# Nga Taumata o te Moana

A return to rangatiratanga over the takutai moana

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By

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**Te Tangi a Kawiti: Kawiti at Pukepoto after the battle of Ruapekapeka, 1846**[1]

E te whanau, i te pakanga ahau ki te Atua i te po,
heoi kihai ahau i mate.
Na reira, takahia te riri ki raro i o koutou waewae.
Kia u ki te whakapono, he poai Pakeha koutou i muri nei.
Waiho kia kakati te namu i te wharangi o te pukapuka,
hei konei ka tahuri atu ai.
Kei takahia e koutou, nga papa pounamu a o koutou tupuna e takoto nei.
Titiro atu ki nga taumata o te moana, ka hua mai i reira he ao hou.

My illustrious warriors and people, I had war with the Gods during the night,
but I survived.
Therefore, I call upon you to suppress war under foot.
Hold fast to the faith, for the day will come when you will become like the
Pakeha.
Await therefore until the sand fly nips the pages of the Book, (the Treaty),
then, and only then, shall you arise and oppose.
Do not desecrate the sacred covenant endorsed by your forebears.
Look beyond the sea, to the transfiguration of the future.

[1] Waitangi Tribunal *Brief of Evidence of Waihoroi Shortland* (Wai 1040, #AA81, 28 October 2016) at [69] [*Wai 1040, #AA81*].

## Abstract

The Foreshore and Seabed Act 2004 extinguished Māori customary rights to the foreshore and seabed at law by vesting ownership of the foreshore and seabed in the Crown.[2] The Act prohibited Māori from having their customary rights recognised at common law by removing the jurisdiction of the courts to investigate customary rights in the takutai moana. The 2004 Act provided for the recognition of new lesser rights, should Māori be able to meet the tests specified in the legislation. The legislation was heavily criticised and deemed inconsistent with the treaty,[3] the rule of law, and international human rights law, where it extinguished the rights of Māori, but not the rights of other right holders.[4] The legislation was so controversial the 2004 Act was repealed by the Marine and Coastal Area (Takutai Moana) Act 2011.[5] In the Crown's mind, the 2011 Act is final, and the longstanding foreshore and seabed dispute related to Māori customary claims to the takutai moana is resolved by the legislation.[6]

The purpose of the Marine and Coastal Area (Takutai Moana) Act 2011 is to "establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders" in the takutai moana.[7] Under the new Act, the takutai moana is now given the special status of "common marine and coastal area"; an area that is "incapable of ownership" by the Crown, Māori or anyone else.[8] The Act states that it "acknowledges" the "Treaty of Waitangi (Te Tiriti o Waitangi)" and "recognises" the "mana tuku iho" exercised in the common marine and


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[2] Section 4 of Foreshore and Seabed Act 2004 vested the full legal ownership of the public foreshore and seabed in the Crown. Note in this thesis 'foreshore and seabed' is also referred to as the 'foreshore', 'takutai moana' and 'takutai'. The Foreshore and Seabed Act 2004 is also referred to as '2004 Act'. For further information on the particular use of terms in this thesis please refer to discussion below at [2.5.2]

[3] The English text is referred to as the 'Treaty of Waitangi' or 'Treaty', the Māori text is referred to as 'te Tiriti o Waitangi' or 'te Tiriti', and the term 'treaty' is used when referring to both versions or the event as a whole. For further information on the particular use of terms in this thesis please refer to discussion below at [2.5.2].

[4] The United Nations Committee on the Elimination of Racial Discrimination 'CERD' decision was significant, where the Committee found for the first time in New Zealand's history that the 2004 Act was discriminatory to Māori and in breach of their human rights. See the work of Claire Charters and Andrew Erueti "Report From the Inside: the CERD Committee's Review of the Foreshore and Seabed Act 2004" (2005) 36 Victoria University of Wellington Law Review 257.

[5] Note in this thesis the Marine and Coastal Area (Takutai Moana) Act 2011 is also referred to as '2011 Act', 'MACA', and 'MACA Act'.

[6] For instance, see: Waitangi Tribunal *Crown Statement of Position and Concessions* (Wai 1040, #1.3.2, 6 July 2012) at [848]-[856]; Waitangi Tribunal *Closing Submissions of the Crown Takutai Moana/Foreshore and Seabed, Issue 11* (Wai 1040, #3.3.416, 10 October 2017) at [4].

[7] Marine and Coastal Area Act 2011, s 4(1)(a).

[8] Marine and Coastal Area Act 2011, ss 3(3)(a)(i) and 11(1).

coastal area by iwi, hapū, and whānau as tangata whenua.[9] Like the 2004 Act, the 2011 Act still bars Māori from obtaining common law customary rights in the takutai moana, and instead puts in place a regime for the recognition of new legal rights that are created by the Act itself.

The primary research question is: Is the Marine and Coastal Area (Takutai Moana) Act 2011 consistent with te Tiriti o Waitangi, the Māori version of the treaty?

The primary research question is answered by examining the colonial experience of Te Kapotai, a coastal hapū (tribe) in the Southern Bay of Islands from pre-te Tiriti times through to the present day. It provides an account of how, over time, Crown law, policy and practice have eroded the ability of Te Kapotai to exercise their rangatiratanga (authority) over their takutai moana. This thesis concludes that the 2011 Act is inconsistent with te Tiriti for four key reasons:

1. The Act was developed and implemented without negotiation and consent from Māori;

2. The Act continues to remove the customary rights and procedure for recognition of those rights that were previously available at common law;

3. The Act fails to provide for the exercise of rangatiratanga by Māori over the takutai moana as guaranteed under Article 2 of te Tiriti o Waitangi; and

4. The Act is in breach of the principle of equity and equal treatment under Article 3 of te Tiriti o Waitangi where it treats Māori and their rights to the takutai moana differently to how all other right/interest holders in the foreshore and seabed are treated.

This research recommends a multifaceted approach to resolving the takutai moana issue, which includes pausing the implementation of the 2011 Act, and the development of interim options to increase Māori participation in the management of the takutai moana. It promotes that a transformational approach to the takutai

[9] Marine and Coastal Area Act 2011, ss 4(1)(d), and 4(1)(b). Note there is no definition of "mana tuku iho" in the 2011 Act.

moana issue can be achieved when te Tiriti is implemented, and when Māori can exercise rangatiratanga over the takutai moana in a manner that was intended under te Tiriti o Waitangi.

# Ngā mihi: Acknowledgements

*Ko Māhuhukiterangi te waka*
*Ko Whiti te tupuna*
*Ko Kapowai te maunga*
*Titiro iho ana ki tona pā tu moana, ko Motukura*
*Ko Waikare te awa*
*Ko Te Turuki te marae*
*Ko Te Kapotai te hapū*

My sister Willow-Jean and I were fortunate to be guided through our research by Dr Ranginui Walker, and in his wisdom, he said, "just write the truth". This advice centred my research on the colonial experience of my hapū Te Kapotai. Te Kapotai is a coastal hapū who have, for centuries, lived in accordance with their own mana and rangatiratanga, and who have demonstrated resilience and abilities to adapt in the face of great colonial forces. I thank our people for their insight and knowledge, and for trusting me to use our hapū korero to bring integrity to my research. This research is for Te Kapotai.

*He kaitukau ahau nō te maara o Hineamaru*
*I am a cultivator from the garden of Hineamaru*

I am also from Ngāti Hine and I have been privileged to work closely with Ngāti Hine on their historical te Tiriti o Waitangi claims. My time with both Te Kapotai and Ngāti Hine has informed my understanding and belief that hapū have the fundamental right and capacity to exercise rangatiratanga over the takutai moana. In acknowledgement of my whakapapa and the historical allegiance between Te Kapotai and Ngāti Hine, the title of this research "Ngā Taumata o te Moana", and methodology are framed by Kawiti's ōhākī or prophecy "Te Tangi a Kawiti".

There are people who have shared their knowledge with me, and this has been formative to my understanding of the issues in this research, particularly tikanga, tribal authority, the meaning of te Tiriti, and the relationship between the Crown and Māori under te Tiriti. Uncle Sonny George, Pāpā Hau Hereora, Uncle Erima Henare, Uncle Kevin Prime, Uncle Waihoroi Shortland, Whaea Moe Milne, Pita Tipene, Rowena Tana, Dr Ranginui Walker and wife Deidre, Judge Michael

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Having made the decision to enrol in the PhD programme, Mum and Dad hung an empty degree frame in their house above my undergraduate degrees with “Season-Mary’s PhD” written on the glass. Always believing, always supporting. This PhD is for you Mum and Dad. Aroha tino nui.

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## He Whakaputanga o te Rangatiratanga o Nu Tireni[10]

Ko matou ko nga Tino Rangatira o nga iwi o Nu Tireni i raro mai o Hauraki kua oti nei te huihui i Waitangi i Tokerau 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 Hapu o Nu Tireni'.

Ko te Kingitanga 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.

Ko matou ko nga Tino Rangatira ke 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 pu 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.

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 pakeha 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 wakaetia katoatia e matou i tenei ra i te 28 o opketopa 1835 ki te aroaro o te Reireneti o te Kingi o Ingarani.

[10] 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) [*He Whakaputanga me te Tiriti*] at 154.

## Declaration of the Independence of New Zealand [11]

We, the hereditary chiefs and heads of the 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.

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 to exist, 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.

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; and they 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.

They also agree to send a copy of this Declaration to His Majesty the King of England, to thank him for his acknowledgement of their flag; and in return for the friendship and protection 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, and that he will become its Protector from all attempts upon its independence.

Agreed to unanimously on this 28th day of October, 1835, in the presence of His Britannic Majesty's Resident.

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[11] *He Whakaputanga me te Tiriti*, above n 10, at 160-161.

## Te Tiriti o Waitangi[12]

Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu 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 Maori 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 Maori ki te Pakehae 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, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu 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 hapu-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 maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

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[12] *He Whakaputanga me te Tiriti*, above n 10, at 346.

(Signed) WILLIAM HOBSON,

Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu 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.

Ko nga Rangatira o te wakaminenga.

# The Treaty of Waitangi [13]

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 authorised 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 authorise 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

[13] *He Whakaputanga me te Tiriti*, above n 10, at 347.

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 Preemption 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.

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.

[*Here follow signatures, dates, etc.*]

## Glossary of Māori terms

| | |
|---|---|
| **Aotearoa** | New Zealand |
| **atua** | god, deity, spirit, supernatural being |
| **awa** | river, stream, creek |
| **hapū** | tribe, descent group, wider kin group than whānau |
| **He Whakaputanga o te Rangatiratanga o Nu Tireni** | The Declaration of the Independence of New Zealand |
| **hīkoi** | to step, stride, march, walk |
| **hui** | meeting, gathering, assembly |
| **iwi** | tribe, collection of hapū, people |
| **kai** | food, to eat |
| **kaimoana** | seafood |
| **kāinga** | home, village, settlement, possibly also country around settlement |
| **kaitiaki** | guardian, trustee, protector, steward, controller; spirit guardians |
| **kaupapa** | topic, matter for discussion, theme, issue, proposal |
| **kaitiakitanga** | ethic of guardianship, protection |
| **karakia** | incantation, chant, prayer, ritual |
| **kaumātua** | elder, elderly |
| **kawa** | marae protocol |
| **kāwanatanga** | governance |
| **kōrero** | discussion, speech, to speak |
| **kōrero tuku iho** | oral tradition |
| **kuia** | elderly woman, grandmother, female elder |
| **mahinga mātaitai** | traditional fishing grounds |
| **mana** | authority, control, influence, prestige, power, reputation |
| **mana i te moana** | authority/rights over the sea |

| | |
|---|---|
| **mana tuku iho** | inherited right or authority derived in accordance with tikanga |
| **mana i te whenua** | authority/rights from land |
| **manaaki** | hospitality, generosity, compassion, respect, kindness |
| **manaakitanga** | ethic of hospitality, generosity, caregiving |
| **marae** | whare, community meeting place |
| **mātaitai** | seafood, fishing area |
| **mātauranga** | knowledge, wisdom, understanding, skill |
| **maunga** | mountain, mount, peak |
| **mauri** | life force |
| **moana** | lake, sea |
| **Ngāpuhi** | tribal group of Northland |
| **noa** | Ordinary, free from tapu or restrictions, safe, touchable |
| **ōhākī** | deathbed prophecy |
| **pā** | fortified village, or more recently, any village |
| **Pākehā** | European |
| **Papatuānuku** | Earth Mother |
| **pātaka** | storehouse |
| **pepeha** | tribal saying, tribal motto, proverb |
| **rāhui** | restriction on access or prohibition on use of land or resources; reserve; preserve |
| **rangatira** | chief |
| **rangatiratanga** | chieftainship, leadership, self-determination, self-management; qualities of leadership and chieftainship |
| **Ranginui** | Sky Father |
| **ringa kaha** | literally ‘strong hand’, but connoting the power to exercise force; conquest |
| **rohe** | boundary, territory, district, area, region |

| | |
|---|---|
| **taiāpure** | local fisheries established under s 174 of the Fisheries Act 1996 in areas that have customarily been of special significance to an iwi or hapū |
| **take** | issue, grievance, cause, reason |
| **takutai moana** | area considered to encompass both the foreshore land and sea |
| **Tangaroa** | god of the sea |
| **tangata whenua** | Māori, people of the land |
| **taniwha** | supernatural guardian of water of waterway; protector |
| **taonga** | treasured possession, property |
| **tapu** | religious or spiritual restriction, sacred, consecrated, prohibited |
| **taua** | war party, army (tauā in some dialects) |
| **tauiwi** | foreigner |
| **taumata** | horizon of the sea |
| **tauranga ika** | traditional fishing ground |
| **tauranga waka** | traditional landing place for waka |
| **Te Arawhiti** | Office for Māori Crown Relations |
| **Te Tai Tokerau** | Northland |
| **te Tiriti o Waitangi** | Māori text of the Treaty of Waitangi |
| **tika** | correct, proper, fair, just, according to traditional ways |
| **tikanga** | custom, habit, rule, plan, method, rights, law |
| **tino rangatiratanga** | full (chiefly) authority |
| **tupuna, tūpuna** | ancestor, ancestors |
| **ture** | law, rule, statute, Act (of Parliament) |
| **urupā** | burial site, cemetery |
| **utu** | reciprocation, recompense, response |
| **wāhi tapu** | sacred sites |
| **waka** | canoe, vehicle |

| | |
|---|---|
| **whakapapa** | genealogy, descent, lineage |
| **whanaungatanga** | relationship, kinship, sense of family connection |
| **whare** | meeting house |
| **whenua** | land, placenta |

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# CHAPTER 1: INTRODUCTION

## 1.1 Te Kapotai

**Figure 1:** View of the Waikare Inlet from Opua[14]

*Ko Māhuhukiterangi te waka*

*Ko Whiti te tupuna*

*Ko Kapowai te maunga*

*Titiro iho ana ki tona pā tū moana, ko Motukura*

*Ko Waikare te awa*

*Ko Te Turuki te marae*

*Ko Te Kapotai te hapū*

Te Kapotai is a tribe that traces its origins back to the Māhuhukiterangi waka. The tribe, originally known as Ngāti Tū, settled at Waikare in the Bay of Islands. In the Waikare Inlet is Motukura Island, the pā of Te Kapotai ancestor Whiti. It is said that Whiti was at Motukura when an encounter with a chief of the Ngare Raumati tribe took place. Whiti fell out of his canoe and "kapokapo kau ana i roto

[14] Waitangi Tribunal *Te Kapotai Hapū Korero – Te Wāhanga Tuatoru* (Wai 1040, #F27(d), 28 April 2014) [*Wai 1040, #F27(d)*].

i te wai" (flailing about in the water), hence the name change to Te Kapotai.[15] Their sacred mountain Kapowai is a reference point of their identity; this is how Te Kapotai know who they are and where they are from. The Waikare Inlet is revered by Te Kapotai people as the pātaka kai or storehouse of the tribe, and as a source of sustenance and wellbeing. At the head of the Waikare Inlet sits Te Turuki marae.[16] Te Turuki has been the meeting place of the tribe for generations.[17] There too, Te Kapotai ancestors are buried, a mark of the tikanga (custom) that when one passes it is right that they should be returned to their homeland, to Papatuānuku their Earth mother. Hundreds of years of occupation, use, and custom mean that Te Kapotai's existence and identity derives from an enduring connection to their ancestral land.

Waikare is part of the greater Bay of Islands, a place rich in cultural, historical and political history. Adjoining the Waikare Inlet is Okiato – Russell, the largest early European settlement, and the first capital of New Zealand. In the early-mid 1800s, the region attracted interest from foreigners, including British, French and Americans, and became a thriving trading point and an economic hub of the North.[18] On 28 October 1835, rangatira (chiefs) of the North gathered at Waitangi and signed he Whakaputanga o te Rangatiratanga o Nu Tireni (the Declaration of Independence) which declared that sovereign authority rested with them, on behalf of their hapū, and that no foreigner could make laws in their lands.[19]

As European settlement increased, Māori and Pākehā needed to reach agreement about how the two peoples could live together and how the area would be managed.[20] Such an agreement was reached in the Bay of Islands on 6 February 1840, when te Tiriti o Waitangi was signed between the chiefs and colonial representatives. Te Tiriti was an agreement that established a rangatira-to-rangatira relationship, where Māori and Pākehā would live in this country in a

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[15] Waitangi Tribunal *Te Kapotai Hapū Korero – Te Wāhanga Tuatahi* (Wai 1040, #F25(b), 28 April 2014) [*Wai 1040, #F25(b)*] at [42].
[16] At [58].
[17] Waitangi Tribunal Henare, Middleton & Puckey *He Rangi Mauroa Ao te Pō: Melodies Eternally New, Te Aho Claims Alliance (TACA): Oral and Traditional History* (Wai 1040, #E67, 21 February 2013) [*Wai 1040, #E67*] at 127.
[18] Waitangi Tribunal, Dr Grant Phillipson, *Bay of Islands Māori and the Crown 1793-1853* (Wai 1040, #A1, 2005) [*Bay of Islands Māori and the Crown*] at 53-57.
[19] *He Whakaputanga me te Tiriti*, above n 10, at 200.
[20] At Chapter 9, Chapter 10 at [10.3]. See also: 529.

partnership based on mutual benefit and respect.[21] Above all, te Tiriti established a form of governance of dual authority, where the tribes would continue to exercise te tino rangatiratanga (full and exclusive authority) over their lands and people, while the Crown would exercise kāwanatanga (governance) over Pākehā. That was the te Tiriti agreement in 1840.[22]

Te Kapotai say that since 1840, te Tiriti has been breached in the sense that the Crown has wrongly asserted, that by signing the treaty, Māori agreed to cede their sovereignty or transfer their right to govern to the Crown.[23] Whether the misunderstandings have stemmed from interpretive issues between the English and Māori texts of the treaty or a more insidious colonial agenda, the outcome has been the usurpation of Māori rangatiratanga or authority. Based on the wrongful assumption that it acquired sovereignty under the treaty, the Crown has taken much more than what was agreed to by the rangatira. By force and by law, the Crown has taken both Te Kapotai lands and resources, and the authority that Te Kapotai once had over its territory.[24] The effect is that Te Kapotai now retain only a small portion of their original land base; their connection to their land and customs is eroded, their tribe has dispersed to urban centres, and they have suffered ever since from sustained social, cultural, political and economic loss.[25]

Te Kapotai have a strong history of resistance to Crown colonisation, and they have always maintained that the Crown must honour both he Whakaputanga and te Tiriti.[26] Today, Te Kapotai seek to reverse the impacts of colonisation on their people, and they seek a return to rangatiratanga over their lands, resources and affairs. This study focuses on how the Crown has taken ownership and control of the takutai moana within Te Kapotai, and the impact this has had on the hapū. There is a focus on how, through a te Tiriti-based transformational approach, Te Kapotai can be returned to a position of authority and exercise rangatiratanga over their takutai moana.

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[21] At 437, 523, 526, 528; Waitangi Tribunal *Closing submissions for Te Runanga o Ngati Hine* (Wai 1040, #3.3.23, 21 January 2011) at [162].
[22] *He Whakaputanga me te Tiriti*, above n 10, at 529. Te Kapotai rangatira were signatories to both he Whakaputanga and te Tiriti.
[23] Waitangi Tribunal *Closing submissions for Te Runanga o Ngati Hine* (Wai 1040, #3.3.23, 21 January 2011) at 6-8.
[24] Waitangi Tribunal *Closing submissions for Te Kapotai* (Wai 1040, #3.3.395, 25 July 2017) at [2.0].
[25] At [2.7]-[2.8], [14.4(d)], [14.5(b)(x)].
[26] See: Te Kapotai hapū kōrero/evidence for the Wai 1040 Te Paparahi o Te Raki Inquiry. Cited in full in bibliography.

## 1.2 The issue

The foreshore and seabed debate came to a head in 2003, when the Court of Appeal ruled, in *Attorney-General v Ngāti Apa*, that the Crown had not extinguished Māori customary title to the foreshore and seabed.[27] The court also held that the Māori Land Court had jurisdiction to determine whether any part of the foreshore and seabed was Māori customary land.[28] This ruling meant that Māori were, at least in theory, capable of gaining an exclusive title or ownership of the foreshore and seabed through the courts.[29] Rather than see how claims would be dealt with by the courts, the Labour Government intervened by introducing a draft foreshore and seabed policy. The policy proposed to vest ownership of the foreshore and seabed in the people of New Zealand (except where private rights exist), thereby extinguishing Māori customary rights, and provide for new customary rights to be framed in legislation.[30]

The policy was highly contentious and received both domestic and international criticism for the way it prejudiced Māori rights, while leaving Crown, public and private interests intact.[31] It triggered the largest ever protest, with over 50,000 people involved in a hīkoi (march) from Te Hiku in the North to the steps of Parliament.[32] The Waitangi Tribunal found the Crown's foreshore and seabed policy was highly prejudicial to Māori and that it was in serious breach of the Treaty of Waitangi.[33] The Tribunal recommended that the two treaty partners get together and agree on a pathway forward, stating that "as legal rights had effectively been taken away, compensation is essential."[34] The Government ignored the Tribunal's recommendations, and in April 2004 the Foreshore and Seabed Act was passed, vesting ownership of the foreshore and seabed in the Crown.

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[27] *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA). For further discussion on the litigation, see: Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 4 March 2004) [*Report on the Crown's Foreshore and Seabed Policy*] at [3.2].
[28] *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA), at [57], [91].
[29] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 132.
[30] At 83, 85, 112-113.
[31] For example, see: Committee on the Elimination of Racial Discrimination (CERD) Decision 1 (66): New Zealand Foreshore and Seabed Act 2004 CERD/C/66/NZL/Dec.1 (2005). Source: < https://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.66.NZL.Dec.1.pdf>.
[32] M Kay "Hikoi ends not with a bang but a winter" (23 March 2011). Source: Stuff website <http://www.stuff.co.nz/national/politics/4797867/Hikoi-ends-not-with-a-bang-but-a-winter>.
[33] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 129.
[34] Linda Te Aho "Contemporary Issues in Māori Law and Society" (2005) 13 Waikato Law Review 145 at 151. For further reading, see: *Report on the Crown's Foreshore and Seabed Policy*, above n 27.

The Māori Party was formed as a consequence of the foreshore and seabed dispute, and the Party's mandate to Parliament in 2008 was to repeal the 2004 Act. The Party's coalition agreement with the National Government promised a review of the Act,[35] and in 2009, a Ministerial Review Panel was appointed. In June 2009, the Panel reported back to the Government with the strong view that the 2004 Act should be repealed.[36] The Panel concluded that "[f]undamentally, a political solution is required based upon Treaty principles of good faith"[37] and just as the Waitangi Tribunal had recommended, the Panel urged that the Government have "a longer conversation" with Māori about how to resolve the foreshore and seabed issue.[38] The Panel was clear that its review was not the recommended longer conversation.[39]

That longer conversation never occurred, and in March 2010, the Government published a revised draft of the foreshore and seabed policy for public consultation, which was to be completed within one month.[40] In September 2010, the Marine and Coastal Area (Takutai Moana) Bill was introduced to the House and a Select Committee process took place, with many submitters claiming that the process was too fast and lacked integrity.[41] In March 2011, the Foreshore and Seabed Act 2004 Act was replaced by the Marine and Coastal Area (Takutai Moana) Act 2011.

The purpose of the 2011 Act is to establish a durable system of ensuring the protection of the legitimate interests of all New Zealanders in the marine and coastal areas of New Zealand.[42] A new area and type of property title called the "common marine and coastal area" was created under the legislation. The

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[35] "Nats, Maori Party to scrap Foreshore and Seabed Act" *The New Zealand Herald* (New Zealand, 14 June 2010). Source: <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10651862> .

[36] T Durie, R Boast and H O'Regan *Report of the Ministerial Review Panel – Ministerial Review of the Foreshore and Seabed Act 2004* (Ministry of Justice, Wellington, 30 June 2009) [*Report of the Ministerial Review Panel*] at 6, 13, 151. A series of additional recommendations are contained in the Panel's report and are discussed throughout this research.

[37] *Report of the Ministerial Review Panel,* above n 36, at 158.

[38] At 159.

[39] At 159.

[40] Marine and Coastal Area (Takutai Moana) Act 2011, s 4(1)(a).

[41] Ministry of Justice *Marine and Coastal Area (Takutai Moana) Act 2011* (Departmental Report, 4 February 2011) at 57.

[42] Marine and Coastal Area (Takutai Moana) Act 2011, s 4(1)(a). Section 4(1) also reads that the purpose of the Act is to "(b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and (c) provide for the exercise of customary interests in the common marine and coastal area; and (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi)".

common marine and coastal area is given a special status which provides that neither the Crown, Māori, nor any other person can own it.[43] The Act claims to restore the customary interests that were extinguished by the 2004 Act, by giving those interests legal recognition in the new legislation.[44] The customary rights of Māori are primarily recognised through the ability of Māori groups to achieve recognition of two new rights under the Act; customary marine title and protected customary rights.[45] Rather than providing for property rights of ownership or title to the takutai moana, the new rights are primarily focused on enhancing the participation of Māori in the management of the takutai moana and allowing them to carry out certain customary rights. There is a limited property right in the ability of Māori to gain prima facie ownership of newly found taonga tuturu, and non-nationalised minerals.[46] Māori are able to seek recognition of the above rights through either High Court or Crown engagement processes that are prescribed in the Act.[47]

The question to be answered is whether these new rights are a fair substitute for the rights that have been taken away, and are they consistent with what Māori are guaranteed under te Tiriti? Article 2 of te Tiriti guaranteed Māori "te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa."[48] Under the English version of the Treaty, this amounts to the "full exclusive and undisturbed possession" of land, estates, taonga and possessions.[49]

One immediate limitation of the 2011 Act is that despite the impression that the wording makes, the "customary marine title", reframed in the Act, is something less than the customary title that was previously available at common law. This limitation arises under the new law in that the common marine and coastal area cannot be owned, and therefore Māori are not able to gain rights of ownership via common law as they may have been able to, were it not for the new Act. A further limitation is that the protected customary rights which can be established by a group to allow them to carry out a customary activity, cannot include commercial Māori fishing, non-commercial Māori fishing, or activities in relation

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[43] Marine and Coastal Area (Takutai Moana) Act 2011, s 11(2).
[44] Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271-283 at 279.
[45] Marine and Coastal Area (Takutai Moana) Act 2011, ss 51 and 58.
[46] Marine and Coastal Area (Takutai Moana) Act 2011, s 82.
[47] Marine and Coastal Area (Takutai Moana) Act 2011, ss 95(1) and 98.
[48] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 127.
[49] At 127.

to wildlife or marine mammals or those based on a spiritual association.[50] Finally, there is statutory provision to ensure that the Crown and local authorities retain their existing controls and functions.[51] This means that any rights that Māori may achieve under the Act still sit firmly under the authority of the Crown.

The 2011 Act contained a statutory deadline requiring Māori to make an application for the recognition of their customary rights within six years of the commencement of the Act; by 3 April 2017.[52] The practical effect of this provision is if Māori did not apply for recognition of their customary interests under the Act by 3 April 2017, then any rights that were available for recognition under the legislation have now ceased and are no longer available. The deadline put Māori in a difficult position where they either had to accept the redefining of their rights to the takutai moana by the Act and apply for recognition of these rights as they are framed in the 2011 Act or lose all rights altogether. While there were only 100 applications three months prior to the deadline, in the end, a much larger number of applications were made.[53] Following the statutory deadline, an assessment shows that 202 applications were made by Māori to the High Court and 385 to the Office of Treaty Settlements ("OTS") for Crown engagement.[54] Given the unexpected high number of applications and complex procedure under the Act, Māori are now in a very difficult and uncertain legal and political environment. It is now over two years since the statutory deadline passed and observations can be made about how the implementation of the Act is impacting Māori.

Given the statutory deadline required Māori to confront the issues that they had with the Act, many groups, still feeling aggrieved, applied to the Waitangi Tribunal for an urgent inquiry into the consistency of the 2011 Act with the treaty.[55] Te Kapotai were the first group to submit an application to the Tribunal. Their application claimed, among other things, that the Marine and Coastal Area (Takutai Moana) Act 2011 remains prejudicial and in breach of the treaty, where

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[50] Marine and Coastal Area (Takutai Moana) Act 2011, s 51(2).
[51] Marine and Coastal Area (Takutai Moana) Act 2011, s 65.
[52] Marine and Coastal Area (Takutai Moana) Act 2011, ss 95(2) and 100(2).
[53] Waitangi Tribunal *Brief of Evidence of Doris Johnston* (Wai 2660, #A131, 18 March 2019) [*Wai 2660, #A131*] at [43].
[54] At [45]-[46]. A total of 176 of the High Court applicants have also applied for Crown engagement.
[55] Approximately 150 applicants and interested parties have joined the Wai 2660 Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry.

it takes away their customary rights at common law and fails to give effect to their rights guaranteed under te Tiriti. Te Kapotai claim that irreversible prejudice arises both in terms of how their rights to the takutai moana are abrogated by the Act, and in terms of the processes that they are required to follow in order to obtain recognition of customary interests under the new law.[56] While the Tribunal declined to hear the applications on an urgent basis, it did grant a national kaupapa inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011 and accorded the inquiry priority in the Tribunal's inquiry programme.[57] The Tribunal's inquiry is currently underway and addresses the following broad questions:[58]

(a) To what extent, if at all, are the MACA Act and Crown policy and practice inconsistent with the Treaty in protecting the ability of Māori holders of customary marine and coastal area rights to assert and exercise those rights?

(b) Do the procedural arrangements and resources provided by the Crown under the MACA Act prejudicially affect Māori holders of customary marine and coastal area rights in Treaty terms when they seek recognition of their rights?

This research does not seek to cut across the Tribunal's inquiry, or comment on the likelihood of success of applications before the Tribunal or applications before the High Court or Crown under the 2011 Act. Similar questions are asked in order to analyse how the Marine and Coastal Area (Takutai Moana) Act 2011 impacts Māori rights, to identify where prejudice may arise for Māori, and to consider whether the current legislative regime is consistent with te Tiriti.

### 1.3 Research questions

The primary question for this research is:

a) Is the Marine and Coastal Area (Takutai Moana) Act 2011 consistent with te Tiriti o Waitangi?

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[56] Waitangi Tribunal *Statement of Claim* (Wai 2660, #1.1.1, 21 December 2016) at [3.1]-[3.2].
[57] See: Waitangi Tribunal *Memorandum-Directions of the Chairperson on applications for a priority kaupapa inquiry into takutai moana claims* (Wai 2660, #2.5.8, 25 August 2017).
[58] At [50]; Waitangi Tribunal *Tribunal Statement of Issues* (Wai 2660, #1.4.1, 3 August 2018).

This question is addressed by examining the cultural, historical and political context to the takutai moana issue. This principal question enables the posing of the following secondary questions:

b) What rights do Māori have to the takutai moana:
   i) at tikanga;
   ii) under te Tiriti/the Treaty; and
   iii) at common law?

c) How have Māori rights to the takutai moana been impacted by Crown colonisation?

d) How have Māori rights to the takutai moana been recognised by the Marine and Coastal Area (Takutai Moana) Act 2011?

e) If the Marine and Coastal Area (Takutai Moana) Act 2011 is inconsistent with te Tiriti, what needs to be done to bring the Act back into line with te Tiriti? How can rangatiratanga over the takutai moana be recognised today?

