliver, S, 'Tuhaere, Paora? - 1892' in Orange, C, *The Turbulent Years 1870 - 1900 - The Māori Biography from the Dictionary of New Zealand Biography* (Vol. 2, Bridget Williams Books, Wellington, 1994).
46. Parsonson, A, 'The Challenge to Mana Māori' in Rice, G.W (ed.) *The Oxford History of New Zealand* (2nd Ed.) (Oxford University Press, Australia, 1992) at 184.
47. Rangihau, J, 'Being Māori' in King, M (Ed), *Te Ao Hurihuri: The World Moves On* (3rd Ed, Longman Paul Press, Auckland, 1981) at 165-175.
48. Rawhiti, T. 'King Tawhiao's Constitution 1894' in McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971) at 165-8.
49. Ruru, J. 'The flow of Laws: the Trans-Jurisdictional Laws of the Longest River in Aotearoa, New Zealand,' in: Gray J, Holley C, and Rayfuse R (eds.) *Trans-Jurisdictional Water Law and Governance* (Oxon/UK, Routledge, 2016) at 175-191.
50. Schwimmer, E, 'The Māori Village' in Pocock, J (ed) *The Māori and New Zealand Politics* (Blackwood and Janet Paul Ltd, Auckland, 1965) at 72 - 80.
51. Scott, C, 'Co-Management and the Politics of Aboriginal Consent to Resource Development: The Agreement Concerning a New Relationship between Le Gouvernement du Québec and the Crees of Québec,' in Michael Murphy, M, (ed) *Canada: The State of the Federation 2003: Reconfiguring Aboriginal-State Relations* (McGill-Queen's University Press, Montreal, 2005) 133 at 134.

52. Selbin, E, 'Agency and Culture in Revolutions,' in Foran, J, (ed.), *Theorising Revolutions,* (Routledge, 1997).
53. Solomon, M 'The Context for Māori' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 76.
54. Sorrenson, M.P.K 'Māori and Pākehā' in Rice, G.W (ed.) *The Oxford History of New Zealand* (2nd Ed.) (Oxford University Press, Auckland, 1992) at 167.
55. Sorrenson, M.P.K 'Treaties in British Colonial Policy: Precedents for Waitangi' in Renwick, W (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) at 15-29.
56. Taylor, J, & Paget, G, 'Federal/Provincial responsibility and the Sechelt' in Hawkes, D, *Aboriginal Peoples and Government Responsibility* (1989) at 297.
57. Te Aho, L, 'Ngā Whakatunga Waimāori: Freshwater Settlements, in Wheen, N, and Hayward, J, (eds.) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) at 102;
58. Te Aho, L, 'The 'False Generosity' of Treaty Settlements – Innovation and Contortion,' in Erueti, A, *The UN Declaration on the Rights of Indigenous peoples: Implementation in Aotearoa*, (Victoria University Press, 2017).
59. Te Waharoa, W.T, 'The Election of the Māori King, 1858' in McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971) at 125-134
60. The Agreement Concerning a New Relationship between Le Gouvernement du Québec and the Crees of Québec,' in Michael Murphy, M, (ed) *Canada: The State of the Federation 2003: Reconfiguring Aboriginal-State Relations* (McGill-Queen's University Press, Montreal, 2005) 133 at 134.
61. Thornberry, P. 'The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism' in Tomuschat, I (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Boston, 1993) at 111.
62. Upton, H and Buck, E, 'Marine Protected Areas: An Overview,' in Mayr, F, (ed) *Marine Protected Areas* (Nova Science Publishers, New York, 2010).
63. Walker, R 'The Treaty of Waitangi as the Focus of Māori Protest,' in Kawharu, I.H *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 271;
64. Walker, R, 'Reclaiming Māori Education,' in Morgan, J & Hutchings, J, (Eds), *Decolonisation in Aotearoa: Education, Research and Practice,* (New Zealand Council for Education Research, Wellington, 2016) at 19-38.
65. Walt van Praag, M. 'The Position of UNPO in the International Legal Order' in Brōlmann, C; Lefeber, R and Zieck, M. (eds.), *Peoples and Minorities in International Law* (Kluwer Academic Publishers, Boston, 1993) at 319.
66. Williams, D, 'Wi Parata is Dead, Long Live Wi Parata,' in Erueti, A and Charters, C (eds.) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) at 31-58.
67. Williams, DV., 'Te Tiriti o Waitangi – Unique Relationship Between the Crown and Tangata Whenua?' in Kawharu, IH, (Ed), *Waitangi: Māori and Pākehā Perspectives,* (Oxford University Press, Auckland, 1990).

UK Government Reports

1. 'Charter for Erecting the Colony of New Zealand, and for Creating and Establishing a Legislative Council and an Executive Council, and for Granting Certain Powers and Authorities to the Governor for the time being of the said Colony,' in *GBPP* (I.U.P. Shannon, Ireland) [1835-1842] Vol. 3, at 153.
2. 'New Zealand Charter and Instructions,' in *GBPP,* (Vol. 5, [1846-1847] at 528-533.
3. 'Royal Instructions,' in *GBPP* (I.U.P Shannon, Ireland, 5 Dec. 1840) [1835-1842] Vol. 3, 156.
4. 'Royal Instructions'*, GBPP* (c. XIV 1847) at 87.
5. *AJHR* (1898, I-3A) at 7.
6. Chapter 14, 'Draft Instructions' to 1846 Constitution, CO 881/1, XXXIII, at the Public Records Office, London
7. Derby / Jervois *GBPP* (C-4413, 1885) at 9.
8. Derby / Jervois GBPP, (C-4413, 1885) at 7-8.
9. *GBPD*, (Vol. 121) at 922,
10. *GBPP* (1854, Grey / Earl Grey, 7 February 1852) at 71.
11. *GBPP* (5, 1846 -47) at 70-1.
12. *GBPP* (U.K), (Vol. 86, 1848) at 327-342.
13. *GBPP*, (1844) at 556, Appendix, at 349.
14. *GBPP,* (1847-8) at 55, Grey / Earl Grey, 15 December 1847.
15. *GBPP*, (1884-85 [C.4413] Derby / Jervois).
16. *GBPP,* (Vol, 1851) at 1144.
17. *GBPP*, (Vol. 21, 22 June 1852) at 1165.
18. Grey / Earl Grey, Secretary of State for the Colonies, 3 May 1847, Colonial Office 209/52, at 247-63, Public Record Office, London.
19. Martin, S. W. 'England and the New Zealanders,' (Part 1: Remarks upon a Despatch from the Right Hon. Earl Grey, to Governor Grey dated December 23 1846. Auckland, Auckland College Press, 1847) at 3-4.
20. Memorandum, 12 March 1885, enclosed with Despatch, Jervois to the Secretary of State, 28 March 1885, in *GBPP,* (C4413, 1884-85),
21. Memorandum, Stout / Jervois *GBPP* (C-4413, 1885) at 11.
22. New Zealand Government Act 1846 (U.K) 9 & 10 Vic. c.103.
23. *NZPD,* (1867, Vol. II) at 494.
24. Pakington, J *Hansard* CXX, 136 -8. Cf . F. Peel, *Hansard* 947-51 and Lord Desart, *GBPP*, (1851-53) at 1134.
25. Right Hon. Earl Grey / Governor Grey, 23 December 1846, *GBPP* (Vol. 5, 1846-1847) at 520-528
26. Sir William Molesworth was Secretary of State for the Colonies from 21 July - 17 November 1855.

New Zealand Government Reports

1. 'Enclosure A, Proceedings of Native Land Court', *AJHR,* (1873. Vol 3, G-3) at 14.
2. 'Evidence of Captain Gilbert Mair,' (National Archives, Wellington, Crown Law Office, File CLO 174, Part I).
3. 'Paora Tuhaere's Parliament at Orakei,' in *AJHR,* (1879, Sess. II, G-8) at 20.

4. ‘Report of the Select Committee on the Thames Sea beach Bill,’ in *AJHR,* (Vol. 2, 1869, F-7).
5. ‘Whanganui-o-Rotu' in ‘*Report of the Native Land Claims Commission’*, *AJHR*, (1921, Vol.2, G-5) at 13.
6. *AJHR* (1858), Stafford / Gore Browne, 6 May 1857.
7. *AJHR* (1869 F-7) at 6.
8. *AJHR* (1871, A-9).
9. *AJHR* (1876, G. 4) at 6.
10. *AJHR* (1883 J-1. Translation in the original source).
11. *AJHR* (1885 Session I, I-02b) 5.
12. *AJHR* (1886 Session I, G-08) at 1-2.
13. *AJHR*, 1860, F-3, at 24.
14. Archives of the Māori Affairs Department, (23/1, Native Office 82/307).
15. By Letter Patent, 14 November 1857. See *New Zealand Gazette*, (11 February 1858) at 20.
16. Crown Law Office, ‘Internal Paper,’ (002.0535, 2017).
17. Despatch from British Resident,’ (ATL, qMS-0344, No. 65/2)
18. Hon Christopher Finlayson, ‘Official Letter, Ngāti Pahauwera determination of customary interests under the Marine and Coastal Area (Takutai Moana) Act 2011,’ (Trustees, Ngāti Pahauwera Development Trust, 23 August 2016) at 1-2.
19. Hon Nanaia Mahuta MP, *NZPD* (711, 15 March 2016) 9662.
20. Hon Ruth Dyson MP, *NZPD* (711, 15 March 2016) at 9663.
21. Hon. Nick Smith MP *NZPD,* (712, 15 March 2016) at 9662.
22. Horowhenua Commission Report and Evidence, *AJHR* (1896, Vol 3, G-2) at 165.
23. John Gorst Resident Magistrate, *AJHR*, (E no 9 sec iii, 1862) at 8;
24. Johnson’s Journal, (23 April 1840, Auckland Public Library).
25. Kermadec Ocean Sanctuary Bill (120—2) (Select Committee Report 2016).
26. LAC Guidelines on Process and Content of Legislation (2016 edition) at 4 cited in Legislation Design and Advisory External Subcommittee ‘Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill’ (2016) at 2.
27. Letter to Solicitor-General Salmond, (5 October 1918, National Archives, Wellington, File CLO 174, Part 2).
28. *New Zealand Parliamentary Debates,* (16, 1874) at 853.
29. Notes of an inquiry made by Hon. Native Minister at Kihikihi, on December 19, 1883, *AJHR* (1886 Session I, G-08) at 2.
30. Notes of meetings *AJHR* (1885 G-1) 14.
31. *NZ Gazette* (24 January 1884) at 111.
32. *NZPD* [1864-66] at 292.
33. *NZPD,* (717, 15 September 2016) at 13783.
34. Petition of the Maniapoto, Raukawa, Tuwharetoa, and Whanganui Tribes,’ *AJHR* (1883, J-1) at 1–4.
35. Priestley, J, ‘Report of Independent Assessor on Evidence supporting claims by Ngati Pahauwera under the Marine and Coastal Area (Takutai Moana) Act 2011,’ (Minister of Treaty Negotiations, 15 December 2015).

36. Richmond, C.W, 11 September 1860: *NZPD* (1858-60) at 478-9; Cf with Nugent, Report 30 June 1854: MA 4/1
37. Salmond to Attorney-General, 1 August 1914, 'Opinions Relating to Lands Department 1913-15,'
38. Sir Joseph Ward *Précis of Proceeding of the Houses of Parliament of Great Britain, Imperial Ministers Conference* (Minutes of Proceedings, London, June 1911).
39. Stanley / Grey, 12 March 1845, C.O No.1, G1 at 13, as cited in at 120.
40. Swainson / Shortland, 27 December 1842, CO 209/16: 487; Opinion of 13 July 1843, (enclosure in Shortland / Stanley (no. 2), 13 July 1843, CO 209/22) 245 at 285-93.
41. Wilkinson telegram to Bryce 15 March 1883 in (MA 23/5 ANZ Wellington).
42. William Lee Rees 1836-1912: *AJHR,* (1891 G4) at xviii.