### 1.4 The importance of the research

Māori are tangata whenua of Aotearoa and, like dry land, the takutai moana was land that belonged to them. Within Ngāpuhi, it was hapū that held authority over the takutai moana.[59] In accordance with tikanga, rangatira coordinated hapū activities, determined fishing, food gathering, trade, the use of coastlines and navigation of the sea.[60] He Whakaputanga (the Declaration of Independence in 1835) and te Tiriti o Waitangi (the Treaty of Waitangi in 1840) were two seminal documents where the authority of the hapū over lands, resources and sea was recognised by British authorities.[61] Mana i te whenua (authority from land) and te tino rangatiratanga ("full exclusive and undisturbed possession" of land, estates, taonga and possessions) were the terms used in the documents, both expressing the highest form of tribal authority that was not subject to that of another.[62] Since

[59] *He Whakaputanga me te Tiriti*, above n 10, at 30-31.
[60] At 30-32.
[61] At 528-529.
[62] At 199, 202, 514.

the first encounters, the takutai moana has been a site of struggle and resistance from Māori to the imposition of Crown sovereignty.

The Marine and Coastal Area (Takutai Moana) Act 2011 joins a "shameful list" of "literally hundreds of legislated restrictions" on Māori custom, property rights and authority.[63] The 2011 Act, like its predecessor the Foreshore and Seabed Act 2004, remains an Act of extinguishment where it bars Māori from obtaining common law customary rights on the foreshore and from the seabed, instead putting in place a regime for the recognition of new legal rights of reduced value. Less than three per cent of the coastline will be able to satisfy the requirements for customary marine title under the Act, because colonisation defeats the ability of most Māori groups to meet the high threshold tests formulated by the Crown.[64]

Te Tiriti was signed in 1840 to guide the relationship between Māori and the Crown, and establish understandings of how the country was to be governed.[65] Since 1840, the extent to which Māori rights to the takutai moana have been recognised by the Crown has been a matter of political will and oversight. The Crown admits it has performed poorly in its recognition of Māori customary interests in the takutai moana, saying:[66]

> …by and large it has not promoted legislation to recognise and protect Māori customary title in the foreshore and seabed. From 1840 until the *Ngāti Apa* decision in 2003, the Crown considered it to be the prima facie owner of the foreshore and owner of the seabed.

Despite opposing the Marine and Coastal Area Bill in 2010, the current Labour Government's position is that the 2011 Act restores the customary interests that were extinguished by the 2004 Act, and that the 2011 Act is consistent with the Treaty.[67] It has now been eight years since the new regime took effect, and there is an urgent need to assess how Māori are impacted before the regime becomes

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[63] (16 March 2011) 670 NZPD 17280.
[64] Waitangi Tribunal *Appendices to Brief of Evidence of Hohipere Williams* (Wai 2660, #A69(a), 18 January 2019) [*Wai 2660, #A69(a)*] at 655-656.
[65] *He Whakaputanga me te Tiriti*, above n 10, at 523-529.
[66] Waitangi Tribunal *Closing Submissions of the Crown Takutai Moana/Foreshore and Seabed, Issue 11* (Wai 1040, #3.3.416, 10 October 2017) at [81]. These submissions represent the Crown's submission/position on the foreshore and seabed issue in the Wai 1040 Te Paparahi o Te Raki district inquiry.
[67] For instance, see: Waitangi Tribunal *Crown Submissions in Response to Application for Urgency* (Wai 2577, #3.1.5, 20 January 2017) at [30]-[34].

entrenched and stated as final outcomes through the determination of applications and implementation of the Act by the High Court and Crown.

This research explores the cultural, historical and political origins of the takutai moana issue, with reference to Ngāpuhi hapū notions of authority over the takutai moana, and the specific colonial experience of the coastal tribe Te Kapotai. The discussion delves into the core of the takutai moana issue which concerns the clash between two world views and two authorities over the takutai moana; that of Crown sovereignty and that of Māori rangatiratanga. In 1846, the paramount chief of Ngāti Hine, Kawiti, prophesied, "Titiro atu ki nga taumata o te moana", "Look beyond the sea to the transfiguration of the future".[68] His instruction to his people was to look beyond the constraints of colonialism to liberation. Te Tiriti, and the wisdom, values and intent that it represents, is the foundation for the transformation that he envisaged for his people.[69] This research also looks beyond the horizon of the sea, that is, beyond the constraints of the 2011 legislation, and envisages a return to rangatiratanga over the takutai moana.

## 1.5 Chapter overview

The takutai moana issue, as it relates to the treatment of Māori rights, is presented across 10 chapters in this thesis. By way of summary, Chapter 2 discusses the research principles and methods that were adopted for this research. Chapter 2 is framed by Kawiti's ōhākī or prophecy and draws on critical theory and kaupapa Māori methodology to promote the empowerment of Māori where oppression is found to exist. In this research, it is the Crown's assumption of sovereignty and subsequent legislative functions that had the effect of the Crown usurping Māori ownership and authority over the takutai moana, which is a site of oppression. It is argued that the cultural, historical and colonial origins of the takutai moana issue must be understood against the Māori struggle to retain control of the takutai moana, before considering what steps can be taken to resolve the issue for Māori. Chapter 2 also explains how, through a te Tiriti-based approach, this research promotes transformational change such that Māori are returned to a position of authority and can exercise rangatiratanga over the takutai moana.

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[68] *Wai 1040, #AA81*, above n 1, at [69].
[69] At [185]-[191].

Chapters 3 and 4 are committed to understanding the cultural, historical and legal background of the takutai moana issue. Chapter 3 positions the takutai moana issue within a Ngāpuhi tribal context and discusses the notions of hapū authority, autonomy and tikanga that underpin the relationship between hapū and the takutai moana. By examining the Māori world view and authority in pre-te Tiriti times and the nature of the te Tiriti agreement in 1840, Chapter 3 asks the reader to adopt an understanding of rangatiratanga, or tribal authority, as it exists in a Northern tribal context. This chapter sets the scene for Chapter 4, which explores how, in the post-te Tiriti period, the Crown began to exercise kāwanatanga and impose laws that displaced Māori rangatiratanga over the takutai moana. Chapter 4 provides a review of key legal developments that have impacted Māori rights in relation to the takutai moana since te Tiriti in 1840.

Chapter 5 provides an analysis of the Foreshore and Seabed Act 2004, particularly those aspects of the legislation that were said to extinguish Māori customary rights to the takutai moana and which gave rise to treaty breaches. Chapter 6 examines the Marine and Coastal Area (Takutai Moana) Act 2011 and establishes that, despite Government claims to the contrary, the replacement legislation fails to restore Māori rights to the takutai moana that were extinguished by the 2004 Act. Treaty principles and standards are provided as a framework to consider the primary research question with respect to whether the 2011 Act is consistent with te Tiriti. Chapter 7 looks at issues that have arisen for Māori during the implementation period of the Act (2011-2019), and how the procedural arrangements under the legislation prejudice Māori. One of the key failings of the Crown that can be seen across the development and implementation of the 2011 regime is Māori were not engaged in the establishment of this Act and did not support the new legislation. Another key theme is that in treaty terms, Māori are not practicably able to exercise rangatiratanga under the new regime.

Chapter 8 provides a case study or examination of the foreshore and seabed issue against the specific tribal experience of Te Kapotai, with the purpose of highlighting how the Crown has acted to consistently undermine hapū rangatiratanga over the takutai moana. This chapter highlights how the Crown's actions impact Māori at a local level and, as such, putting their colonial experience at the forefront of prejudice experienced by Māori as a consequence of the 2011 Act. This discussion delves into the core of the takutai moana issue,

which concerns the clash of two world views and two authorities; Crown sovereignty and hapū rangatiratanga.

Chapters 9 and 10 are focused on how Māori can be returned to a position of authority in terms of the takutai moana. Chapter 9 promotes a multifaceted approach where Māori are able to employ mechanisms that are currently available in law and may be within the political interests of the Government and, in doing so, draw a pause in the implementation of the 2011 Act. This multifaceted approach will likely fall short of Māori aspirations for rangatiratanga over the takutai moana. Chapter 10 therefore discusses how a te Tiriti-based approach will provide a pathway for resolving the takutai moana issue and returning to Māori their rangatiratanga over the takutai moana.

# CHAPTER 2: FRAMEWORK AND METHODOLOGY

## 2.1 Introduction: Te Tangi a Kawiti - Kawiti's prophecy

E te whanau, i te pakanga ahau ki te Atua i te po,
heoi kihai ahau i mate.
Na reira, takahia te riri ki raro i o koutou waewae.
Kia u ki te whakapono, he poai Pakeha koutou i muri nei.
Waiho kia kakati te namu i te wharangi o te pukapuka,
hei konei ka tahuri atu ai.
Kei takahia e koutou, nga papa pounamu a o koutou tupuna e takoto nei.
Titiro atu ki nga taumata o te moana, ka hua mai i reira he ao hou.

My illustrious warriors and people, I had war with the Gods during the night,
but I survived.
Therefore, I call upon you to suppress war under foot.
Hold fast to the faith, for the day will come when you will become like the
Pakeha.
Await therefore until the sandfly nips the pages of the Book, (the Treaty),
Then, and only then, shall you arise and oppose.
Do not desecrate the sacred covenant endorsed by your forebears.
Look beyond the sea, to the transfiguration of the future. [70]

The battle of Ruapekapeka marked the end of a series of battles between the British military and 'rebel' tribes in the North. The battles took place between 1844-1846, when martial law was enforced in the Bay of Islands by the settler government to suppress rebellion and assert the sovereignty that the Crown thought it had acquired under the Treaty.[71] Hone Heke, Kawiti of Ngāti Hine and Hikitene of Te Kapotai formed an allegiance and led their contingent of tribes in a

[70] Te Tangi a Kawiti, taken from: *Wai 1040, #AA81*, above n 1, at [69].
[71] Historian Ralph Johnson presents a historical overview of the Northern War between 1844-1846, examining the causes and impacts of the British military attacks on Ngāpuhi. He concludes that the Northern War represents the earliest and clearest example of the forcible imposition of British colonial power (kāwanatanga) over Ngāpuhi chiefly authority (tino rangatiratanga). See Johnson's report at: Waitangi Tribunal, Ralph Johnson *The Northern War* (Wai 1040, #A5, 2006) [*Wai 1040, #A5*].

fight against the imposition of Crown authority in their territories.[72] This period of war is referred to as the Northern War and is highlighted in this thesis because it contributed to the origins of the takutai moana issue for Te Kapotai, thus becoming an important part of the conversation about how Te Kapotai and other tribes attempted to retain their mana and rangatiratanga over their lands and resources. This history has been absent from today's takutai moana debate, which has instead been fuelled by propaganda that if Māori owned the foreshore and seabed they would block public access to beaches.[73] There has not been a genuine attempt by the Crown to understand why Māori felt so aggrieved by the Government's decision in 2003 to take ownership of the takutai moana, and it has not been acknowledged that for Māori, the issues go beyond the recent controversy and include historical events such as the Northern War.

Particularly relevant to the discussion in this chapter is that the Northern War provides the genesis of the legacy which frames the methodological approach applied in this research. Shortly after the war ended and peace was reached, Kawiti, the paramount chief of Ngāti Hine, made the ōhākī or prophetic saying that is cited above and is the title of this research project. Kawiti's ōhākī, also known as "Te Tangi a Kawiti", not only memorialised the war between hapū and the Crown, but also guided his people by setting the tone for their resistance and relationship with the Crown going into the future.[74] Through his ōhākī, Kawiti called his people and allies to "suppress war underfoot" or to cease violent warfare; "Na reira, takahia te riri ki raro i o koutou waewae". His directive was not to accept or submit to Crown authority, but to see beyond the immediate conflict and navigate their way forward in other ways.[75] Waihoroi Shortland discusses how Kawiti's ōhākī has continued to carry weight, just as those hapū who fought against the Crown in 1845 sought to engage with the changes that were occurring in their environment and exert the authority that they believed they still possessed, but now only on peaceful terms as Kawiti requested his people adhere to.[76]

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[72] At 11.
[73] David Fisher and Cliff Taylor *Māori deal will 'close access to public beaches'* (New Zealand Herald website, 18 January 2009). Source: <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10552397> .
[74] *Wai 1040, #AA81*, above n 1, at [69]-[88].
[75] At [57].
[76] At 14, 15.

Kawiti's prophecy is about colonisation, resistance, and the maintenance of rangatiratanga. This research seeks to promote Māori aspirations for rangatiratanga over the takutai moana with te Tiriti as the foundational reference of this discussion. Rangatiratanga refers to Māori authority that existed prior to, and was guaranteed under, te Tiriti.[77] Rangatiratanga sits within its own cultural and social context, and is discussed in this research with reference to sovereignty, because Northern hapū understand rangatiratanga to be a very high level of authority akin to sovereignty, or the right to make and enforce laws (a position acknowledged by the Waitangi Tribunal).[78] Rangatiratanga is also the form of authority discussed in this research because the fundamental guarantee under Article 2 of te Tiriti was that hapū maintained the right to exercise te tino rangatiratanga over their lands, resources, taonga and affairs.[79] How rangatiratanga has been denied by the Crown, and the question of how it can be restored in terms of the takutai moana today, is explored through this research.

Embodied within Kawiti's ōhākī are the three core messages which are interpreted as research methods in this thesis. These messages include understanding the cultural, historical and colonial context to the takutai moana issue, reframing the discussion on the takutai moana, which has not been a balanced or fair discussion from the perspective of Māori, and understanding and aspiring for rangatiratanga or transformational change where Māori are returned to a position of authority in terms of their rights to the takutai moana. Where Kawiti says "Waiho kia kakati te namu i te whārangi o te pukapuka" he metaphorically speaks of the sand-fly being the Crown, and directs his people to wait until the sand-fly nips (or breaches) the pages of the book, "te Tiriti", after which they should then rise and oppose.[80] The first part of the chapter is committed to understanding the nature of the relationship between Māori and the Crown and the colonial origins of the takutai moana issue. The remainder of the chapter is concerned with explaining how kaupapa Māori research principles are adopted to resist Crown dominance and restore or transform how Māori rangatiratanga should be recognised and protected in terms of the takutai moana.

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[77] *He Whakaputanga me te Tiriti*, above n 10, at 202-203.
[78] At 9. The Tribunal said: "In our view, 'sovereignty' can be understood in general terms as the power to make and enforce law."
[79] At 350.
[80] *Wai 1040, #AA81*, above n 1, at [69].

## 2.2 The takutai moana as a site of colonisation

> ... i te pakanga ahau ki te Atua i te po, heoi kihai ahau i mate
> I had war with the Gods during the night, but I survived.[81]

The discussion on how Māori were colonised by the British has been dominated by Western writers and informed by Western values.[82] According to dominant perspectives, Aotearoa was annexed on peaceful terms. A commonly held sentiment was "better the British than the French", as if Māori should be thankful their colonial experience was not worse than it was.[83] For the best part of the nineteenth and twentieth centuries, the voice of tangata whenua was absent from historical discourse. This has meant information about colonisation has been biased creating a power imbalance between Pākehā and Māori.[84] A myth that has been perpetuated over time is that Māori are inferior and Pākehā are superior, and in a similar vein, that Māori are less intelligent, less able and less human than Pākehā. Linda Smith says: [85]

> The word itself, 'research' is probably one of the dirtiest words in the indigenous worlds vocabulary … just knowing that someone measured our 'faculties' by filling the skulls of our ancestors with millet seeds and compared the amount of millet seed to the capacity of mental thought offends our sense of who and what we are.

Western knowledge and accounts of the treaty were developed on the incorrect assumption that under the treaty Māori ceded their sovereignty to the British. The colonial government claimed legitimacy and was established on the back of that

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[81] *Wai 1040, #AA81*, above n 1, at [69].
[82] See, for example, Linda Smith in *Decolonising Methodologies* (2012), which discusses how Western knowledge and institutions continue to exclude indigenous people and their aspirations. Linda Tuhiwai Smith *Decolonising Methodologies, Research and Indigenous Peoples* (Otago University Press, Dunedin, 2012) [*Decolonising Methodologies*] at xii.
[83] For example, Crown expert witness the late Dr Don Loveridge saw colonisation of Māori as inevitable. He suggested that Māori were better off with the protections afforded under the Treaty than no Treaty at all. See further similar discussion in: *He Whakaputanga me te Tiriti,* above n 10, at 475.
[84] *Decolonising Methodologies,* above n 82, at 39 – 41. See also N Mahuika, in L Pihama, S-J Tiakiwai and K Southey *Kaupapa Rangahau: A Reader, A collection of readings from the Kaupapa Rangahau Workshop Series* (Kotahi Research Institute, Hamilton, 2015) [*Kaupapa Rangahau*] at *62.*
[85] *Decolonising Methodologies,* above n 82, at 1.

"cession".[86] The laws made by the settler government were the tools used to embed the Crown's wrongful assumption that it was the single sovereign power. The use of knowledge and law to maintain power in favour of Pākehā can be considered in terms of Foucault's theory of power/knowledge, that power and knowledge have been used by the state as a form of social control.[87] In Western societies, the language of power is law.[88] Through the imposition of Western laws and institutions in New Zealand, the Government was able to extend its authority into the realm of the Māori world and in turn displace the control Māori had maintained over their territories for hundreds of years. Jacinta Ruru speaks of the Government using "legal fictions" of the Western world to deprive Māori of their rights to land:[89]

> They sought land for settlement, signing a treaty with nga iwi Maori (Māori tribes) agreeing to respect Maori property rights. Unfortunately, the newcomers soon after became frustrated by their slow progress in gaining land and so they went to war against Maori. After a drawn-out battle, which was somewhat indecisive, the newcomers turned to their law in an attempt to gain the land. Through this law the newcomers declared the first peoples uncivilised, primitive, and savage. They used the fictions of discovery to claim that Maori lacked rights to property. These laws cut deeply into Papatuanuku. In the next 100 years or so, Maori were unable to hold on to all that was dear to them.

Crown policy for Māori from 1840 onwards has been described as being driven by a "strongly assimilationist agenda".[90] Dr Ranginui Walker describes colonisation as "total" in that it involves "cultural invasion and colonisation of the

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[86] For further discussion on the interpretation of the two texts of the Treaty, see Margaret Mutu, "Constitutional Intentions: The Treaty of Waitangi Texts" in M Mulholland & V Tawhai, (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2017) at 36.

[87] M Foucault *Power/Knowledge* (Pantheon Books, New York, 1980) at 140-141.

[88] At 140. Foucault says: "Law was an effective instrument for the constitution of monarchical forms of power in Europe, and political thought was ordered for centuries around the problem of Sovereignty and its rights."

[89] Jacinta Ruru "Settling Indigenous Place: Reconciling Legal Fictions in Governing Canada and Aotearoa New Zealand's National Parks" (PhD Dissertation, University of Victoria, 2012) at 3.

[90] Waitangi Tribunal, D Armstrong, V O'Malley and B Stirling, *Northland Language, Culture and Education* (Wai 1040, #A14, 2008) at 4. 7

minds of the invaded as well."[91] Armstrong says: "The idea of rapid assimilation was the cornerstone of Crown education policy for a century", and was underpinned by attitudes of racial superiority.[92] These "overarching assimilationist tendencies" can be found in nearly every aspect of Crown policy, but are particularly prevalent in land and resource alienation, the education system and the exclusion of te reo Māori.[93] Ultimately, the Crown sought to achieve the "peaceful" and "civilising" assimilation of Māori by submerging all aspects of Māori culture and language.[94]

Assimilationist policies were legislated throughout the twentieth century, for example, the Māori Affairs Act 1953, which allowed the Government to compulsorily acquire Māori land from its owners; the effect of which was continued dispossession at a time when Māori had very little land left.[95] Government policies encouraged Māori to do labouring and secretarial work, to work in the trades, and to teach and become nurses, because the view held by Government officials was that "Māori were genetically suited to non-academic activities".[96] In the face of such strong state power, Māori could not rise to positions of authority within this country, could not exert their own authority and struggled for influence within and outside of the institutions of government.[97] Willow-Jean Prime of Te Kapotai says:[98]

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[91] R Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Huia Publishers, Auckland, 1990) [*Ka Whawhai Tonu Matou*] at 145. Walker says, "Beginning with the missionaries, the founding fathers of the new nation state were therefore committed to the policy of assimilation".

[92] Waitangi Tribunal D Armstrong, V O'Malley and B Stirling *Northland Language, Culture and Education* (Wai 1040, #A14, 2008) at 101.

[93] At 405.

[94] At 382. For example: "The Crown accepts that early education policy, particularly in the 19th century, was premised on the notion that it would be better for Māori to assimilate towards European customs." In: Waitangi Tribunal *Generic claimant closing submissions - Issue 14* (Wai 1040, #3.3.221, 24 March 2017).

[95] Waitangi Tribunal H Bassett and R Kay *Tai Tokerau Māori Land Development Schemes, 1930-1990* (Wai 1040, #A10, 2006) at 123-126.

[96] Waitangi Tribunal J Barrington *Northland Language, Culture and Education Part One* (Wai 1040, #A2, 2005) at 281. See also report summary Wai 1040, #A2(b), at [51].

[97] Waitangi Tribunal J Barrington *Northland Language, Culture and Education Part One* (Wai 1040, #A2, 2005) at 200-201.

[98] Waitangi Tribunal *Brief of Evidence of Willow-Jean Prime* (Wai 1040, #AA86, 28 October 2016) at [20]-[24]. Prime also explains how the establishment of central and local government displaced hapū rangatiratanga:

> "kawana[ta]nga" institutions that have been set up by the Crown have been so dominant and controlling that everything we wish to do in terms of our land and people must be consistent with the Crown's laws, no matter whether they are inconsistent with our tikanga and rangatiratanga. The whole notion of our rangatiratanga having to be consistent with law is in direct contention with rangatiratanga, which is an authority that does not sit below or subordinate to another. So, the impact of the Crown's institutions

> Any Maori interests that have been provided for alongside or within Crown governance/kawanatanga, have arisen primarily from the starting point that the Crown determines what role or level of authority we can have and how we can exercise it.
>
> We can see that in the recognition of our Maori interests by the Crown, there have been undertones of racism, superiority and colonisation. The Crown's provision for our interests has not been meaningful. It is always temporary, it is always conditional, and it is always aimed at ensuring that there will not be a threat to the Crown's authority and control.

The courts were not necessarily independent of the state and had a role in the discrimination against Māori through the application of Crown laws. In 1877, the Chief Justice in *Wi Parata* said that the treaty was worthless and a simple nullity because it had been signed "between a civilised nation and a group of savages" who were not capable of signing a treaty.[99] This ruling prevailed for approximately 60 years.[100] The exclusion of Māori has been applied across law, politics, and other professions; the net effect being that Māori were not in positions of influence and had little capacity to change the direction of colonisation which was having a devastating impact on them.

Few would know about the Northern War that took place between the British and Ngāpuhi in 1844-1846, and that the Governor had a practice during the war period of gifting flour, sugar and other goods to loyal chiefs to secure their support against the "rebel Māori".[101] "Rebel" tribes like Te Kapotai, suffered impoverishment on account of the Government blocking trade and food supplies from entering the Bay of Islands. During this period, the Governor wanted Māori to wear bands around their heads or necks so the Crown could distinguish the loyal tribes from the rebellious tribes.[102] The extent of Māori education in the Native School at Te Kapotai during the early land wars was that Hone Heke was depicted as a "Dick Dastardly rascal" and that it was necessary for the safety of

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> on rangatiratanga is so extensive, that we have not been able to exercise rangatiratanga in any real sense of the meaning.

[99] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur NS 72 (SC).
[100] *Wi Parata* prevailed until the Privy Council's 1941 decision in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590.
[101] *Wai 1040, #A5*, above n 71, at 358.
[102] At 168.

settlers that any Māori rebellion against the settler government be suppressed.[103] A deeper examination of post-treaty times in the North exposes an insidious colonial history, carried out according to the principles of racism, assimilation, conflict, and marginalisation of Māori by the Crown.

Boast cites the 1869-72 *Kauwaeranga* foreshore and seabed dispute in Thames as the "first foreshore crisis".[104] The background to this case includes Pākehā claims to the foreshore and seabed for mining, the refusal by Māori land owners to sell coastal lands sought for mining, followed by the Shortland Beach Act 1869 where the Crown prohibited private dealings over the foreshore and seabed. When the question of ownership came before the court, Judge Fenton, aware of the political significance of any findings on ownership over the foreshore, found Māori were entitled to an exclusive fishing right only, not title to the soil of the foreshore itself.[105] The point to be made here is that fast-forward some 150 years, and Māori rights to the foreshore and seabed are no more secure or protected by law than they were when the 1869 case first came to court.

To achieve better outcomes for Māori in terms of the recognition of their takutai moana rights today, the cultural and historical backdrop to this issue must be examined and better understood. More broadly, to address the power imbalance between Pākehā and Māori, and to return Māori to a position of authority, the hard truths about colonisation and the question of how authority was taken from Māori, must be confronted in the various contexts in which this power imbalance occurs and is maintained today, including the takutai moana. The conversation about Māori rights to the takutai moana can no longer be dominated by Western perspectives, legal fictions and misunderstandings.

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[103] Te Kapotai kaikōrero Romana Tarau says: "At school in Auckland we were taught that Hone Heke was a Dick Dastardly rascal, and that he was treacherous and you know our hapū fought alongside Heke. The history that we were taught was a Pākehā history, certainly not a Māori one." In: Waitangi Tribunal, *Te Kapotai Hapū Korero for Crown Breaches of Te Tiriti: Te Wāhanga Tuawha* (Wai 1040, #F28(c), 8 April 2014) [*Wai 1040, #F28(c)*] at 6.

[104] Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 12. It is noted that while the correct spelling of the area is 'Kauaeranga', the spelling used for the name of the case is adopted wherever the case is referred to (*Kauwaeranga Judgment* (Chief Judge Fenton, Native Land Court, 3 December 1870), (1984) 14 VUWLR 227). 'Kauaeranga' is used to refer to the area.

[105] *Kauwaeranga Judgment* (Chief Judge Fenton, Native Land Court, 3 December 1870), (1984) 14 VUWLR 227). Discussed in Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 12.

## 2.3 The takutai moana as a site of resistance

He poai Pakeha i muri nei
When you will become like Pakeha[106]

One of the famous lines in Kawiti's prophecy was "He poai Pakeha koutou i muri nei", which literally means "you will become Pakeha boys".[107] Pita Tipene of Ngāti Hine explains:[108]

> While the message seems clear, when you put that line in context with the rest of his prophecy and consider that he and his force had just finished a harsh war against the British and their Maori allies, Kawiti was sending his inner feelings to his people about his vision for Ngati Hine and particularly for future generations.
>
> The preceding lines of his korero were "Takahia te riri ki raro i o koutou waewae. Kia u ki te whakapono", or "control your warlike anger, adhere to your beliefs." Kawiti left many messages in his waiata that still resonate today. While he was literally saying "you will become Pakeha boys" he was saying that we must resist assimilation and that Pakeha values and ways of operating would be the undoing of Ngati Hine.

Colonisation is discussed in general terms above. Understanding the colonial, racist and assimilationist agenda of the Crown in terms of Māori rights to the takutai moana requires further discussion and the telling of specific tribal experiences.[109] Ken Hingston, a retired Māori Land Court judge, said that while much has been written about the foreshore and seabed issue, nowhere in the analysis is why the Labour Government reacted to Māori in the way that it did.[110] Hingston argues that the foreshore and seabed issue is not about ownership, rather it is about racism and the removal of Māori property rights:[111]

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[106] *Wai 1040, #AA81*, above n 1, at [69].
[107] At [69].
[108] Waitangi Tribunal *Brief of Evidence of Pita Tipene* (Wai 1040, #AA82, 28 October 2016) at [28]-[32].
[109] Smith says we must analyse how we were colonised and what it means for our past, present and future. In: *Decolonising Methodologies*, above n 82, at 25.
[110] K Hingston *Foreshore and Seabed*, in *State of the Māori Nation twenty-first-century issues in Aotearoa* (Reed Publishing, Auckland, 2006) at 110.
[111] At 110.

> Some of our present politicians and media would deny that the foreshore and seabed legislation is confiscatory, suggesting it was enacted to clarify the law (editorial in the Dominion Post of 4 July 2005, '… in the case of the foreshore and seabed, the government acted only to clarify a situation that 99 percent of people took as fact') … The Waitangi Tribunal's conclusions state the position clearly: '… it [the legislation] removes property rights whether the rights are few or many, taking them away amounts to expropriation'.

Hingston goes on to say that Māori not only lost the rights to go to court to establish title to the foreshore and seabed, but also the right to the land itself. [112] He states:[113]

> 2. C.J Elias, at paragraph 37 of her 2003 decision, stated, '…from the beginning of the Crown Colony Government it was accepted that the entire country was owned by Māori according to their customs and until sold, land continued to belong to them.' (My understanding). The Court of Appeal also found as a matter of law that the foreshore and seabed are both land. I suggest that what is lost to Māori in the Foreshore and Seabed legislation was in reality 'land', not only the right to proceed to court to establish title.

By contextualising the takutai moana issue with specific local or tribal examples, and looking at tribal resistance and struggle for rangatiratanga in terms of the takutai moana, this research attempts to understand the extent to which Māori rights have been eroded over time, and how Māori are impacted by the current legislative regime for the takutai moana.

Like Hingston, Mikaere cautions us not to be fooled by the idea that the Crown might be more enlightened nowadays and that its assimilationist policies are a

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[112] Hingston notes that the Government's attack on Ngāti Apa was unprecedented and compares the legal injustices to the Mugabe campaign in Zimbabwe (save for the violence). K Hingston *Foreshore and Seabed*, in *State of the Māori Nation twenty-first-century issues in Aotearoa* (Reed Publishing, Auckland, 2006) at 107 and 111.

[113] At 107, 111. In Hingston's view, the way the Government handled the foreshore and seabed issue turned any progress made in the treaty settlement process over the past two decades on its head, and he stresses we must now face the reality of where we are racially.

thing of the past, saying that the foreshore and seabed is the primary example of a contemporary Crown policy that suggests otherwise:[114]

> … however strenuously the Crown might try today to distance itself from the thievery of its predecessors, theft of Māori land has remained very much part of its repertoire … [t]he most blatant act of theft to have taken place in recent times must surely be the Seabed and Foreshore Act 2004. It serves as a timely reminder that the Crown remains, as ever, prepared to wield legislative power as a weapon against us in order to clothe its criminal act with a show of legality.

Mikaere is particularly interested in how the Crown still demonstrates a compulsion "to force itself upon us",[115] adding that when the Crown had taken all but five percent of the land in Aotearoa, and when there was a possibility that Māori rights to the foreshore and seabed might be recognised, the Crown's response "was to invade it, symbolically at least by appropriating it."[116] Mikaere argues that dismantling colonisation and racism is a complex task, but that she believes that our cultural survival is dependent on the way we confront these issues:[117]

> An essential element of racism in the colonial context is power …What makes our lives difficult is that the Pākehā people in Aotearoa have power. In exercising their power, they seek to define us and to dictate to us how we should behave. In order to combat racism, therefore, we need to strategize about how to reclaim power over ourselves.

Mikaere encourages us to strive for transformational change "the result of which will be our strength and freedom".[118]

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[114] Ani Mikaere *He Rukuruku Whakaaro, Colonising Myths Māori Realities* (Huia Publishers, Wellington, 2011) [*He Rukuruku Whakaaro*] at 156, 159
[115] At 159.
[116] At 159.
[117] At 80
[118] At 57.

## 2.4 The takutai moana as a site of transformation

> Titiro atu ki ngā taumata o te moana, ka hua mai i reira he ao hou.
>
> Look beyond the sea to the transfiguration of the future[119]

Whaea Moe Milne of Ngāti Hine recalls the pain and loss felt when Māori became aware of the Government's intentions to take ownership of the foreshore and seabed in 2003. Milne explains when she learnt the policy was going to take the last remnant of Māori land in ownership "it made me sick": [120]

> I was in Taranaki in 2003 when the foreshore and seabed went down and the trauma and stress that it caused the people there was actually palpable. I was at the marae and I had to stop my work. I had people saying "oh my god what are we going to do." People's grief; you could almost touch it. Even if people didn't actually know what was going on, what they did know was that they had lost more land, and the loss of land is why it is so difficult to get oranga (wellbeing) back.

The title of this research, "Ngā Taumata o Te Moana" is taken directly from Kawiti's ōhākī. "Kei takahia e koutou, nga papa pounamu a o koutou tupuna e takoto nei" – Kawiti warns his people not to desecrate the sacred covenant signed by their forbears – te Tiriti. In saying, "Titiro atu ki nga taumata o te moana, ka hua mai i reira he ao hou", he tells them to "Look beyond the sea, to the transfiguration of the future".[121] This speaks to Kawiti's vision that the oranga or wellbeing of his people lies beyond the taumata or horizon of the sea. In a spiritual sense, the sea was their atua Tangaroa, and their whakapapa and identity. In a physical sense, the sea was their life source. Maintaining a spiritual and physical connection to the sea is essential for the oranga or wellbeing of Māori as a whole.[122]

The transformational aspect of this research is the intention to examine how Māori can retain their rangatiratanga over the takutai moana in the manner intended by the rangatira who signed te Tiriti with the Crown in 1840. This is explored by addressing the research question as to whether the 2011 Act is consistent with te

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[119] *Wai 1040, #AA81*, above n 1, [69].
[120] Informal discussion with Moe Milne, Pakaraka, 28 January 2018.
[121] *Wai 1040, #AA81*, above n 1, at [69].
[122] Informal discussion with Moe Milne, Pakaraka, 28 January 2018.

Tiriti, and whether the guarantee in Article 2 that Māori would continue to exercise rangatiratanga over their lands, taonga and affairs, including the takutai moana, still holds. A series of additional questions are asked, including; What was the nature of Māori authority? How was Māori authority taken? Who took it, and when? Was it taken fairly or legitimately? How does the Marine and Coastal Area (Takutai Moana) Act 2011 provide for rangatiratanga today? How can rangatiratanga be recognised today?

Answering these questions in terms of the takutai moana is not a simple task. Questions which challenge specific laws and the Crown's compliance with te Tiriti inevitably turn to the legitimacy of the Crown's claim to sovereignty under the Treaty, and longstanding issues regarding interpretation of the meaning and effect of the two texts, and the principles and duties which flow from them. Mikaere identifies the inherent illogicality Māori face in trying to achieve justice in a legal system that has operated to undermine them for hundreds of years.[123] She believes that transformation and constitutional change is needed for Māori to reclaim power. Past treaty breaches must be dealt with, but only in so far that Māori can ask the next set of questions; questions which she says go to the heart of our constitutional arrangements:[124]

> To end racism in Aotearoa, there is work to be done by both Pākehā and Māori. Colonisation has shaped all of us; dismantling its ill-effects will therefore take the best efforts of all of us. As a first step, Pākehā need to own up to the truth about how they have come to occupy their position of dominance in our country – and to deal with it.

Mikaere says "Māori are always being told that to expect a share of political power based on the Treaty relationship is unrealistic" and promotes gaining an understanding of how we relate to the Crown and rejecting the colonisers' view of what is realistic.[125]

Linda Smith explains that theory plays an important role in conceptualising transformation, where it allows us to make sense of our reality and determine

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[123] *He Rukuruku Whakaaro*, above n 114, at 56.
[124] At 56.
[125] At 94.

action toward transformational outcomes.[126] Freire's pedagogy of the oppressed is concerned with identifying and understanding the source of oppression, and then transforming the reality of the oppressed to a liberated state.[127] Freire considers oppression by the dominant class to be dehumanising, or the taking of humanity from the oppressed.[128] Decolonisation and liberation are key pillars of his theory, giving his theory significant value in this research. The primary tenet of Freire's pedagogy is that only the oppressed can liberate themselves and, furthermore, that the oppressed must not only liberate themselves but also their oppressor. According to Freire, the only way you can long for freedom and justice is when you lack freedom and justice, and your humanity has been taken, and you must struggle to recover your humanity and have your humanity recognised.[129] For Māori, this means understanding colonisation and how the system of law currently in operation is oppressive, and that this must be followed by the pursuit of options that remove the oppressive aspects of that system.

Within Freire's theory, "struggle" or resistance refers to an attempt to overcome oppression.[130] For true liberation to occur in such a struggle, both the oppressed and the oppressor have to be liberated. In Freire's view, struggle must be non-violent as he argues that liberation is only a consequence of methodological and diligent planning.[131] The value of this thinking to my research can be seen in how this form of peaceful resistance was envisaged by Kawiti in his ōhākī. The process of liberation or humanisation within Freire's pedagogy is called praxis. Praxis must be 'genuine praxis' for liberation to occur. The essential elements of genuine praxis include the following principles:[132]

- Recognition and reflection, or in other words, the oppressed recognising or knowing their oppression;
- Engaging in critical dialogue and discussion; and

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[126] *Decolonising Methodologies*, above n 82, at 45.
[127] Paulo Freire *Pedagogy of the Oppressed* (30th Anniversary ed, The Continuum International Publishing Group Inc, New York, 2000) [*Pedagogy of the* Oppressed] at 44.
[128] At 44.
[129] At 44, Freire says:

> This, then, is the greatest humanistic and historical task of the oppressed: to liberate themselves and their oppressors as well. The oppressors, who oppress, exploit, and rape by virtue of their power, cannot find in this power the strength to liberate either the oppressed or themselves.

[130] At 126
[131] At 126. Note: These sentiments of transformation and liberation as being non-violent are also expressed in Kawiti's ōhākī which ensured that his people would not take up arms again.
[132] At 125.

- Dialogue must be followed by action.

If knowledge, dialogue and action have occurred and genuine praxis is reached, Freire believes people have the power and the ability to make revolutionary change towards liberation.[133] Freire's theory provides insights into what approach should be taken in this research project, if it is to contribute to the transformation and liberation of Māori with respect to a particular situation that is causing them oppression.

## 2.5 Kaupapa Māori methodology

Kaupapa Māori methodology promotes that research should be conducted according to Māori culture, knowledge, values and perspectives. Smith explains that Kaupapa Māori research begins from the assumption that Māori knowledge, language and culture is valid and asks the following questions:[134]

(i) What research do we want to carry out?

(ii) Who is that research for?

(iii) What difference will it make?

(iv) Who will carry out the research?

(v) How do we want the research to be done?

(vi) How will we know it is a worthwhile piece of research?

(vii) Who will own the research?

(viii) Who will benefit?

Kaupapa Māori research principles have developed over the past 30 years to ensure that cultural integrity is maintained, that the research responds to the wants and needs of Māori, and that the research allows a Māori voice to be heard.[135] For example, the principle of whakapapa involves the notion that research, which

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[133] At 44: Liberation is the state where the oppressed have restored the humanity of both themselves and their oppressors who in the process of taking the humanity from the oppressed, have also dehumanized themselves.
[134] *Kaupapa Rangahau*, above n 84, at 49.
[135] *Decolonising Methodologies*, above n 82, at 191 – 194.

recognises identity at whānau, hapū and iwi levels, is central to the promotion of Māori knowledge systems and values.[136] The principle of te reo asks researchers to understand and incorporate a level of te reo Māori in research as the language embodies tikanga and its own knowledge and values.[137] Similarly, the principle of tikanga means that research should be conducted in a manner that is consistent and respectful of Māori customs, behaviours and beliefs.[138] The principle of rangatiratanga supports the idea that research should be transformative and decolonising. At a practical level, the principle of rangatiratanga can be interpreted as promoting research that enhances Māori authority or control over resources, and a treaty partnership with the Crown.[139]

Kaupapa Māori methodology builds on the critical theories of Foucault and Freire and in doing so promotes the significance of Māori values and aspirations for transformational change.[140] For example, Graham Smith explains that Kaupapa Māori research methodologies have reframed Western thinking on transformation such that instead of being thought of in a linear progression, it is beginning to be thought of as having circular progression.[141] Kaupapa Māori research rejects the popular notion depicted in the diagram below, that transformative praxis requires lineal progression from conscientization (knowing or understanding), to resistance, to transformation: [142]


**Figure 2:** Graham Smith critique on transformation

[136] *Kaupapa Rangahau*, above n 84, at 49.
[137] At 49.
[138] At 49.
[139] At 49.
[140] *Decolonising Methodologies*, above n 82, at 187. Smith discusses Kaupapa Māori research as "a local approach to critical theory".
[141] Graham H Smith "Mai i te maramatanga, ki te putanga mai o te tahuritanga: From conscientization to transformation" (2004) 37 Educational Perspectives. Indigenous Education 46 at 50.
[142] At 50.

Rather, Smith thinks that for Māori, transformation occurs in a cycle, where each of the states are equally important, and where people can enter the cycle at any point as shown in the diagram below:[143]

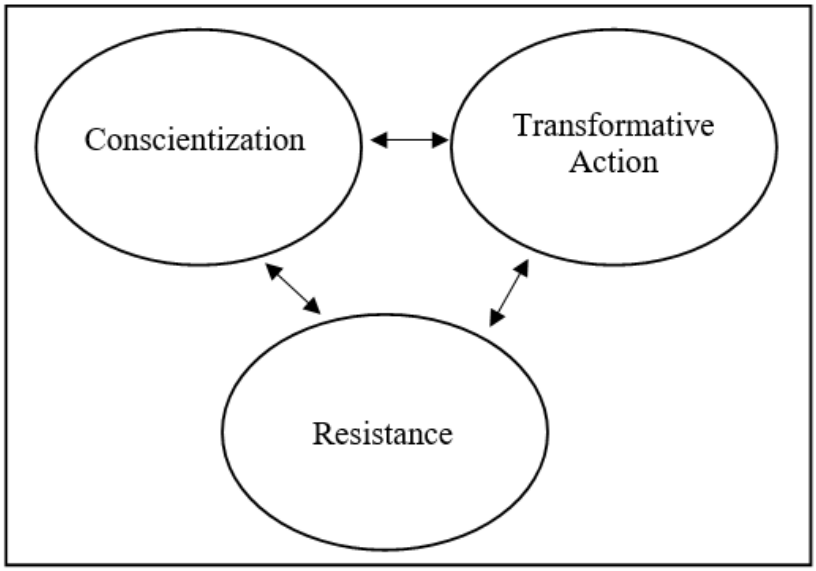


**Figure 3:** Transformation by Graham Smith

Graham Smith says that Māori experience leans towards conscientization, transformative action and resistance occurring in any order, or even simultaneously; as is depicted by the arrows going in both directions in the above diagram.[144] He uses the Kohanga Reo movement in education as an example, where individuals would be involved in transformative praxis by choosing to put their children in Kohanga Reo, and that this choice would then lead to conscientization, which would then lead to further involvement in activities of resistance. This approach is a critique of much of the writing on transformation, which he says has tended to argue for a lineal progression of conscientization, resistance and transformative action.[145]

In terms of the tone and language used in research, Ngahuia Murphy explains how Kaupapa Māori principles inform the way she presents the tangata whenua

[143] At 51.
[144] At 51-52.
[145] At 51-52.

voice.[146] In particular, Murphy said that she is very careful not to refer to the women she speaks with as "marginalised" or "oppressed" because none of the women who she speaks with can be described as oppressed.[147] She adds that while colonial oppression is experienced to varying degrees, the women she speaks to symbolise the continuation of ancestral leadership, and strength; "Their voices are not voices of the marginalised and oppressed but voices of survivors, voices of resilience, and resistance".[148] The presentation of the tangata whenua perspective in this thesis is cognisant of this point and speaks of honouring the legacies, resistance and capacity of Māori to lead the restoration of the treaty partnership between Māori and the Crown.

Dr Sarah-Jane Tiakiwai explains indigenous researchers have been able to use Kaupapa Māori methodologies "to tell an alternative story: the history of Western research through the eyes of the colonised."[149] Nepia Mahuika explains that kaupapa Māori methodologies reconfigure state power and Western views of history.[150] He states:[151]

> The re-claiming, and re-mapping, of these spaces has been one of the major strengths of both postcolonial and Kaupapa Māori theory. Kaupapa Māori for instance, places matauranga Māori at the centre, and challenges the place of Pākehā history and power, re-positioning them as historians from elsewhere whose cultural and intellectual frameworks are inadequate for interpreting the histories and worldviews of the indigenous peoples here in Aotearoa.
>
> For Māori and iwi, the reclaiming of our world from the clutches of those who would consume it requires a pathway that has been partially signposted but is still evolving in theory and practice. In redefining our world, we assert the notion that as the indigenous people here we are not 'other', and resist those voices, discourses and frameworks that would either marginalize or subsume us.

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[146] N Murphy *Te Awa Atua, Menstruation in the pre-colonial Māori world* (He Puna Manawa Ltd, Ngaruawahia, 2014) at 53.
[147] At 53.
[148] At 53.
[149] *Kaupapa Rangahau,* above n 84, at 77-94.
[150] N Mahuika in *Kaupapa Rangahau,* above n 84, at 62.
[151] At 63.

Moana Jackson believes that the process of reclaiming knowledge and authority begins with Māori talking to each other first and that eventually, the reclaiming process will undermine the framework of oppression.[152] The tangata whenua voice is presented in this research through stories, traditions and conversations of Te Kapotai people, Kawiti's ōhākī and existing Tribunal jurisprudence which has validated their accounts.

Jacinta Ruru, in her research on national parks, has examined the implications of colonialism on indigenous rights to land.[153] Ruru discusses transformation in terms of reconciliation, and she promotes the reshaping of the Crown/Māori relationship through respect for the indigenous world view. Like Mikaere, Ruru acknowledges the clash of Western and indigenous world views and reminds readers that reasserting indigenous law over land is not simply a matter of reforming the Western law but reclaiming our own world view. Ruru says:[154]

> Indigenous peoples remain committed to preserving their own identities, and adapting their ancestral ways to make sense of the modern world. For many indigenous communities, self-determination, in whatever form it is defined, is the end goal. For some indigenous communities, the vision might simply mean knowing that their ways of doing things are respected within a dominant colonial regime, and for others it might mean regaining total separate control of their destinies.

Ruru argues that reconciliation and protection of Māori interests in national parks can only occur through a combination of recognition, indigenisation and decolonisation.[155] In her view, recognition means accepting and showing tolerance towards both Western and Māori world views. Indigenisation is about retaining and practising indigenous knowledge and laws in contemporary contexts. Finally, decolonisation is about communicating visions, developing cultural relations and promoting a legitimate place for both world views. [156]

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[152] "Constitutional Transformation: An Interview with Moana Jackson" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) at 325.
[153] Jacinta Ruru "Settling Indigenous Place: Reconciling Legal Fictions in Governing Canada and Aotearoa New Zealand's National Parks" (PhD Dissertation, University of Victoria, 2012) at 3.
[154] At 32
[155] At 37.
[156] At 37-43.

According to Mahuika, there is an increasing shift by Māori scholars to centre their research on their own tribal experiences and specific knowledge.[157] He notes that research based on real communities and personalised experiences is central to the process of closing the gaps:[158]

> They provide essential matauranga that gives local meaning to how these theories work in practice. Without these foundations in place – at the heart of historical scholarship here in Aotearoa – there will always be a gaping chasm between Māori, iwi and tauiwi interpretations of the past. Kaupapa Māori and post colonialism can only take us so far. Their usefulness is inextricably dependent on how they materialize within the work of those who have sought to group themselves in the language, tikanga and matauranga of the iwi kaenga. Only then can one truly belong.

This research recognises the significance of these Kaupapa Māori methodologies and uses key literature and resources outlined below to present a hapū specific narrative and experience on the takutai moana issue.

### 2.5.1 Key literature / resources

This section identifies key literature and explains why and how it is used to underpin the methodological approach to this research.

**Waitangi Tribunal record of inquiry documents and reports:** This research draws heavily on Waitangi Tribunal reports and evidential documentation across various Tribunal inquiries. The Waitangi Tribunal was established in 1975, with its jurisdiction expanded in 1985 to inquire into historical claims.[159] A quasi-judicial commission of inquiry, the Tribunal's role is to inquire into claims by Māori that the Crown has acted inconsistently with the principles of the treaty. In carrying out its functions, the Tribunal has the "exclusive authority" to consider both texts of the treaty; "to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between

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[157] N Mahuika in *Kaupapa Rangahau*, above n 84, at 70.
[158] At 70.
[159] The Waitangi Tribunal is a quasi-judicial Commission of Inquiry operating under the Treaty of Waitangi Act 1975 and the Commissions of Inquiry Act 1908. Its legislative functions under the Treaty of Waitangi Act are to hear claims by Māori against the Crown concerning breaches of the principles of the Treaty of Waitangi, to determine the validity of these claims, to make recommendations to the Crown on redress for valid claims, and to examine and report on any proposed legislation referred to the Tribunal by the House of Representatives or a Minister of the Crown.

them".[160] The Tribunal has held inquiries throughout the country into the impact of colonisation on Māori and into contemporary claims on a range of issues. Through reporting, the Tribunal continues to clarify what the treaty means, the respective obligations of the Crown and Maori under the treaty, and how the treaty applies in different contexts.[161]

The Waitangi Tribunal's 2014 report, *He Whakaputanga me te Tiriti,* is the product of the Stage One inquiry in the Wai 1040 Te Paparahi o Te Raki (Northland) District Inquiry. The inquiry took place between 2008 and 2018 and in total involved 31 hearing weeks. The first five hearing weeks were focused on the meaning and effect of he Whakaputanga and te Tiriti in the Northern context.[162] The report is used to establish the rangatiratanga and te Tiriti framework for this research because it provides the first detailed account from the Tribunal on the meaning of he Whakaputanga and te Tiriti, and is based on substantial tangata whenua evidence which the Tribunal says was absent from earlier Tribunal inquiries.[163] The Tribunal's report is important because he Whakaputanga and te Tiriti are considered sacred and foundational documents to the Northern tribes and, furthermore, it is the first time in New Zealand legal history that a judicial body has unequivocally determined that sovereignty was not ceded by the Northern chiefs under the treaty.[164] The report contains substantial discussion on the nature of rangatiratanga and te Tiriti agreement, which themselves are principles of Kaupapa Māori research.

The tangata whenua narrative and tribal context of this research is primarily sourced from the evidence presented in Stage Two of the Wai 1040 Te Paparahi o Te Raki (Northland) Inquiry. The remaining 26 hearing weeks were held on a regional rotation around the inquiry district, with five of these weeks allocated to hearing the claims of hapū in the Bay of Islands region, including Te Kapotai and Ngāti Hine. During these hearings, tangata whenua witnesses, including kuia and kaumātua, from these hapū presented their knowledge on tikanga, whenua, he

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[160] Treaty of Waitangi Act 1975, s 5 (2).
[161] Hayward says "…the Tribunal's reports stand very much at the center of developing notions of justice under the Treaty". Hayward and Nicola R Wheen (eds) The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi (Bridget William Books, Wellington, 2004) at xvi.
[162] *He Whakaputanga me te Tiriti*, above n 10, at 6.
[163] At 6.
[164] At xxi-xxii.

Whakaputanga, te Tiriti, the impact of colonisation on their people, and their aspirations for the future of their tribes.

The Waitangi Tribunal's report on the Crown's Foreshore and Seabed Policy from 2004 is another key resource used in this research.[165] Most coastal iwi represented in the inquiry claimed the Crown's policy (which would soon be passed into law via the Foreshore and Seabed Act 2004) was in breach of the treaty. The report is useful because the Tribunal makes clear findings and recommendations on what treaty standards and principles apply when the Government makes laws that impact Māori rights to the takutai moana. In its report, the Tribunal identifies aspects of the policy it considers to be prejudicial to Māori and therefore in breach of the treaty. Comparative analysis is carried out by contrasting the Tribunal's discussion on prejudicial aspects of the 2003 policy against the 2011 Act.

The Waitangi Tribunal's Wai 2660 Kaupapa Inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011 is underway, and as it progresses a substantial body of tangata whenua and evidential documentation is being collated and compiled. This research has examined Crown evidence and material produced through discovery that has been placed on the public record of inquiry, including internal Crown papers relating to policy development and Cabinet decision-making on the 2011 Act.

**Texts by Professor Richard Boast:** Professor Richard Boast is a renowned academic and leading authority on Māori land law, and the foreshore and seabed. In addition to a number of articles and his substantial participation as counsel in the Wai 1071 Foreshore and Seabed Inquiry, Boast's text *The Foreshore and Seabed* provides a comprehensive discussion on the legal history of the foreshore and seabed.[166] Boast was also a member of the Ministerial Review Panel that led the review of the Foreshore and Seabed Act in 2009.

**Report of the Ministerial Review Panel:** The Ministerial Review into the Foreshore and Seabed Act 2004 commenced in 2009.[167] The review had its origins in the coalition agreement between the Māori Party and National Party in

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[165] *Report on the Crown's Foreshore and Seabed Policy*, above n 27.
[166] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005).
[167] *Report of the Ministerial Review Panel*, above n 36, at 8.

November 2008.[168] The review was led by former Justice of the High Court, Chief Justice of the Māori Land Court and Chairperson of the Waitangi Tribunal, Sir Edward Taihakurei Durie; leader and activist of Ngāi Tahu, Hana O'Regan; and Professor Richard Boast.[169] The Panel was tasked with advising on the workable and efficient methods for providing for Māori and public interests in relation to the foreshore and seabed.[170] The review was carried out over three months and included nationwide consultation hui where the Panel heard from 263 oral submitters.[171] On 30 June 2009, the Panel reported back to the Government with the overarching recommendation that the Foreshore and Seabed Act 2004 be repealed.[172] The report is a key piece of literature for this research, not only because of the standing of the Panel members, but because the Government developed the 2011 legislation after receipt of the Panel's report.

### 2.5.2 Key terms

This research approaches the use of key terms carefully and in a manner that reinforces that Māori tikanga, values and beliefs exist in their own cultural context. A brief explanation is provided below on how certain terms are used, and it will become clearer as the research evolves as to why these distinctions are so important.

**Te Tiriti o Waitangi / The Treaty of Waitangi:** It is important to be clear which text of the treaty is being spoken about at all times, because each version has different meanings. This thesis follows the same terminology for the treaty as used by the Waitangi Tribunal in *He Whakaputanga me te Tiriti*. Use of 'te Tiriti o Waitangi' or 'te Tiriti', refers to the te reo Māori version, use of 'the Treaty of Waitangi' or 'the Treaty', refers to the English text. The term 'the treaty' in lower case refers to both texts together or the event of signing the treaty.[173]

**Takutai moana / Foreshore and seabed / Marine and Coastal Area:** Similarly, it is important to be clear about what is meant by the 'takutai moana' and the

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[168] At 9.
[169] At 9.
[170] At 10. In addition, the Panel had to develop "workable and efficient" options to resolve any issues with the Act and consider how those options would integrate with existing legislation which regulate the coastal marine area.
[171] *Report of the Ministerial Review Panel*, above n 36, at 31. 580 submissions were made to the Panel.
[172] Above n 36.
[173] *He Whakaputanga me te Tiriti*, above n 10, at 2.

'foreshore and seabed'. The 'foreshore' is identified as the intertidal zone, or the land between high and low water mark that is left wet daily by the tide (not the beach above the high-water mark). Whereas the 'seabed' extends from the low-water mark to 12 miles out to sea.[174] While the Tribunal states that these two zones are distinguished by English common law, there is no such distinction for Māori under tikanga.[175] The terms 'takutai moana' and 'foreshore and seabed' are used interchangeably in this research to denote both areas.

Furthermore, under the 2011 Act, the foreshore and seabed is now termed the 'marine and coastal area'. Section 9 of the 2011 Act says the marine and coastal area:[176]

> (a) means the area that is bounded,—
>
> (i) on the landward side, by the line of mean high-water springs; and
>
> (ii) on the seaward side, by the outer limits of the territorial sea; and
>
> (b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and
>
> (c) includes the airspace above, and the water space (but not the water) above, the areas described in paragraphs (a) and (b); and (d) includes the subsoil, bedrock, and other matter under the areas described in paragraphs (a) and (b)

The term 'Takutai Moana', while used in the title of the Act, is not defined by the legislation and does not appear in the Act outside of references to the title. The term 'marine and coastal area' is used when referring to the new marine and coastal area space created by the 2011 Act.

**Whānau, hapū, iwi / Māori:** This research promotes a te Tiriti partnership between Māori and the Crown. From a Ngāpuhi hapū perspective, it is critical

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[174] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 38.
[175] At xi.
[176] Marine and Coastal Area (Takutai Moana) Act 2011, s 9.

that the partnership can exist at a hapū level.[177] This research also promotes that the recognition of whānau, hapū and iwi rights over the takutai moana occurs at the level of tribal organisation specific to that area of takutai moana.[178] Given the varied nature of Māori tribal organisation, there may be instances where rights are held by a group at a whānau level, a hapū level, an iwi level, or at a combination of these levels. The terms 'whānau, hapū and iwi', and 'Māori' are used interchangeably in this thesis; however, the point is that Māori have the choice to define how and by whom they are represented in the te Tiriti partnership with the Crown, and that the rights guaranteed to Māori can be held and exercised by those who are entitled to them. To be clear, when the term 'Māori' is used, it does not promote engagement with Māori or recognition of rights at a generic, pan-tribal or nationwide level.

**Tikanga / treaty rights / Common law customary rights / rights created by legislation:** There is also a distinction to be made between rights under tikanga, treaty rights, customary rights at common law, and rights created by legislation governing the takutai moana – all being different rights, arising from different contexts. Briefly, Maori rights to the takutai moana under tikanga include the right of Māori to live in accordance with their own customs, systems of law and authority.[179] The treaty is not the source of Maori tikanga or customary rights, rather it was recognition by the British Colonial authorities that such rights were pre-existing and guaranteed to Maori in 1840.[180] Common law rules and principles that recognise the customary rights of indigenous peoples, were established in other jurisdictions like Britain, Canada, America and Australia, and evolved in New Zealand post the signing of the treaty in 1840 through the establishment of the legislature and courts.[181] Common law customary rights range from use rights to ownership and, to some extent, recognise the custom of indigenous peoples in law. For example, in the context of the takutai moana,

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[177] See: Waitangi Tribunal Associate Dean Dr M Henare, Dr H Petrie and Dr A Puckey, "*He Whenua Rangatira" Northern Tribal Landscape Overview (Hokianga, Whangaroa, Bay of Islands, Whāngārei, Mahurangi and Gulf Islands)* (Wai 1040, #A37, 16 November 2009) [*He Whenua Rangatira*] at 158-160.

[178] An approach supported by the Ministerial Review Panel which said (*Report of the Ministerial Review Panel*, above n 36, at 13): "The new Act should acknowledge that the customary rights in that area belong to the hapu and iwi with traditional interests in it, not to all Maori…".

[179] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 24-28.

[180] At 28, 42-43.

[181] See: Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) Chapter 5: 'Common law aspects – title at common law and native title issues' at 37.

following *Ngāti Apa*, Māori could apply to the courts for the recognition of common law customary rights.[182] If successful, Māori could potentially achieve private title to the foreshore and seabed, which would carry a high level of authority and provide for an expression of rangatiratanga or capacity to exercise tikanga.

However, the ownership and use of land and resources under Western law in New Zealand should not be presumed to correlate with the nature of the authority under rangatiratanga as it exists under tikanga, or guaranteed under Article 2 of the treaty.[183] It is therefore important that the distinction is made between common law customary rights and the capacity of Māori to achieve them through the courts, such that these rights are not a substitute for tikanga or fulfilment of treaty rights of Māori. Furthermore, under the Marine and Coastal Area (Takutai Moana) Act 2011, the rights that can be recognised (customary marine title and protected customary rights) are neither common law customary rights nor treaty rights; they are rights created by the Crown and defined by the legislation and are, as such, a new class of rights altogether.[184]

There is an attempt to be clear about what right is being discussed at various points of the research. At times, the terms 'rights' and 'Māori rights' refer to all classes of rights together.

### 2.5.3 Researcher's interest

I graduated from the University of Waikato in 2009 with a Bachelor of Laws and Bachelor of Arts, and was admitted to the bar the same year.[185] I have been counsel for Te Kapotai and Ngāti Hine on their treaty claims since my first year of practice, initially as a junior to (now) Judge Michael Doogan, and from 2013 as their lead legal counsel. Following the enactment of the Marine and Coastal Area

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[182] *Report of the Ministerial Review Panel*, above n 36, at 108.
[183] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 15-16, 25-26.
[184] For instance, see: (15 September 2010) 666 NZPD 13997 – David Clendon says:

> The legislation that is on offer to replace the Foreshore and Seabed Act differs from it in name only … The legislation remains manifestly unjust, and treats Māori and Māori customary rights as inferior and second-class … Their customary title is determined not by tikanga but by the Government … The bill extinguishes customary rights by operation of law, without the consent of the customary owners, because rights can be obtained through legislation. This bill replaces an unjust law with an equally unjust law. It uses different language and wears different clothes, but in essence it is the same.

[185] In 2012, I graduated from the University of Waikato with a Master of Laws (First Class Honours).

(Takutai Moana) Act 2011, Te Kapotai and Ngāti Hine sought advice on the Act, and later instructed me to file an urgent application with the Waitangi Tribunal to determine whether the Act was inconsistent with the treaty. Urgent applications were filed on 21 December 2016 and 17 January 2017 respectively. I continue to act for Te Kapotai and Ngāti Hine (and others) before the Waitangi Tribunal inquiry, and on their applications before the High Court and for Crown engagement under the 2011 Act.

My professional and personal work has been dedicated to assisting whānau, hapū, iwi and communities to protect and achieve their aspirations for rangatiratanga. I have predominately worked for tribes in Te Tai Tokerau, while also living there for the last 10 years. Like the historical case law examined in Chapter 4, the legal proceedings I have been counsel in have been lengthy and always strongly opposed by the Crown. For both Te Kapotai and Ngāti Hine, the inquiry into their historical treaty grievances was active for nine years and was extremely intensive for the hapū. The Wai 2490 Ngāpuhi Mandate Inquiry was live for three years, and the broader issues concerning the Crown's settlement policy in Ngāpuhi have now been live for 10 years. Ngāti Hine's application to the Māori Land Court to withdraw from the Mandated Iwi Organisation, Te Rūnanga ā Iwi o Ngāpuhi has been live since 2011, and in that proceeding the Crown also joined as an interested party to oppose Ngāti Hine's withdrawal.[186]

Through whakapapa and longstanding professional relationships, I am privileged to be trusted and supported in my research by Te Kapotai and Ngāti Hine. The majority of citations are to evidential material of the hapū and are available on the public record via the Waitangi Tribunal website. I also provide opinion and perspectives from working and living in hapū communities in the North. Another proceeding which has shaped my understanding of mana i te whenua, mana i te moana and rangatiratanga is the Waitangi Tribunal's Wai 2840 Hauraki Overlapping Claims Inquiry. In this proceeding, I represented Ngāi Te Rangi, an iwi of Tauranga Moana who fervently opposed the Crown's allocation of settlement redress to Hauraki Iwi in Tauranga Moana. The primary objective of

[186] Māori Land Court *Application to withdraw from Mandated Iwi Organisation* (A20110008223, 2011). The application is currently adjourned while parties attempt to reach an agreement out of court.

Ngāi Te Rangi was the protection of their mana and rangatiratanga over the Tauranga Moana harbour and sea.

I have not yet had the experience of working for Māori claimants (pre- and post-settlement) that have a secure relationship with the Crown, or that operate in a collaborative and positive space in terms of their treaty issues, although I acknowledge that such relationships may exist elsewhere. The groups I represent have either fallen out with the Crown and experienced a breakdown in their treaty partnership or have never had the opportunity (and favour of the Crown) since 1840 to develop a relationship. When matters have come before the Waitangi Tribunal and courts, in every instance, the Crown has strongly opposed the claimants' position. The clients that I have represented are critical of the current mechanisms for recognition of their rangatiratanga in law, which they say are woefully inadequate. All legal matters that I have assisted with cross the difficult interface of tikanga, law and politics. My clients' issues have strong moral foundations, but are not afforded much, if any, legal protection, which is why they primarily succeed in the Waitangi Tribunal, because it is an institution that is able to consider their issues in treaty terms. Their issues, whether they be related to historical claims or contemporary Crown action in some way or another, centre on an inherent belief and desire of Māori to secure rangatiratanga over their lands, people and affairs.

### 2.6 Concluding remarks

This chapter has sought to outline the methodological approach that is used to answer the overarching research question of whether the Marine and Coastal Area (Takutai Moana) Act 2011 is consistent with te Tiriti. As discussed, kaupapa Māori methodology promotes the pursuit of transformational research to challenge dominant institutions and knowledge that are known to deprive Māori of rights and keep the Government in the seat of power and controlling what rights (if any) are available to Māori. Understanding how Crown law and policy have prohibited Māori from exercising rangatiratanga in terms of the takutai moana is essential. Informing this discussion with Māori history, values and perspectives is a way of encountering the inherent bias Māori face in reclaiming rangatiratanga over the takutai moana. The edict of Kawiti to his people is to wait until the sand-fly nips the pages of the book, that is, when the Crown has breached te Tiriti, then seek

fulfilment of te Tiriti; "…hei konei ka tahuri atu ai", "…then, and only then, shall you arise and oppose". [187] The takutai moana may be the site of oppression and struggle in this research, but it is equally the site of transformation and liberation.