Iwi Reports

1. Ngāti Kurī Trust Board Inc. 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016).
2. Ngāti Pahauwera Development Trust, 'Takutai Moana Ratification Booklet for Members of Ngāti Pahauwera,' (Unpublished Ngāti Pahauwera Report, May-July 2017).
3. Te Ohu Kai Moana Trustee Limited, 'Submission on the Kermadec Ocean Sanctuary Bill,' (2016) at 7.
4. Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016).
5. Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 14.
6. Fagan, C *The Successes and Failures of Indigenous Co-Management Regimes in Canada: Possible Ways the Waikato River Claim Settlement Process Can Learn from the Canadian Experience* (Hamilton: Waikato Raupatu Trustee Co. Ltd, 2005);

First Nations/Inuit Reports

1. Christie, G, *Aboriginal Nationhood and the Inherent Right to Self-Government,* (Research paper for the National Centre for First Nations Governance, May 2007).
2. Clark, M and others, *Biodiversity of the Kermadec Islands and offshore waters of the Kermadec Ridge: Report of a coastal, marine mammal and deep-sea survey* (Ministry of Primary Industries, TAN1612, January 2017).
3. Coastal First Nations, *Coastal First Nations Great Bear Initiative Annual Report 2017,* (Coastal First Nations, Vancouver, 2017).
4. Coastal First Nations, *Protecting Our Coast, Building Our Economy,* (Coastal First Nations, Vancouver, 2017).
5. Cree Nations of Eeyou Istchee, *Cree Vision of Plan Nord,* (Cree Nations of Eeyou Istchee, James Bay, Canada, 2011).

6. Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Cree and Cree Territory into a Sovereign Quebec* (Grand Council of the Crees, Nemaska, Quebec, 1995).
7. Nunavut Tungavik *Nunavut '99: Changing the Map of Canada* (Nortext Multimedia Inc, Nunavut Tungavik Inc, Iqaluit, Nunavut, 2000).
8. Penikett, T, *Six Definitions of Aboriginal Self-Government and the Unique Haida Model,* (Action Canada, B.C, September 2012).

Aboriginal and Torres Strait Islander Reports

1. Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia 2018) at ix.
2. Cultural Values Project Steering Committee, *Which Way Australia's Rainforest Culture: Relisting the Cultural Values for World Heritage*, (Compiled by Hill, R, Bock, E and Pert, P with and on behalf of the Rainforest Aboriginal Peoples and the Cultural Values Project Steering Committee, Cairns, Australia: Rainforest Aboriginal Peoples' Alliance and Project Partners, 2016).

Research Reports

3. ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: Final Report* (Ministry of Aboriginal Affairs, BC and Federal Treaty Office, BC, July 1995).
4. Baragwanath, D 'The Treaty of Waitangi and the Constitution' in *Treaty of Waitangi Issues – the Last Decade and the Next Century* (New Zealand Law Society Seminar, April 1997) at 1.
5. Berkes, F, George, P, and Preston, R, *Co-Management: the Evolution of the Theory and Practice of Joint Administration of Living Resources* (TASO Research Report, Second Series, No. 1 Paper Presented at the Second Annual Meeting of IASCP University of Manitoba, Winnipeg, Canada, Sept. 26-29, 1991).
6. Christie, G, *Aboriginal Nationhood and the Inherent Right to Self-Government,* (Research paper for the National Centre for First Nations Governance, May 2007).
7. Clark, M and others, *Biodiversity of the Kermadec Islands and offshore waters of the Kermadec Ridge: Report of a coastal, marine mammal and deep-sea survey* (Ministry of Primary Industries, TAN1612, January 2017) at 7.
8. Coastal First Nations, *Coastal First Nations Great Bear Initiative Annual Report 2017:*
9. Cree Nations of Eeyou Istchee, *Cree Vision of Plan Nord,* (Cree Nations of Eeyou Istchee, James Bay, Canada, 2011).
10. Cultural Values Project Steering Committee, *Which Way Australia's Rainforest Culture: Relisting the Cultural Values for World Heritage*, (Compiled by Hill, R, Bock, E and Pert, P with and on behalf of the Rainforest Aboriginal Peoples and the Cultural Values Project Steering Committee, Cairns, Australia: Rainforest Aboriginal Peoples' Alliance and Project Partners, 2016).

11. Dale, A, Wren, L, Fraser, D, Talbot, L, Hill, R, Evans-Illidge, L, Forester, T, Winer, M, George, M, Gooch, M, Hale, L, Morris, S and Carmody, J, *Traditional Owners of the Great Barrier Reef: The Next Generation of Reef 2050 Actions*, (Commonwealth of Australia 2018).
12. Dean, W, 'The Importance of Indigenous Governance and its Relationship to Social and Economic Development,' (Patron, Reconciliation Australia, Unpublished Indigenous Governance Conference Address, Australia National University, Canberra, 3 April, 2002).
13. Dodson, G & Papoutsaki, E (Eds), *Communication Issues in Aotearoa New Zealand: A Collection of Research Essays* (Epress Unitec, Auckland, 2014) at 62-73.
14. Fagan, C *The Successes and Failures of Indigenous Co-Management Regimes in Canada: Possible Ways the Waikato River Claim Settlement Process Can Learn from the Canadian Experience* (Hamilton: Waikato Raupatu Trustee Co. Ltd, 2005);
15. Financial Services Council, *Valuing Native Title in Australia: Native Title Agreements and Trusts Research. Final Report*, (KPMG, Melbourne, Australia, 2015).
16. Fodder, T, Davis-Ngatai, P & Joseph, R, *Ka Takahia ano o Tātou Tapuae: Retracing our Steps: A Maori Governance Overview and Literature Review,* (Māori and Indigenous Governance Centre, University of Waikato, Hamilton, prepared for Ngā Pae o te Māramatanga, 2014) at 8-15.
17. Forest and Bird, WWF NZ and The Pew Charitable Trusts, 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016)
18. Harmsworth, G, 'The role of Māori values in Low-impact Urban Design and Development, (LIUDD), Discussion Paper, no date).
19. Henare, M, 'Ngā Tikanga me ngā Ritenga o Te Ao Māori,' (Report of the Royal Commission on Social Policy, Wellington, 1988).
20. Iorns, CJ 'International Standards and State Obligations Concerning Indigenous Peoples' Self-Determination and Cultural Survival' (Unpublished Paper for Te Mātāhauariki Institute, Laws and Institutions for a Bicultural Aotearoa/New Zealand, University of Waikato Programme, 1998).
21. Jackson, M 'An Analysis of the Foreshore and Seabed Bill' (Māori Law Commission, Wellington, May 2004) at 1.
22. Jackson, M *He Whaipaanga Hou: Māori and the Criminal Justice System: A New Perspective* (2 Vols, Department of Justice, Wellington, 1987, 1988).
23. Joseph, R, Tahana, A, Kilgour, J, Mika, J, Rakena, M & Jeffries, T.P, *Te Pae Tawhiti: Exploring the Horizons of Māori Economic Performance through Effective Collaboration,* (Māori and Indigenous Governance Centre (MIGC), University of Waikato, Hamilton, prepared for Ngā Pae o te Māramatanga, 2016).
24. JustSpeak, *Māori and te Criminal Justice System: A Youth Perspective,* (Position Paper by JustSpeak, March 2012).
25. Kroeber, A and Kluckhohn, C, *Culture: A Critical Review of Concepts and Definitions,* (Papers of the Peabody Museum of American Archaeology and Ethnology, Harvard University, Vol. XLVII-No.1, 1952);
26. Marriot, L & Sim, D, *Indicators of Inequality for Māori and Pacific People,* (Working Paper 09, Working Papers in Public Finance, Victoria Business School, Wellington, August 2014);

27. McNeil, K, 'The Jurisdiction of Inherent Right Aboriginal Governments' (Research Paper for the National Centre for First Nations Governance, 11 October 2007)
28. Menczer, M, 'Strategies on Implementing Self-Government' (Unpublished Research Paper, Canada, March 29, 2012).
29. Metge, J, 'Commentary on Judge Durie's Custom Law,' (Unpublished Custom Law Guidelines Project Paper, 1997).
30. *Ministry of Agriculture and Fisheries Management Planning ITQ Implications Study - Second Report* (Community Issues) FMP Series No 20, 48) as cited in Munro, J, 'The Treaty of Waitangi and the Sealord Deal,' in *Victoria University of Wellington Law Review,* (Vol. 24, 1994) 389 at 421-422.
31. Ministry of Justice, *Hinatore ki te Ao Māori: A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001)
32. Mulgan, R, 'Commentary on Chief Judge Durie's Custom Law Paper from the Perspective of a Pākehā Political Scientist,' (Unpublished Paper, Law Commission, 1997).
33. New Zealand Fishing Industry Association, 'Supplementary Submission A to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016)
34. Norman, P, 'Crown and Iwi Co-Management: A Model for Environmental Governance in New Zealand? (University of Auckland Policy 701, 2011)
35. Nunavut Tungavik *Nunavut '99: Changing the Map of Canada* (Nortext Multimedia Inc, Nunavut Tungavik Inc, Iqaluit, Nunavut, 2000).
36. Penikett, T, *Six Definitions of Aboriginal Self-Government and the Unique Haida Model,* (Action Canada, B.C, September 2012)
37. Coastal First Nations, *Protecting Our Coast, Building Our Economy,* (Coastal First Nations, Vancouver, 2017).
38. Rennie, H, Thomson, J and Tutua Nathan, T, *Factors Facilitating and Inhibiting section 33 transfers to Iwi,* (University of Waikato & Electric Energy, Hamilton, 2000) at 34.
39. Richardson, B, *Regional Agreements for Indigenous Lands and Cultures in Canada: A Discussion Paper* (North Australia Unit, Australia National University, 1995)
40. Royal, C, *The Purpose of Education: Perspectives Arising from Mātauranga Māori: A Discussion Paper* (Report Prepared for the Ministry of Education, Version 4, January 2007).
41. Rumbles, W, *Africa: Co-Existence of Customary and Received Law: Review of the South African Law Commission's Project 90: The Harmonisation of the Common Law and the Indigenous Law: Report on Conflict of Laws* (Te Mātāhauariki Institute, Waikato Print, Hamilton, 2000).
42. Scott, C, 'Co-Management and the Politics of Aboriginal Consent to Resource Development:
43. Severinsen, G and Peart, R, *Reform of the Resource Management System - The Next Generation* (Environmental Defence Society (EDS) Working Paper 1, 2018).
44. Smith, G.H, Tinirau, R., Gilles, A. & Warriner, V. *He Mangopare Amohia: Strategies for Māori Economic Development*, (Te Whare Wānanga o Awanuiārangi, Whakatāne: 2015).
45. Taylor, L, Te Whenua, T and Hatami, B, '*Discussion Paper: How Current Legislative Frameworks Enable Customary Management and Ecosystem-based Management in*

Aotearoa New Zealand – the Contemporary Practice of Rāhui,' (Landcare Research Contract Report LC3103, Sustainable Seas National Science Challenge: Cross Programme 1.1 Enabling EBM in the current legislative framework, April 2018).