[187] *Wai 1040, #AA81*, above n 1, at [69].

# CHAPTER 3: CULTURAL AND HISTORICAL CONTEXT – RANGATIRATANGA AND THE TAKUTAI MOANA

## 3.1 Introduction

The takutai moana issue has arisen because two peoples' authority over, and relationship to, the coastal area of Aotearoa clash. A key theme of this research is recognising Māori rangatiratanga over the takutai moana. This requires an understanding of the nature of Māori authority and some historical and political perspective on how rangatiratanga has been impacted by colonisation. While there are competing views about who should own and control the takutai moana, what must be remembered is the takutai moana issue is about real people and their real lives.[188] For many tribes, the takutai moana was, and still is, a primary source of food and an economic resource, and whānau are dependent on their coastal areas for their survival and wellbeing. Tangaroa is the atua of the sea, which means the takutai moana is a place of spirituality for Māori and a place from which their identity derives. As the Foreshore and Seabed Tribunal in 2004 found, if a regime is to be imposed on the takutai moana that cuts across Māori law, that regime damages and undermines Māori tikanga and identity.[189] In these circumstances, "every Māori person who maintains his or her connection with land in the foreshore and seabed of their tribal area is in some way diminished".[190]

The first part of this chapter seeks to provide the reader with an understanding of the Māori world view, or system of tikanga and authority over the takutai moana. It explores the Māori world view from a Ngāpuhi hapū perspective and establishes the cultural and historical underpinnings that this research is based upon. The discussion demonstrates that the Ngāpuhi rohe was not the domain of the colonisers and that hapū maintained laws and traditions that were set by their tūpuna (ancestors), and these laws and traditions shaped their relationship with the takutai moana independently of colonial governance.

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[188] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 3.
[189] At 3.
[190] At 3.

This chapter also covers two important events where the capacity of hapū to exercise their own law was recognised by the British Crown; the signing of he Whakaputanga in 1835 and the signing of te Tiriti o Waitangi in 1840. It discusses the Ngāpuhi hapū perspective that there was no transfer of authority by Māori over their people, land and takutai moana as a result of the signing of these documents.[191] He Whakaputanga, a declaration signed by rangatira, and recognised by British colonial representatives, recognised Aotearoa as a sovereign nation under the authority of the chiefs. Moreover, te Tiriti o Waitangi was an agreement between Māori and Queen Victoria through her British colonial representatives about how authority over land, people and resources would be shared as two peoples living together in one land. The treaty agreement promised Māori a partnership with the Crown, and the continuation of their mana and rangatiratanga over their territories, including the takutai moana.[192] These are the fundamental tenets of the two documents that will be applied throughout this research.

## 3.2 Tangata whenua

The traditional narrative of how Māori came into being recounts the transition from a state of non-existence to its self-generation; something that happened over eons. In the beginning, Ranginui the sky father, and Papatūānuku the Earth mother, were entwined in a tight embrace. Between them, in darkness, were their six sons: Tāne-Mahuta (god of the forest); Tangaroa (god of the sea); Tāwhirimātea (god of the winds); Tūmatauenga (god of war); Haumiatiketike (god of fern roots); and, Rongomātāne (custodian of kūmara and the god of cultivation and peaceful arts).[193] It was Tāne-Mahuta who forced his parents apart, allowing light to enter the world and the environment to take shape.[194] Tāne also fashioned Hineahuone from sand and breathed life into her to create the first human, and from there procreation commenced.[195] According to Dr

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[191] See: *He Whakaputanga me te Tiriti,* above n 10, at 529.
[192] At 529.
[193] *Ka Whawhai Tonu Matou,* above n 91, at 13. Upon the sons deciding that they no longer wished to live in the darkness between their parents, Tāne-Mahuta prised them apart. Note: Māori Marsden considers that traditions vary across tribes, as do the place and role of the gods in those traditions.
[194] Mason Durie *Te Mana, Te Kāwanatanga – The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) ["*Te Mana, Te Kāwanatanga*"] at 21.
[195] *Ka Whawhai Tonu Matou,* above n 91, at 14.

Ranginui Walker, the personification of the natural world through atua is fundamental to the holistic Māori world view:[196]

> Papatuanuku was loved as a mother is loved, because the bounty that sprang from her breast nurtured and sustained her children. Humans were conceived of as belonging to the land; as tangata whenua, people of the land. This meant that they were not above nature but were an integral part of it. They were expected to relate to nature in a meaningful way. For instance, trees were not to be cut down wantonly. If a tree was needed for timber, then rituals seeking permission from Tane had to be performed first. Similarly, a fisherman had to return to the sea the first fish he caught as an offering to Tangaroa.

The tradition continues, and at least 800-1000 years ago, Māori voyaged on waka (canoe) from their homeland, Hawaiki, to settle and integrate in Aotearoa.[197] The use of the term 'integrate' acknowledges that most voyaging traditions cite the existence of people, said to be canoe migrants from Eastern Polynesia who were living in Aotearoa.[198] Walker explains that after the initial phase of resettlement and integration, there was a period of some 500 years of tribal warfare, where the tribes across Aotearoa determined their territories and political relationships by collectivising in iwi (tribes), hapū (tribes and or sub-tribes), and whānau (families).[199] Māori were established in Aotearoa for hundreds of years prior to colonisation by the British in the early nineteenth century.[200]

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[196] At 13-14.
[197] New Zealand Ministry for Culture and Heritage Te Manatu Taonga "Canoe traditions – Te Ara Encyclopedia of New Zealand". Source: <https://www.teara.govt.nz/en/canoe-traditions>.
[198] *Ka Whawhai Tonu Matou*, above n 91, at 28.
[199] At 55.
[200] See: Margaret Mutu "Constitutional intentions: the Treaty of Waitangi texts" in M Mulholland and VMH Tawhai (eds) *Weeping waters: the Treaty of Waitangi and constitutional change* (Huia Publishers, Wellington, 2010) 13-40 at 16. Mutu says that Europeans arrived some 700 years after Māori. Note, Max Smith highlights in contrast that "Europeans arrived just 250 years ago, from 1769 onwards". See commentary by Max Harris also "Racism and White Defensiveness in Aotearoa: A Pākehā Perspective" Source: <https://e-tangata.co.nz/comment-and-analysis/racism-and-white-defensiveness-in-aotearoa-a-Pākehā-perspective/>.

### 3.3 Ngāpuhi world view: hapū rangatiratanga

#### *Ngāpuhi origins*

The northern tribe of Ngāpuhi is New Zealand's largest iwi.[201] Today, there are many versions of Ngāpuhi origins.[202] A common account is that Kupe was the first to journey from Hawaiki on the Matawhaorua waka and arrived in Hokianga on the west coast of Te Tai Tokerau. Hearing of Kupe's travels, his descendants, Ruanui and Nukutawhiti, later migrated and, over time, they too were joined by other waka, including Kurahaupō, Mataatua, Takitimu, Tinana and Mahuhukiterangi.[203] The terms "Ngāpuhi-nui-tonu", "Great everlasting Ngāpuhi" describe the many tribal groupings and marae that developed within its territories.[204] The whakataukī "Ngāpuhi kohao rau kai tangata", "Ngāpuhi of a hundred holes, man-eaters" denotes the fierce independence of the many tribes within Ngāpuhi.[205] These traditions speak to the independent nature of tribal authority, which is perhaps the defining feature of Ngāpuhi political autonomy.

Rāhiri is the tupuna who expanded the influence of Ngāpuhi. In settling a dispute between his two sons, Kaharau and Uenuku, he flew a kite called Tūhoronuku. Tūhoronuku landed at Kaikohe and this event set the boundary and relationship between Hokianga on the west coast and Taumarere on the east coast. The legacy that the two sections would support each other rather than fight is captured in the preeminent whakataukī:[206]

> Ka mimiti te puna ki Hokianga, ka toto ki Taumarere;
> Ka mimiti te puna ki Taumarere, ka toto ki Hokianga.
>
> When the spring of Hokianga dries up, that of Taumarere fills up;
> When the spring of Taumarere dries up, that of Hokianga fills up.

The two coasts are also known as Te Tai Tamatāne and Te Tai Tamawahine. Te Tai Tamatāne, the west coast, is said to have been named for its rougher seas and Kaharau's warrior traits. Whereas Te Tai Tamawahine, the east coast, upon

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[201] Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015) at 8.
[202] At 8.
[203] At 7.
[204] *He Whenua Rangatira*, above n 177, at 23.
[205] At 27.
[206] At 26.

which this research is based, is said to have been named for its gentler waters, for Uenuku's milder temperament, and because some of Rāhiri's wives came from that coast.[207] Coastlines, rivers, and mountains shaped the world view of hapū. Hapū identity and traditions are embodied in these environmental features, and hapū hold the view that the "land is the body and identity of the people, the water is their life-blood".[208] The cultural and spiritual significance of land and water was also a determining factor in the historical settlement patterns of Ngāpuhi. By the nineteenth century, the core territory of Ngāpuhi was set by mountains which surrounded the harbours of Hokianga, Whangaroa, Pēowhairangi (Bay of Islands), Whangarei and Mahurangi.[209]

### 3.3.1 Te Kawa o Rāhiri

A brief overview of the Ngāpuhi world view, or perspective, is essential to any discussion about the nature of Māori authority and law in the Northern context, as this is part of what shapes the political relationships between tribes in this region, and with other people and nature. Henare, in his report *He Whenua Rangatira*, discusses the Ngāpuhi world view, or account of the world as it has been experienced and understood by hapū. He says that the Ngāpuhi world view is derived from specific Ngāpuhi cosmology and beliefs, which provide key principles for the purpose of guiding the hapū way of life, and adds:[210]

> The way Ngāpuhi people have organised their lives is profoundly shaped by their world view, cultural traditions, kinship systems and experiences in history. The environmental conditions and the geographic landscape from Pēwhairangi on Te Tai Tamawahine to Te Moana Nui a Kiwa, across the Taitokerau peninsula to Te Hokianga a Kupe on Te Tai Tamatāne to Te Tai o Rehua, has also helped shape the world view and the communities.
>
> Their world view contains within it distinctive values, some of which have been identified. These values give Ngāpuhi a strong sense of identity,

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[207] Waitangi Tribunal *Transcript of initial hearing, 10-14 May 2010* (Wai 1040, #4.1.1, 2010) at 51, 113, 223, 312.
[208] *He Whenua Rangatira*, above n 177, at 39.
[209] At 39.
[210] At 21, 31. Henare states that the Io tradition is the belief that a numinous reality named Io is the primary source of life itself and thus of all creation. The teachings of Io were transmitted through wananga and the Ngāpuhi tradition emanates from the Ngāpuhi wananga.

> rootedness, belonging to a time and place, and of continuity with a tradition and a timeless past.

Principles and practices of the Ngāpuhi world view are expressed in "Te Kawa o Rāhiri", or "Rāhiri's customs". Te Kawa o Rāhiri is one of the features that makes Ngāpuhi hapū distinct from other tribes. From Rāhiri's time onwards, the political unit of organisation in Ngāpuhi was hapū. While the more common definition of hapū throughout the country is "sub-tribe", Ngāpuhi hapū can be defined as a tribe because there is no overarching iwi authority or political unit. Henare notes that 'iwi', as they are referenced today as political units, is a relatively contemporary notion and goes on to say that prior to the 1850s, iwi "amounted to no more than 'a loose association of related peoples who did not act on a day-to-day basis as a corporate group".[211] This definition is reinforced by the Ngāpuhi Mandate Tribunal, which said:[212]

> This pattern persisted into the 1830s when 'wars were still conducted by autonomous but related hapū, who could act in concert or separately' [such that] decision-making was conducted through lengthy debates between rangatira and hapū and while '[p]ressure was brought to bear on those who did not want to go [to war] they could not be compelled to' even when groups did choose to participate in conflict alongside other groups, each remained independent and acted according to its custom and preferences.

Kinship and the independence of hapū also underpinned the Ngāpuhi world view, and to this day, hapū maintain their separate identities and act according to their own customs and preferences:[213]

> They lived according to Rāhiri's kawa: as distinct hapū, staunchly independent, each maintaining authority over its own people and territories, and each also highly conscious of kinship, capable of cooperating with others or of fighting as circumstances demanded. Like their forebears, they remained fundamentally concerned with relationships, and their lives continued to be governed by the spiritual and legal imperatives of mana, tapu and utu.

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[211] *He Whenua Rangatira*, above n 177, at 137.
[212] Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015) at 9.
[213] At 36.

…

> In many respects, everyday life continued to revolve around whānau, who might cultivate their own crops and gather food for themselves. But, increasingly, the demands of larger-scale economic activities, along with defence and the acquisition of territory, demanded that whānau work together in larger kin-based groups under coordinated leadership. Hapū were not simply large whānau but political and economic groupings based on a combination of common descent and interest.

Rangatira provided the strategic and political leadership for hapū, they coordinated collective efforts and decision making, and led warfare. Again, it is one of the defining aspects of Te Kawa o Rāhiri that the authority of rangatira was based on meritocracy and came from the hapū itself, not whakapapa or chiefly lineage. This meant that rangatira did not act on their own account, but rather through the consensus of the hapū.[214]

It was hapū that held rights over lands, resources, fishing grounds, and assets in Ngāpuhi.[215] "Mana i te whenua", like rangatiratanga, is one of the terms widely used by Northern hapū to describe tribal authority over land and resources, and it is described as the highest form of authority. "Mana i te whenua" traces the source of mana from the land back to Ranginui and Papatūānuku, and it is therefore from the land and atua (gods) that hapū obtain mana and authority.[216] Mana i te whenua denotes a combination of hapū authority from land, and hapū obligation to land. Māori Marsden provides a description of the reciprocal relationship between hapū and the environment:[217]

> …'all life was birthed from Mother Earth' and thus 'the resources of the earth did not belong to man but rather, man belonged to the earth'. Rangatira were obliged to exercise their authority in accordance with this principle, caring for and nurturing resources to preserve their mauri and keep them available for future use.

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[214] *He Whakaputanga me te Tiriti*, above n 10, at 31. Erima Henare says rangatira were determined on meritocracy and leadership was earned; there was no lineal descent as of right.
[215] *He Whakaputanga me te Tiriti*, above n 10, at 30
[216] At 180.
[217] At 32.

Mana i te whenua and hapū rangatiratanga were actively exercised to defend territories and resources. The Wai 1040 Te Paparahi o Te Raki Tribunal said that "[a]ll territories were under the authority of one hapū or another, and the boundaries were typically well known".[218] Under this authority, hapū determined fishing rights, the sharing of resources with other hapū, and the regulation of the environment within the territories of the hapū.[219]

### 3.3.2 Tikanga

It is the knowledge contained in Māori traditional belief systems that determines the nature of Māori authority and furthermore, it is that which forms the body of law or tikanga that regulates Māori society. Tikanga is commonly defined as rules, plans, custom, law or the right way of doing things.[220] Tikanga regulate Māori society, and shape Māori philosophy, and motivations and behaviour; all of which have been passed down the generations through oral tradition and practice.[221] Sir James Henare describes tikanga and traditional forms of speech, song, whakapapa and arts as "Ko ngā tohu ō rātou tapuwae i kakahutia i runga i te mata o te whenua", "The footsteps and teachings of past rangatira etched into the landscape".[222] The Wai 1040 Te Paparahi o Te Raki said tikanga and related traditions were "sources of knowledge not only about history and identity, but [also] about [those] who had authority to make and enforce law, and about law itself."[223] Linda Te Aho provides the following core values, which are considered foundational tikanga:[224]

> (1) whakapapa and whanaungatanga – the importance of genealogy, of collectivity and connectivity, connections to land, to creation and to each other; (2) mana – authority over who might exercise certain rights; (3) utu

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[218] Territories were often defined by significant natural features like maunga, rivers, and rocks.
[219] *He Whenua Rangatira*, above n 177, at 158-160.
[220] For instance, see: Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 6-7. For an insightful and authoritative account of tikanga and Māori world view see: Māori Marsden *The Woven Universe*: *Selected writings of Rev. Māori Marsden* (Te Ahukaramū Charles Royal, Otaki, Estate of Rev. Māori Marsden, 2003).
[221] *He Whakaputanga me te Tiriti*, above n 10, at 25 – "In an oral culture, sacred or specialised knowledge was transmitted from generation to generation verbally – through pepeha (sayings), whakataukī (proverbs), tauparapara (formal incantations), waiata, place names, and other kōrero, as well as through whakairo (carving), rāranga (weaving), and tā moko (tattooing)."
[222] *He Whakaputanga me te Tiriti*, above n 10, at 25.
[223] At 25.
[224] Linda Te Aho "Tikanga Māori, historical context and the interface with Pākehā law in Aotearoa/New Zealand" (2007) 10 Yearbook of New Zealand Jurisprudence at 10

– reciprocity; (4) tapu and noa – sacredness and secularity; and (5) kaitiakitanga – stewardship.

While there are some commonly shared tikanga across tribes, as the discussion regarding the Ngāpuhi world view demonstrates, there are tribal variations on the understanding and practice of tikanga. In terms of the tikanga pertaining to the takutai moana, the Foreshore and Seabed Tribunal said that "everything is about tikanga, and tikanga is about everything", and that the takutai moana is "quintessentially" bound up with tikanga:[225]

> … without his relationship through tikanga to land by whakapapa, in a fundamental sense, he does not exist. Tikanga defines him; shapes his idea of himself and his place in the world.

Tikanga pertaining to the takutai moana have been recognised by the Foreshore and Seabed Tribunal as including:[226]

- the indivisibility of the natural world so that all its elements flow together and are seen as one;
- the oneness of the spiritual world and the physical world;
- the mutuality in the relationship between people and land;
- the connection of the people with the land through whakapapa, korero and the process of naming; and
- the endless cycle of reciprocity, particularly seen in the example of mana and manaakitanga.

Mana, tapu, utu and associated tikanga constitute the body of law and authority - authority that was applied over the takutai moana long before the arrival of Europeans.[227]

### 3.4 Te Kapotai

Chapter 8 examines Te Kapotai's experience with the takutai moana issue; however, it is appropriate to provide a brief overview of Te Kapotai at this point in the thesis. Te Kapotai is one of the many hapū within Ngāpuhi. In terms of the

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[225] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 3.
[226] At 4.
[227] *He Whakaputanga me te Tiriti*, above n 10, at 25.

tribe's placement, Te Kapotai is located at Waikare, which is in Te Taitamawahine/Taumarere or Te Pēowhairangi/Southern Bay of Islands region. Te Kapotai trace their origins from the Māhuhukiterangi waka. The tribe descends from Paru who was one of Rāhiri's wives and their whakapapa continues from Tahuhunuiorangi down to Tuhukea and from three siblings, Pare, Whiti and Horahia.[228]

The pepeha of Te Kapotai cites the Waikare Inlet as the river or sea of the Te Kapotai people; "Ko Waikare te awa", "Waikare is the river".[229] The phrase in their pepeha, "Ko Motukura te pā tū moana of Whiti" refers to Motukura which is an island in the Waikare Inlet and was the pā of Te Kapotai tupuna, Whiti.[230] The Waikare Inlet falls wholly within the territory of Te Kapotai and is the area of takutai moana that is the focus of this research. The Inlet meets the Taumarere River at Opua and flows out into Te Moana o Pikopiko i Whiti, the wider Bay of Islands. Opua is also the area where the foreshore and seabed becomes shared with other tribal groups.[231] Sites of historical and cultural significance along and on the Waikare Inlet include pā, kāinga (homes), tauranga waka (landing places) traditional walking paths, wāhi tapu (sacred sites), urupā (burial grounds), and trees where bodies were hung to carry out traditional practices upon death. The Inlet has sustained the Te Kapotai people for generations and is described as their "pātaka" or food house. Te Kapotai say they have maintained mana i te whenua/mana i te moana, or tribal authority over their traditional territory through to the present day.[232]

### 3.5 Te taenga mai o te Pākehā: The arrival of Pākehā

It was some 150 years after the time of Rāhiri's sons, Uenuku and Kaharau, that Europeans first reached the shores of Aotearoa.[233] In 1769, Captain Cook was the first European to arrive in the Bay of Islands and encounter Māori. According to Phillipson, the visit involved misunderstandings between the two peoples, but

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[228] *Wai 1040, #F25(b)*, above n 15, at [41].
[229] At [43]. It is also spoken of as Te Awa o Waikare (the Waikare River), Te Moana o Waikare (the Sea of Waikare).
[230] At [55].
[231] Neighbouring tribes to the east are Ngāti Wai, Ngāti Kuta and Patukeha; to the south and west Ngāti Manu, Ngāti Hau and Ngāti Hine; and to the north Ngāti Rāhiri, Ngāti Kawa, Ngāti Rēhia and other hapū of Te Pēowhairangi.
[232] *Wai 1040, #F25(b)*, above n 15, at [65].
[233] *He Whenua Rangatira*, above n 177, at 184.

marked the beginning of barter and trade in the Bay.[234] The second visit to the Bay of Islands took place in May 1772 and included French vessels, the Mascarin and the Marquis de Castries, under Captain Marion Du Fresne.[235] Te Kapotai were said to have become well acquainted with Du Fresne and his men, and traded timber, fish, shellfish, pigeons, and kūmara, for axes, adzes, nails, and fishhooks.[236]

Te Kapotai were part of the vibrant trade economy and their tūpuna plied their own boats to carry goods and produce to trade in Auckland, Australia and the Pacific Islands.[237] The timber trade was bolstered by kauri felled in the Waikare forest; which was used to build the settlers' homes, including Kemp house in 1821-1822. The evolving relationships between Māori and settlers were often recognised through gifting, and in 1814, Samuel Marsden gave one of 12 axe heads to the rangatira of the tribes in the Bay of Islands including to Riwhi Hari of Te Kapotai.[238] Te Kapotai still possess this axe head which is named "ringakaha" or "strong hand".[239] Intermarriage between Te Kapotai and settlers was common and included marriages between locals and Cook, Stephenson, Waetford/Waitford, Greenway, Baker and Day families, who lived at Waikare. These settlers and their families acquired lands through pre-1840 land transactions or old land claims.[240]

In Charles Wilkes' Journal, *Narrative of the United States Exploring Expedition XII*, Wilkes describes passing through "Waicaddie Pa" in 1840:[241]

> … It contains about two hundred houses, and is situated between two small fresh-water streams. This is the most cleanly and extensive town in the neighbourhood of the Bay of Islands.

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[234] *Bay of Islands Māori and the Crown*, above n 18, at 49. See also: *He Whenua Rangatira*, above n 177, at 610 where Henare speaks to the "natural advantages" of the Bay of Islands; whaling, viable anchoring, the availability of timber, all enhancing trading opportunities.
[235] *Bay of Islands Māori and the Crown*, above n 18, at 49.
[236] *Wai 1040, #F25(b)*, above n 15, at [74]; *Bay of Islands Māori and the Crown*, above n 18, at 50.
[237] *Wai 1040, #F25(b)*, above n 15, at [87]. See also: *He Whenua Rangatira*, above n 177, at 376 – Henare describes how, between 1820s and 1830s, a considerable number of Māori were travelling internationally to trade.
[238] *Wai 1040, #F25(b)*, above n 15, at 29.
[239] At 29.
[240] At 31-32.
[241] At [90].

While settlement increased and there were developments in the use of technology, Phillipson states that this did not necessarily mean that the Māori world view, ethics and values changed at the same rate:[242]

> Evidence suggests that there was a selective adoption of European influence by Ngāpuhi, and that certain items were more readily transferable than others
>
> ...
>
> The 200-year encounter of Ngāpuhi and Pākehā people points to Ngāpuhi having maintained their distinctive world view while acculturating additional values from Christian theology, rituals and economic values.

The significance of hapū maintaining their distinctive way of life and systems of authority is also supported by the Wai 1040 Te Paparahi o Te Raki Tribunal, which stated that hapū "dominate[d] the early decades of contact with Europeans, and above all the formal relationships with Britain and its officials."[243] According to Dr Patu Hohepa, hapū autonomy endured in both pre and post-European contact times: "one hapū would not tell another hapū what to do, and no single line of Rāhiri's descendants would dominate, either in pre-European times or even today."[244] It is in this cultural and historical context that he Whakaputanga and te Tiriti were signed by chiefs in the North.

### 3.6 He Whakaputanga o te Rangatiratanga o Nu Tireni 1835

He Whakaputanga o Te Rangatiratanga o Nu Tireni, or the Declaration of the Independence of New Zealand, was signed on 28 October 1835 by 34 rangatira from the North, and was one of the early events which formalised the relationship between Māori and Britain.[245] The Declaration was proposed to the chiefs by British resident James Busby in response to threats from the French and as a means of securing their unified independence, and to protect Māori owned commercial ships from being seized for failing to fly the flag of their nation.[246]

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[242] *He Whenua Rangatira*, above n 177, at 661.
[243] *He Whakaputanga me te Tiriti*, above n 10, at 36.
[244] At 31.
[245] At 499.
[246] At 119.

The form of authority and wording contained in the Declaration was "mana i te whenua" and this was used to denote the highest level of authority of Māori:[247]

> What was required, he advised, was for the rangatira to affix their tohu (signatures) to a document declaring their rangatiratanga (their chiefly status and duties) in relation to their lands, along with their kīngitanga and their mana i te whenua (the highest authority and status within their lands). Their lands were furthermore to be declared 'wenua rangatira' – chiefly lands, or lands at peace – another clear endorsement of their authority and their responsibilities as leaders.

In 2010, the Waitangi Tribunal held an inquiry into the meaning and effect of he Whakaputanga and te Tiriti, and reported on the nature of Māori authority that was recognised under he Whakaputanga, and specifically the recognition of "mana i te whenua" within the document.[248] The Tribunal found that he Whakaputanga was an "unambiguous" declaration that hapū and rangatira authority continued on the ground, that their authority in relation to their territories rested with them, and that no one could make laws over their land.[249] Finally, the Tribunal found nothing in he Whakaputanga that would have suggested to the chiefs that a loss of their own authority or that of their hapū, or any transfer of authority would occur under the document.[250] Te Kapotai rangatira, Whiwhia, was one of the 34 rangatira who signed he Whakaputanga, on 28 October 1835 on behalf of Te Kapotai.[251]

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[247] At 199.
[248] At 180.
[249] At 502. The Tribunal found he Whakaputanga was a declaration by rangatira in response to a perceived foreign threat to their authority. It also said, under he Whakaputanga:

- 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, 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.

[250] *He Whakaputanga me te Tiriti*, above n 10, at 502.
[251] Wai 1040, #F25(b), above n 15, at [6], [105].

### 3.7 Te Tiriti o Waitangi 1840

On 6 February 1840, at Waitangi, Hikitene, Te Matatahi and Te Toro signed te Tiriti o Waitangi on behalf of Te Kapotai.[252] Te Tiriti o Waitangi was signed at Waitangi between approximately 40 rangatira and the Crown.[253] The document is rendered in Māori and English; however, the two texts are fundamentally different, although both were declared to be identical in their meaning. The Māori version was the version that was explained at the pre-te Tiriti discussions on 5 February 1840 and the one that was understood and signed by the chiefs.[254] The Māori version guaranteed the chiefs the retention of their mana, their rangatiratanga, and their supreme decision-making within their rohe; powers that the Tribunal has found are akin to sovereignty.[255] The English text did the opposite in that British Officials drafted it as a treaty of cession; having Māori agree to cede their sovereignty to the Crown.[256]

Māori say that under te Tiriti, the Crown gained a limited right to exercise kāwanatanga or authority over their own British people, and that kāwanatanga was a lesser authority qualified by their rangatiratanga.[257] Conversely, the Crown claims legitimacy of government off the back of the "agreement" by Māori to cede their sovereignty to the British Crown under the English version of the Treaty.[258] By the Treaty, the Crown believes it has the supreme right to govern and make laws over all people, including Māori.[259]

As previously mentioned, between 2010 and 2011, the Wai 1040 Te Paparahi o Te Raki Tribunal considered the meaning and effect of he Whakaputanga and te Tiriti within a Northern context. The Tribunal released its report in November 2014 and reached the conclusion that the rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to the British Crown; that is, they did not cede their authority to make and enforce laws over their people or their

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[252] At [113]. Tawatawa was also another signatory; he was Te Kapotai and Ngāti Wai.
[253] *He Whakaputanga me te Tiriti*, above n 10, at 165: A total of 54 rangatira signed He Whakaputanga, 34 signed following the flag hui debate, and a further 18 signed over the next three and a half years.
[254] *He Whakaputanga me te Tiriti*, above n 10, at 394.
[255] At 433, 509, 512, 514, 528.
[256] At 1, 392-395.
[257] At 181.
[258] At 8, 503-504.
[259] At 8.

territories.[260] The Tribunal made other conclusions about the agreement reached between Māori and the Crown under the treaty, including:[261]

- The rangatira agreed to share power and authority with Britain. 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. The details 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;
- The rangatira agreed to enter land transactions with the Crown, and the Crown promised to investigate pre-treaty land transactions and to return any land that had not been properly acquired from Māori; and
- The rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary.

The Tribunal recognised the importance of te Tiriti, the Māori version of the treaty, as that is the document that was explained, understood and signed by the rangatira in February 1840.[262] Where Britain considered that Māori consent was a necessary prerequisite for a cession of sovereignty to be valid, the Tribunal concluded that nothing in the words of the Māori text of the treaty, or in the explanations and assurances provided to Māori by the British on 5 February 1840, expressed a cession of sovereignty under te Tiriti. The Tribunal noted that while some may see their conclusions as radical, they are not.[263] The Presiding Officer explains "[w]hen all of the evidence is considered … we cannot see how other conclusions can be reached."[264]

The report, together with the principal conclusion concerning cession of sovereignty, draws together 175 years of differing perspectives on the treaty and

[260] At 526-527.
[261] At xxi, 529.
[262] At 522.
[263] At xxii, 527.
[264] At xxii.

overcomes ambiguities in scholarship and past jurisprudence concerning the interpretation of the treaty. It is a revolutionary report where it unequivocally states that the rangatira who signed te Tiriti in February 1840 did not cede their sovereignty to the British because no other court or Tribunal had made a clear finding of this nature in New Zealand's legal history.

The Tribunal did not examine or reach conclusions about how the Crown came to acquire the sovereignty that it has today as it is a matter for Stage Two, which the Tribunal is currently reporting on.[265] The Tribunal also states:[266]

> It suffices to reiterate that, in February 1840, an agreement was made between Māori and the Crown, and we have set out its meaning and effect. It is from that agreement that the Treaty principles must inevitably flow.

This statement provides that treaty principles need to be reviewed and evolved with regard to the Tribunal's findings.[267]

### 3.7.1 Treaty principles

While the treaty is discussed as the "founding document" of the nation,[268] the constitutional and legal status of the treaty and which version of the document is to be applied in the contemporary context is uncertain and not mutually agreed by Māori and the Crown. For example, despite the findings of the Waitangi Tribunal in 2014, the current Labour Government still maintains its sovereign power and that the Crown legitimately acquired sovereignty under the Treaty.[269] New Zealand does not have a written constitution and there is no rule or law that binds the Crown to give effect to the treaty. The general legal principle is that the treaty can only be applied by the courts where incorporated in statute.[270] The courts, however, are demonstrating a consistent move toward greater recognition of the treaty. For example, in the 2007 High Court *Forests* case, Gendall J held that

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[265] The Tribunal entered report writing in 2018 and it is likely that reporting could take anywhere between 2-5 years (potentially longer). Claimants have asked for priority reporting on the issue of sovereignty and rangatiratanga.
[266] *He Whakaputanga me te Tiriti*, above n 10, at 527.
[267] In Chapter 10, this research will advance arguments in favour of implementation of te Tiriti and an evolution of treaty principles, to align with the Tribunal's finding that sovereignty was not ceded under te Tiriti.
[268] *Ka tika ā muri, ka tika ā mua: Healing the past, building a future* (Office of Treaty Settlements, Wellington, March 2015) [*Red Book*].
[269]Adam Bennett and Rebecca Quilliam "Crown still in charge: Minister Chris Finlayson on Waitangi Treaty ruling The New Zealand Herald (online ed, Auckland, 14 November 2014).
[270] Te Heuheu Tukino v Aotea District Maori Land Board, NZLR [1941] 590, 596-97.

Treaty of Waitangi obligations "must be heeded and given recognition by the Courts irrespective of a specific statutory provision".[271] While Glendall J's decision was overturned by the Court of Appeal, the High Court case demonstrates how the judiciary is grappling with the application of the Treaty in modern times.[272]

The Crown's recognition of the treaty within legislation has been minimal, and its reference to the treaty in the way that it governs is dependent on the political will of the day.[273] Consistent protest and legal challenge by Māori demonstrates that, from a Māori perspective, the Crown has performed poorly in terms of its duties under the treaty.

Through applications by Māori in the regular courts and the Waitangi Tribunal, and the Crown's own policy development, treaty principles have emerged to assist the Crown with compliance with its duties under the treaty. Treaty principles were first articulated in the 1987 *Lands* case and include: [274]

- The acquisition of sovereignty in exchange for the protection of rangatiratanga;
- The treaty established a partnership, and imposes on the partners the duty to act reasonably and in good faith;
- The freedom of the Crown to govern;
- The Crown's duty of active protection of Māori in the use of their lands and waters;
- The Crown's duty to remedy past breaches;
- Māori to retain rangatiratanga over their resources and taonga and to have all the rights and privileges to citizenship; and
- A duty to consult.

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[271] *New Zealand Maori Council v Attorney General* (HC, Wellington, CIV-2007-485-95, 4 May 2007) at [66] per Gendall J.
[272] *New Zealand Maori Council v Attorney General* [2007] NZCA 269, at [62]-[76].
[273] See for example: State Owned Enterprises Act 1986; Conservation Act 1987; Environment Act 1986; Resource Management Act 1991; Te Ture Whenua Māori Act 1993.
[274] *New Zealand Māori Council v Attorney-General* [1987] I NZLR 641 (CA) ("*Lands* case"). In the *Lands* case, the Court of Appeal declared a set of treaty principles in order to be able to apply the s 9 Treaty of Waitangi provision in the State-Owned Enterprises Act 1986 and create a framework from which to measure whether the Crown's actions had been inconsistent with that section.

This is the framework upon which treaty principles have since evolved. The issue with the above principles is they are formulated from the presumption that Māori ceded sovereignty to the Crown under the treaty, and the promotion of the English text. Since the *Lands* case, the Waitangi Tribunal has had a substantial role in the evolution of the above treaty principles.

### 3.7.2 Findings of the Foreshore and Seabed Tribunal in relation to Crown treaty duties and principles over the takutai moana

The Waitangi Tribunal's Foreshore and Seabed Inquiry in 2004 was undertaken on the jurisprudential position at that time, which was that under a cession of sovereignty under the treaty, the power to govern and make laws resides with the Government.[275] The inquiry focused on whether the Government's foreshore and seabed policy was fair and what fetters or duties applied under the treaty when the Crown chose to implement its foreshore and seabed policy.[276] The Tribunal concluded that the foreshore and seabed is a taonga and that the Treaty of Waitangi recognised, protected and guaranteed Māori te tino rangatiratanga over it in 1840.[277] Māori tribes had dominion over the takutai and over their territorial waters to at least the 12-mile mark, and on this basis, the treaty promise was to apply just as much to the foreshore and seabed as to all dry land.[278]

According to the Foreshore and Seabed Tribunal, the Crown's treaty duty is one of "active protection" of Māori te tino rangatiratanga in respect of the takutai moana, or a duty to:[279]

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

The forms of authority encapsulated in rangatiratanga, and therefore protected under the treaty, include:[280]

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[275] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at xxi.
[276] At xii – xvi.
[277] At 28.
[278] At 28.
[279] At 28
[280] At 25-26, 130.

- A spiritual dimension: By karakia, rāhui, naming of places and rituals, tangata whenua created and maintained whakapapa and spiritual links with the foreshore and seabed;
- A physical dimension: Mana and authority 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 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 the takutai moana and carry out practices as they saw fit;
- Manaakitanga: Sharing through manaaki and authority (mana) are applied concurrently; and
- Manuhiri from across the seas: Māori granted certain use rights, as part of the relationship established between the peoples before 1840.

As mentioned, the Wai 1040 Te Paparahi o Te Raki Tribunal's findings regarding sovereignty were released in 2014, and the way in which these findings will impact the future consideration of treaty issues by the Crown, courts and Waitangi Tribunal is yet to be seen. It is important to note these findings were not available to the Foreshore and Seabed Tribunal when it held its urgent inquiry into the Crown's foreshore and seabed policy in 2004, which is discussed in the following chapter. Despite not confronting the sovereignty issues, the Foreshore and Seabed Tribunal concluded that the treaty duty of active protection "sets a high standard by which to measure the Crown's past actions and present policies".[281] The Foreshore and Seabed Tribunal's findings provide a good starting point for assessing the research question on whether the 2011 Act breaches te Tiriti. The Tribunal's *He Whakaputanga me te Tiriti* report requires the standards and thresholds for applying te Tiriti, in terms of the takutai moana, to be further evolved.

[281] At 28.

## 3.8 Concluding remarks

The first part of the chapter examined the nature of Māori authority within a Northern context and the agreements reached under the treaty. He Whakaputanga and te Tiriti affirmed and guaranteed the continuation of Māori authority over their territories, including the takutai moana. The next step is to explore how the exercise of Crown sovereignty or kāwanatanga impacted Māori rights to the takutai moana in the years between 1840 and 2003, as disputes over ownership of the foreshore and seabed came to the fore.

# CHAPTER 4: HISTORICAL AND LEGAL CONTEXT (TE TIRITI TO NGĀTI APA) – ASSIMILATION OF RANGATIRATANGA

**Colonisation of New Zealand: Daily Southern Cross 18 July 1846**[282]

> The sovereignty of the island was obtained by a species of political fraud. 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 granted and the privileges it conferred: whereas, the miserable document upon which the right of the Crown to exercise its prerogative is founded, is neither perspicuous in language, nor explicit 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 [sic] idea of the nature of those claims which it had guaranteed to respect. In fine [sic], 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?

[282] Waitangi Tribunal *Closing Submissions for Te Runanga o Ngāti Hine* (Wai 1040, #3.3.23, 21 January 2011) at 6.

## 4.1 Introduction

Following the signing of te Tiriti in 1840, colonisation of Māori by the British involved war and assimilation, bringing about the alienation of nearly all customary land and as a result causing extensive social, cultural and economic prejudice to Māori.[283] The takutai moana is a site of colonisation, where the actions of successive governments displaced the ownership and authority of many Māori from their coastal lands. Boast says the issue of the ownership of the foreshore and seabed is not new and "has been troublesome through the country's legal history".[284] The Foreshore and Seabed Tribunal also says that the recent controversy over the takutai moana did not occur in a vacuum but rather at the end of a 160-year period during which two peoples had lived together in a nation founded on the signing of the treaty.[285] According to Boast, the reason why the law relating to the foreshore and seabed is so "complex" and even "baffling" is because the history of this issue has been the result of an unsatisfactory application of a mix of common law principles and a number of "disparate" statutes.[286] He says that, given the recent controversy on the issue, it is important for "national-wellbeing" that the legal history relating to the foreshore and seabed is clarified and understood.[287]

The following discussion seeks to clarify what happened to Māori authority over the takutai moana between the signing of te Tiriti in 1840 and *Ngāti Apa* in 2003. An argument advanced in this section is that the foreshore and seabed dispute has arisen because the Crown has incorrectly interpreted and applied the treaty on two counts: the first error was the Crown's assumption that it had acquired sovereignty as a result of the treaty; and the second error centres on this wrongful assumption of sovereignty leading to the Crown presuming it owned the foreshore and seabed. Under the assumption of Crown sovereignty, the Crown legislated over the

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[283] From the 1860s, Māori land was alienated at a rapid pace and on a huge scale, including eight million acres in the North Island between 1865 and 1890, and a further three million acres by 1899. See: Professor Alan Ward *National Overview vol.i: Waitangi Tribunal Rangahaua Whanui Series* (GP Publications, Wellington, 1997) at 8. The trend of alienation and loss continued for the remainder of the twentieth century until today roughly a mere per cent or 1.5 million hectares of New Zealand's total land area remains in Māori ownership. See also: Tanira Kingi *Ahuwhenua – Māori land and agriculture – Land ownership and Māori agriculture*, (Te Ara - the Encyclopedia of New Zealand, accessed 25 July 2019). Source: <http://www.TeAra.govt.nz/en/ahuwhenua-Māori-land-and-agriculture/page-2>.

[284] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 10.

[285] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 15.

[286] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 11.

[287] At 10.

foreshore and seabed and hence managed it with little regard for Māori authority, which, in turn, had the effect of displacing Māori authority over the foreshore and seabed. These matters are addressed and then the 12 key legal developments pertaining to the foreshore and seabed, as identified by Boast, are examined.[288]

### 4.2 The Crown wrongly assumes sovereignty

The newspaper article cited at the beginning of this chapter is dated just six years after the signing of te Tiriti and illustrates early concerns about the Crown's acquisition of sovereignty under the Treaty. It says, "the Government glided into power by a sort of hocus pocus process of unpremeditated deceit".[289] Events surrounding the signing of te Tiriti show just how loosely the Government "glided into power". From 1838 onwards, there were growing concerns among officials in Britain that "desultory" and "disorganised" colonisation was already taking place in New Zealand, and that Britain lacked jurisdiction to exercise law making to control settlement.[290] There was general agreement amongst British officials of the need to increase both the formal presence of laws and the establishment of institutions in New Zealand, but there was less agreement about what form this increased presence and establishment should take. Between 1838 and 1840, there were different proposals made, ranging from increasing the powers of the British resident, acquisition of sovereignty over certain areas of land, military presence, through to full annexation and systematic colonisation.[291] A view that was consistently expressed during this time was that, because Māori were a recognised people possessing sovereign authority, consent from Māori to a cession of sovereignty was necessary. This was expressed by Glenelg who said there was "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".[292]

British intentions with regards to New Zealand were finally determined by Normanby's instructions to Hobson in July 1839.[293] Britain sought to establish a

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[288] At 12 – 14.
[289] Waitangi Tribunal *Closing Submissions for Te Runanga o Ngāti Hine* (Wai 1040, #3.3.23, 21 January 2011) at 6.
[290] *He Whakaputanga me te Tiriti*, above n 10, at 305.
[291] At 305.
[292] At 506.
[293] Normanby's final instructions are regarded as the key statement of British intentions regarding the Treaty. *He Whakaputanga me te Tiriti*, above n 10, at 315.

model of government that would enable it to make and enforce laws over all people, including Māori, and in a context where sovereignty was ceded.[294] For this to occur, Hobson was to peacefully persuade chiefs, to agree to cede sovereignty by signing a treaty. The instruction was to apply to the North Island only. Hobson was to be clear when proposing the treaty to emphasise that the treaty was intended as a treaty of protection, and that ceding sovereignty did not extinguish property rights. Hobson could give gifts and explain other advantages of receiving such agreement from the chiefs.[295]

How to practically obtain consent from the chiefs was another matter, and Hobson faced a difficult challenge. The Treaty (the English text) was clearly drafted as a treaty of cession. The English text was then translated by Henry Williams to Māori. It was the Māori translation that was explained to the rangatira at the debates on 5 February 1840, and signed by the chiefs the next day on 6 February.[296] The Māori text, te Tiriti, did not make it clear that sovereignty would be ceded under the treaty, and instead was explicit in the guarantee that Māori would retain their land and authority.[297] The English text was not discussed at the debates or put to the chiefs, and there was no explanation that it would apply to them. Therefore, the implications of British sovereignty were not explained, and Māori were not informed that they would have to comply with English law, or that it would apply to them.[298] Both the assurances and guarantees from Hobson and officials during these debates, and the explicit guarantees in the Māori text itself, promised continuation of Māori authority, ongoing independence, and a relationship with the Crown for land transactions and protection.[299] These assurances, guarantees and understandings underpinned the chiefs' decision to sign te Tiriti on 6 February 1840.

The circumstances around Governor Hobson's proclamation of sovereignty, which was drafted in February 1840, proclaimed on 21 May 1840, and later published on 2 October 1840 continued the charade.[300] Hobson knew that under

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[294] At 329.
[295] At 329
[296] The debates were also all conducted in te reo Maori.
[297] *He Whakaputanga me te Tiriti*, above n 10, at 512. The Waitangi Tribunal said the guarantee of te tino rangatiratanga in Article 2 was a significant departure from the English text of the treaty which made no mention of Māori authority.
[298] *He Whakaputanga me te Tiriti*, above n 10, at 395.
[299] At 395.
[300] At 385, 389, 525.

British law, the chiefs' signatures on te Tiriti did not transfer sovereignty on their own, and that a proclamation of sovereignty would be necessary.[301] He also knew that he did not have sufficient signatures from the chiefs in the North to declare sovereignty over the whole of New Zealand and therefore he would have to take the treaty around the country to gain more support. Hobson parked his draft proclamation and set out to obtain more signatures. However, he fell ill and had to retire to the North while he waited for his health to improve.[302] Other British officials were tasked with obtaining signatures, but their task was not completed before Hobson received news that members of the New Zealand Company, at Port Nicholson, were attempting to start their own government and had written their own constitution.[303] In May 1840, Hobson simply responded by proclaiming the Queen's sovereignty over the North Island, on the basis of a cession of sovereignty by the chiefs under the Treaty, backdating the proclamation to 6 February 1840.[304] The sovereignty of the South Island was proclaimed on the basis of British discovery.[305]

When the Treaty was printed in London in 1841, the Māori version was labelled the 'Treaty' and the English version was labelled the 'Translation'.[306] Questions were already being raised about the differences between the Māori and English texts. Between 1840 and 1870, a number of back translations of te Tiriti (the Māori text) were requested as Māori and the Crown clashed in relation to their distinctive understandings of what was actually agreed to in these documents.[307] Salmond says that the request for 'back translations' is a recognition by various European authorities that te Tiriti and the Treaty were different, and that an accurate translation of the text in Māori was needed.[308] Interestingly, in 1869, a back translation of the Treaty was requested in the *Kauwaeranga* case, which was the first legal dispute over the ownership of the foreshore in Thames.[309] Walter Mantell, a member of the Legislative Council, asked for both an accurate

[301] At 385.
[302] At 385.
[303] At 386.
[304] At 525.
[305] At 394-395.
[306] At 389.
[307] At 392.
[308] At 393.
[309] "*Kauwaeranga* (1870) 4 Hauraki MB 236" (1984) 14 VUWLR 227.

translation of te Tiriti into English and a translation of the official English text back into Māori.[310]

There has always been differing perspectives on the meaning and interpretation of the treaty. The Tribunal said "no other document in the nation's history has been written about so much, or generated so much controversy, or been seemingly open to so many wildly contrasting interpretations."[311] Māori, for their part, have stressed the affirmation and continuation of their rangatiratanga or sovereignty under te Tiriti – the Māori text. Crown and Pākehā perspectives have dominated legal and academic discourse over time, and as discussed, this perspective has promoted the view that the Crown acquired legitimate sovereignty under the Treaty – the English text.[312] The Waitangi Tribunal has found that Hobson and his agents "concealed the full British intentions" and did not explain to the rangatira that Britain sought sovereignty or the right to make and enforce laws over the whole country; the Crown did not acquire sovereignty through informed consent of Māori to cede sovereignty under the treaty.[313] Despite the contentions regarding cession of sovereignty, and that the Crown did not meet its own requisites for acquiring sovereignty, from 1840 onwards, the Crown proceeded to colonise New Zealand and enforce law on the assumption that it had gained legitimate sovereignty under the Treaty.

### 4.3 The Crown assumes ownership of the takutai moana

The Crown's position in relation to dry land is that all land was Māori customary land unless the customary title could be shown to have been validly extinguished through a Crown grant or an Act of Parliament.[314] The Crown's position in relation to the foreshore and seabed was different, in that while dry land was claimed by Māori, the sea was not, and there was little evidence that Māori "owned" the foreshore and seabed.[315] The Crown claimed ownership of the

[310] *He Whakaputanga me te Tiriti*, above n 10, at 392.
[311] At 2.
[312] For instance, see: *He Whakaputanga me te Tiriti,* above n 10, at 413-418, 474-475
[313] At 527.
[314] *Report on the Crown's Foreshore and Seabed Policy,* above n 27, at 20-21.
[315] At 20-21.

foreshore and seabed in two separate parts; the foreshore, and the seabed and sea. The Crown says:[316]

> In terms of the foreshore – that is – the area between the high and mean low water marks – it was the rule of the common law that the Crown had title to the foreshore of England unless the contrary could be proved (for example by an express grant by the Crown of the foreshore). This rule was established prior to 1840. In the Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim the Tribunal stated:
>
> > Thus the English of 1840 considered that the Crown owned the foreshore but that its title was rebuttable by evidence of a long term contrary user.
> >
> > …
> >
> > In terms of the seabed and beyond the foreshore, by 1840 it was assumed that the Crown had both sovereignty over and property in the seabed surrounding the British Isles … This is the position that Crown officials would have considered applied in 1840.

The Crown legislated over the takutai moana on the assumption it was the prima facie owner of all foreshore, that it was the owner of all seabed, and that Māori did not hold property rights to the seabed. It has only been since *Ngāti Apa*, that the Crown acknowledges that not only were these assumptions incorrect, but that legislation passed by the Crown did not have the effect of extinguishing customary title that Māori may have had (and still have) in the foreshore and seabed.[317]

### 4.4 Key legal developments from 1840

Boast unpacks the complexity of the legal history of the foreshore and seabed issue by setting out 12 key legal steps and principal texts in chronological order

[316] Waitangi Tribunal *Crown Statement of Position and Concessions* (Wai 1040, #1.3.2, 6 July 2012) at 209.
[317] At [811].

between the first Native Land Acts 1862 and *Ngāti Apa* in 2003.[318] These key developments (which include the Native Lands Acts, a series of coastal and environmental legislation, and case law pertaining to the foreshore and seabed) are as follows:[319]

1. Native Lands Acts 1862 and 1865;
2. The Thames/*Kauwaeranga* foreshore and seabed crisis 1869 -1872;
3. Enactment of Harbours Act 1878;
4. Foreshore cases in the Native Land Court circa 1920-1957;
5. Decision of the Court of Appeal in *re Ninety-Mile*;
6. Territorial Sea Act 1965;
7. Marine Farming Act 1971;
8. Territorial Sea and Exclusive Economic Zone Act 1977;
9. Fisheries Amendment Act 1986;
10. Resource Management Act 1991, Crown Minerals Act 1991;
11. Abolition of harbour boards and the establishment of the port companies 1991; and
12. *Ngāti Apa v Attorney-General* 2003.

These developments are summarised below.

### 4.4.1 Native Land legislation

The way alienation of Māori land was to occur following the treaty, involves questions about the colonial Government's obligations under the treaty when acquiring Māori land for settlement. There were two dominant views held by British officials, the first being that if Māori held customary title over all of New Zealand, then every acre of land for colonisation would have to be freely ceded by Māori for settlement.[320] The other view was that Māori were entitled only to those pieces of land they occupied with dwellings and cultivations, the rest would be deemed surplus and acquired by the Crown. If the latter view was to be applied, it would have been much easier for the Crown to acquire large tracts of

[318] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 59 – 74. See Chapter 7 "Title aspects – the evolution of New Zealand law relating to the foreshore and seabed 1840-2004.
[319] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 59 – 74. See Chapter 7 "Title aspects – the evolution of New Zealand law relating to the foreshore and seabed 1840-2004.
[320] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 16

unoccupied land for settlement.[321] The Crown's position as to the Crown's treaty obligations in terms of land alienation was not settled until 1846, when Governor Grey attempted to implement the waste lands policy to facilitate ownership of 'unoccupied' waste land to the Crown.[322] The Government abandoned the policy following a backlash from some officials and Māori who claimed that the policy breached the treaty. From this point, the Crown's policy, which is the predominant position in relation to land, was that Māori owned the surface of land. The Crown accepted that this had been guaranteed and protected by the treaty in terms of dry land, but as mentioned, the Crown did not agree that the principle should also be applied to land covered by water: lakes, rivers, and foreshore and seabed.[323]

Between 1840 and 1862, the Crown acquired land for settlement through Crown pre-emption, which meant that only the Crown could purchase land from Māori.[324] Crown pre-emption ended in 1862, with the introduction of the Native Land Acts of 1862 and 1865, and the establishment of the Native Land Court. The Native Land Court was empowered to transform customary land into freehold titles to open Māori land up for settlement. The Native Land Court functioned on the assumption mentioned above; that all land that had not already been extinguished through Crown pre-emption or statute must belong to Māori.[325] Since its establishment, there has always been the question of whether the Native Land Court's functions extend to the foreshore and seabed, lake beds and rivers beds.[326] The question that the court has had to answer is: If the Native Land Court has the jurisdiction or power to deal with all customary dry land, does that same power apply to the foreshore and seabed, and other land covered by water?[327] This question was addressed when the first legal dispute over the foreshore and seabed arose in Thames in 1869, which is now known as the *Kauwaeranga* judgment.[328]

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[321] At 16.
[322] At 16-18.
[323] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 17.
[324] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 59. The issue of Crown pre-emption is a treaty grievance in itself and has been examined by many historical Tribunal inquiries and found to be a breach of the treaty.
[325] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 61.
[326] At 63.
[327] At 12.
[328] "*Kauwaeranga* (1870) 4 Hauraki MB 236" (1984) 14 VUWLR 227.

### 4.4.2 The Thames / Kauaeranga foreshore and seabed dispute 1869 -1872

The Crown was attempting to negotiate the purchase of Māori land for the Kauaeranga gold mine. When the Māori owners maintained their reluctance to sell, the Crown passed the Shortland Beach Act 1869 which barred private dealings over the foreshore and seabed at Thames. In opposition to the legislation, a series of applications were made by Māori landowners that requested the Native Land Court determine the ownership of the foreshore and seabed from Tarau Creek to Kauaeranga.[329] The Crown opposed the applications on the basis that, under English common law, the foreshore belonged to the Crown and could only be held by Māori if there was a grant to this effect from the Crown.[330] The claimants' response was that the Crown's arguments could not be applied in New Zealand because the relationship between the Crown was "strictly defined" by the Treaty of Waitangi.[331]

In his judgment, Fenton found that the treaty protected Māori rights to their fisheries and that the area of foreshore was of great value and importance to Māori.[332] Fenton granted a right of fishery, but not title of the land to the applicants, saying:[333]

> The Court then is of the opinion that the rights which these claimants and their ancestors, from the earliest times, exercised over this parcel of land, constitute a privilege or easement, which is included in the word "fishery" used in the treaty

Fenton declined to vest the title of the soil of the foreshore itself in the claimants, preferring that the question of whether Māori claimants were entitled to title of the mudflats should be answered by the highest court in the land.[334] The effect of Fenton's decision was that Māori owners had an exclusive fishing right but not title to the land.[335]

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[329] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 30.
[330] For further discussion on *Kauaeranga* see: Waitangi Tribunal *The Hauraki Report* (Wai 686, 6 June 2006) at 1031.
[331] Waitangi Tribunal *The Hauraki Report* (Wai 686, 6 June 2006) at 1032.
[332] At 1032.
[333] At 1033.
[334] At 1029.
[335] See: *Report on the Crown's foreshore and seabed policy*, above n 27, at 26. Boast notes that there are differing views on whether Fenton should have awarded a fee simple title, and there is the criticism that the decision may have been dictated by policy or politics of the time. See also:

### 4.4.3 Legislative developments

Following the *Kauaeranga* challenge and to prevent further claims to the takutai moana, the Crown enacted the Harbours Act 1878 (and its Amendment some years later in 1950). The Harbours Act reinforced the Crown's position in *Kauaeranga* that no part of the foreshore could be granted without the sanction of an Act of Parliament.[336] The Tribunal describes the Harbours legislation as an action of the Crown to strengthen its control over the foreshore, and shut down the jurisdiction of the Native Land Court to hear Maori claims:[337]

> The introduction of the Harbours Act 1878, and the termination of the Crown's purchasing of foreshore rights, left Maori in some confusion as to the nature of their existing rights over the foreshore (and their fisheries). This tribunal is not in a position to determine the extent of prejudice caused by the prohibition on taking cases concerning customary rights over the foreshore to any court, except to say that it is undeniable that for over 100 years Maori were blocked from bringing such claims and that the denial of such a right is prejudicial.

Boast says that the harbour board legislation was complex in its own right, and acknowledged that, within the legislation, there was some provision for Māori fishing rights and other interests.[338] A Northland example where Harbour legislation acknowledged existing customary property rights is s 2 of the Whangarei Harbour Board Vesting Act 1917. The Act reserved the bed of the Whangarei harbour in the Whangarei Harbour Board but recognised "any Native Land as defined by the Native Land Act 1909 and any Native fishing-grounds and fisheries".[339] Alexander, in his report, Land-Based Resources, Waterways and Environmental Impacts, examined the impact of the Whangarei Harbour Board

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Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, GP Publications, Wellington, 1988) at 84: "The convenience of the *Kauwaeranga Judgment* was that it protected the Crown's interest in the gold, which was the main concern at the time."

[336] Also, the Crown Grants Act of 1866 (and subsequent Acts) had defined freehold grants as applying only to land above the high-water mark. See: Waitangi Tribunal D Alexander, *Land-based resources, waterways and environmental impacts* (Wai 1040, #A7, November 2006) at 614.

[337] Waitangi Tribunal *The Hauraki Report* (Wai 686, 6 June 2006) at 1051-1052.

[338] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 68. Boast explains that some Harbours legislation made provision for Māori rights and interests in the foreshore and seabed.

[339] Whangarei Harbour Board Vesting Act 1917, s 2.

Vesting Act and concluded that the Crown has deprived tangata whenua of legal and practical authority over their taonga:[340]

> In its pursuit of European and port development, it has almost totally ignored the views of tangata whenua. The one "success" that Māori have achieved was the return of a paltry area of less than 2 acres at Hihiaua in 1917, but that was negated by its re-acquisition by the Harbour Board under the Public Works Act 20 years later. In all other respects, the reclamations of the Harbour Board, both in legislation and actually on the ground, have deprived tangata whenua of legal and practical authority over their taonga.

The Hauraki Tribunal also found that, by the end of the 1870s, Maori had lost control of the foreshore and seabed, adding "[n]ot only were Maori denied proprietary rights over the foreshore lands, but they had lost control of their exclusive rights to the fisheries they harboured".[341]

The question that came before the courts, as Māori sought to challenge and clarify their ownership, was whether the Harbours and other sea legislation had validly extinguished Māori customary title. For example, the Territorial Sea and Fishing Zone Act 1965 and the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 deemed the seabed within New Zealand waters (to the limits of the 12-mile zone) to have been vested in the Crown.[342] Likewise, the Foreshore and Seabed Endowment Revesting Act in 1991 revoked all former Harbour Board and Local Government vestings, and re-vested all original vestings in the Crown.[343] That Act was amended in 1994 with the inclusion of section 9A, which declared all foreshore and seabed to not be subject to private ownership or public use, to be land of the Crown, and to be land that was to be administered by the Department of Conservation. [344] The Crown continued to extend its authority over the foreshore and seabed under the Fisheries Amendment Act 1986, which established

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[340] Waitangi Tribunal, D Alexander, *Land-based resources, waterways and environmental impacts* (Wai 1040, #A7, November 2006) at 613-615.
[341] Waitangi Tribunal *The Hauraki Report* (Wai 686, 6 June 2006) at 1052.
[342] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 68.
[343] At 68.
[344] Waitangi Tribunal *Crown Statement of Position and Concessions* (Wai 1040, #1.3.2, 6 July 2012) at 217. When this Act was considered by the Court of Appeal in *Ngāti Apa* it found that section 9A did not expressly confiscate Māori customary title.

the quota system to regulate commercial fishing.[345] The Resource Management Act 1991 ("RMA") and Crown Minerals Act 1991 were also developed on the premise that the Crown had the ownership and authority to manage the foreshore and seabed. [346] Interestingly, the Court of Appeal in *Ngāti Apa* found that these Acts only assumed ownership because of sovereignty and did not expressly extinguish Māori claims.[347]

### 4.4.4 Case law

As discussed, the first major legal dispute arose in Thames when the Crown passed legislation to acquire foreshore lands for gold mining. The *Kauwaeranga* judgment went as far as to grant Māori an exclusive fishing right over a specific area, but not title in the soil of the foreshore itself.[348] Judge Fenton, in the Native Land Court, felt that the issue of ownership of the soil or land itself was of great public interest and hence would have been best dealt with by the highest court of the land.[349] The Crown response was to attempt to prevent Māori from bringing further applications before the court by passing legislation like the Harbours Act. Māori persevered and several cases in relation to lakes, rivers and the foreshore and seabed came before the Native Land Court during the 1900s. The legal question which has consumed much of the court's attention is whether the Native Land Court had the jurisdiction to recognise customary interests over land covered by water and not just dry land. The question, as Boast puts it, was: "Did the Native Land Court have the same powers relating to land covered by water as it did to dry land?" [350]

In other countries, customary rights issues would be dealt with by the ordinary courts, and concepts of mana whenua would be considered against common law principles of Native Title developed in England, Australia, Canada and America.[351] Here in New Zealand, the Native Land Court (now the Māori Land Court), is unique in that it is a special and exclusive jurisdiction established by the Native Lands Acts to deal with customary land.[352] The Native Land Court has

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[345] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 13.
[346] At 13.
[347] *Ngāti Apa v Attorney-General* [2003] NZCA 117; [2003] 3 NZLR 643.
[348] Waitangi Tribunal *The Hauraki Report* (Wai 686, 6 June 2006) at 1032-1033.
[349] At 1032-1033.
[350] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 61.
[351] At 44-46.
[352] At 60-61.

developed its own body of rules, processes and common law, particularly in relation to Native Title and the relevance of the Treaty of Waitangi.[353] This meant that the courts in New Zealand have been able to consider the unique body of common law that has emerged from the Native Land Court when addressing questions in relation to Māori customary rights.[354]

Given the courts' focus has been on jurisdictional issues, not the actual granting of applications, nominal foreshore and seabed land has been awarded to Māori. The Crown has appeared to oppose Māori claims to lake beds, rivers, and the foreshore and seabed, maintaining the position that the Crown either owned these lands as sovereign, or by virtue of statute and common law principles. It is worth noting that the court reached different conclusions in respect of Māori claims to lakes, rivers and the foreshore and seabed. These differences are briefly discussed below.

### 4.4.5 Rivers

For non-navigable rivers, the common law rule applied by the courts is the ad medium filum aquae rule, which means Crown grants of titles to land that abound rivers, extend to the mid-point of the riverbed. This principle was applied in *Re the Bed of the Wanganui River* in 1962 where the Court of Appeal held that once the Māori Land Court had awarded title to a block adjoining the land, then the common law principle of ad medium filum aquae applied, not customary rights.[355] This meant that if Māori owners still owned the block of land, then they would have title to the middle of the river ad medium filum aquae, and all customary claims to the land were annulled by the court's investigation of title.[356] In respect of navigable rivers, the Crown's position is that it owned the beds of all navigable rivers by virtue of the Coal Mines Amendment Act 1903 which vested navigable rivers, and title to minerals in the riverbeds, to the Crown. The issue then fell on whether the Coal Mines Act 1903 extinguished Māori customary rights to navigable rivers. In *Te Runanga o Te Ika Whenua v Attorney General*, Cooke doubted whether the provisions of the Coal-Mines Act Amendment 1903 were sufficient to extinguish Māori customary title to riverbeds.[357] Like lakes

[353] At 25.
[354] At 59-74.
[355] *Re the Bed of the Wanganui River* [1962] NZLR 600.
[356] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 19.
[357] *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 7.

discussed below, the Crown has approached Māori claims to significant rivers by entering into negotiated agreements to recognise the customary rights of iwi; for example negotiated agreements have been reached in terms of the Whanganui River, Waikato River and Waipa River.[358]

### 4.4.6 Lakebeds

Ben White says the legal status of lakes has been "indeterminate".[359] The Crown's view is that, unless where native title has been determined by the Māori Land Court or otherwise extinguished by statute, the bed of lakes in New Zealand are the property of the Crown by virtue of the assumption of allodial title or in other words title by virtue of sovereignty.[360] *Tamihana Korokai* is a seminal case where in 1912, it was found the Native Land Court had jurisdiction to investigate titles to the beds of navigable lakes.[361] The case arose as tourism became more popular over the lakes and the Crown began actively asserting sovereignty and assuming greater rights over the lakes. Te Arawa applied to have legal title to the lakes determined, and the court "unhesitatingly" rejected the Crown's claims to the lakes.