46. Walker, R, 'Reclaiming Māori Education,' in Morgan, J & Hutchings, J, (Eds), *Decolonisation in Aotearoa: Education, Research and Practice,* (New Zealand Council for Education Research, Wellington, 2016) at 19-38.
47. Wickliffe, C, 'A Māori Commentary on the Paper Written by the Hon. Bertha Wilson entitled: Self-determination of Native Peoples: A Canadian Perspective on Emerging Issues in New Zealand' (Unpublished Paper, 1997, in author's possession).
48. Williams, N and Broadley, ME, 'Ngā Taonga Whakaako – Underlying Theoretical Principles of Tikanga,' (Ako Aotearoa, Open Polytechnic Kuratini Tuwhera and Te Tari Puna Ora o Aotearoa, 2012).

Other Official Reports

1. 'Māori and Environmental Law - Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012' in *Environmental and Resource Management Law Online* (Lexis Nexis, September 2017).
2. Ajwani, S, Blakely, T, Robson, B, Tobias, M & Bonne, M, *Decades of Disparity: Ethnic Mortality Trends in New Zealand, 1980-1999*, (Ministry of Health and University of Otago, 2003).
3. Auckland Council, 'Unitary Plan Update Request Memorandum,' (Auckland Council, 23 June 2018).
4. Auckland Council, 'Unitary Plan Update,' (Auckland Council, August 2017) Chapter B6.
5. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (2 Vols, 1986).
6. Benton, R, *The Māori Language: Dying or Reviving?* (Reprinted, New Zealand Council for Educational Research, Wellington, 1997).
7. Benton, R, *Who Speaks Māori in New Zealand?* (New Zealand Council for Educational Research, Wellington, 1979).
8. Canada, *Indian Self-Government in Canada: Report of the Special Committee,* (Penner Report, Queen's Printer, Ottawa, 1983) c. I-5.
9. Canada, *Perspective's in Native Claims Policy* (A background paper prepared for the Canadian Arctic Resources Committee's Third National Workshop on 'People, Resources and the Environment North of 60,' (Yellowknife, June 1-3, 1983).
10. Department of Corrections, 'Trends in the offender population,' (Department of Corrections, Wellington, 2013) at 8 online at: http://corrections.govt.nz (Accessed October 2018).
11. Department of Indian Affairs and Northern Development, *Western Arctic (Inuvialuit) Claim Implementation Annual Review 1990-1991,* (Department of Indian Affairs and Northern Development, Ottawa, 1991);
12. Department of Indian Affairs and Northern Development, *Western Arctic (Inuvialuit) Claim Implementation Annual Review, 1991-1992,* (Department of Indian Affairs and Northern Development, Ottawa, 1992);

13. Department of Indian Affairs and Northern Development, *Western Arctic (Inuvialuit) Claim Implementation Annual Review,1992-1993,* (Department of Indian Affairs and Northern Development, Ottawa, 1993).
14. Environmental Protection Agency, *Briefing to Incoming Ministers* (October 2017).
15. Hunn, J, *Report on the Department of Māori Affairs,* (RE Owen, Wellington, 24 August 1961).
16. Jackson, M *He Whaipaanga Hou: Māori and the Criminal Justice System: A New Perspective* (2 Vols, Department of Justice, Wellington, 1987, 1988).
17. Jackson, M, *Māori and the Criminal Justice System: A New Perspective, He Whaipaanga Hou,* (Study Series 18, Policy and Research Division, Department of Justice, 1987).
18. Law Commission, *The Treaty of Waitangi and Māori Fisheries: Mataitai: Nga Tikanga Māori Me Te Tiriti o Waitangi* (Preliminary Paper No 9, Wellington, New Zealand).
19. Local Government New Zealand, *Local Authorities and Māori: Case Studies of Local Arrangements* (Local Government New Zealand, 2011).
20. Ministry for the Environment, *A New Marine Protected Areas Act: Consultation Document* (Ministry for the Environment, Wellington, 2016).
21. Ministry for the Environment, *Environment Aotearoa 2019: New Zealand's Environmental Reporting Series,* (Ministry for the Environment and Stats NZ, Wellington, 2019).
22. Ministry for the Environment, *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (25 February 2016).
23. Ministry of Fisheries, *Mātaitai Reserve* (2009).
24. Nana, G, Stokes, F & Molano, W, *The Asset Base, Income Expenditure and GDP of the 2010 Māori Economy* (BERL Report, Te Puni Kokiri, Wellington, 2011).
25. New Zealand Government, *A New Marine Protected Areas Act: Consultation Document,* (Ministry for the Environment, Wellington, 2016).
26. New Zealand Health and Disability Bill, (As Reported to the Health Committee: Commentary, Wellington, November 2018).
27. New Zealand Institute of Economic Research, Ministry of Māori Development, *Māori Economic Development Te Ōhanga Whanaketanga Māori* (NZIER, Wellington, 2003).
28. New Zealand Law Commission, *Waka Umanga: A Proposed Law for Māori Governance Entities* (New Zealand Law Commission, Wellington, 2006).
29. New Zealand, *New Zealand Handbook of International Human Rights* (Ministry of Foreign Affairs and Trade, Wellington, 1998).
30. Parliamentary Commissioner for the Environment, *Possum-Management in New Zealand: Critical Issues in 1998* (Office of the Parliamentary Commissioner for the Environment, PCE Progress Report No 1, November 1998) at 7.
31. Rangihau J, *Puao-Te-Ata-Tu* (Department of Social Welfare, Wellington, 1986) at 19-20.
32. Rickys, P, 'Local Government Reform and Māori 1988-2002,' (Te Ngutu o Te Ika Publications, Auckland, 2004).
33. Royal Commission on Aboriginal Peoples (RCAP), *Restructuring the Relationship* (Appendix 4b at section 1, Ottawa, 1995).
34. Royal, C, *The Purpose of Education: Perspectives Arising from Mātauranga Māori: A Discussion Paper* (Report Prepared for the Ministry of Education, Version 4, January 2007).

35. Secretariat of the Convention on Biological Diversity, *The Ecosystem Approach* (Secretariat of the Convention on Biological Diversity, Montreal, QC, Canada, 2004).
36. Te Puni Kokiri & Gover, K, *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal,* (Te Puni Kokiri, Wellington, 2001).
37. Te Puni Kokiri, *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Te Puni Kokiri: Ministry of Māori Development, Wellington, 2002).
38. Te Puni Kokiri, *Māori in the New Zealand Economy,* (Ministry for Māori Development, Wellington, 2002).
39. Te Puni Kokiri, *Te Ture Whenua Māori Act 1991 Review Panel: Discussion Document* (Te Puni Kokiri, Wellington, 2013).
40. Te Rūnanga o Ngāi Tahu and Department of Conservation, *Te Waihora Joint Management Plan. Mahere Tukutahi o Te Waihora* (Christchurch, Te Rūnanga o Ngāi Tahu and Department of Conservation, 2005).
41. Te Toi Ora, *Housing and Health,* (Te Toi Ora – Public Health, Bay of Plenty District Health Board, July 2008).
42. United Nations Environment Programme, *Ecosystem-based Management: Markers for assessing progress* (UNEP/GPA 2006).
43. Usher, J, *North Project Area 5: Land, Resource and Environment Regimes Contemporary Aboriginal Land, Resource and Environment Regimes Origins, Problems and Prospects* (Report prepared for Royal Commission on Aboriginal Peoples Land, Resource and Environmental Regimes, P.J Usher Consulting Services, 1996).

United Nations Reports

1. Anaya, J, 'Extractive Industries and Indigenous Peoples, Report of the Special Rapporteur on the Rights of Indigenous Peoples,' (Report to the Human Rights Council A/HRC/24/41, 2013) para 49-51.
2. Article 27, International Covenant on Civil and Political Rights 1966.
3. CERD 'Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: Suriname' ibid; CERD 'Decision 1(66):
4. CERD/C/DEC/NZL/1 (March 2005).
5. *Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity,* 21November 1990, reprinted in (1991) 30 I.L.M. 190.
6. *Charter of the United Nations*
7. *Charter of the United Nations,* Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993. Signed at San Francisco on June 26, 1945; entered into force on October 24, 1945. Signed by Canada on June 26, 1945 and ratified on November 9, 1945.
8. *Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) [*Convention (No 107)*]; *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries,* 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).

9. Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) [ILO Convention No. 107].
10. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).
11. Convention on Biological Diversity, 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993), *Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets,* (Target 11).
12. Cot, J. -P. & Pellet, A. (eds.), *The Charter of the United Nations* (Éditions Economica, Paris, 1985).
13. Daes, E.I *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples* UN Doc. E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993).
14. Daes, E-I, *Confidential Report, by Prof. Erica-Irene Daes,* (Chairman-Rapporteur of the United Nations Working Group on Indigenous Populations, on visit to New Zealand, 2-7 January, 1988).
15. *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res. 67/1, 24 September 2012 (adopted without vote).
16. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971). Reprinted in *I.L.M*. (Vol. 9, 1970) 1292.
17. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,* UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971). Reprinted in *I.L.M*. (Vol. 9, 1970) 1292.
18. *Declaration on the Granting of Independence to Colonial Countries and Peoples,* U.N.G.A. Resolution 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684, adopted on 14 December 1960.
19. Dr Dalee Dorough, 'Concept Paper on the 2014 Theme Regarding Good Governance' (UN Permanent Forum on Indigenous Issues, 13th Session, New York, 12-23 May 2014).
20. Economic and Social Council *Report of the Commission on Human Rights* (18th Sess, March-April 1962) UN Doc E/3616/Rev 1, para 105.
21. Erica-Irene Daes, Chairman-Rapporteur of the United Nations Working Group Populations, Visit to New Zealand, (2-7 January 1988).
22. *Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act),* August 1, 1975. Reprinted in *I.L.M*. (Vol. 14, 1975) 1295.
23. Frechette, L, Deputy Secretary-General of the UN, *Speech to the World Conference on Governance* (31 May 1999).
24. General Recommendation No. 23: Indigenous Peoples: 18/08/97.
25. Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009).
26. ILO Convention 169 on Indigenous and Tribal Peoples.
27. *International Covenant on Civil and Political Rights* (1966), G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). Adopted

by the U.N. General Assembly on 16 December 1966 and entered into force 23 March 1976.
28. *International Covenant on Economic, Social and Cultural Rights,* G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16), 49, U.N. Doc. A/6319 (1966); Can. T.S. 1976 No. 46. Adopted by the General Assembly on 16 December 1966 and entered into force on 3 January 1976.
29. International Work Group for Indigenous Affairs, *The Indigenous World: 1993-94* (International Work Group for Indigenous Affairs, Copenhagen, 1994).
30. Johannesburg Declaration on Sustainable Development A/CONF.199/20 at 25-26.
31. New Zealand Foreshore and Seabed Act 2004' (11 March 2005) CERD/C/66/NZL/Dec.1; UN Committee on Economic, Social and Cultural Rights (CESCR) 'Concluding Observations: Bolivia' (21 May 2001) UN Doc E/C.12/1/Add.60, CESCR 'Concluding Observations: Ecuador' (7 June 2004)
32. Report of the UN Special Rapporteur on the rights of Indigenous peoples, James Anaya, to the UN General Assembly (2013) A/68/317.
33. Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OAS Doc., OEA/Ser.L/V/II.62. Doc. 26 (1984).
34. *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples,* Eur. Parl. Doc. (PV 58) 2, (1994) at 3, para. 2.
35. Rights Committee, *General Comment No. 12, Article 1*, 21st sess., A/39/40 (1984).
36. Secretariat of the Convention on Biological Diversity, *The Ecosystem Approach* (Secretariat of the Convention on Biological Diversity, Montreal, QC, Canada, 2004).
37. *The African Charter on Human and Peoples' Rights, 1981*
38. The United Nations General Assembly. *Declaration on the Rights of Indigenous People*, 2007, Article 32.
39. U.N. General Assembly, 3rd Session, 180th Plenary Meeting (1948) at 862.
40. U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations,* U.N. Doc. E/CN.4/Sub.2/1986/7, Add. 4 (J. Cobo, Special Rapporteur), at paras. 579 & 580.
41. UN Committee on the Elimination of Racial Discrimination (CERD), 'General Recommendation XXIII: Indigenous Peoples' (18 August 1997) UN Doc A/52/18, annex V; CERD 'Decision 1(53): Australia' (11 August 1998) UN Doc A/53/18; CERD 'Concluding Observations on United States of America' (14 August 2001) UN Doc A/56/18 paras 380–407; CERD 'Concluding Observations: Argentina' UN Doc CERD/C/65/CO/1 (August 2004), para 16; CERD 'Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: Suriname' UN Doc CERD/C/64/CO/9 (2004);
42. UN Doc E/C.12/1/Add.100; UN Committee on the Elimination of Discrimination Against Women 'Concluding Observations: Australia' UN Doc A/52/38/Rev.1 Part II (12 August 1997) at para 119.
43. UN Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government* (E/CN.4/1992/42, Nuuk, Greenland, September 24 – 28, 1991).
44. UNHRC 'Concluding Observations of the Human Rights Committee: Republic of Guatemala' (27 August 2001) UN Doc CCPR/CO/72/GTM;
45. UNHRC 'Concluding Observations on Chile's Fourth Periodic Report' (30 March 1999) UN Doc CCPR/C/79/Add.1094, para 22;