The legal position of *Tamihana Korokai* was that lake beds are Māori customary land until investigated by the court and Crown title was granted.[362] The application to investigate the title was never completed in the Native Land Court because the Crown put "considerable pressure" on Te Arawa to reach a negotiated agreement over the ownership of the lakes. Under the agreement native title was extinguished for an annuity and the confirmation of various rights.[363] Te Arawa were dissatisfied with the original agreement, where White notes the annuity payment was not indexed to inflation and Te Arawa did not get a share of revenue

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[358] For example: Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010; Nga Wai o Maniapoto (Waipa River) Act 2012.
[359] Ben White "Inland Waterways: Lakes" in Alan Ward (ed) *National Overview* Waitangi Tribunal Rangahaua Whānui Series, Theme Q (Waitangi Tribunal, March 1998) at 6.
[360] At 7.
[361] *Tamihana Korokai v Solicitor-General* (1912) 15 GLR, 95.
[362] *Tamihana Korokai v Solicitor General* (1912) 15 GLR, 95 at 30-31; Ben White "Inland Waterways: Lakes" in Alan Ward (ed) *National Overview* Waitangi Tribunal Rangahaua Whānui Series, Theme Q (Waitangi Tribunal, March 1998), at 6-7, 108.
[363] The Native Land Amendment and Native Land Claims Adjustment Act, s 27. See also: Ben White "Inland Waterways: Lakes" in Alan Ward (ed) *National Overview* Waitangi Tribunal Rangahaua Whānui Series, Theme Q (Waitangi Tribunal, March 1998) at 127.

generated from commercial fishing.[364] Te Arawa renegotiated the lakes agreement and in 2004, title to ownership of 13 lake beds was transferred to the iwi along with other redress.[365]

The *Lake Omapere* case, that was played out between 1913 and 1929, is said to be an important component of the long legal struggle between northern tribes and the Government over the ownership of lakes, rivers and foreshore. According to Boast, the *Lake Omapere* decision deserves to be better known, and the fact that it is still not known is an illustration of the "ongoing scandal" that should surround the decisions of the Māori Land Court and Māori Appellate Court with respect to such cases not being officially reported on.[366] The Crown did not assert ownership over Lake Omapere in the nineteenth century or during the first decades of the twentieth century, and officials did not know whether the Crown had title to it when they began carrying out works to lower the level of the lake in order to construct the railway.[367] Protest broke out as local Māori objected to work proceeding and this caused works to halt. An application was made by Ripi Wihongi and others for the investigation of title of the Omapere lakebed. The Crown was said to have strongly opposed the claim because it was concerned about the implications it may have for more significant lakes like Waikaremoana and Taupo.[368]

The court upheld the tribe's claims to the lakebed, finding title to the lakebed of Omapere had never been legally extinguished and vested the lakebed in the tribes. Judge Acheson held, among other things, that Māori customary law recognised the ownership of lakebeds, that Ngāpuhi people owned and occupied the lake in 1840, that Native title had to be legally extinguished, and in terms of the Omapere lakebed, customary title had never been legally extinguished.[369] The Crown was criticised for protracting the proceedings and that, because of this, the benefits of

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[364] Ben White "Inland Waterways: Lakes" in Alan Ward (ed) *National Overview* Waitangi Tribunal Rangahaua Whānui Series, Theme Q (Waitangi Tribunal, March 1998) at 128.
[365] Te Arawa Lakes Deed of Settlement Summary (Te Arawhiti: The Office for Māori Crown Relations, 18 December 2004). Source: <https://www.govt.nz/treaty-settlement-documents/te-arawa-lakes/te-arawa-lakes-deed-of-settlement-summary-18-dec-2004/redress/>.
[366] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005), at 25.
[367] *Judge Acheson, the Native Land Court and the Crown*, A report to the Waitangi Tribunal (Wai 1040, #A64, October 2016) at 15. Boast adds: "… Court's jurisprudence was invisible; another reason was probably because the Native Land Court was not a prestigious body. Judgments of the Native Land Court were not even reported in the New Zealand Law Reports".
[368] *Judge Acheson, the Native Land Court and the Crown*, A report to the Waitangi Tribunal (Wai 1040, #A64, October 2016) at 35-36.
[369] *Lake Omapere* (1929) 11 Bay of Islands MB 253-278.

such a win were not realised by the Māori claimants.[370] For example, the claim was filed in 1912 and not heard until 1929 because the Crown failed to produce a survey plan.[371] The Crown's appeal of the application also ran for another 24 years, which meant that the claimants could not give effect to the court orders.[372] In August 1940, the Crown made an order vesting Lake Omapere in the Ngāpuhi tribe, and the Crown's appeal was struck out in 1953.[373]

Like rivers, the Crown has chosen to adopt a policy to negotiate agreements with Māori over certain lakebeds. Those agreements have been done on a case-by-case basis and given effect to through their own settlement legislation. Lake settlements include, among others, Lake Taupo in 1926, Lake Waikaremoana in 1971, Te Arawa Lakes in 2006 and Ngāti Tūwharetoa in 2018.[374]

### 4.4.7 Foreshore and Seabed

According to Boast, the most significant developments in case law relating to the foreshore and seabed took place in Northland in the Te Tai Tokerau division of the Māori Land Court, where Judge Acheson granted title below the high-water mark:[375]

> Acheson was making grants below high-water mark and Meredith was appealing the decisions to the Māori Appellate Court. Of these cases the most significant was one over the *Ngakororo* mudflats on the Hokianga Harbour, decided by Acheson in 1941 and dealt with by the Appellate Court in 1944. Northland was also an area of High Māori population, had a long coastline relative to its area, and was a region where Māori dependence on the resources of the foreshore and sea had always been historically important and continued to be so.

Case law in relation to customary rights to the foreshore and seabed was relatively consistent until 1957 when *Re Ninety-Mile Beach* "confused the legal

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[370] *Judge Acheson, the Native Land Court and the Crown*, A report to the Waitangi Tribunal (Wai 1040, #A64, October 2016) at 35.
[371] At 36.
[372] At 36.
[373] At 95.
[374] See: Ngāti Tūwharetoa Claims Settlement Act 2018, Ngāti Tūwharetoa Lake Taupo Deed of Settlement 2007, Lake Te Arawa Lakes Settlement Act 2006, and Waikaremoana Act 1971.
[375] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 66. *Ngakororo* (1942) 12 Auckland NAC MB 137, cited in: Waitangi Tribunal R Boast, *The Foreshore* (Wai 1071, #A11, November 1996) at 60.

landscape".[376] The context to *Re Ninety-Mile Beach* was *Ngakororo*; a case where again, the Māori Appellate Court had no issue in finding that it had the jurisdiction to investigate the title to the foreshore just as much as it had to investigate the title to dry land. In *Ngakororo,* the tests Māori had to prove to achieve an award were "relatively strict"; to obtain title Māori had to show proof of a clear definition of the area, continuous and exclusive use different from that of the public generally, evidence that proprietary rights were exercised over a particular section, and evidence that the area 'existed in 1840 in much the same condition as it did today'. [377]

In terms of *In Re-Ninety Mile,* in 1957, an application was made by Māori for the title to Ninety-Mile beach to be investigated by the Māori Land Court. The court found its powers, in terms of the foreshore, were no different to dry land and made an order issuing titles to the foreshore between Te Aupōuri and Te Rarawa.[378] Again, the Crown appealed on the question of whether the Māori Land Court had the jurisdiction to issue titles to the foreshore and seabed. The Court of Appeal overturned the Māori Land Court decision, finding it did not have the jurisdiction to investigate Māori customary title to the foreshore and seabed because the Crown had title to it. The Ministerial Review Panel said that the court's reasoning was complicated:[379]

> Essentially the Court of Appeal took as its starting point the effects of the Māori Land Court conducting an investigation of title to an area of former Māori customary land along the coast. If the foreshore and seabed had been included in the Māori Land Court title at that point, then it was owned by Māori as part of the freehold, or perhaps to the Crown or private purchaser if Māori had alienated the land to them in the interim. Alternatively, if the Court had excluded the foreshore when it heard the original case, the title remained with the Crown. Or, a third possibility (and usual position, as it happens), the Court might have said nothing at all about the foreshore, which would mean that title likewise "remained" with the Crown. The net effect of the case was that the Crown was deemed to have title to the foreshore.

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[376] *Report of the Ministerial Review Panel,* above n 36, at 103.
[377] *Report on the Crown's Foreshore and Seabed Policy,* above n 27, at 71.
[378] In *Re Ninety-Mile Beach* (1957) 85 Northern Minute Book 126.
[379] *Report of the Ministerial Review Panel,* above n 36, at 105.

The Foreshore and Seabed Tribunal has commented that the Crown was "content" with the outcome of *Re Ninety-Mile* because it favoured the Crown and, therefore, we can assume, it did not take steps following this decision to vest the foreshore and seabed in the Crown.[380]

#### 4.4.7.1 *Ngāti Apa*

The Court of Appeal's decision in *Ngāti Apa* is said to be one of the most important legal texts on Crown-Māori relationships since the *Lands* case of 1987.[381] The case began in 1997 following two applications by eight iwi at the top of the South Island who applied to the Māori Land Court for the investigation of title to land below the high-water mark in the Marlborough Sounds.[382] The applications were prompted because the iwi were experiencing issues with local authorities that were granting resource consents for aquaculture activities in the coastal space. Again the Crown opposed the applications on the grounds that a series of Acts had extinguished customary title, that there was no legal basis for the claim, and the rights of the iwi were use rights, not title rights.[383] In the Māori Land Court, Judge Hingston examined the question of jurisdiction and found that the court did have the power to investigate the interests of the iwi in the Marlborough Sounds. The court said while it was bound by the Court of Appeal decision in *Re Ninety-Mile*, the applications by the southern iwi were different because *Re Ninety-Mile* applied to adjoining land only, not the seabed. The court then had to consider whether customary title to the foreshore and seabed had been extinguished by the Sea and Exclusive Economic Zone Act 1977. After a review, the court found the Crown had only assumed ownership under the Act because of sovereignty but that the Act did not expressly extinguish Māori customary interests.[384]

The Crown appealed to the Māori Appellate Court which stated a case to the High Court. The High Court upheld the position outlined in *Re Ninety-Mile*, that once

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[380] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 134.
[381] *Report of the Ministerial Review Panel*, above n 36, at 106.
[382] The Court of Appeal case involved Ngāti Apa, Ngāti Koata, Ngāti Kuia, Ngāti Rarua, Ngāti Tama, Ngāti Toa and Rangitāne as first appellants and Te Ātiawa Mana Whenua ki te Tau Iho Trust as Second Appellants.
[383] *Ngāti Apa v Attorney-General* [2003] NZCA 117; 3 NZLR 643 at [4].
[384] Nelson Māori Land Court minute book, 22a, 1; Te Waipounamu Appellate Court minute book, 19 October 1998. See also: *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 41-45.

the Māori Land Court had investigated title to a coastal block, the title to the foreshore was also extinguished. In addition, the High Court held that the Territorial Sea Act extinguished customary rights to the foreshore and seabed, and that the seabed and territorial waters were vested in the Crown.[385]

The iwi lodged an appeal to the Court of Appeal which overturned the High Court decision and upheld the decision of the Māori Land Court. The question before the Court of Appeal only concerned whether the Māori Land Court had the jurisdiction to hold a substantive inquiry into whether the foreshore and seabed under the application was customary land.[386] Chief Justice Sian Elias cautioned that the outcome of the appeal should not be exaggerated, because the question of whether the land subject to the applications was customary land, would be a matter for the Māori Land Court, if it was found to have jurisdiction by the Court of Appeal.[387]

Chief Justice Sian Elias held that Judge Hingston was correct at law, saying when the Crown acquired sovereignty, it did not acquire property in the land of New Zealand:[388]

> The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with law. I agree that the legislation relied on in the High Court does not extinguish any Māori customary law in the seabed or foreshore.

The court reached its decision on the basis that the Crown had always accepted the "entire country was owned by Māori according to their customs and that until sold land continued to belong to them".[389] The Treaty of Waitangi, common law and legislation all confirmed that Māori customary land is land owned and held by Māori in accordance with tikanga, customs or usages.[390] The general common law principle applied both internationally and in New Zealand was that the customary rights of natives should continue and be respected unless lawfully

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[385] *Attorney-General v Ngāti Apa* [2002] 2 NZLR 661, at 679-680. See also: *Ngāti Apa v Attorney-General* [2003] NZCA 117; 3 NZLR 643 at [7]; *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 42.
[386] *Ngāti Apa v Attorney-General* [2003] NZCA 117; 3 NZLR 643, at 2.
[387] At [8].
[388] At [13].
[389] At [34].
[390] At [14].

extinguished.[391] The court said after sovereignty was transferred, the common law was applied to recognise the existence of customary land, and legislation maintained the common law principle that customary rights continued until extinguished:[392]

> What is of significance in the present appeal is that New Zealand legislation has assumed the continued existence at common law of customary property until it is extinguished. It can be extinguished by sale to the Crown, through investigation of title through the Land Court and subsequent deemed Crown grant, or by legislation or other lawful authority. The Māori lands legislation was not constitutive of Māori customary land. It assumed its continued existence. There is no presumption of Crown ownership as a consequence of the assumption of sovereignty to be discerned from the legislation. Such presumption is contrary to the common law. Māori customary land is a residual category of property, defined by custom. Crown land, by contrast, is defined as land which is not customary land and which has not been alienated from the Crown for an estate in fee simple. The Crown has no property interest in customary land and is not the source of title to it.

The court found that the Harbour Act and Territorial Seas Act, where Crown ownership was presumed, did not have an expropriatory effect because they too acknowledged the existence of Māori property and conformity with common law.[393] It also overturned the Court of Appeal's finding in *In Re Ninety Mile* that the investigation of dry land adjoining coastal land extinguishes Māori customary property rights. The court said it was conceivable that custom/tikanga and therefore property rights are still held in lands below the high-water mark.[394]

Having found that customary title to the foreshore and seabed had not been extinguished, the court's decision in *Ngāti Apa* at least clarified that the Māori Land Court did have the jurisdiction to determine applications for customary title to the foreshore and seabed. Unlike the Crown's response to rivers and lakes, where the Crown decided to negotiate settlements with Māori over various water

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[391] At [19], [34].
[392] At [47].
[393] At [58]-[74].
[394] At [88].

bodies, the Crown decided to legislate to make certain that it (the Crown) owned the foreshore and seabed. There was no time for Māori to test what options were available to them for the recognition of their customary rights through common law because the Crown commenced policy development for the Foreshore and Seabed Act 2004 almost immediately after the Court of Appeal released its decision.

### 4.5 Concluding remarks

Following the signing of te Tiriti in 1840, the Crown proceeded to colonise Aotearoa on the basis that Māori consented to a cession of sovereignty under the Treaty. The Crown claimed ownership of the foreshore and seabed by virtue of having acquired sovereignty in 1840, through Acts of Parliament which attempted to extinguish Māori customary rights to the foreshore, and through common law principles. Since te Tiriti, Māori have taken the issue of ownership of the foreshore and seabed, and other water resources to the courts to have the foreshore and seabed declared customary land. The courts were relatively consistent in determining that it did have jurisdiction to investigate the foreshore and seabed in the same manner as it had jurisdiction to investigate dry land. The Tribunal said that it was only a matter of time, once all the appeals were done, before Māori would begin to have customary rights orders declared over the takutai moana.[395]

While common law rights are important in theory and in principle, court proceedings were protracted and concerned "relatively discrete" areas of the foreshore and seabed, which means the common law has not, in practice, operated in a manner that recognised and secured Māori rangatiratanga over the takutai moana. Legislation passed in relation to coastal space reinforces the Crown's understanding of the Treaty where it claimed Crown sovereignty and ownership, without meaningfully accommodating rangatiratanga and Māori treaty rights. The effect of nearly two centuries of legislation in favour of Crown ownership and fraught legal battles, is the Crown's transfer or taking of Māori rangatiratanga or authority over the takutai moana. What took place in terms of the expropriation of the takutai moana from Māori is appropriately characterised in the 1846 Daily

[395] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 137.

Southern Cross article, quoted at the beginning of this chapter, in which it was said that the Government "glided into power by a sort of hocus pocus process":[396]

> What could reasonably be expected to result from such a commencement but rebellion and strife?

[396] Colonisation of New Zealand: Daily Southern Cross 18 July 1846: Waitangi Tribunal *Closing Submissions for Te Runanga o Ngāti Hine* (Wai 1040, #3.3.23, 21 January 2011) at 6.

# CHAPTER 5: FORESHORE AND SEABED ACT 2004 – EXTINGUISHMENT AND TREATY BREACH

## 5.1 Introduction

The *Ngāti Apa* decision in 2003 was the genesis of the foreshore and seabed issue of today. In relation to *Ngāti Apa,* the Court of Appeal held that the Crown had not extinguished Māori customary claims to the foreshore and seabed.[397] The effect of the decision was that Māori had two pathways available to them in the courts to pursue their customary rights in the foreshore and seabed. Māori could go to the High Court under the common law doctrine of aboriginal title for a declaration that an area of foreshore and seabed was customary land, or they could go to the Māori Land Court for a declaration that foreshore and seabed was customary land.[398] Under Te Ture Whenua Māori Act 1993, the Māori Land Court has the jurisdiction to determine and declare (by a status order) the status of any parcel of land to be Māori customary land.[399] The court can then make an order vesting the land in such persons, or trustees, as it thinks fit and the land would become subject to the Land Transfer Act 2017.[400] The effect of registration under the Land Transfer Act is that it brings customary land into the general land tenure system and allows its owners to exercise rights of ownership.[401] The Tribunal said that it was only a matter of time after *Ngāti Apa* before customary title would be recognised, at least over parts of the foreshore and seabed.[402]

The Labour Government of the day chose not to allow Māori claims to the foreshore and seabed to be handled by the courts and believed legislation was

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[397] *Ngāti Apa v Attorney-General* [2003] NZCA 117; [2003] 3 NZLR 643 at [13], [88], [183].
[398] The 'doctrine of aboriginal title' is a common law principle that recognises that indigenous people may have held customary rights prior to the acquisition of Crown sovereignty. The doctrine of aboriginal title allows for the recognition of customary rights ranging from use rights, to rights equivalent to land ownership. While the doctrine comes within the jurisdiction of the High Court and has been a part of our legal system since 1840, it has rarely been applied, primarily because the Native Land Court was established in 1860 to deal with customary interests in land.
[399] All land must have one of the following statuses: Māori customary land; Māori freehold land; General land owned by Māori; General land; Crown land; or Crown land reserved for Māori.
[400] Te Ture Whenua Māori Act 1993, ss 132(4)(a), (b).
[401] Te Ture Whenua Māori Act 1993, Part 6.
[402] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 77-78. See the discussion on the Tribunal's analysis of the High Court and Maori Land Court's jurisdiction to grant customary rights at common law.

necessary to overcome uncertainty and clarify Crown ownership.[403] Within months of *Ngāti Apa,* the Government announced a new legislative regime to replace the post-*Ngāti Apa* legal environment.[404] The regime would remove the jurisdiction of both the High Court and Māori Land Court, thereby preventing the granting of fee simple titles, and put in place a new regime for the recognition of customary rights defined by the statute.[405]

This chapter examines elements of the foreshore and seabed policy and the Foreshore and Seabed Act 2004, which are considered prejudicial to Māori customary rights. The Waitangi Tribunal's report into the Crown's foreshore and seabed policy, and the Ministerial Review Panel's report into the former 2004 Act are leading authorities on the issue. The reports are reviewed in this chapter with respect to their comments on aspects of the foreshore and seabed policy that were said to be inconsistent with the treaty.

## 5.2 The Foreshore and Seabed Policy 2003

The Crown's foreshore and seabed policy was underpinned by four principles or bottom lines that were essential to the Government:[406]

1. The foreshore and seabed should be public domain, with open access and use for all New Zealanders (principle of access);
2. The Crown is responsible for regulating the use of the foreshore and seabed, on behalf of all present and future generations of New Zealanders (principle of regulation);
3. Processes should exist to enable the customary interests of whānau, hapū, and iwi in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected (principle of protection); and
4. There should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions (principle of certainty).

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[403] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 83-87. This section contains the Tribunal's analysis of core elements of the Crown's 2003 foreshore and seabed policy.
[404] Peace Movement Aotearoa, *Fact sheet: Foreshore and Seabed* (Scoop website, 4 July 2003). Source: <http://www.scoop.co.nz/stories/PO0307/S00029.htm>.
[405] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 134.
[406] At 85.

In short, the policy proposed that all unalienated foreshore and seabed, or foreshore and seabed not already in private title, become public domain. Statutory provision would be made to ensure that all people had access to the foreshore and seabed. This meant Māori, and all people, could no longer obtain fee simple titles to the foreshore and seabed.[407] The High Court and Māori Land Court jurisdiction to investigate customary claims would be removed and new statutory processes would be established to guide the allocation of new forms of customary rights over the public foreshore and seabed. In this way, new customary rights/title under the Act would co-exist and be subject to public domain title. Customary title under the legislation would be managerial or decision-making in nature with successful applicants obtaining a right to make decisions regarding the management of a specified area of public foreshore and seabed. Successful applicant groups could also obtain rights to exercise certain customary rights so long as they were sustainable. The policy recognised the Crown may have to provide redress, or some recognition for customary rights holders, where their interests cannot be properly provided for within the new framework.[408] For example, redress might be appropriate where a group was not able to exercise a right because of sustainability, public works or reclamation.[409]

### 5.3 Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy

The Labour Government's foreshore and seabed policy was so contentious that it led to the largest, and fastest, urgent inquiry by the Waitangi Tribunal during its tenure.[410] Most coastal iwi from across the country were represented and claimant groups argued that the Crown's policy was unfair and unnecessary, and that it breached the treaty by extinguishing Māori customary rights to the foreshore and seabed.[411] As mentioned above, the Crown's rationale was the policy was necessary to manage the uncertainty of the outcomes that may arise from Māori claims to the foreshore and seabed if title was able to be granted by the courts. The Crown argued the policy responded to its responsibility to "protect and regulate a wide range of interests, at the same time securing and enhancing

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[407] Even though private titles already exist.
[408] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 83-87.
[409] At 87.
[410] Six days of hearing were held, and the Tribunal's report was released in March 2004.
[411] *Report on the Crown's Foreshore and Seabed policy*, above n 27, at 89.

recognition of Māori customary rights."[412] There was no Bill at the time the hearing was held, and the Tribunal's inquiry was on the policy available at that time. While there were serious concerns about the process and speed at which the Crown sought to give effect to the policy, the Tribunal focused on substantive issues of how the policy impacted Māori customary rights. The Tribunal explored whether the policy was a good one, whether it was consistent with the principles of the treaty and wider norms, including international human rights.[413]

The Tribunal's report on the Crown's Foreshore and Seabed Policy was released in March 2004. It said, given that there were no precedents, there were limitations in trying to answer what might have emerged from the courts if the courts were able to consider applications for customary rights following *Ngāti Apa*.[414] Some counsel argued that the Māori Land Court would be permissive and most applications for customary title to the foreshore and seabed would result in a declaration of the foreshore and seabed as customary land.[415] Conversely, the Crown's view was it would only be in rare circumstances that customary interests in the foreshore and seabed would be sufficient to support an award of customary title.[416] The Tribunal preferred the "middle ground" advanced by Boast where he argued that the Māori Land Court would likely develop tests for proving different interests in the foreshore and seabed.[417]

The Tribunal said it was likely that the High Court would exercise its discretionary jurisdiction to declare foreshore and seabed land to be customary land under the common law doctrine of aboriginal title.[418] More time was spent by the Tribunal analysing how the Māori Land Court might treat applications under the middle ground approach. The Tribunal said it was relatively

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[412] At 83.
[413] At 81. In the current system there is an expectation that the power will be exercised within certain limits, for example, under the rule of law there is an expectation that the policy is just and fair in the way that it treats Māori and all parties. To determine whether the proposed policy was unfair, and eroded or took rights of value from Māori, the Tribunal considered the legal options and rights available to Māori following *Ngāti Apa*, and how those were impacted by the policy. The questions for the inquiry were:

> What were the legal options post *Ngāti Apa*?
> How were those options constrained by the Crown's proposed policy?
> Was the policy in breach of the principles of the Treaty?

[414] *Report on the Crown's Foreshore and Seabed policy*, above n 27, at 61.
[415] At 67.
[416] At 67.
[417] At [3.5.2].
[418] At 77.

straightforward for the Māori Land Court to make a determination that a portion of foreshore and seabed is customary land, saying:[419]

> If land is not Māori free hold land, general and owned by Māori, Crown land reserved for Māori, and it is held in accordance with tikanga Māori, then it would follow that that land would be Māori customary land according to s 129(2)(a).

The question is then whether a Māori Land Court declaration that a portion of the foreshore and seabed was customary land would lead to a vesting order and registration of foreshore and seabed under the Land Transfer Act. This question was not determined by the Court of Appeal in *Ngāti Apa*.[420] The Tribunal's view was that, because Te Ture Whenua Māori Act 1993 placed a strong emphasis on tikanga and the protection of rangatiratanga as embodied in the Treaty of Waitangi, it was foreseeable that some foreshore and seabed could become freehold land.[421] It was from the starting point that Māori could obtain a title or property rights to the foreshore and seabed via the courts, and from the perspective that these potential rights were of high value, that the Tribunal was then able to assess how the policy eroded those rights and, therefore, whether the policy was consistent with the treaty.[422]

### 5.3.1 Tribunal findings and recommendations on the policy

The Tribunal provided five key reasons why the policy was in breach of the Treaty of Waitangi and wider norms, including:[423]

1. The policy expropriates Māori property rights;
2. There was no compelling reason to expropriate Māori rights;
3. The policy does not deliver greater certainty for Māori than if the law was allowed to run its course;
4. The policy violates the rule of law; and
5. The policy is unfair to Māori.

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[419] At [3.4.3].
[420] At 70-71. The middle ground approach was adopted, it was likely the Māori Land Court would develop tests to determine whether customary title was met to a standard which could be translated into a fee simple today.
[421] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 74-75. For example, also see 71-72 where the Tribunal refers to *Ngakororo*.
[422] At 77-79.
[423] At 121-125.

The Tribunal found that the Crown's foreshore and seabed policy breached the principles of the treaty, both in terms of Article 2, which guaranteed Māori te tino rangatiratanga over their taonga, and in terms of Article 3, which provides for the principle of equity and equal treatment for Māori.[424] The Tribunal said, while kāwanatanga, under the treaty, gave the Crown authority to formulate the policy and introduce new laws governing the takutai moana, the Crown had a duty to exercise kāwanatanga in a manner that was consistent with the treaty and active protection of rangatiratanga.[425] Furthermore, if the Crown expropriates property rights, especially from its treaty partner, it must have "compelling reasons" for doing so.[426] In this case, the Crown did not. The Tribunal did not think legislation was required to secure public access, and said the Crown's concern that Māori might sell the foreshore and seabed could be managed by a simple legislative limitation on sales, rather than through a full-scale expropriation of Māori rights.[427] The Tribunal also said that the policy breached Article 3 of the treaty (the principle of equity and equal treatment of Māori), in that it proposed to take away the existing property rights of Māori and replace them with rights that were not as valuable.[428] It said the Government was wrong to impose its own assessment of the relative benefits of the policy upon Māori:[429]

> To insist that the regime under the policy will be better for Māori whether they realise it or not is at best patronising to Māori, but at worst is plain wrong. The Crown is really in no better position to predict what the courts will do than Māori.

The Tribunal was critical that increased participation in environmental decision-making, which was to be the substitute for title rights obtained via the courts, did not seem to be "a very good deal for Māori."[430] A comparison was drawn with

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[424] At 127-130.
[425] At 127.
[426] At 121. The policy was deemed expropriatory where it proposed to do away with the power of the courts to declare Māori property rights in the foreshore and seabed and replaces them with "enhanced" participation in decision-making processes. The Tribunal was clear the proposed customary title under the policy is not a property right, and the regulatory rights Māori would gain under the policy were lesser rights than those obtainable through common law.
[427] At 89.
[428] At 123. The Tribunal did not agree with the Crown that Māori would benefit under the proposed legislation. The policy was said to be unfair because it treated Māori customary property rights in the foreshore and seabed differently from all other rights by creating new rights for Māori and leaving all other rights intact.
[429] At 103.
[430] At 105.

the RMA, the Tribunal hesitant that if the RMA could not deliver enhanced participation for Māori, then it is unlikely that new legislation would either: [431]

> There are extensive provisions in that Act for recognition of the Māori interest in the management of the environment, including the devolution to them of decision-making powers. It is certainly the case that the Treaty aspirations of that legislation have never come to fruition. The complaints of Māori about the regime have come before us, and have been reported upon to the Government. In our view, the Crown had an obligation to take measures to ensure that the intentions of that Act were realised long ago. To agree to do it now as partial recompense for the removal of legal rights does not seem to us to be a very good deal for Māori.

Based on this kind of experience, the Tribunal said that Māori were justified in feeling dubious about forgoing legal rights for the right to participate in environmental processes, saying "[e]ven if it all looks very promising at the outset, the reality can be quite otherwise."[432]

### 5.3.2 Recommended options

With a range of options recommended by the Tribunal, the Government was aware there were a number of ways in which it could improve its policy in terms of the treaty.[433] The Tribunal asked the Government to consider whether any of the proposed options, either individually or in combination, might achieve the Government's goals in a more treaty-compliant way. Significantly, for a regime to be fully compliant with the treaty, the Crown would be required to negotiate with Māori and obtain their agreement. All the other options would require compromise between the treaty partners. The Tribunal said:[434]

> … any action that the Crown takes unilaterally, short of full restoration of te tino rangatiratanga over the foreshore and seabed, will breach the principles of the Treaty. As we see it, it is critical that the path forward is consensual.

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[431] At 105.
[432] At 117.
[433] At 139-143.
[434] At 139.

The Tribunal doubted the Government understood Māori and suggested that a longer conversation needed to be held over an extended period with Māori to negotiate a treaty-compliant regime.[435]

It also identified the various ways public access to beaches could be preserved while protecting customary rights, based on a less interventionist approach.[436] This included legislation both to provide for public access (except in the case of specified areas, for example, wāhi tapu) and to ensure any recognised Māori interests in the foreshore and seabed were not able to be sold.[437] The Tribunal also said negotiated agreements like those contained in the Orakei Act 1991 could be reached in respect of the foreshore and seabed.[438] In terms of Orakei, the title to some of the foreshore area at Orakei was returned to Ngāti Whātua but public access has never been restricted. The final option proposed by the Tribunal was that the Government be consistent with its treatment of lakebeds and extend the policy for negotiating lakebeds to the foreshore and seabed. [439] The Tribunal felt it was more appropriate to deal with issues as they arose, not pre-empt them, therefore it said an acceptable option for the Government was to let things run their course after *Ngāti Apa* and see how the common law developed through the courts.[440] This approach was tantamount to the 'do nothing' option and was the preferred option of the Tribunal as the courts would then be able to investigate and declare rights according to applications as they arose.[441]

The Tribunal was highly critical of the Government for not acknowledging the possibility that compensation should be a part of the policy, saying:[442]

> On what legitimate basis can it be postulated that the strong presumption at law that there is no expropriation without compensation does not apply when the property rights belong to Māori? If anything, the terms of the Treaty, with the guarantee of property rights in article 2, should operate to

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[435] At 139-140.
[436] At 141.
[437] At 141.
[438] At 142. In this way, the Act achieves the Government's principles of access, regulation, protection and certainty, without extinguishing the customary rights of Māori. The Tribunal did caution that the Ngāti Whātua approach, among others, are not one-size-fits-all. See: Orakei Act 1991.
[439] At 143.
[440] At 140-141.
[441] At 143.
[442] At 113.

> protect Māori property rights. This makes more egregious the expropriatory element of the Government's foreshore and seabed policy. Thus, we consider that this proposed extinguishment of Māori property rights is no small matter. It is especially worrying because: it is not the subject of consent by Māori; compensation is not being offered; and other owners of private property rights are not being treated in the same way.

The Tribunal said that if the Government wishes to proceed with its policy unchanged, or implement a policy that takes away rights of Māori, then the treaty requires the Crown to compensate Māori for the removal of their property rights; "the bare minimum of what the Treaty, and any standard of fair and good government, demands."[443]

### 5.4 The Foreshore and Seabed Bill

In April 2004, Hone Harawira led the country's largest hīkoi from Te Hiku (the Far North) to Parliament in Wellington to protest against the Crown's foreshore and seabed policy. Harris describes how the foreshore and seabed issue had a unifying effect in that both conservatives and radicals joined the hīkoi en route to Parliament.[444] The Foreshore and Seabed Bill was introduced to the House the following month on 6 May 2004. The Crown chose to ignore the Waitangi Tribunal's findings and recommendations, with no meaningful adjustments made to the policy in response to the Tribunal's report. Deputy Prime Minister, Michael Cullen, described the Waitangi Tribunal's report as "disappointing" in that it implicitly rejected the principle of Crown sovereignty, saying that the findings "depend upon dubious or incorrect assumptions by the Tribunal." [445]

Despite strong recommendations from the Waitangi Tribunal, and the significant level of opposition and protest, the legislative processes did not protect Māori rights or their position on the issue. For example, there were 3946 submissions to the Fisheries and Other Sea-Related Legislation Select Committee on the Bill, 94% of which were in opposition. However, the Select Committee was unable to reach agreement on whether the Bill should go ahead and made no amendments to

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[443] At 143.
[444] Aroha Harris *Hīkoi: Forty Years of Māori Protest* (Huia Publishers, Wellington, 2004) at 151.
[445] Brian James Bargh *The Struggle for Māori Fishing Rights: Te Ika a Māori* (Huia Publishers, Wellington, 2016) at 162.

the Bill.[446] In May 2004, the Attorney-General, Margaret Wilson, reported on the consistency of the Bill against the Bill of Rights Act 1990 and said there was a prima facie breach of s 19 regarding freedom from discrimination where only Māori rights holders would lose rights. However, the Attorney-General went on to say that the Bill was justified in a free and democratic society and was therefore not in conflict with the New Zealand Bill of Rights Act 1990.[447]

The Bill was referred by Māori to the United Nations Committee on the Elimination of Racial Discrimination ("CERD committee") where it was reviewed for its consistency with the International Convention on the Elimination of All Forms of Racial Discrimination. The CERD committee issued a report in March 2005, after the Act was passed, noting its concern about the political atmosphere that had developed in New Zealand following the Crown's foreshore and seabed policy development and encouraged the Government to refrain from exploiting racial tensions.[448] The CERD Committee was also concerned with the haste in which the legislation was enacted and cautioned that not enough consideration was given to alternative responses to *Ngāti Apa*. The Committee concluded that the legislation appeared to contain discriminatory aspects against Māori, particularly where it extinguished the ability of Māori to establish customary title to the foreshore and seabed and failed to provide redress. The Government was encouraged to commence negotiations with Māori regarding the legislation to find ways of lessening the policy's discriminatory effects. Suggestions included amending the legislation, flexible application of the legislation, and broadening the scope of the redress available to Māori.[449]

Again, the Deputy Prime Minister, Michael Cullen, without referencing any facts or authorities, rejected the CERD Committee's report saying that it was full of factual and interpretation errors, adding that it "was an attempt to tell us how to manage our political system".[450] He said "[t]hat may be fine in countries without

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[446] New Zealand Parliament *Report of the Fisheries and Other Sea-related Legislation Committee: Foreshore and Seabed Bill* (4 November 2004). Source: <https://www.parliament.nz/resource/en-NZ/47DBSCH_SCR3255_1/77ab93ed8c13576352a601aecc18a7beb716d80d> at 2.
[447] Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 107.
[448] *Decision 1 (66) New Zealand Foreshore and Seabed Act 2004* CERD/C/66/NZL/Dec.1 (11 March 2005). Source: < https://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.66.NZL.Dec.1.pdf>
[449] At 2.
[450] Audrey Young "UN foreshore report 'unbalanced'" The New Zealand Herald (online ed, Auckland, 5 April 2006).

a proud democratic tradition but not in New Zealand, where we prefer to debate and find solutions to these issues ourselves".[451]

The Foreshore and Seabed Act was enacted on 25 November 2004.

### 5.5 The Foreshore and Seabed Act 2004

The Foreshore and Seabed Act 2004 delivered on the Crown's policy objectives in relation to section 13, which vested all public foreshore and seabed in the Crown, while providing for the continuation of public rights of access, fishing, navigation and private titles. The Act was drafted "clear and plain" to ensure that it met the common law requirements for extinguishment of common law customary rights.[452] Boast claimed that the provision was by far the biggest property and resource nationalisation, and perhaps the biggest expropriation ever.[453] The Act also provided a regime for newly formulated "customary rights" to recognise what the Crown considered to be Māori interests in the foreshore and seabed. To achieve these two things, the Act removed the jurisdiction of the courts to grant customary rights relating to the foreshore and seabed to Māori, and then remodelled the courts' jurisdiction to be able to grant two new types of orders, which replaced the common law rights that were previously available to Māori.[454] These two new forms or rights were Territorial Customary Rights Orders, and Customary Rights Orders.[455]

#### 5.5.1 Territorial Customary Rights Orders

Under the 2004 Act, Māori could make an application to the High Court for a territorial customary rights order. A territorial customary right order over an area could be established if an applicant group could prove they had customary title or aboriginal title over an area of foreshore and seabed that is recognisable at common law. Section 32 provided the main provision governing territorial customary rights. This section came under strong criticism for the restrictive tests

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[451] Audrey Young "UN foreshore report 'unbalanced'" The New Zealand Herald (online ed, Auckland, 5 April 2006).
[452] *Report of the Ministerial Review Panel*, above n 36, at 123. The Ministerial Review Panel noted that s 13 needs to be read alongside ss 3 and 4, which state that the Act gives effect to the object of the Act (s 3) by "vesting the full legal and beneficial ownership of the public foreshore and seabed in the Crown".
[453] At 132.
[454] At 120.
[455] Boast notes that while these were devised to give specific recognition to Māori customary rights, theoretically the new procedures are open to all.

that applicant groups were required to meet in order to achieve a successful award. Section 32 reads:[456]

> For the purposes of subsection (1)(a), a group may be regarded as having had exclusive use and occupation of an area of the public foreshore and seabed only if –
>
> (a) that area was used and occupied, to the exclusion of all persons who did not belong to the group, by members of the group without substantial interruption in the period that commenced in 1840 and ended with the commencement of this Part; and
>
> (b) the group had continuous title to contiguous land.

Section 32 was described as an attempt to codify and restate native or customary title law, which ended up turning out to be "very complicated".[457] Cognisant of the Tribunal's approach to its consideration of the policy, again there is little value in speculating on how the court would apply these tests, particularly given the Act has since been repealed. However, some general observations speak to the discriminatory nature of the provision. Boast's view was that the legislation would have to be read generously if it were to have any meaningful significance and in turn have practical application. For example, if a strict interpretation of "to the exclusion of all persons" who did not belong to the group was to be applied, then it is unlikely that any group would be able to meet the test of exclusivity, because there is almost no foreshore and seabed that has been untouched by another person.[458] The next question refers to what kind of uses might be said to destroy "exclusive occupation" – Boast observed that a reasonably remote beach that is used for fishing may not necessarily destroy exclusive occupation, whereas more intense beach use and harbour developments like the Port of Tauranga and Mount Maunganui may destroy exclusive occupation.[459] He notes that on closer inspection, the threshold refers to "exclusive use and occupation", "without substantial interruption", meaning interpretation would then fall on what amounts

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[456] See Appendix 1 - Relevant provisions of Foreshore and Seabed Act 2004.
[457] *Report of the Ministerial Review Panel*, above n 36, at 128. Like the Tribunal, the Panel's view was that "litigation over the meaning of an intricate statute is something that should be avoided", and that the common law should have been left to develop on its own accord.
[458] At 147.
[459] At 148. It is likely the scale and intensity of an activity impacts exclusivity.

to "substantial interruption".[460] Boast concluded that a territorial customary rights order would not be easy to obtain and many groups would be barred by the requirement to prove "continuous title to contiguous land" given that 95% of land has been alienated in New Zealand and only 5% remains in customary ownership, much of which is not coastal.[461]

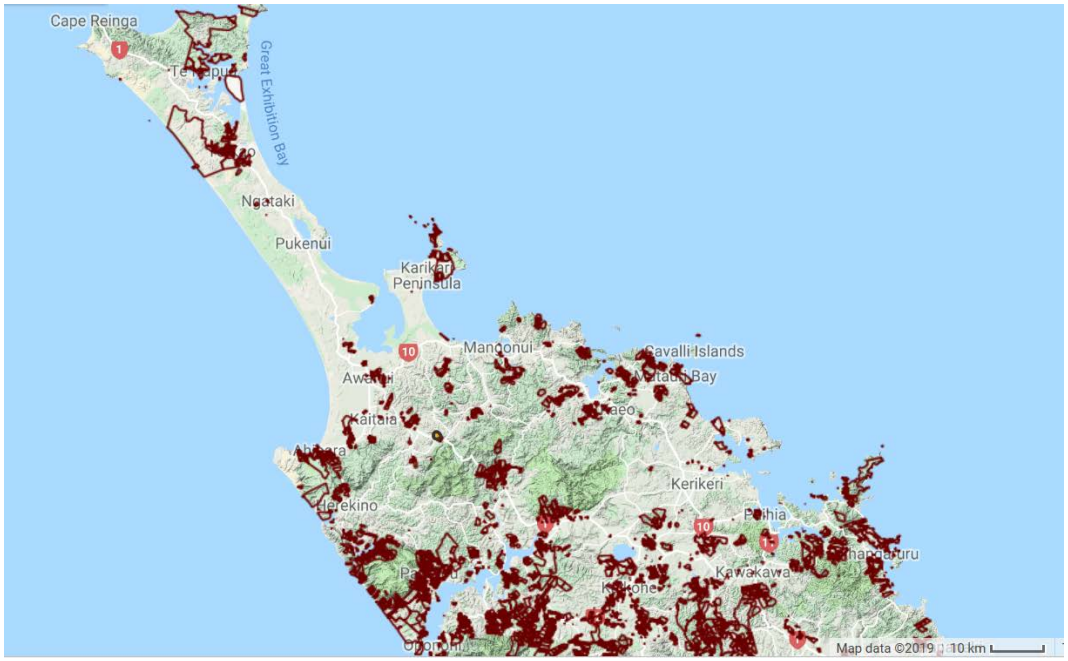


**Figure 4:** Remaining Māori Land in Te Tai Tokerau[462]

Prejudice would arise, even for those Māori applicants who may have been successful under the legislation, as a consequence of the limited scope and nature of such territorial customary rights. The practical effect of a group obtaining a territorial customary rights order from the High Court was the group obtained the right to enter negotiations with the Crown for the purpose of reaching an agreement over a foreshore and seabed reserve. Alternatively, the group obtained the right to apply directly to the High Court for the establishment of a foreshore

[460] At 150. Given the extent of land alienation through colonisation, the additional requirement that the applicant be able to show "continuous title, to contiguous land" would also eliminate many groups from obtaining a territorial customary rights order.
[461] At 126-128, 139-140, 154. It is noteworthy that the requirement to prove "continuous title to contiguous land" is not a requirement at common law. The Act therefore made it more difficult for applicants to obtain rights that are less than those common law rights that were extinguished by the Act.
[462] Te Puni Kokiri: Ministry of Māori Development, Whenua Māori Visualisation Tool. Source: <https://whenuaviz.landcareresearch.co.nz/>. Note this does not include general land owned by Māori.

and seabed reserve.[463] The reserve was intended to be a form of recognition of customary title and would be subject to public rights of fishing and navigation.[464] A board could be set up to administer the reserve agreement under a management plan; however, central and local government were not obliged to meet the cost of administering the management plan.[465] The legislation effected, as the Tribunal foresaw, the extinguishment of property rights, which were replaced by new managerial rights. In the Tribunal's view, the new managerial rights offered less than property rights at common law, and as guaranteed to Māori under the treaty.[466]

### 5.5.2 Customary Rights Orders

The second class of right available under the 2004 Act was a customary rights order. The Māori Land Court was provided with a limited jurisdiction to grant a whānau, hapū or iwi a customary rights order, allowing them to carry out a customary activity, use or practice in a specified area of the foreshore and seabed.[467] The Act did not specify what a customary right could be as that was for the applicants to establish. However, again it set out the tests which had to be met by the applicants. The applicant had to demonstrate than an activity, use or practice:[468]

> a) is, and has been since 1840, integral to tikanga Māori; and
>
> b) has been carried on, exercised, or followed in accordance with tikanga Māori in a substantially uninterrupted manner since 1840; and
>
> c) continues to be carried on, exercised in accordance with tikanga Māori; and
>
> d) is not prohibited by any enactment or rule of law; and
>
> e) is not extinguished as a matter of law.

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[463] At 127. See also: Richard Boast *Foreshore and Seabed* (Lexis Nexis, Wellington, 2005) at 164, where Boast notes that this is an unusual jurisdiction for the court, which is not usually concerned with reserving areas of Crown land as this would typically be done by proclamation or gazette.

[464] *Report of the Ministerial Review Panel*, above n 36, at 128. See: Foreshore and Seabed Act 2004, s 40.

[465] Foreshore and Seabed Act 2004, s 43. As mentioned, instead of applying to the High Court, applicants could opt to enter direct negotiations with the Crown for a recognition agreement and then have their agreement certified by the High Court. his allowed parties to circumvent the High Court application process. The requirements for Crown engagement paralleled s 32 and therefore it was unlikely that negotiations could be seriously pursued if s 32 criteria could not be met by the applicants.

[466] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 97.

[467] Foreshore and Seabed Act 2004, s 48.

[468] Foreshore and Seabed Act 2004, s 50.

The court's jurisdiction in relation to common law customary rights was removed, and the court was strictly confined to awarding rights within the scope of orders provided for in the 2004 Act.[469] Section 49 sets out activities which could not be classified as customary rights under the 2004 Act including activities in relation to:[470]

- Commercial Māori fishing rights – settled by Treaty of Waitangi; (Fisheries Claims) Settlement Act 1992;
- Non-commercial Māori fishing rights;
- Any activity regulated by or under the Fisheries Act 1996;
- Protected wildlife; and
- Marine mammals.

A further restriction was that a customary right could not be based on a spiritual or cultural association, unless it was manifested by the relevant applicant group in a physical activity or use related to the resource.[471] These limitations raised the question as to what is left? The primary value of a customary rights order under the 2004 Act was that it would confer a right on the holder to carry out an activity in accordance with ss 17A and 17B and Schedule 12 of the RMA to protect the activity under the Act, and to derive a commercial benefit from carrying out the activity.[472]

Territorial customary rights and protected customary rights as they were framed in the 2004 Act replaced rights of ownership with limited rights to participate in the decision-making and carry out activities over the foreshore and seabed. The statutory tests would likely be very difficult for Māori to prove. Ultimately, the issues for Māori fell where the Tribunal predicted; Māori were most prejudicially affected by the regime because their rights at law were removed and replaced with something else, whereas the rights of the public, private title holders and the Crown remained untouched. As a result, it was Māori who would bear the brunt

[469] See: Foreshore and Seabed Act 2004, ss 46(2) and 47 on jurisdiction of the Māori Land Court.
[470] Foreshore and Seabed Act 2004, s 49.
[471] Foreshore and Seabed Act 2004, s 49(2).
[472] Foreshore and Seabed Act 2004, s 52(4): To the extent that the exercise of a recognised customary activity exceeds the scale, extent or frequency specified for the activity under the customary rights order, s 17A (1) of the Resource Management Act 1991 does not apply. The right holder may also determine who can carry out the recognised activity under the order, so long as it acts in the best interests on whose behalf the order is held. Foreshore and Seabed Act 2004, s 53.

of prejudice arising from unfair treatment of their rights, and the uncertain legal environment the legislation moved them to. The Tribunal stated that the one thing that could be said with certainty was that this legislation would tie up the time and energy of Māori for many months and possibly years to come.[473]

### 5.6 Ministerial Review Panel on the Foreshore and Seabed Act 2004

The Ministerial Review into the Foreshore and Seabed Act 2004 commenced in 2009. As previously mentioned in Chapter 1, the review had its origins in the political compact or confidence and supply agreement between the Māori Party and National Party. The review was led by former Justice of the High Court, Chief Justice of the Māori Land Court and Chairperson of the Waitangi Tribunal, Sir Edward Taihakurei Durie, leader and activist of Ngāi Tahu, Hana O'Regan, and renowned academic in Māori land law, Professor Richard Boast. The Panel was tasked with advising on workable and efficient methods for providing for Māori and public interests in the foreshore and seabed.[474]

The Panel considered the nature of Māori interests in the coastal marine area prior to *Ngāti Apa*, options available to the Government to respond to *Ngāti Apa*, and whether the Foreshore and Seabed Act 2004 effectively provided for Māori and public interests in the foreshore and seabed.[475] The review was undertaken from the starting point that *Ngāti Apa* was correct in law, and that the legal position was that the whole coastal marine area is subject to customary interests, unless expressly extinguished by some specific Act.[476] The review was carried out in 2009 over three months (including reporting), with the Panel holding nationwide consultation hui.[477]

On 30 June 2009, the Panel released its report; *Pākia ki uta, pākia ki tai*.[478] The Panel was clear it did not think its process was long enough and that the review was not the "longer conversation" recommended by the Waitangi Tribunal in

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[473] *Report of the Ministerial Review Panel*, above n 36, at 10.
[474] At 10. In addition, the Panel had to develop "workable and efficient" options to resolve any issues with the Act and consider how those options would integrate with existing legislation which regulate the coastal marine area.
[475] At 10.
[476] At 12.
[477] The Panel heard from 580 submitters, which included 236 oral presentations.
[478] The Marine and Coastal Area (Takutai Moana) Act was enacted in 2011.

2004.[479] Three key interests, or interest groups, in the foreshore and seabed were identified: Māori (or mana whenua) interests; public interests; and private interests.[480] The Panel concluded the public interest was limited to rights of navigation and fishery, noting however, there is a national culture that has grown over the last 100 years that sees the coastal marine area as a public recreation ground, which is the birthright of every New Zealander.[481] What is in contention in the Panel's view, is the nature of Maori interests, and how they could be fairly recognised and balanced against public and private interests in the foreshore and seabed area.[482] The Panel acknowledged that Māori and the public hold competing and conflicting cultural views about the coastal marine area; however, the report reinforced that when conflicting views between Māori interests and other interests are discussed, they are not an excuse for promoting one interest over another or denying customary rights, saying "in law, customary rights are as good as any other private, property right."[483]

The Panel's strong view was that the 2004 Act should be repealed, adding it was "simply wrong in principle and approach" where it severely discriminated against Māori:[484]

> It imposed extremely restrictive thresholds for the recognition of customary interests and severely reduced their nature and extent. It drew on legal tests that had developed in other countries whose historical treatment of the issue was entirely different from our own. It was simply wrong in principle and approach. The timing was also wrong. It caused much anguish and concern to Māori and to many non-Māori as well.

The Panel said a territorial customary rights order would be "very difficult to obtain and can fairly be said to offer very little that is tempting in terms of practical outcomes."[485] The Panel went on to say that what was provided for

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[479] *Report of the Ministerial Review Panel*, above n 36, at 6, 91-92, 142, 154, 159.
[480] Private interests were specified freehold interests defined in the Act (s 5) to mean, forms of private title in the foreshore and seabed, including land held pursuant to a certificate of title under the Land Transfer Act 1952 and Māori freehold land.
[481] The Panel commented on whether this "national culture" that has developed over time extends the public interest beyond a navigation and fishery interest.
[482] *Report of the Ministerial Review Panel*, above n 36, at 12.
[483] At 73.
[484] At 12.
[485] At 128. In addition to finding the Act was discriminatory to Māori, the Panel said the Act contravened fundamental constitutional principles of New Zealand's unwritten constitution,

Māori in the Act was not an adequate recompense or a fair exchange for the rights the Act extinguished.[486] The Panel provided five reasons for reaching this view and these are summarised below:[487]

1) The Act is obviously discriminatory – The Act extinguishes only customary titles and therefore discriminates on the grounds of race;
2) There are new thresholds that are not part of our law – The threshold tests in the Act came from countries, unlike ours, where there was no policy to recognise native land rights;
3) The thresholds are much too high – The legal tests in the Act are far too restrictive and make customary rights extremely difficult to obtain;
4) The Act produces for Māori an inadequate result – Should an applicant group overcome the hurdles of the legislation there are only two possible outcomes; either commence negotiations with the government or establish a foreshore and seabed reserve which the Panel said to be more or less pointless; and
5) The Act creates significant uncertainty – The Act creates a mass of statutory complexities and creates confusion around customary rights and management of the foreshore and seabed.

The Panel included two overarching proposals it considered to be workable models for resolving the issues with the Act: the National Proposal; and/or, the Regional Iwi Proposal.[488] In summary, the national model focused on a national resolution, by using a bicultural body with ongoing oversight of the whole coastal marine area and proposing, at a national level, a legislative framework by which national and local solutions may be found to accommodate customary ownership. The regional model focused on achieving the same objective by regional and national negotiations directly between Crown and iwi and hapū. The Panel

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including the rule of law and separation of powers, which maintain, in their simplest interpretation, that Parliament and the courts are separate and that it is not for the Government to interfere with the work of the courts.

[486] *Report of the Ministerial Review Panel*, above n 36, at 139.

[487] At 139-142.

[488] At 151 - the Panel said that either proposal, or a combination of the two, would achieve an "expeditious resolution". See also: 154-155.

recommended the continuation of the courts, saying that no one should be denied the opportunity to have their full customary rights determined by legal process. [489]

In the Panel's view, it was essential to establish a new paradigm within which to consider an effective approach to rights to the foreshore and seabed, regardless of which proposals were adopted by the Crown. It said, "[f]undamentally, a political solution is required based upon treaty principles of good faith."[490] As such, it was recommended that both the national and regional proposals be underpinned by a Treaty of Waitangi principles framework.[491] The treaty, in the Panel's view, was of paramount significance and offered the resolution for the way forward, it said:[492]

> The Treaty provides the government and its diverse constituency with the most historical and political foundation, moral authority, and guiding principles to develop a new paradigm for action to resolve the issue of the foreshore and seabed.

The Panel said the treaty framework was to reflect and accept the spirit of the treaty, which was to provide for two people in one land; "it is time to expect that both cultural views in respect of the foreshore and seabed should be recognised in law and to the extent practical, reconciled."[493] The Panel said that its proposed treaty framework needed to be more widely discussed and further developed as part of the longer conversation that it envisaged would be necessary. In its findings, the Panel cautioned that the conversation would take considerable time and effort, and goodwill would be required to repair and rebuild the relationship of trust that was damaged when the Crown enacted the Foreshore and Seabed Act 2004.[494] The Panel did not engage with issues of legitimacy or the relationship between kāwanatanga and rangatiratanga. Rather, it discussed general ideas for a

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[489] This was on the basis that it was the Panel's view that the High Court is primarily the custodian of the law, not the keeper of fact, and that the customary issues are primarily issues of fact, not law, therefore the High Court should be primarily concerned with appeals and review.
[490] *Report of the Ministerial Review Panel*, above n 36, at 158.
[491] The Panel developed, and it said - admittedly on its own accord - what it considered to be an approach or foundational framework based on the treaty. The Panel also considered the issue from other perspectives or frameworks, including human rights, property rights, environmental sustainability and economics and commerce.
[492] *Report of the Ministerial Review Panel*, above n 36, at 79.
[493] At 12.
[494] At 78, 88. In proposing that the Foreshore and Seabed Act 2004 be repealed, the Panel also recommended that another Act which establishes a new regime, with transitional provisions, take its place (at 152).

treaty framework based on the fundamental principles of partnership, reciprocity and active protection, justice, fairness, equity and sustainability:[495]

- The principle that customary rights attach to hapū and iwi (as defined by hapū and iwi themselves) and not to Māori in general;
- The principle of reasonable public access;
- The principle of equal treatment where there should be equal treatment of similar cases;
- The principle of due process where process should not be unduly constrained;
- The principle of good faith where negotiations with iwi and hapū are respected;
- The principle of restricting alienation regardless of who holds ownership of the foreshore and seabed;
- The principle of compensation where property rights are extinguished; and
- The principle of the right to development in order that customary rights are not frozen in 1840.

The idea was that the framework would be incorporated into the statute and would govern the resolution of foreshore and seabed issues. The Panel's options are analysed in the following chapter, which examines how the Crown considered the Panel's report when it developed the new regime. [496]

## 5.7 Concluding remarks

The Crown's foreshore and seabed policy was released shortly after *Ngāti Apa*; the Crown proposing the enactment of legislation to remove the jurisdiction of the High Court and Māori Land Court to grant customary title of the foreshore and seabed to Māori. The policy was considered under urgency by the Waitangi Tribunal, with the Tribunal finding that the policy was unfair and prejudicial towards Māori, and a serious breach of the treaty. The Tribunal's report was dismissed by the Crown and the Foreshore and Seabed Act 2004 was passed with haste. The Act vested ownership of the foreshore and seabed in the Crown and

[495] At 153.
[496] There is also further analysis in Chapter 9 regarding the multifaceted approach to addressing the takutai moana issue.

put in place a new regime for the recognition of new customary rights that were managerial in nature.

The Ministerial Panel which included Sir Edie Durie, Professor Richard Boast and Hana O'Regan was appointed in 2009 to conduct a review of the 2004 Act. The Panel, having identified the prejudicial impact of the Act for Māori, recommended the 2004 Act be repealed. The Panel proposed that new legislation be based on a Treaty of Waitangi framework which balanced the rights and interests of the treaty partners. The Panel's view was that Māori should be able to assume their customary rights in relation to the foreshore and seabed, either through a national or regional settlement programme, where in either proposal, the right for parties to go to court be retained. The Panel also considered it important that further discussion take place, as the proposals represent the thinking of the Panel, not necessarily those who participated in the review. The longer conversation envisaged by the Panel did not take place and the Crown commenced policy development for the replacement regime.

# CHAPTER 6: MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011 – CONTINUED TREATY BREACH

## 6.1 Introduction

The Marine and Coastal Area (Takutai Moana) Act 2011 became law on 31 March 2011. The 2011 Act is generally structured as follows:

- Part 1 Preliminary provisions;
- Part 2 Common marine and coastal area;
- Part 3 Customary interests; and
- Part 4 Administrative and miscellaneous matters.

Minister Finlayson, the Attorney-General at the time the Act became law, said the new Act was a "just and durable resolution" to the foreshore and seabed issue.[497] The Act is, at least in both the last National Government and current Labour Government's mind, the final response to the takutai moana debate as the Crown position is that the Act fairly balances the interests of all New Zealanders in relation to the foreshore and seabed.[498]

Again, common law rights are no longer available as the jurisdiction of the High Court and Maori Land Court to grant common law rights has been removed by the Act. The 2011 Act provides for two new legal rights that Māori can make applications for: customary marine title under s 58; and protected customary rights under s 51. Māori could either make applications through the High Court or Crown engagement pathway under the Act.[499]

There were any number of options available to the Crown to recognise Māori customary rights. Some options would protect Māori more than others, and some would be in greater alignment with the treaty than others. The Waitangi Tribunal and the Ministerial Review Panel had made a series of recommendations to the

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[497] Minister Finlayson, Press Release, *Marine and Coastal Area (Takutai Moana) Bill Passes* (Scoop website, 24 March 2011). Source: <http://www.scoop.co.nz/stories/PA1103/S00419/marine-and-coastal-area-takutai-moana-bill-passes.htm?from-mobile=bottom-link-01>

[498] For example, see: Waitangi Tribunal *Crown submissions in response to application for urgency* (Wai 2660, #3.1.12, 20 January 2017) at [18], [36].

[499] Marine and Coastal Area (Takutai Moana) Act 2011, s 94. A protected customary right or customary marine title may not be recognised in any other way.

Crown with the treaty in mind, both with the view to ensuring prejudice did not arise for Māori from the regime that was to be imposed over the takutai moana.

This chapter begins with an overview of the legislative background or policy development for the 2011 Act, followed by a review of the main provisions of the Act which concern Māori rights to the takutai moana. The Act is considered in treaty terms and with reference to the findings of the Waitangi Tribunal and Ministerial Review Panel. The primary conclusion made in this chapter is that the Marine and Coastal Area (Takutai Moana) Act 2011 is inconsistent with the treaty on three main grounds:

1. The Act is inconsistent with Article 2 which guarantees Māori active protection of tino rangatiratanga, the Act having been passed without negotiation or agreement from Māori;

2. The Act is inconsistent with Article 2 which guarantees Maori active protection of tino rangatiratanga, on account of the rights under the Act failing to provide for the exercise of rangatiratanga by Māori over the takutai moana; and

3. The Act is inconsistent with the principle of equity and equal treatment under Article 3 of the treaty, where it abrogates the rights of whānau, hapū and iwi while leaving the rights of others (private, public and Crown) intact.

## 6.2 A treaty framework for considering the 2011 Act

The Tribunal's Foreshore and Seabed Report 2004 explains what treaty rights and principles applied to policy development over the takutai moana in 2003-2004. This report was in place when the Crown enacted the 2004 Act and, as such, the report was still relevant when the Crown developed the replacement regime between 2009 and 2011. In addition to the Ministerial Review Panel's report in 2009, the Crown should have had regard for and implemented the Tribunal's findings and recommendations in order to ensure that the new regime complied with the Crown's treaty duties at that time. This section draws on the findings and recommendations from the Tribunal's 2004 report to establish a treaty framework,

or a set of treaty standards and principles, in order to consider the consistency of the 2011 Act in relation to the treaty.[500]

Firstly, it needs to be noted that when the Tribunal considered the Crown's foreshore and seabed policy in 2004, it did so on the presumption that the New Zealand Government wanted to be a good government and exercise its law-making functions fairly.[501] The Tribunal was then operating under the long-held jurisprudential position that the Crown acquired sovereignty or kāwanatanga under Article 1 of the treaty, and that kāwanatanga must be exercised in light of the guarantees in Article 2.[502] This understanding is expressed in terms of the principle of reciprocity or exchange, where Māori ceded sovereignty according to the English text, or kāwanatanga according to the Māori text, in exchange for the Crown's protection of tino rangatiratanga.[503] The principle of reciprocity and exchange is rejected in this discussion as this principle is based on the Crown's assumption that the chiefs ceded sovereignty under the treaty. In 2014, the Wai 1040 Tribunal found that sovereignty was not ceded by the chiefs. Logically, the thinking of the 2014 report was not considered in 2004, nor when the Crown developed the 2011 Act. This chapter therefore begins with the Tribunal's Foreshore and Seabed Report of 2004, as this was the relevant jurisprudence available to the Crown at the time when the 2011 Act was developed.

In 2004, the Tribunal considered the foreshore and seabed policy against what it considered to be fair, in terms of the treaty, as well as in relation to legal and international human rights norms.[504] As an interpretive approach, the Tribunal took the meaning from the actual texts of the treaty, as well as from principles that arise from the context in which the treaty agreement was reached in 1840.[505] The plain words of Article 2 of te Tiriti guarantees "te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa" to Māori (Māori version). Article 2 of the Treaty guarantees Māori:[506]

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[500] How the treaty framework now needs to evolve in light of the Wai 1040 *He Whakaputanga me te Tiriti* findings on sovereignty is addressed at Chapters 9 and 10.
[501] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at xxi.
[502] At 127.
[503] At 130
[504] At 81.
[505] At 15, 127.
[506] At 127.

> … full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and such other Properties as they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession (English version).

Both versions protect rangatiratanga over the takutai moana. The Tribunal states that the Crown's kāwanatanga or right to make law is qualified and must be exercised in light of the guarantees to Māori in Article 2.[507]

In terms of the foreshore and seabed policy, the Tribunal said the time allowed by the Crown for policy development was "extremely short". Furthermore, it observed that the Crown was determined to pass legislation "irrespective of the consequences".[508] The Tribunal suggested a slow and deliberate pace of policy development would be more suited to the way Māori prefer to do things.[509] The Tribunal said:[510]

> It may be the conversations would be long ones, and would take place over an extended period. We think that is appropriate. The issues are complex, the rights being interfered with are important ones.

Given that any revised policy would have a significant impact on Māori rights to the takutai moana, the Tribunal was clear that "full compliance with the Treaty would require the Crown to negotiate with Māori and obtain their agreement to a settlement".[511] The Tribunal said:[512]

> We think that the standards of honourable conduct, fair process, and recognition of each other's authority … require the Crown and Māori to try to reach a negotiated agreement.

A longer conversation, as well as negotiation and agreement from Māori were therefore required for any policy which impacted Māori rights over the foreshore and seabed to be treaty compliant.

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[507] At 127.
[508] At 120.
[509] At 93.
[510] At 140.
[511] At 139, 140
[512] At 133.