46. UNHRC 'Concluding Observations on Mexico's Fourth Periodic Report' (27 July 1999) UN Doc CCPR/C/79/Add.109 para 19;
47. United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP)
48. United Nations Development Programme (UNDP) *Integrating Human Rights with Sustainable Human Development* (UNDP, Geneva, 1995).
49. United Nations Environment Programme, *Ecosystem-based Management: Markers for assessing progress* (UNEP/GPA 2006).
50. *Vienna Convention on the Law of Treaties* (Done at Vienna on 23 May 1969, Entered into force on 27 January 1980, United Nations, *Treaty Series*, Vol. 1155).
51. *Vienna Declaration and Programme of Action: Note by the Secretariat,* World Conference on Human Rights, U.N. Doc. A/CONF.157/23, (1993).
52. World Bank, *Governance and Development* (World Bank, USA, 1992).

Waitangi Tribunal Reports

1. Alexander, D, 'The Rangitīkei River, Its Tributary Waterways, and Other Taihape Waterways: Scoping Report,' (A Report commissioned by the Crown Forestry Rental Trust, February 2012).
2. Hughes, H, *Environmental Management and the Principles of the Treaty of Waitangi* (A Report on the Crown Response to the Recommendations of the Waitangi Tribunal, 1983 - 1988, Wellington, 1988).
3. Marr C. 'Te Rohe Potāe Political Engagement 1864-1886,' (Prepared for the Waitangi Tribunal, 2011) at 471.
4. Ona Heitia, Ngāti Parewahawaha, WAI-2197 Claimant, 30 January 2012, cited in Alexander, D, 'The Rangitīkei River, Its Tributary Waterways, and Other Taihape Waterways: Scoping Report,' (A Report commissioned by the Crown Forestry Rental Trust, February 2012) at 44.
5. Wai 898, #1.1.131., *Statement of Claim for Ngati Ingoa*, (17 December 2008) at 4
6. Waitangi Tribunal *Fisheries Settlement Report 1992* (GP Publications, Wellington, 1992)
7. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Legislation Direct, Wellington, 2011).
8. Waitangi Tribunal *Report on the Muriwhenua Fishing Resource Claim* (G.P Publications, Wellington, 1988).
9. Waitangi Tribunal *Taranaki Report: Kaupapa Tuatahi* (WAI 143, GP Publishers, Wellington, 1996).
10. Waitangi Tribunal *The Fisheries Settlement Report* (Wai 307, 1992).
11. Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, Legislation Direct, Wellington, 2011).
12. Waitangi Tribunal *The Taranaki Report Kaupapa Tuatahi* (G.P Publications, Wellington, 1996).
13. Waitangi Tribunal, 'Errata for the Rohe Pōtae/King Country Inquiry Boundary Discussion Paper,' (Wai 898 #6.22, Waitangi Tribunal, January 2007) at 4.
14. Waitangi Tribunal, *He Maunga Rongo Report,* (Wai 1200, Legislation Direct, Wellington, 2008).

15. 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, Wellington, 2014).
16. Waitangi Tribunal, *Kiwi Marketing Report* (G.P Publications, Wellington, 1995) 3.
17. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Legislation Direct, Wellington, 2011).
18. Waitangi Tribunal, *Manukau Report* (Wai 8, GP Publications, Wellington, 1985).
19. Waitangi Tribunal, *Matua Rautia Report on the Kohanga Reo Claim,* (Wai 2336, Legislation Direct, Wellington, 2012).
20. Waitangi Tribunal, *Muriwhenua Fishing Report,* (Wai 22, Waitangi Tribunal, 1987).
21. Waitangi Tribunal, *Ngāi Tahu Report* (WAI 27, Brooker and Friend Ltd, Wellington, 1991) at 224.
22. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Resource Report* (G.P Publications, Wellington, 1992).
23. Waitangi Tribunal, *Orakei Report,* (Wai 9, Waitangi Tribunal, 1897) at 207.
24. Waitangi Tribunal, *Rangahaua Whanui Series: National Overview* (GP Publications, Wellington, 1997).
25. Waitangi Tribunal, *Report Findings and Recommendations of the Waitangi Tribunal ...in Relation to Fishing Grounds in the Waitara District* (WAI-6) 17 March 1983).
26. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies,* (Wai 26, Waitangi Tribunal, 1990).
27. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River,* (Wai 4, Waitangi Tribunal, 1984).
28. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim,* (Wai 8, Waitangi Tribunal, 1985).
29. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim,* (Wai 22, Legislation Direct, Wellington, 1988)
30. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy,* (Wai 1071, Legislation Direct, Wellington, 2004).
31. Waitangi Tribunal, *Te Mana Whatu Ahuru – Pre-Publication Report,* (Wai 898, Parts 1 and 2, Legislation Direct, Wellington, 2018).
32. Waitangi Tribunal, *Te Reo Māori Report,* (Wai 11, Waitangi Tribunal, 1987)
33. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui Report,* (Wai 785, Legislation Direct, Wellington, 2008).
34. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui,* (Wai 785, Waitangi Tribunal, 2008).
35. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island,* (Wai 785, Legislation Direct, Wellington, 2007).
36. Waitangi Tribunal, *Te Urewera Report,* (Wai 894, Vol. 8, Legislation Direct, Wellington, 2017).
37. Waitangi Tribunal, *Te Whanganui a Tara Me Ona Takiwa: Report of the Wellington District,* (Wai 145, Waitangi Tribunal, 2003) at 74.
38. Waitangi Tribunal, *Te Whanganui-a-Orotu Report* (G.P Publications, Wellington, 1995).
39. Waitangi Tribunal, *The Fisheries Settlement Report* (Wai 307, 1992).
40. Waitangi Tribunal, *The Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry,* (Wai 2757, Legislation Direct, Wellington, 2019).

41. Waitangi Tribunal, *The Manukau Report* (Wai 8, Government Printer, Wellington, 1985).
42. Waitangi Tribunal, *The Napier Hospital and Health Services Report,* (Wai 692, Legislation Direct, Wellington, 2008).
43. Waitangi Tribunal, *The Ngāi Tahu Report,* (Government Printer, Wellington, 1991).
44. Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993,* (Wai 304, Brookers Ltd, Wellington, 1993).
45. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wai 796, Legislation Direct, Wellington, 2011).
46. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).
47. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (GP Publications, Wellington, 1996).
48. Waitangi Tribunal, *The Tarawera Forest Report,* (Wai 411, Legislation Direct, Wellington, 2003).
49. Waitangi Tribunal, *The Whanganui River Report 1999,* (GP Publications, Wellington, 1999).
50. Waitangi Tribunal, *Turangi Township Report,* (Wai 84, Waitangi Tribunal, 1995).
51. Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake,* (Wai 2417, Waitangi Tribunal Report, 2015).
52. Williams, D, *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices,* (Waitangi Tribunal, Wellington, 2001).

Newspapers

1. ‘Claim to the Pacific,’ in *New Zealand Herald,* (24 February 1955).
2. ‘Hi Ritenga Māori’ in *Ko Te Karere o Nu Tireni,* (Vol. 2, No. 6, 1 June 1843) at 23.
3. ‘On Māori Customs being Codified’ in *New Zealand Times*, (30 August 1905) at 6.
4. ‘Red Tape stymies native Indians, economist says’ in *Vancouver Sun*, (22 November 2001).
5. ‘Sechelt Nation pens new deal with province for 288 hectares,’ in *Coast Reporter,* (21 July 2016).
6. ‘Te Kitenga o Te Awhiorangi: The Finding of Te Awhiorangi', reproduced in *Te Ao Hou*, (No. 51, June 1965) at 40.
7. ‘Te Kupu a Manga: The Words of Manga’ in *Te Waka Māori o Niu Tireni*, (1 February 1879) at 288.
8. *Aborigines’ Friend* II (April 1850) at 410-12.
9. *Aborigines’ Friend* IV (June/July 1852);
10. Andrew Little cited in Trevett, C and Jones, N, ‘PM John Key: Kermadec sanctuary will be put on ice if no agreement with Māori Party,’ *New Zealand Herald* (20 September 2016) <www.nzherald.co.nz (Accessed October 2016).
11. *Auckland Star*, (20 June 1879) at 2 Translation in the original source.
12. *Daily Southern Cross*, (25 January 1868) at 5
13. *Daily Southern Cross*, (8 July 1875) at 6.
14. *Evening Post* (28 November 1890)
15. *Huia Tangata Kotahi* (Vol. 1, No. 2, 23 Feb. 1893) at 4, No. 24, 25 Nov. 1893) at 5;
16. *Huia Tangata Kotahi*, (24 February 1894) at 3.

17. Jamie Tuuta cited in, Sachdeva, S, 'Kermadec sanctuary legislation to be delayed after failed negotiations over Māori rights,' *Stuff* (14 September 2016) <www.stuff.co.nz (Accessed October 2016). .
18. Let Fisheries assets flow, Henare urges Māoridom,' in *The Dominion*, (Wellington, August 5, 1998).
19. Letter from Rewi Maniapoto, Te Ni, and Te Kohika to Grey 23 April 1883, *Grey letters*, (GNZ MA 197 Auckland Public Library. Translation in the original source).
20. *Māori Messenger* (10 July and 26 July 1860).
21. *Nelson Examiner and New Zealand Chronicle*, (5 May 1869) at 3.
22. *New Zealand Herald*, (19 May 1879) at 5.
23. *New Zealand Herald*, (23 February 1882) at 5.
24. *New Zealand Herald*, (23 July 1883) at 5
25. *New Zealand Herald*, (27 February 1882) at 2.
26. *New Zealand Herald*, (5 September 1866) at 3.
27. *New Zealand Herald*, (8 April 1882) at 5.
28. *New Zealand Spectator*, (24 February 1856).
29. Price, R, 'Kermadec Ocean Sanctuary: a 'dangerous' precedent for Māori rights?' in *Stuff* (23 March 2016) <www.stuff.co.nz (Accessed March 2016).
30. Te Kooti's Exploits a Canard, *Auckland Star*, (3 August 1872) at 2.
31. *Te Korimako* (No. 66, 22 Aug 1887) at 6, No. 67, 20 Sept. 1887) at 4, No. 68, 15 Oct. 1887) at 9;
32. *Te Korimako,* (15 August 1883).
33. *Te Korimako,* (15 September 1883) at 5. Translation in *New Zealand Herald,* (28 August 1883) 5.
34. *Te Paki o Matariki* (No. 67, 20 Sept. 1895) at 3;
35. *Te Paki o Matariki*, (17 May 1881);
36. *Te Pipiwhauraurоa* (No 59, Jan. 1903) at 10.
37. *Te Toa Takitini*, (No. 9, October 1930) at 2161.
38. *Te Waka Māori o Niu Tirangi*, (17 April 1877) at 100. Translation in the original source.
39. *Te Waka Māori o Niu Tireni* (Vol. 13b, No. 2, 13 Feb. 1877), Vol. 1, No. 29, 19 April 1879) at 399;
40. *Te Waka Māori o Niu Tireni*, (1 February 1879) at 272. Translation in the original.
41. *Te Waka Māori o Niu Tireni*, (1 February 1879) at 287. Translation in the original source.
42. *Te Wananga,* (Vol. 5, No. 44, 2 November 1878) at 550.
43. *Te Wananga,* (Vol. 5, No. 44, 2 November 1878) at 550.
44. Te Wehi, *Te Waka o Te lwi,* (Vol. 10, No. 19, 22 September 1874).
45. *Te Whetu o te Tau*, (1 September 1858) at 11.
46. *The Jubilee Te Tiupiri* (Vol. 1, No. 23, 7 June 1898), Vol. 1, No. 24, 14 June 1898) at 8, Vol. 2, No. 49, 23 February 1899) at 1, Vol. 2, No. 52, 6 April 1899) at 5;
47. *The New Zealander,* (18 July 1846).

Conference Addresses

1. 'How the Environmental Protection Authority incorporates the principles of the Treaty of Waitangi into its regulatory practice,' in Report for the New Zealand Productivity Commission (February 2014) at 3.

2. Cameron, J 'Sovereignty, Equality and Plural Justice in New Zealand' (Research Paper for the Law Commission, 1997).
3. Clark, M and others, *Biodiversity of the Kermadec Islands and offshore waters of the Kermadec Ridge: report of a coastal, marine mammal and deep-sea survey* (Ministry of Primary Industries, TAN1612, January 2017).
4. Don Brash, 'Nationhood,' (An address by Leader of the National Party to the Orewa Rotary Club, 27 January 2004).
5. Durie, E, 'Custom Law,' (Unpublished Draft Paper, Address to the New Zealand Society for Legal and Social Philosophy, January 1994).
6. Durie, E, 'Governance' in School of Māori and Pacific Development, *Strategies for the Next Decade: Sovereignty in Action* (University of Waikato, Hamilton, 1996) at 116.
7. Durie, M, *Understanding Biculturalism* (Race Relations Conference Paper, Gisborne, New Zealand, 20 September, 1994) at 5-8.
8. Environmental Protection Agency, *Briefing to Incoming Ministers* (October 2017).
9. Harmsworth, G, 'The role of Māori values in Low-impact Urban Design and Development, (LIUDD), Discussion Paper, no date).
10. Mahuta, R 'Waikato: A Case Study of Tribal Settlement' (Address given at the Conference, 'Indigenous Peoples: Land, Resources, Autonomy,' Vancouver, 19-24 March, 1996) at 12.
11. Majurey, P and Beverley, P, *Tai Timu Tai Pari Sea Change Hauraki Gulf Marine Spatial Plan: An Introduction and Overview,* (Hauraki Gulf Forum, MPI, DOC, Waikato Regional Council and Auckland Council, May 2017)
12. Mead, H, 'The Nature of Tikanga,' (Unpublished Manuscript Paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000) at 3-4.
13. Mead, H, 'The Nature of Tikanga,' (Unpublished Manuscript Paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000) at 3-4.
14. Metge, J, 'Commentary on Judge Durie's Custom Law,' (Unpublished Custom Law Guidelines Project Paper, 1997) at 5.
15. Ministry for the Environment, *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (25 February 2016).
16. Ministry of Agriculture and Fisheries Management Planning ITQ Implications Study - Second Report (Community Issues) FMP Series No 20, 48).
17. Mulgan, R, 'Commentary on Chief Judge Durie's Custom Law Paper from the Perspective of a Pākehā Political Scientist,' (Unpublished Paper, Law Commission, 1997) at 2.
18. New Zealand Government, *A New Marine Protected Areas Act: Consultation Document,* (Ministry for the Environment, Wellington, 2016).
19. Ngāti Pāhauwera Development Trust, 'Takutai Moana Ratification Booklet for Members of Ngāti Pāhauwera,' (Unpublished Ngāti Pāhauwera Report, May-July 2017).
20. Parliamentary Commissioner for the Environment, *Possum-Management in New Zealand: Critical Issues in 1998* (Office of the Parliamentary Commissioner for the Environment, PCE Progress Report No 1, November 1998).
21. Rickys, P, 'Local Government Reform and Māori 1988-2002,' (Te Ngutu o Te Ika Publications, Auckland, 2004).

22. Royal, C, 'Speech Notes,' in Te Puni Kokiri, *Proceedings of Whakawhānau: Whānau Development National Hui* (Wellington, 24-25 March 2003) at 47.
23. Taylor, L, Te Whenua, T and Hatami, B, '*Discussion Paper: How current legislative frameworks enable customary management and ecosystem-based management in Aotearoa New Zealand – the contemporary practice of rāhui,'* (Landcare Research Contract Report LC3103, Sustainable Seas National Science Challenge: Cross Programme 1.1 Enabling EBM in the current legislative framework, April 2018).
24. Te Ohu Kaimoana, 'Māori Customary Fishing Rights in the Modern New Zealand Context,' (Unpublished Presentation, Torres Strait, Australia, 8 April 2014).
25. Te Ohu Kaimoana, 'Māori Customary Fishing Rights in the Modern New Zealand Context,' (Unpublished Presentation, Torres Strait, Australia, 8 April 2014) at 11.
26. Te Puni Kokiri & Gover, K, *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal,* (Te Puni Kokiri, Wellington, 2001).
27. Waikato Regional Council, Mark Brockelsby Presentation, 'The Resource Consent Process in the Waikato River Catchment: The Practical Implications of the Co-Management Framework,' (30 November 2010).
28. Wickliffe, C, Maranui, K & Meredith, P, 'Access to Customary Law,' (Visible Justice: Evolving Access to Law, Wellington, 12 September 1999) at 1-2.
29. Wickliffe, C, Maranui, K & Meredith, P, 'Access to Customary Law,' (Visible Justice: Evolving Access to Law, Wellington, 12 September 1999) at 1-2.
30. Williams, J, 'The Māori Land Court: A Separate Legal System?' (New Zealand Centre for Public Law, Wellington, 2001).
31. Williams, J, 'The Māori Land Court: A Separate Legal System?' (New Zealand Centre for Public Law, Wellington, 2001) at 4.
32. Willis, R, 'Good Māori Governance' (Unpublished Paper, 2003) at 2.
33. Wright, S, 'Approaches to International Human Rights, Self-determination and Indigenous Cultural Sovereignty' (Conference Proceedings, Protecting Knowledge: Traditional Resource Rights in the New Millennium, UBCIC, Victoria, BC, February 2000).

Affidavits

1. Affidavit of John Winitana, in *Te Runanga o Muriwhenua v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 10.
2. Affidavit of Professor Hirini Moko Mead, in *Te Runanga o Muriwhenua v Treaty of Waitangi Fisheries Commission* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 7-8.
3. Affidavit of Professor Tamati Reedy, in *Te Rūnanga o Muriwhenua v Treaty of Waitangi Fisheries Commission* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 6-7, 18-20.
4. Affidavit of Professor Wharehuia Milroy and Professor Timoti Karetu at 4, in *Te Rūnanga o Te Upoko o te Ika Association Inc., v the Treaty of Waitangi Fisheries Commission* (1998), C.P No. 122/95 (H.Ct of New Zealand, Auckland Registry). Judgment on that case *per* Patterson J., reported [2000] 1 N.Z.L.R at 289; and affidavit of Professor Timoti Karetu at 4.

5. Affidavit of Rima Edwards in Support of Muriwhenua, in *Te Runanga o Muriwhenua v Treaty of Waitangi Fisheries Commission* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 4-5.
6. Affidavit of Robert Mahuta in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 18.
7. Affidavit of Sir Robert Mahuta in support of Tainui Waka Fisheries, in *Te Runanga o Muriwhenua v Treaty of Waitangi Fisheries Commission*, M1514/94 (Rudd Watt & Stone, Auckland, 24 February 1998) at 18.
8. Affidavit of Waerete Violet Beatrice Norman in Support of Muriwhenua, in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 12.
9. Durie, M in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 204.
10. First Affidavit of Manuka Henare, in *Te Runanganui o Te Upoko o Te Ika Association Inc v Treaty of Waitangi Fisheries Commission* (Russell McVeagh McKenzie Bartlett & Co, Auckland, 29 January 1998) at 3-4.
11. Graham Latimer, in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 196.
12. Hopa , N in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) 40-41.
13. Jackson, J in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 115.
14. Kawharu, I. H in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 542.
15. *Manukau Urban Māori Authority and Others v. Treaty of Waitangi Fisheries Commission and Others and Reuben Brian Perenara Treaty of Waitangi Fisheries Commission and Others* (Privy Council Appeal No. 68 of 2000 Delivered the 2nd July 2001).
16. Sir John Turei, in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) lines 10-12, 30.
17. Thompson Winitana, in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 254.
18. Walker, R in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 101-02.

Manuscripts

1. Hadfield MSS, Hadfield / Vennh, 18 May 1847. Cited in Sinclair, K, *The Origin of the Māori Wars* (New Zealand University Press, 1957) at 107.
2. Hare Hongi (1859-1944) writing as HM Stowell, 'Reliable Ancient Māori History,' (Unpublished Manuscript, ATL gMS-929).
3. Kāwhia Committee Minute Book, (Ormsby Family Papers ATL Ref. MSY-5008) at 2.
4. National Archives, (MA 1, 1906/285).
5. Ngata, A, 'The genealogical method as applied to the early history of New Zealand', (ATL Ref. qMS-1587, 1929).
6. Te Rangi Hiroa, P, 'Māori Food-supplies of Lake Rotorua,' in *Transactions of the New Zealand Institute*, (Vol III, 1921) at 433-451.

Literature Reviews

1. Daymond, Api and Rakena, C, 'Rāhui at the Interface of Tikanga and New Zealand Law - Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).
2. Donnelly, E, 'The Protection of Māori Knowledge and Culture in the Proposed Kermadec Ocean Sanctuary Bill,' (Unpublished Report, Faculty of Law, University of Victoria, 2018).
3. Iorns, C and Morar, R, 'The Operation of tikanga Māori within the EEZ and Continental Shelf Act Draft,' (Unpublished Draft MIGC Report, University of Victoria, November 2018).
4. Iorns, C, 'Māori Co-Governance and/or Co-Management of Nature and Environmental Resources,' (Draft Paper, August 2019).
5. Jones, M, 'Aquaculture Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).
6. Jones, M, 'The Status and Limits of the Marine and Coastal Area (Takutai Moana) Act 2011 Report and Database Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).
7. Rakena, M & Rakena, C, 'Tikanga Māori and the Marine Estate: Literature Review, - Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).
8. Rakena, M, 'Indigenous Peoples Customary Rights to Participate in the Marine Estate Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).
9. Sterling, R, 'Co-Governance Mechanisms in the Local Government Act 2002 and Resource Management Act 1991 – Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).
10. Sterling, R, 'Resource Management Act 1991 Legal Analysis Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).
11. Takuira, J, 'Treaty of Waitangi Settlement Redress Options Literature Review Draft,' (Unpublished Draft MIGC Report, University of Waikato, November 2018).
12. Toki, V, 'The Māori Fisheries Settlement Process – A Critique,' (Unpublished Draft MIGC Report, University of Waikato, September 2018).

Theses

1. Bennion, T, 'Treaty Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi' (Research Paper for Administrative Law, LLM, Wellington, 1987).
2. Charters, C, 'The Legitimacy of Indigenous Norms under International Law,' (PhD Thesis, University of Auckland, January 2011).
3. Erueti, A, 'UN Declaration on the Rights of Indigenous Peoples: A Mixed-Model Interpretative Approach,' (SJD Thesis, University of Toronto, 2016).
4. Henare, M 'The Changing Images of Nineteenth Century Māori Society – From Tribes to Nation' (Unpublished PhD Thesis, Victoria University of Wellington, August 1003) at 107 – 199.
5. Jones, C, 'Tino Rangatiratanga and Sustainable Development: Principles for Developing a Just and Effective Resource Management Regime in Aotearoa/New Zealand,' (Masters Dissertation, York University, Toronto, Ontario, 2003).
6. Matthews, B, 'Ko Au te Moana, Ko te Moana, Ko Au: Te Rangatiratanga me te Kaitiakitanga o roto i te Rangai Kaimoana Māori: I am the Ocean, the Ocean is Me:

Rangatiratanga and Kaitiakitanga in the Māori Seafood Sector,' (Master of International Relations and Diplomacy Thesis Dissertation, University of Canterbury, 2018).
7. McCrossin, N, 'Intention and Implementation: Piecing Together Provisions for Māori in the Resource Management Act 1991,' (Master of Arts, Thesis, University of Otago, 2010) at 118.
8. McHugh, P 'The Aboriginal Rights of the New Zealand Māori at Common Law,' (Unpublished PhD. Thesis, Sydney Sussex College, Cambridge, 1987).
9. Oldham, O, 'If Māori speak in a forum that doesn't listen, have they been heard at all? A critical analysis of the incorporation of tikanga Māori in decisions on genetic modification,' (Unpublished LLB (Hons) Dissertation, Victoria University of Wellington, 2017).
10. Outram A, 'Post-Colonialism, Indigenous Power and Resource Management: Does s 33 of the Resource Management Act 1991 have its intended effect for iwi authorities?' (Masters Dissertation, Lincoln University, 2017).
11. Renwick, W.L, 'Self-Government and Protection: A Study of Stephen's Two Cardinal Points of Policy in their Bearing Upon Constitutional Development in New Zealand in the Years 1837-1867,' (M.A Thesis, Victoria University of Wellington, 1961);
12. Shortall, S.A 'Aboriginal Self-Government in Aotearoa/New Zealand: A View Through the Canadian Lens' (Unpublished LLM Thesis, University of Calgary, Edmonton, 1996).
13. Talbot, L.D. 'Indigenous Knowledge and Governance in Protected Areas in Australia and Sweden,' (PhD Thesis Submitted in the Division of Tropical Environments and Societies, JCU, Cairns, 2017).
14. Wever, S.G, 'Recognising Rangatiratanga: Sharing Power with Māori through Co-Management,' (Bachelors of Laws Honours Dissertation, Faculty of Law, University of Otago, 2011).
15. Williams, D 'The Use of Law in the Process of Colonisation – A Historical and Comparative Study with Particular Reference to Tanzania (Mainland) and New Zealand' (Ph.D Thesis, University of Dar-es-Salaam, 1983);
16. McCrossin, N, 'Intention and Implementation: Piecing Together Provisions for Māori in the Resource Management Act 1991,' (Master of Arts, Thesis, University of Otago, 2010).

Interviews

1. Interview with Damian Stone, lawyer, (Wellington, 4 December 2003).
2. MIGC Tūhonohono Project Interview Series, (Te Tau Ihu Interviewees, September 2018).
3. MIGC, Mana Whakahaere Project Interview Series, (Coastal First Nations Interviewee, 2020).
4. MIGC, Mana Whakahaere Project Interview Series, (Waikato River Authority Interviewee, 2020).
5. Ngā Kōrero Tuku Iho, (Waitangi Tribunal Wai 898 Te Rohe Pōtae Inquiry Hearings, Hui 6, 2010).
6. Ngā Kōrero Tuku Iho, (Waitangi Tribunal Wai 898 Te Rohe Pōtae Inquiry Hearings, Hui 5, 2010).

Internet Websites

1. Aquaculture New Zealand, 'Research Shows Strong Support,' (Aquaculture New Zealand, 1 August 2018) online at https://www.aquaculture.org.nz/2014/08/20/research-shows-strong-support/ (Accessed November 2018).
2. GBRMPA, *GBRMPA Guidelines - Traditional Owner Heritage Assessment* (2017), Online at: http://elibrary.gbrmpa.gov.au/jspui/bitstream/11017/3241/5/Traditional-Owner-Heritage-Assessment-Guideline.pdf (Accessed May 2020).
3. GBRMPA, *Traditional Use of Marine Resource Agreements,* (2018). Online at: http://www.gbrmpa.gov.au/our-partners/traditional-owners/traditional-use-of-marine-resources-agreements (Accessed May 2020).
4. GNS Science website Online at: https://www.gns.cri.nz/Home/Learning/Science-Topics/Ocean-Floor/Undersea-New-Zealand/NZ-s-Continental-Shelf (Accessed November 2018).
5. 'About the proposed Kermadec Ocean Sanctuary,' Ministry for the Environment, online at: https://www.mfe.govt.nz/marine/kermadec-ocean-sanctuary/about-sanctuary (Accessed February 2020).
6. 'Canada signs fisheries agreement with seven BC Coastal First Nations – offering up co-management but retaining control,' Ha-Shilth-Sa: Canada's Oldest First Nations Newspaper, online at: https://hashilthsa.com/news/2019-07-26/canada-signs-fisheries-agreement-seven-bc-coastal-first-nations-%E2%80%93-offering-co (Accessed May 2020).
7. 'Cree Governance' as discussed in the Grand Council of the Crees (Eeyou Istchee) online at http://www.gcc.ca/gcc **(**Accessed November 2019).
8. 'First Nations have created a robust conservation economy in Great Bear Rainforest Report,' Mongabay News and Inspiration from Natures Frontline online at https://news.mongabay.com/2019/06/first-nations-have-created-a-robust-conservation-economy-in-great-bear-rainforest-report/ (Accessed May 2020).
9. 'General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations,' Government of Canada, online at: https://www.rcaanc-cirnac.gc.ca/eng/1373385502190/1542727338550 (Accessed May 2020).
10. 'Government of Canada signs historic reconciliation agreement with B.C Coastal First Nations' in CFN-GBI website online at: https://coastalfirstnations.ca/government-of-canada-signs-historic-reconciliation-agreement-with-b-c-coastal-first-nations/ (Accessed May 2020).
11. 'Indigenous Land and Sea Management Projects,' National Indigenous Australians Agency, Australian Government, online at: https://www.niaa.gov.au/indigenous-affairs/environment/indigenous-land-and-sea-management-projects_old (Accessed May 2020).
12. 'Indigenous People and Historical Globalisation map,' online at http://mrlowegpcsd.weebly.com/indigenous-people--historical-globalization.html (Accessed May 2020).
13. 'James Edward FitzGerald,' New Zealand History Nga Korero a Ipurangi o Aotearoa, online at: https://nzhistory.govt.nz/people/james-e-fitzgerald (Accessed May 2020).

14. 'Ministry of Defence,' (25 May 2017) Budget 2017 www.budget.govt.nz (Accessed July 2017).
15. 'Modern Treaties in Canada map,' Indigenous and Northern Affairs Canada online at: www.aadnc-aandc.gc.ca (Accessed May 2020).
16. 'New Era in Lake Taupo Management' in *Rotorua Daily Post* (22 May 2018). Available at https://www.nzherald.co.nz/rotorua-daily-post/news/article.cfm?c_id=1503438&objectid=12056107. (Accessed May 2020).
17. 'Nunavik's population grows, but slows from last census: StatsCan,' in Nunatsiaq News, (9 February 2017) online at: https://nunatsiaq.com/stories/article/65674nunaviks_population_grows_but_slows_from_last_census/ (Accessed May 2020).
18. 'Petition of the Maniapoto, Raukawa, Tuwharetoa and Whanganui Tribes,' in *AJHR* (26 June 1883) at J-1. Available online at: https://atojs.natlib.govt.nz/cgi-bin/atojs?a=d&cl=search&d=AJHR1883 (Accessed May 2020).
19. 'Social and Cultural Impacts: Tangata Whenua Matters' in Marine Consents and Marine Discharge Consents EEZ000011 online at: (https://www.epa.govt.nz/public-consultations/decided/trans-tasman-resources-limited-2016/the-decision/ (Accessed November 2018);
20. 'Submission to the Local Government and Environment Select Committee on the Kermadec Ocean Sanctuary Bill,' (2016) at 9 and 'Legal Challenge to Kermadec Ocean Sanctuary,' Radio NZ (20 March 2016) www.radionz.co.nz (Accessed May 2016).
21. Andrew Little cited in Trevett, C and Jones, N, 'PM John Key: Kermadec sanctuary will be put on ice if no agreement with Māori Party,' *New Zealand Herald* (20 September 2016) www.nzherald.co.nz (Accessed October 2016).
22. Arctic and Northern Studies, University of Washington, online at https://guides.lib.uw.edu/research/arctic/nunavik (Accessed May 2020).
23. Auditor General Report 'Principles for effectively co-governing natural resources,' online at: https://www.oag.govt.nz/2016/co-governance/docs/co-governance-amended.pdf (Accessed August 2018).
24. Beehive 'Q&A: Kermadec Ocean Sanctuary,' online at: www.beehive.govt.nz (Accessed November 2018).
25. BirdLife International 'Important Bird Areas factsheet: Kermadec Islands,' (2012) BirdLife International www.birdlife.org (Accessed November 2018).
26. Borrini-Feyerabend, G. and Hill, R., 'Governance for the conservation of nature,' in Worboys, G.L. Lockwood, M and Kothari, A, *Protected Area Governance and Management*, (ANU Press, Canberra, 2015) at 170-205. Online at http://press.anu.edu.au/wp-content/uploads/2015/02/CHAPTER7.pdf. (Accessed May 2020).
27. Bourova, E; Dias, N, 'Bidyadanga Initial Works Indigenous Land Use Agreement (ILUA)' (12 August 2011). ATNS (28 October 2011 ed.). Online at https://www.atns.net.au/agreement.asp?EntityID=5479 (Accessed May 2020).
28. Butterly, L. 'Native Title Rights, Regulations and Licences: The Torres Strait Sea Claim,' in *The Conversation,* (8 August 2013). Online at https://theconversation.com/native-title-rights-regulations-and-licences-the-torres-strait-sea-claim-16808 (Accessed May 2020).
29. Cabinet Economic Growth and Infrastructure Committee, 'Establishment of the Kermadec Ocean Sanctuary,' (10 September 2015) at 4.

30. Campbell, K, Menzies, C & Peacock, B, *B.C First Nations Studies,* (British Columbia Ministry of Education, Victoria, Canada, 2003) at 17.
31. Canada Energy Regulator, Government of Canada, online at https://www.cer-rec.gc.ca/glbl/nwt-nnvt-mp-eng.html (Accessed May 2020).
32. Canada Lands, Government of Canada, online at: https://www.nrcan.gc.ca/earth-sciences/geomatics/canada-lands-surveys/about-canada-lands/10855 (Accessed May 2020).
33. Canada, Newfoundland and Labrador and the Inuit of Labrador, *Labrador Inuit Lands Claims Agreement, 2003* (Her Majesty the Queen of Canada, Her Majesty the Queen of Newfoundland and Labrador and the Inuit of Labrador, Ottawa, 2003). Online at: http://www.laa.gov.nl.ca/laa/liaclaims/pdf/complete.pdf (Accessed March 2020).
34. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya,* 276/03, Judgment of November 2009, see http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf. (Accessed February 2020).
35. Coastal First Nations Great Bear Initiative website https://coastalfirstnations.ca/our-sea/marine-plan-partnership-for-the-north-pacific-coast-mapp/ (Accessed November 2018).
36. Crown Law Office, 'Internal Paper,' (002.0535, 2017). See also Te Arawhiti: 'Applications made under the Marine and Coastal Area Act' online at https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications-made-under-the-marine-and-coastal-area-act/ (Accessed March 2020).
37. Dale, A.P., George, M., Hill, R., Fraser, D. *Traditional Owners and Sea Country in the Southern Great Barrier Reef - Which Way Forward?* (Report to the National Environmental Science Program. Reef and Rainforest Research Centre Ltd., Cairns, Australia, 2016). Online: http://nesptropical.edu.au/wp-content/uploads/2016/05/NESP-TWQ-3.9-FINAL-REPORT.pdf. (Accessed May 2020).
38. Declaration of Independence 1835 taken off the internet at https://nzhistory.govt.nz/media/interactive/the-declaration-of-independence (Accessed May 2020).
39. Department of Agriculture, Water and Environment, Australian Government, 'Reef 2050 Plan,' online at: https://www.environment.gov.au/marine/gbr/long-term-sustainability-plan (Accessed May 2020).
40. Department of Conservation 'Kermadec Islands,' www.doc.govt.nz (Accessed November 2018).
41. Department of Conservation, 'DOC's Budget 2017 Explained,' (25 May 2017) www.doc.govt.nz (Accessed June 2017).
42. Department of Conservation, 'Marine Protected Areas: Policy and Implementation Plan,' (2005) at 865-94 online at http://doc.govt.nz/about-us/science-publications/conservation-publications/marine-and-coastal/marine-protected-areas/marine-protected-areas-policy-and-implementation-plan/ (Accessed November 2018).
43. Environment Guide website for a summary of the EEZ Act and the area subject to this legislation: (http://www.environmentguide.org.nz/eez (Accessed November 2018).

44. Environment Guide website on *Māori and the EEZ Act online at:* http://www.environmentguide.org.nz/eez/Māori-and-the-eez-act (Accessed November 2018).
45. Environmental Protection Authority, *Māori Engagement Guideline For Hazardous Substances Notified Applications*, (2015) online at: https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf (Accessed November 2018).
46. EPA instructions to applicants online at: https://www.epa.govt.nz/applications-and-permits/engaging-with-Māori (Accessed November 2018).
47. EPA *Māori Engagement Guidelines for Hazardous Substances for Notified Applicants* (2015). Online at: https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf (Accessed November 2018).
48. EPA website online at: https://www.epa.govt.nz/assets/Uploads/Images/Content-page-images/Marine-Activities-EEZ/Notified-EEZ-Process-Diagram.jpg (Accessed November 2018).
49. Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations, 13 September 2007; http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2007/0-13-September-2007.php (Accessed 2019).
50. Forbes, M, 'Government to delay Kermadec Ocean Sanctuary Bill,' Radio New Zealand (14 September 2016) www.radionz.co.nz (Accessed October 2016).
51. Forum Ag, 'Sea Change – Tai Timu Tai Pari: Hauraki Gulf Marine Spatial Plan,' online at: 2020PlanWR.pdf http://seachange.org.nz/Page Files/1166/5086 SCTTTP Marine%20Spatial%20Plan WR.pdf (Accessed August 2018).
52. See Gabrielle Wast, 'British Columbia adopts UN standards for Indigenous rights,' in Jurist: Legal News and Commnetary online at: https://.www.jurist.org/news/2019/11/british-columbia-adopts-un-standards-for-indigenousr-ights/#:~:text=The%20Legislative%20Assembly%20of%20British,population%20of%20First%20Nations%20people (Accessed August 2020).
53. GBRMPA, *GBRMPA Guidelines - Assessment and Decision.* (2017). Online at: http://elibrary.gbrmpa.gov.au/jspui/bitstream/11017/3229/1/Assessment-and-Decision-Guidelines.pdf;
54. GBRMPA, *GBRMPA Guidelines - Traditional Owner Heritage Assessment.* (2017). Online at: http://elibrary.gbrmpa.gov.au/jspui/bitstream/11017/3241/5/Traditional-Owner-Heritage-Assessment-Guideline.pdf (Accessed May 2020).
55. Gisborne District Council, www.gdc.govt.nz/assets/Uploads/15-346-X1-Appendix-reduced.pdf (Accessed August 2018).
56. Government of Canada, online at https://www.rcaanc-cirnac.gc.ca/eng/1100100030830/1542984701672?wbdisable=true (Accessed May 2020).
57. Great Barrier Reef Marine Park Authority http://elibrary.gbrmpa.gov.au/jspui/bitstream/11017/2856/5 (Accessed May 2020).
58. Great Barrier Reef Marine Park Authority, *Reef Facts*, (2018). Online at: http://www.gbrmpa.gov.au/the-reef/reef-facts (Accessed May 2020).

59. Greenpeace New Zealand Map online at: https://www.greenpeace.org/new-zealand/story/te-ohu-kaimoana-crying-crocodile-tears-over-kermadec-ocean-sanctuary/ (Accessed November 2018).
60. Harris, C, 'Iwi calls Crown on consultation but backs Kermadecs marine sanctuary,' in *Stuff* (27 March 2016) www.stuff.co.nz (Accessed May 2016).
61. Hon Nick Smith MP, 'Kermadec Ocean Sanctuary objections mistaken,' (11 April 2016) Beehive www.beehive.govt.nz (Accessed May 2016).
62. Hon Ruth Dyson MP *NZPD* (711, 15 March 2016) at 9662.
63. Hon. Nick Smith cited in Price, R 'No co-management with Māori on Kermadec Ocean Sanctuary,' *Stuff* (8 March 2016) www.stuff.co.nz (Accessed May 2016).
64. Hon. Nick Smith MP *NZPD,* (712, 15 March 2016) at 9662. See also Radio New Zealand 'Legal challenge to Kermadec Ocean Sanctuary,' (20 March 2016) online at: www.radionz.co.nz (Accessed November 2018).
65. Hon. Nick Smith MP, 'Kermadec Ocean Sanctuary Bill introduced,' (8 March 2016) Beehive www.beehive.govt.nz (Accessed 2016).
66. Horn, C and Kilvington, M, *Māori and 1080* (2002) 5 online at: www.landcareresearch.co.nz (Accessed November 2018).
67. http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-Māori-english/population.aspx. (Accessed February 2014). Stats New Zealand online at https://www.stats.govt.nz/news/expected-updates-to-Māori-population-statistics (Accessed May 2020).
68. https://nzhistory.govt.nz/politics/treaty/read-the-treaty/ (Accessed August 2018).
69. https://wellington.govt.nz/your-council/plans-policies-and-bylaws/district-plan/volume-1-objectives-policies-and-rules (Accessed September 2018).
70. https://www.epa.govt.nz/about-us/our-people/nga-kaihautu-tikanga-taiao/ (Accessed November 2018).
71. https://www.sciencelearn.org.nz/resources/2506-looking-at-ecosystem-based-management-ebm-draft (Accessed August 2018).
72. In contrast, see Horn, C and Kilvington, M, *Māori and 1080* (2002) 5 online at: www.landcareresearch.co.nz (Accessed November 2018).
73. Indigenous Protected Areas, Department of Agriculture, Water and Environment, Australian Government, online at: https://www.environment.gov.au/land/indigenous-protected-areas (Accessed May 2020).
74. International Law Association, 'The Hague Conference Rights of Indigenous Peoples Interim Report,' (2010) online at: www.ila.org/.../9E2AEDE9-BB41-42BA-9999F0359E79F62D (Accessed 2019).
75. Inuit Treaty Settlement Map, Research Gate online at: https://www.researchgate.net/figure/Map-of-Inuit-Nunangat-The-darker-the-colour-the-more-recent-the-land-claims-settlement_fig1_323124614 (Accessed May 2020).
76. Inuvialuit Final Agreement, Government of Canada online at https://www.rcaanc-cirnac.gc.ca/eng/1427987089269/1543249556315 (Accessed May 2020).
77. Inuvialuit Map online at https://www.nationalia.info/new/10581/inuvialuit-to-receive-autonomy-within-canada (Accessed May 2020).
78. Inuvialuit website: www.beaudelselfgov.org/inuvialuit.html (Accessed January 2020).

79. Jackson, M, 'Tipuna title as a Tikanga Construct re the Foreshore and Seabed,' (March 2010) Online at: http://www.converge.org.nz/pma/mjtipuna.htm (Accessed December 2019).
80. Jamie Tuuta cited in, Sachdeva, S, 'Kermadec sanctuary legislation to be delayed after failed negotiations over Māori rights,' *Stuff* (14 September 2016) www.stuff.co.nz (Accessed October 2016). .
81. John Key cited in Trevett, C and Jones, N, 'PM John Key: Kermadec sanctuary will be put on ice if no agreement with Māori Party,' *New Zealand Herald* (20 September 2016) www.nzherald.co.nz (Accessed October 2016).
82. Joint Management Agreement, The Waikato Raupatu River Trust – Waikato District Council (23 March 2010) at 4. Available at: https://www.waikatodistrict.govt.nz/your-district/iwi-in-our-district/iwi-working-together (Accessed May 2020).
83. JustSpeak, *Māori and the Criminal Justice System: A Youth Perspective,* (Position paper by JustSpeak, March 2012) and Department of Corrections, 'Trends in the offender population,' (Department of Corrections, Wellington, 2013) at 8 online at: http://corrections.govt.nz (Accessed October 2018).
84. Kawharu, I.H, 'Treaty of Waitangi – Kawharu Translation,' (2011), Online at the Waitangi Tribunal – Te Rōpū Whakamana i te Tiriti o Waitangi: http://www.waitangitribunal.govt.nz/treaty/kawharutranslation.asp%3E. (Accessed May 2020).
85. Key, J, PM announces Kermadec Ocean Sanctuary,' (29 September 2015) Beehive online at: www.beehive.govt.nz (Accessed November 2018).
86. Labrador Inuit Land Claims Agreement Map, online at: https://www.gov.nl.ca/exec/iias/files/map.pdf (Accessed May 2020).
87. Law of the Sea, Mineral resources in New Zealand waters from Te Ara the Encyclopaedia of New Zealand online at: https://teara.govt.nz/en/map/6971/mineral-resources-in-new-zealand-waters (Accessed November 2018).
88. Local Government New Zealand Co-management: Case Studies Involving Local Authorities and Māori (2007) online at: http://policyprojects.ac.nz (Accessed May 2020).
89. *Māori Engagement Guidelines for Hazardous Substances for Notified Applicants* (2015). Online at: https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/Guide-to-Māori-Engagement-for-HS-applicants-2015.pdf (Accessed November 2018).
90. Map online at https://globetrottinggrandparents.wordpress.com/2017/05/26/bcs-sunshine-coast/ (Accessed March 2020)
91. MaPP, *Title,* (2016) available online at: http://mappocean.org (Accessed November 2018).
92. Marine Conservation Institute 'MPAtlas,' online at: www.mpatlas.org ((Accessed November 2018).
93. Marine Plan Partnership for the Pacific North Coast website http://mappocean.org/about-mapp/sub-regions/ (Accessed November 2018).
94. McGilligan, S, 'Self-Government Agreements and Canadian Courts,' in *Aboriginal Policy Research Consortium International*, (Western University Scholarship, 2010) at 31 online at https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1413&context=aprci (Accessed May 2020).

95. McLeod, K and Leslie, H, *Ecosystem Management for the Oceans* (Island Press, Washington DC, 2009) at 325; and World Wildlife Funds website at: http://wwf.panda.org/our_ambition/our_global_goals (Accessed November 2018).
96. Ministry for Primary Industries, 'Customary fisheries management areas,' (14 October 2018) Fisheries New Zealand https://www.fisheries.govt.nz/law-and-policy/Māori-customary-fishing/managing-customary-fisheries/customary-fisheries-management-areas/ (Accessed October 2018).
97. Ministry for Primary Industries, 'Customary fisheries management areas,' (14 October 2018) Fisheries New Zealand https://www.fisheries.govt.nz/law-and-policy/Māori-customary-fishing/managing-customary-fisheries/customary-fisheries-management-areas (Accessed September 2018).
98. Ministry for Primary Industries, 'Managing customary fisheries,' (2018) Fisheries New Zealand https://www.fisheries.govt.nz/law-and-policy/Māori-customary-fishing/managing-customary-fisheries/#mataitai-reserves (Accessed September 2018).
99. Ministry for the Environment 'About the Kermadec Ocean Sanctuary,' (2 August 2016) www.mfe.govt.nz (Accessed November 2018).
100. Moir, J 'Winston Peters confident of Kermadec Marine Sanctuary deal by end of year,' Radio NZ (24 July 2018) www.radionz.co.nz (Accessed August 2018).
101. Moir, J 'Winston Peters confident of Kermadec Marine Sanctuary deal by end of year,' Radio NZ (24 July 2018) www.radionz.co.nz (Accessed August 2018).
102. Morgan, G, 'Returning to Orewa – The Treaty and Don Brash (Speech),' (Unpublished Presentation, Orewa, Auckland, 4 February 2015) online at: http://morganfoundation.org.nz/returning-to-orewa-the-treaty-and-don-brash-speech/ (Accessed May 2020).
103. National Native Title Tribunal http://www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx (Accessed May 2020).
104. National Native Title Tribunal, Indigenous Land Use Agreements (ILUAs) http://www.nntt.gov.au/ILUAs/Pages/default.aspx (Accessed May 2020).
105. National Science Challenge ecosystem-based management (EBM) diagram located online at the website: https://www.sciencelearn.org.nz/system/documents/files/000/000/667/original/Sustainable_Seas_Challenge_EBM.pdf?1507494794 (Accessed March 2019).
106. New Zealand Multilateral Organisations, from Te Ara the Encyclopedia of New Zealand online at: https://teara.govt.nz/en/map/33830/exclusive-economic-zones (Accessed November 2018).
107. New Zealand's Continental Shelf, GNS Science website: https://www.gns.cri.nz/Home/Learning/Science-Topics/Ocean-Floor/Undersea-New-Zealand/NZ-s-Continental-Shelf (Accessed November 2018).
108. Ngāti Pahauwera Development Trust, 'Takutai Moana Ratification Booklet for Members of Ngāti Pahauwera,' (Unpublished Ngāti Pahauwera Report, May-July 2017).
109. 'Ngāti Tuwharetoa set to become first iwi to utilise a section 33 transfer with Waikato Regional Council,' (Media Statement, 31 July 2020), Waikato Regional Council online at https://tuwharetoa.co.nz/ngati-tuwharetoa-set-to-become-first-iwi-to-utilise-a-section-33-transfer-with-waikato-regional-council (Accessed September 2020).

110. Online at https://coastfunds.ca/first-nations/coastal-first-nations-great-bear-rainforest-initiative/ (Accessed November 2018).
111. Online at https://teara.govt.nz/en/map/13882/marine-protected-areas-map (Accessed November 2018).
112. Online at https://www.mpi.govt.nz/law-and-policy/legal-overviews/fisheries/fishery-maps/ (Accessed November 2018).
113. Online at https://www.sfmcanada.org/en/sustainable-forest-management/great-bear-rainforest (Accessed November 2018).
114. Online at https://www.theglobeandmail.com/news/british-columbia/key-players-in-great-bear-rainforest-deal-find-common-ground/article28475126/ (Accessed November 2018).
115. Previous Māori Party Co-Leader Marama Fox cited in Marwick, F, 'Rahui a possible way out of Kermadec impasse,' (20 September 2016) Newstalk ZB www.newstalkzb.co.nz (Accessed October 2016).
116. Price, R 'No co-management with Māori on Kermadec Ocean Sanctuary,' *Stuff* (8 March 2016) www.stuff.co.nz (Accessed May 2016).
117. Price, R, 'Kermadec Ocean Sanctuary: a 'dangerous' precedent for Māori rights?' in *Stuff* (23 March 2016) www.stuff.co.nz (Accessed March 2016).
118. Report of the Native Affairs Committe 3rd August 1883. http://www.waitangi-tribunal.govt.nz/reports/view.asp?reportid=ad61afe4-9943-41f1-8872-7435b1ab83b8.
119. Richards, S, 'Our ancestors will be smiling: Kaurna people gain native title rights,' in INDaily: Adelaide Independence News, (21 March 2018). Online at: https://indaily.com.au/news/2018/03/21/kaurna-people-granted-native-title-rights-historic-australian-first/ (Accessed May 2020).
120. Rohenga Tipuna (Hapū and Marae clusters) and Primary Marae Map, Te Rūnanganui o Ngāti Porou, online at: https://ngatiporou.com/nati-biz/about-te-runanganui-o-ngati-porou/rohenga-tipuna-0 (Accessed February 2020).
121. Rotorua Te Arawa Lakes Strategy Group Terms of Reference (2010) online at http://www.boprc.govt.nz/media/73612/rotorua%20te%20arawa%20lakes%20strategy%20group.pdf (Accessed May 2020).
122. Royal, C, 'Kaitiakitanga – Guardianship and Conservation - Understanding Kaitiakitanga,' (22 September 2012) Te Ara – The Encyclopedia of New Zealand online at www.teara.govt.nz
123. Sachdeva, S, 'Hope grows for compromise on Māori fishing rights in Kermadec Ocean Sanctuary,' *Stuff* (23 September 2016) www.stuff.co.nz (Accessed October 2016).
124. Seymour cited in Sachdeva, S, 'Kermadec sanctuary legislation to be delayed after failed negotiations over Māori rights,' in *Stuff* (14 September 2016) www.stuff.co.nz (Accessed November 2016).
125. Swaffield, S, 'Sustainable practices in New Zealand agricultural landscapes under an open market policy regime,' in *Landscape Research*, (Vol. 39, Issue 2, 2014) at 190-204. Online at https://doi.org/10.1080/01426397.2013.809058 (Accessed August 2018).
126. Takutai Trust, the Māori Agricultural Settlement Trust online at: http://www.takutai.Māori.nz/about/takutai.htm (Accessed November 2018).
127. Tamati Muturangi Reedy, 'Ngāti Porou - Tribal boundaries and resources,' in Te Ara – the Encyclopedia of New Zealand, online at: https://teara.govt.nz/en/map/647/ngati-porou-tribal-area (Accessed May 2020).

128. Taupo District Council and Ngāti Tuwharetoa at http://www.taupodc.govt.nz/our-council/policies-plans-and-bylaws/joint-management-agreements/Documents/Joint-Management-Agreement.pdf (Accessed August 2018).
129. Te Arawhiti Office for Māori Crown Relations, 'Te Kahui Takutai Moana (Marine and Coastal Area) – Applications made under the Marine and Coastal Area Act,' online at: https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications-made-under-the-marine-and-coastal-area-act/agreements-and-orders/ (Accessed May 2020).
130. Te Arawhiti, Office for Maori Crown Relations, *Te Kahui Whakatau (Treaty Settlements) Year-to-date Progress Report 1 July 2019-31 March 2020,* (Te Arawhiti, Office for Maori Crown Relations, Wellington, 2020). Online at: https://www.govt.nz/assets/Documents/OTS/Quarterly-reports/Quarterly-report-to-31-Mar-2020.pdf (Accessed May 2020).
131. Te Ohu Kaimoana 'Building on the Fisheries Settlement' < https://teohu.māori.nz/wp-content/uploads/2018/06/Building_on_the_Settlement_TOKM.pdf (Accessed September 2018).
132. Te Ohu Kaimoana Governance Structure online at: https://teohu.maori.nz/governance-structure/ (Accessed November 2018); and the Māori Fisheries Act 2004.
133. Te Ohu Kaimoana, 'Māori Customary Fishing Rights in the Modern New Zealand Context,' (Unpublished Presentation, Torres Strait, Australia, 8 April 2014) at 10. See also Te Ohu Kaimoana Governance Structure online at: https://teohu.maori.nz/governance-structure/ (Accessed November 2018).
134. Te Ohu Kaimoana, 'Māori Customary Fishing Rights in the Modern New Zealand Context,' (Unpublished Presentation, Torres Strait, Australia, 8 April 2014) at 19. See also Te Ohu Kaimoana Governance Structure online at: https://teohu.maori.nz/governance-structure/ (Accessed November 2018).
135. Te Tiaki Mahinga Kai, 'What are AMTs?' (2018), Te Tiaki Mahinga Kai, http://www.mahingakai.org.nz/resources/what-are-amts/ (Accessed September 2018).
136. The Declaration of Independence 1835 acknowledged Māori tribal sovereignty in Article 2 that preceded the Treaty of Waitangi. See https://waitangitribunal.govt.nz/news/report-on-stage-1-of-the-te-paparahi-o-te-raki-inquiry-released-2/ (Accessed May 2020).
137. Traditional use of the Marine Park,' Great Barrier Reef Marine Park Authority, Australian Government, online at http://www.gbrmpa.gov.au/our-partners/traditional-owners/traditional-use-of-the-marine-park (Accessed May 2020).
138. Trent University Treaty Recognition Week, Canada Treaties and Land Claims map online at https://www.trentu.ca/education/sites/trentu.ca.education/files/documents/TrentUSchoolofEd_TreatiesWeek_ResourcePackage.pdf (Accessed May 2020).
139. Trustees of Te Rūnanganui Te Aupouri Trust, 'Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill,' (2016) at 20.

140. UNESCO, *Great Barrier Reef,* (2018), Online at: http://whc.unesco.org/en/list/154 (Accessed May 2020).
141. Waikato Regional Council Sea Change – Tai Timu Tai Pari website online at: https://www.waikatoregion.govt.nz/council/policy-and-plans/coastal-policy/sea-change/ (Accessed November 2018).
142. World Wildlife Funds website at: http://wwf.panda.org/our_ambition/our_global_goals (Accessed November 2018).

Radio

1. Legal Challenge to Kermadec Ocean Sanctuary,' Radio NZ, (20 March 2016), www.radionz.co.nz (Accessed May 2016).
2. Forbes, M, 'Government to delay Kermadec Ocean Sanctuary Bill,' Radio New Zealand (14 September 2016) <www.radionz.co.nz (Accessed October 2016).
3. Previous Māori Party Co-Leader Marama Fox cited in Marwick, F, 'Rahui a possible way out of Kermadec impasse,' (20 September 2016) Newstalk ZB <www.newstalkzb.co.nz (Accessed October 2016).

Images

1. Image 1 on p. 2: National Science Challenge, Ko Ngā Moana Whakauka, Beach and Carving, MyChillybin.
2. Image 2 on p. 6: National Science Challenge, Ko Ngā Moana Whakauka, Wave, Dave Allen, NIWA.