The Foreshore and Seabed Tribunal identified treaty principles that flow from the broader meaning and context of the treaty:[513]

> (a) The principle of partnership: A principle that requires that parties act with utmost good faith towards each other;
>
> (b) The principle of active protection of te tino rangatiratanga: A duty of the Crown which 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';
>
> (c) The principle of equity and options: A duty under Article 3 of the treaty that Māori be treated as equal citizens; and
>
> (d) The principle of redress: The principle that if rights are to be taken away then compensation must flow.

The Muriwhenua Tribunal described the principle of active protection as embracing three other key elements of the treaty relationship, including "honourable conduct, fair process, and recognition by the Crown and Māori of one another's authority".[514] These are the overarching principles and standards that are applied in this chapter.

## 6.3 The policy development was inconsistent with the principle of active protection of tino rangatiratanga under Article 2

This chapter contends the 2011 Act is inconsistent with the treaty on three key grounds. The first ground is that the Act is inconsistent with Article 2 which guarantees Maori active protection of tino rangatiratanga, when the Act was passed without negotiation or agreement from Māori. A review of the policy development for the 2011 Act highlights that the treaty was not at the forefront of the review, that the Crown unilaterally determined the core components of the new regime, and that the policy development was too fast and did not properly include whānau, hapū and iwi who would be impacted by the policy regime. These points are examined below.

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[513] At 130-133.
[514] At 132.

### 6.3.1 The treaty was not a primary focus of the review

Policy development for the 2011 Act commenced after the Ministerial Review Panel's report on the Foreshore and Seabed Act 2004 was released in June 2009. On 17 July 2009, a paper was provided by the Attorney-General to Cabinet on the Panel's report and contained proposals for a replacement regime. A review of this paper shows that the Crown was selective in its consideration of the findings and recommendations of both the Waitangi Tribunal's report in 2004 and the Ministerial Review Panel's report in 2009.[515] The Crown accepted the Ministerial Review Panel's recommendation that the 2004 Act had a disproportionate impact on Māori interests and that a full repeal of the Act was necessary.[516] However, it appears that instead of engaging with Māori on how the review should proceed, the Crown scoped the core components and timeframes for the repeal. In doing so, the Crown disregarded the recommendation of the Panel that the findings contained in the report be a catalyst for further discussion with Māori.[517]

The Ministerial Review Panel said that the foundation for the new Act must go to the core of the issues; "the conflict between two world views, between customary and public interests and how both can be respected".[518] It said the answer to the reconciliation of the cultural difference is to build on the framework of the Treaty of Waitangi:[519]

> The Treaty is important in reconciling Māori customary rights and the national culture of access across the foreshore and to the sea. It compels respect for the legitimate, cultural expectations of both of the two founding peoples of the state.

The Cabinet paper on the Panel's report did not discuss the Panel's suggestion that, regardless of what options the Crown considered for the new regime, the options should be underpinned by a Treaty of Waitangi framework. It was not until a later Cabinet paper that the Treaty of Waitangi first appears as a guiding principle underpinning policy development, despite other guiding principles

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[515] *Wai 2660, #A69(a)*, above n 64, at 1-15.
[516] At 49, 73. Those interests included recreational and conservation interests, customary interests, business and development interests and local government interest.
[517] *Report of the Ministerial Review Panel*, above n 36, at 6, 159.
[518] At 152.
[519] At 152.

having already been stated in earlier Cabinet papers.[520] Te Puni Kōkiri also suggested additional principles for the review, including due recognition and protection of rights and interests, that priority should be given to long-held rights, intervention should be kept to a minimum, and that customary rights develop and not be limited to 1840.[521] The Attorney-General did not incorporate these additional principles as he believed they were already inherent in the principles he had stipulated.[522]

The Crown settled on the following guiding principles for the repeal, which in the end did include the Treaty of Waitangi:[523]

- good faith – to achieve a good outcome for all: following fair, reasonable and honourable processes;
- Treaty of Waitangi – the development of a new regime must reflect the Treaty of Waitangi, its principles and related jurisprudence;
- recognition and protection of interests – recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;
- equity – provide fair and consistent treatment for all;
- certainty – transparent and precise processes that provide clarity; and
- efficiency – a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies.

Despite the Treaty of Waitangi being included as a guiding principle for the review, most Cabinet papers, under the section on "Treaty of Waitangi Implications", noted that "[t]here are no Treaty of Waitangi implications that arise from this paper".[524] A later Cabinet paper dated August 2010, included approximately one page on treaty implications; however, this was withheld from the release of discovery documentation and it is not possible to ascertain what the Government's consideration of the treaty was at that time.[525] There was also negligible reference to the Waitangi Tribunal's report on the foreshore and seabed policy in all Cabinet papers on the repeal. This is inconsistent with the Crown's

[520] *Wai 2660, #A69(a),* above n 64, at 57.
[521] At 26, 103, 112-113.
[522] At 58.
[523] At 58.
[524] For instance, see: *Wai 2660, #A69(a),* above n 64, at 36, 118, 137.
[525] *Wai 2660, #A69(a),* above n 64, at 660-661. See also: 872.

own principle for policy development as noted above, with respect to the notion that the regime should reflect the principles of the treaty and related jurisprudence.

Limited recognition of the treaty by the Crown can be construed as a failure by the Government to properly consider and incorporate the treaty during the development of the new policy. It was an early but critical failure that set the tone for the inadequate way in which the Crown would draw on the treaty and involve Māori in the review.

### 6.3.2 The Crown's unilateral determination of bottom lines for the new regime undermined Māori rights

There were no material differences between the Government's bottom lines for the 2004 Act and the new legislation. The Crown's bottom lines for the new legislation were restated as reasonable public access, recognition of customary interests, protection of fishing and navigation, and protection of existing use rights to the end of their terms.[526] The new legislation would need to ensure the continuation of Crown and local authority functions, and Crown ownership of nationalised minerals.[527] The Attorney-General was also clear that the new Act should be congruent with existing legislation operating in the coastal space.[528] This bottom line ignored the Ministerial Review Panel's recommendation that consultation on the new regime should include a reconsideration of the body of law relating to the coastal area.[529]

The Crown's bottom lines for the review set the parameters, or scope, in which Māori rights to the takutai moana could be recognised. The Attorney-General acknowledged that the effect of the Crown's bottom lines for the repeal was to "significantly diminish" the property rights in customary title, but despite this, no compensation would be provided to Māori. He said:[530]

> My current thinking is it may be necessary to provide for a customary title that is subject to the government's bottom lines. (i.e. access, navigation,

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[526] At 73.
[527] At 29, 31. To ensure certainty, the Government required that the new legislation include the right of the Crown and local authorities to manage the foreshore and seabed subject to mechanisms recognising and protecting either customary title or right.
[528] At 143.
[529] *Report of the Ministerial Review Panel*, above n 36, at 158.
[530] *Wai 2660, #A69(a)*, above n 64, at 81-82.

> and fishing, and existing use rights). The effect, however, of the government bottom lines proposed in this paper is to significantly diminish the property rights available in an award for customary tile. For instance, the ability to exclusively possess the property could not occur if there are to be exercisable statutory rights of public access, navigation and fishing.
>
> Generally speaking, this approach would likely be to require compensation for any diminishing of the bundle of rights. Parliament has also recognised that, in some circumstances, any interference or removal of private property rights requires compensation to be paid to the affected land owner.
>
> I do not think that a monetary compensatory approach accords with statements made by submitters to the Panel that "money is not an issue" for Māori. I think a more appropriate approach than monetary compensation is to augment the diminished bundle of property rights with regulatory rights. I think that in some circumstances, regulatory rights could be considered on par with or more valuable or powerful than some incidents of fee simple title.

The issue of whether compensation should be provided for the diminishing of Māori rights under the proposed legislation did not feature in any material way in the remainder of the policy development (unless the information was contained in the sections withheld under legal privilege). This was despite recommendations from the Waitangi Tribunal and Ministerial Review Panel that if rights are to be taken away then compensation is essential.

The question of who would own the foreshore and seabed under the new regime was a key issue in the early policy phase, which once settled, would inform the rest of the replacement regime. The Crown considered various options, including an absolute vesting of the foreshore and seabed in the Crown, who could then grant interests to others. [531] It also considered an interim vesting option, whereby an interim owner acts as full legal and beneficial owner until the issue of ownership is dealt with.[532] Other options included the Crown as the absolute

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[531] At 839.
[532] At 63-65. This would be similar to the Ministerial Review Panel's recommendation of an interim Act.

owner, Māori and the Crown as joint absolute owners, and Māori as absolute owners.[533]

The Crown determined that ownership would be dealt with under the new regime by clarifying the roles and responsibilities of interest holders in the foreshore and seabed. The Crown believed this was the best way to balance the interests of all New Zealanders. It is from this point in the review that the notion of non-ownership of the marine and coastal area evolved. The following Cabinet extract on the reframing of ownership under the new regime is worth citing in full because it highlights how the concept of non-ownership achieved the Crown's bottom lines. The Attorney-General said:[534]

> … Tied up with the issue of ownership is also the perception of what ownership *is*. There are widely held and sometimes inaccurate views about the meaning of ownership and the actual authority and control that ownership brings with it. Control or authority can also be burdened by liability. The person who has control is often ultimately liable for matters such as abandoned structures, vehicles and other issues.
>
> In the foreshore and seabed, authority and control can be broken down into specific roles and responsibilities (which include rights and interests). For example, the authority to issue resource consents lies with local government even though in the coastal marine area the Crown owns all public foreshore and seabed.
>
> Ownership is one way of providing certainty and clarity of roles and responsibilities in the foreshore and seabed but, depending on how it is framed, it can be viewed as a relatively blunt approach. There are other ways to provide the same certainty and clarity.
>
> …
>
> Instead of identifying an owner of the foreshore and seabed, the replacement regime would provide detail on roles and responsibilities of all interests in the foreshore and seabed. The detail of those roles and

[533] At 63-65. Under the absolute ownership option, the owner would have full legal and beneficial title. It can grant proprietary interests (which are less than absolute ownership) to the parties.
[534] At 129-130, 133.

> responsibilities would be informed by the legislative regimes already in place as well as consideration of the interests involved and their nature and extent (including whether they are proprietary or non-proprietary).

The Attorney-General said the move away from ownership discourse is bold, saying:[535]

> It is innovative and reflects New Zealand's longstanding history of taking an inclusive approach to the management of important resources. This approach also recognises the uniqueness of New Zealand. It has the potential to align with how Māori traditionally interact with the foreshore and seabed where the different elements and interests are not fragmented but each informs and strengthens the other.
>
> This new approach is effectively a "shared space" concept whereby different public and private interests co-exist. It will be critical for this approach to cover both regulatory and property rights given the replacement regime will need to connect with more than 40 pieces of legislation operating in the coastal marine area, some of which are property related and others that are related to regulation.
>
> This concept would be unique to New Zealand because it would not derive from a purely regulatory framework. A demarcation between property and regulatory interests can often be artificial. An approach that looks at both property and regulatory interests in the round can produce a comprehensive and durable regime that recognises the Crown's role to regulate the coastal marine area while ensuring appropriate recognition and participation of all interests including customary.
>
> I think this new approach could deliver a permissive replacement regime that uses simple, transparent and effective processes and results in an area where everyone's interests are provided for, everyone knows what to do, when and how to do it and there are processes in place to resolve any uncertainties.

[535] At 133-134.

A special title or status would apply to the foreshore and seabed termed the "common marine and coastal area". The Attorney-General said the concept of common marine and coastal area would be successful if those with interests clearly understood their distinct roles and responsibilities under the new legislation.[536] This would be achieved by ensuring the continuation of the Crown's roles and responsibilities, protecting public rights of access and navigation, and clearly specifying the nature and extent of the new rights available to Māori under the new Act.

This section demonstrates that the Crown determined the bottom lines for the new regime. The Crown knew its bottom lines would significantly diminish the rights of Māori. It appears Māori were not provided with the space to participate in how key components of the policy were developed. The exclusion of Māori perspectives and decision-making on core aspects of the policy would limit how Māori rights were provided for in the new legislation.

### 6.3.3 Policy development was too fast and did not include negotiation and agreement from Māori

The Crown did not take the advice of the Tribunal and Panel that process was just as important as the outcome, and that the Crown should proceed slowly with policy development.[537] The policy development for the new regime commenced in July 2009 and ran for approximately 18 months until May 2011, when the Marine and Coastal Area (Takutai Moana) Act 2011 became law. In November 2009, Cabinet considered three timeframes for repealing the 2004 Act: option 1 would involve no consultation component; option 2 would provide for constrained policy development and a four-month select committee process; and option three included a longer policy development phase and a four-month select committee process.[538] Cabinet decided on option two, despite the Attorney-General describing it as "both ambitious and the bare minimum" because it did not want to be dealing with what was likely to be a controversial Bill in an election year.[539] The Attorney-General set an "ambitious" timeframe to introduce the Bill to the House by mid-2010 and established a small group of Ministers to facilitate

[536] At 134.
[537] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 93, 120, 124-125.
[538] *Wai 2660, #A69(a)*, above n 64, at 92-94.
[539] At 93.

decision-making.[540] Cabinet agreed to a four-week public consultation process for the purpose of implementing the Government's preferred regime for replacing the 2004 Act, which ran from 31 March 2010 to 30 April 2010. Consultation focused on the core elements of the regime including non-ownership, recognition of non-territorial and territorial customary interests, the courts and negotiations pathway, and tests for recognising customary interests; all of which were underpinned by the Crown's bottom lines.[541]

The speed of the legislative process was identified as an issue when the Marine and Coastal Area Bill was referred to the Select Committee in September 2010. Submissions were taken for just over a month and submitters complained the legislative process was rushed.[542] Ironically, the Labour Party, which was responsible for the 2004 Act, recommended that the 2010 Bill should not proceed in its current form because of the level of opposition from submitters, inadequacies in the legislative process, and the failure of the Bill to remedy issues related to the 2004 Act.[543] The Labour Party complained that the National Government blocked legal advice being obtained by the Committee on the effect of the changes to the threshold tests for the establishment of customary marine title.[544] It also said that the Government allowed less than a day for the Labour Party to consider the 500-page departmental report, which dealt with complex technical issues, and that the National Party failed to provide a track-changed version of the Bill which, in turn, made the Labour Party consideration of the Bill impossible.[545]

The Select Committee recommended by majority that the Bill be passed without amendment.[546] Furthermore, the report of the Department of the Prime Minister did not recommend that any changes be made to the Bill.[547]

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[540] At 93.
[541] Waitangi Tribunal *Appendices to Brief of Evidence of Doris Johnston* (Wai 2660, #A131(a), 18 March 2019) at 14. See also: Waitangi Tribunal *Chronology of Events from Evidence of Doris Johnston* (Wai 2660, #A131(d), 29 March 2019).
[542] For example, see: (8 March 2011) 670 NZPD 16976 (Marine and Coastal Area (Takutai Moana) Bill – Second Reading, Parekura Horomia).
[543] Marine and Coastal Area (Takutai Moana) Bill (201-1, 9 February 2011) (Report of the Maori Affairs Committee) at 3.
[544] At 3.
[545] At 3.
[546] At 2.
[547] See: Waitangi Tribunal *Index and document bank for the brief of evidence of Lucy Jane Mouland* (Wai 2660, #B3(a), 7 November 2019), Volume 13, at 42.

A review of the policy development phase suggests that the Crown had limited engagement with the Iwi Leaders Forum, Te Puni Kōkiri and the Minister of Māori Affairs. The Government's consultation with Māori during the development of the Bill included limited meetings with iwi leaders, and the establishment of a technical advisory group that would meet weekly to discuss issues of shared importance and provide advice to the Minister on a monthly basis. It is not clear from the evidence produced in the Wai 2660 Tribunal proceeding how Māori perspectives on the Government's proposals for the revised regime of customary rights were tested beyond both the Bill process and regular public consultation. There were no papers from the technical advisory group produced under discovery. There was limited reference in Cabinet papers to views expressed by Te Puni Kōkiri, the Iwi Leaders Forum and the Minister of Māori Affairs, most of which did not indicate support for the policy.[548]

Further, the recommendations which were made by Minister Flavell, the Minister of Māori Affairs and Te Puni Kōkiri, do not appear to have been incorporated into the new regime. For example, the concept of Tipuna Title was rejected by the Attorney-General without enough exploration of what the title could entail. The Minister of Māori Affairs proposed that a 'statutory tipuna title' could be used to recognise Māori ownership, while safeguarding alienation of the foreshore and seabed.[549] The concept was proposed in "the Treaty-based hope" that it would be accommodated and respected by the Crown.[550] Three underlying principles of Tipuna Title were that it was a concept sourced from tikanga with no European equivalent, that as a concept of title it includes a set of rights and entitlements, and that the integrity of the title is dependent on acknowledgement that the foreshore and seabed belongs to Māori.[551] The Attorney-General's perspective on Tipuna

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[548] Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai 953, December 2002) at 71. This group was established in conjunction with the Iwi Leaders Group. The technical advisory group included four advisors to the iwi leaders; Sacha McMeeking, Dayle Takitimu, Matanuku Mahuika and Justine Inns, and four government advisors including the Senior Advisor to the Minister of Māori Affairs, Senior Advisor to the Attorney-General, and two officials from the Ministry of Justice (the Director and a Manager of the Foreshore and Seabed Unit). The comment above is not to say the group did not meet, however minutes were not located in the discovery, so it's not possible to discern further what input and impact the group had in the review.

[549] *Wai 2660, #A69(a)*, above n 64, at 34.

[550] At 41.

[551] At 41.

Title was that, on the spectrum of rights and interests, it aligned with absolute Māori ownership:[552]

> "Tipuna title" as expressed by the Māori Party would fall at the same end of the spectrum as absolute Māori ownership, but it is different because it sits outside of New Zealand's legal framework. For this reason, it is uncertain how, "tipuna title" would integrate with existing resource management frameworks in the coastal marine area.

The option of Tipuna Title was set aside as the Attorney-General's view was that it was akin to Māori ownership.[553]

The policy development and legislative process implemented by the Crown for the 2011 Act falls short of treaty standards. In 2004, the Foreshore and Seabed Tribunal said that the Crown's haste and unwillingness to make changes, together with its "unwillingness to make real or significant changes to its policy in response to Māori concerns, falls short even of a minimum interpretation of the principle of active protection".[554] Further, the Wai 953 Ahu Moana Tribunal said that consultation with Māori in a Select Committee phase was not representative of active protection:[555]

> … where a policy would significantly affect Māori, the Treaty requires a more active response from the Crown than one that rests solely on Māori views being considered in a report from the relevant select committee. That report comes far too late in the process of law making. In the normal course of events, the Crown should not rely on such a process, since it is not sufficient in Treaty terms to demonstrate active protection.

The treaty framework at the beginning of this chapter also speaks to the necessity for the Crown to negotiate and seek agreement from Māori for policy which impacts their rights to the takutai moana.

The discussion in this section highlights that policy development for the 2011 Act was fast, and that Māori had little influence on the legislative process. The Crown

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[552] At 64.
[553] At 64.
[554] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 133.
[555] Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai 953, December 2002) at 46.

considered the Waitangi Tribunal and Ministerial Review Panel's reports, and what findings and recommendations would influence the review – all without Māori input. The Tribunal's findings regarding how policy development should proceed; slowly, carefully and through negotiation and agreement with Māori, cannot be identified in the Crown's policy process for the 2011 Act. The Panel's recommendation that any policy over the takutai moana should be underpinned by treaty principles or a treaty framework was also not adopted by the Crown. Any claim by the Crown that the 2011 Act is now consistent with the treaty can only be taken as the Crown's own self-assessment, as Māori were not meaningfully engaged as treaty partners in the development of the replacement regime.

From the outset, the Crown determined the bottom lines for the review, and those bottom lines largely set the parameters in which Māori customary rights could be recognised. The Attorney-General acknowledged that the effect of the bottom lines was to diminish Māori customary rights, but that compensation was not necessary.[556] Māori were not engaged in policy development at a whānau, hapū and iwi level, and the input or suggestions from Māori within Government did not appear to have been incorporated by the Attorney-General. For example, the creation of a Tipuna Title over the takutai moana was a suggestion that would potentially improve the policy in favour of Māori; however, it was rejected before it was fully scoped. From the time the Crown's bottom lines were announced, through to the enactment of the 2011 Act, there were no major changes to the policy that would support the meaningful accommodation of Māori rights in the takutai moana. There was no negotiation with or agreement from Māori with respect to the new regime, and therefore the Crown policy development of the 2011 Act can be considered inconsistent with the Crown's duty of active protection under the treaty.

### 6.4 The Act is inconsistent with the right of Māori under Article 2 of the treaty to exercise rangatiratanga

The second ground on which this chapter argues the 2011 Act is inconsistent with the treaty has to do with the provisions for recognising Māori rights to the takutai moana under the Act, and the fact that they fail to provide for the Article 2 guarantee of tino rangatiratanga to Māori. To highlight this point, key provisions

[556] *Wai 2660, #A69(a),* above n 64, at 81-82.

of the 2011 Act concerning Māori customary rights are analysed below. The first part of this analysis explores how the preliminary provisions of the Act inappropriately incorporate tikanga and explains how the inclusion of tikanga is damaging to Māori. This is followed by a discussion on the "common marine and coastal area", and the new customary marine title and protected customary rights under the Act.

### 6.4.1 Inappropriate incorporation of tikanga Māori

A new feature of the 2011 Act is the incorporation of numerous Māori terms and tikanga. The use of Māori language in the Act gives the appearance the legislation provides for Māori rights to the takutai moana; however, on closer review, the terms are not well placed and create a new range of issues for Māori. During the reading of the Bill, the Hon Parekura Horomia said the inclusion of tikanga in law was a risk because tikanga is something live.[557] The Hon Parekura Horomia was concerned that the courts would assume a broad scope of power in determining what constitutes tikanga, and said it was important judges have the capacity to understand the nuances of hapū tikanga.[558] Similarly, Labour MP Mita Ririnui said, "[w]hen the High Court makes a decision on what tikanga and other customary practices are, it codifies them in law…", and the potential impact of codification is that it will lock Māori into an understanding of the world that is not right and that they are not comfortable with.[559] Mr Ririnui went on to say:[560]

> When tikanga is codified, it does not matter who makes the decision or who gives the advice; that is the legal precedent, and that is the end of it. What do they not understand about that? I am concerned that that member stands in this Chamber and tries to pull the wool over our eyes, and the

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[557] (15 March 2011) 670 NZPD 17181.

[558] (15 March 2011) 670 NZPD 17181 (Marine and Coastal Area (Takutai Moana) Bill – In Committee, Speaker Recalled, In Committee, Parekura Horomia). Hon Parekura Horomia also noted the concern the legislation would cause division among Māori:

> There can possibly be an agreement, but what is more important is that we do not fuel or encourage more conflict amongst the whānau and the hapū. In some parts that wehewehe is something that certainly puts asunder a lot of hard work by people in this building, by people outside, and especially by the whānau, hapū, and iwi. That is of interest.

[559] (16 March 2011) 670 NZPD 17280 (Marine and Coastal Area (Takutai Moana) Bill – In Committee, Speaker Recalled, In Committee, Mita Ririnui). Mita Ririnui on the codification of tikanga also said: "But the value of that relationship has now gone, because we are talking about codification. Everything that Māori once believed in will be codified in law, particularly where takutai moana is concerned. That in itself is an extinguishment of our practices".

[560] (17 March 2011) 670 NZPD 17393 (Marine and Coastal Area (Takutai Moana) Bill – In Committee, Mita Ririnui.

> eyes of the rest of Māoridom, in saying this bill is good for them, when Te Ao Māori, as they know, it is slowly disappearing.
>
> …
>
> This is a very simple issue. This is about us, about Māori people. This is about our customary rights, but the codification of those rights changes them. There is nothing wrong with going to court and arguing our case, but when tikanga, manaakitanga, and all those areas that we hold valuable are codified, then they are no longer ours.

Turning to the preamble of the 2011 Act, it reads:[561]

> This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations.

"Manaakitanga" is not well placed in the preamble, and the Act does not provide a definition of this term. Manaakitanga is the value or tikanga of hospitality, nurturing relationships and people.[562] What does manaakitanga mean in the context of this legislation? Are Māori to presume the Crown is talking about their desire to accommodate and share the takutai moana with others? Why the Government chose to use the tikanga of manaakitanga, rather than tikanga which denote authority and rangatiratanga or the treaty language of partnership in legislation that defines Māori authority, rights and interests, is peculiar. Where the preamble says the Act takes account of the "intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga", is it to be assumed that the Crown knows what those inherited and intrinsic rights are, or that they are capable of being translated into legal rights within legislation?

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[561] Marine and Coastal Area (Takutai Moana) Act 2011, Preamble.
[562] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 29 - Mead noted that the Law Commission said aroha was an "essential part of manaakitanga."

Section 4 is the purpose provision of the Act, and it also contains Māori concepts like "mana tuku iho". Section 4 reads:[563]

> (1) The purpose of this Act is to -
>
> > (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and
> > (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and
> > (c) provide for the exercise of customary interests in the common marine and coastal area; and
> > (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).
>
> (2) To that end, this Act –
>
> > (a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and
> > (b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and
> > (c) gives legal expression to customary interests; and
> > (d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and
> > (e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area –
> >
> > > (i) for its intrinsic worth; and
> > > (ii) for the benefit, use, and enjoyment of the public of New Zealand.

"Mana tuku iho" is defined in s 9 as the "inherited right or authority derived in accordance with tikanga".[564] "Tikanga" is defined in the same section as "Māori customary values and practices."[565] Boast says s 4 contains "four new basic interpretive principles" of the Act, which are intended to establish a durable

[563] Marine and Coastal Area (Takutai Moana) Act 2011, s 4.
[564] Marine and Coastal Area (Takutai Moana) Act 2011, s 9.
[565] Marine and Coastal Area (Takutai Moana) Act 2011, s 9.

regime to protect the legitimate interests of all New Zealanders, recognise the "mana tuku iho" in the coastal marine area, provide for the exercise of customary rights, and acknowledge the Treaty of Waitangi (Te Tiriti o Waitangi).[566] What does it mean to recognise the "mana tuku iho" of a group as an interpretive principle? How does the Act contribute to the continuing exercise of mana tuku iho? The Hon Shane Jones said "mana tuku iho" was "ill-defined" in the legislation and the result is that it will be "hotly litigated" and "hotly debated" as applications before the court bring Māori terminology into law.[567]

The Ministerial Review Panel said the Government did not understand the nature of Māori interests in the takutai moana well. It was therefore unlikely the Crown was going to get it right one year later when it formulated the new law with little involvement with Māori. The policy papers are quiet on why certain language was chosen or who provided advice on the manner it was included in the Act. The Crown's use of terms in the preliminary provisions of the Act gives a false sense of security that Māori rights are respected and provided for; however, this is not maintained in a wider review of the legislation. Māori language and tikanga were included in the Act out of context, with the effect of statutory incorporation such that the Crown has rewritten tikanga to mean less than what it does to Māori. It is simply an assumption by the Crown that the customary rights, as they are reframed in the legislation, adequately recognise the "mana tuku iho" and inherited rights and interests of Māori. It is unlikely that the legislators understood the complexity of Māori tikanga like "manaakitanga" and "mana tuku iho", but if they had, they would have known that including these concepts in legislation would have needed careful consideration and a high level of input from Māori; a minimum requirement of a treaty partnership.

### 6.4.2 Section 7 is one of the weakest treaty provisions in all legislation

There was no treaty provision in the 2004 Act. Section 7 of the new Act reads as one of the weakest treaty provisions contained in any legislation. The main issue with the wording of s 7 is the absence of language that would enable it to be used

[566] Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271-283 at 279. Source: <https://www.victoria.ac.nz/law/about/staff/richard-boast/publications-richard-boast/Foreshore-and-Seabed-Again-2011.pdf>.
[567] (15 March 2011) 670 NZPD 17181.

as an interpretive section by decision-makers. Section 7 of the 2011 Act states that the Act "takes account" of the Treaty of Waitangi:[568]

> **7 Treaty of Waitangi (te Tiriti o Waitangi)**
>
> In order to take account of the Treaty of Waitangi (te Tiriti o Waitangi), this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing, —
>
> > (a) in subpart 1 of Part 3, for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and
> > (b) in subpart 2 of Part 3, for customary rights to be recognised and protected; and
> > (c) in subpart 3 of Part 3, for customary marine title to be recognised and exercised.

The phrase "… in order to take account of the Treaty of Waitangi …" is self-fulfilling. Presumably, the provision for customary rights contained within the Act itself is fulfilment of the treaty, or the thing which brings the Act into alignment with the treaty.

Section 7 can be compared with treaty provisions in other environmental legislation, which, to at least some extent, contain obligatory language. Section 4 of the Conservation Act states: "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi."[569] Section 8 of the RMA requires that all persons exercising functions and powers under the Act "shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."[570] The inclusion of such language is intended to ensure the administration of legislation for the environment is done in a treaty-compliant way. While these provisions have been criticised for lacking in effect, they still carry more weight than s 7 contained in the 2011 Act, which simply takes account of the treaty by providing specified rights. The legislators would have been careful about the language used in s 7, and it is telling that it sits at the weakest

[568] Marine and Coastal Area (Takutai Moana) Act 2011, s 7.
[569] Conservation Act 1987, s 4.
[570] Resource Management Act 1991, s 8.

end of the spectrum in terms of treaty provisions; to the extent that the provision has no meaningful effect in terms of the treaty.

### 6.4.3 Common marine and coastal area

Earlier in this chapter, there was a discussion on how the Crown approached the issue of ownership of the takutai moana. Section 11 of the 2011 Act accords special status to the foreshore and seabed by vesting it in a title called the "common marine and coastal area".[571] The new status is intended to reflect the Crown's preferred approach and to clarify the roles and responsibilities of those with interests in the foreshore and seabed, rather than focus on traditional notions of ownership.[572] According to the Crown, this status balances all interests where neither the Crown, nor anyone else, can own the "common marine and coastal area", and all public rights of access, navigation and fishing are protected. There is an immediate exception to the status where private titles are not impacted by the new status and those owners who have private titles retain their portions of their privately owned foreshore and seabed.[573] In terms of the Crown's interests, while the Crown may not technically 'own' the foreshore and seabed, ss 11(5) and 11(6) continue the Crown's authority and the existing legislative regime for the coastal area, thereby leaving the Crown's position intact.

The concept of non-ownership, full protection of public and private interests coupled with the continuation of Crown authority, needs to be critically engaged. Boast said the vesting provision is one of the most interesting provisions and questioned whether the new title is just Crown land in another name.[574] Moana Jackson stated that 'non-ownership' under the new law remains an abrogation of Māori customary rights:[575]

> ... it still takes Iwi and Hapū interests off Māori and vests them in a new construct called a 'common space' in the marine and coastal area. It remains a confiscation because it is still a taking from Iwi and Hapū. The

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[571] Marine and Coastal Area (Takutai Moana) Act 2011, s 11.
[572] It is section 11(5) that ensures the Crown bottom line that existing rights and interests, and roles and responsibilities of Crown authorities, are continued in the new Act.
[573] Section 26 of the 2011 Act also ensures public rights of access, fishing and navigation and s 21 guarantees the existence of all existing private titles.
[574] Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271-283 at 279.
[575] Moana Jackson "A further primer on the foreshore and seabed: the Marine and Coastal Area (Takutai Moana) Bill" (8 September 2010) at 3. Source: http://www.converge.org.nz/pma/mj080910.htm>.

> only difference is that the final destination of the confiscated land is given a new name.

Kent McNeil argued that under the 2004 legislation, the extinguishment of customary marine title occurred by the vesting of the foreshore and seabed in the Crown, and removal of the jurisdiction of the High Court to give legal effect to those rights.[576] Similarly, the effect of the new common marine and coastal area status is still the removal of the jurisdiction of both the High Court and Māori Land Court to grant customary rights at common law. Māori are now barred from establishing an exclusive right to the foreshore and seabed via the courts, and in this way, the new Act effectively operates to remove or extinguish those rights, in the same way the 2004 Act did. It is also clear from the creation of the title that only Māori rights to the takutai moana are impacted, and in this way, Māori are discriminated against or treated unfairly, because their rights are changed, while the rights of all other interest holders remain intact. This was tantamount to unfair treatment of Māori rights – treatment which was said to be a discriminatory factor of the 2004 Act, and which manifested again in the creation of the common marine and coastal area under the 2011 Act.

The Government said that the success of the concept and new regime, would be dependent on clarifying the roles and responsibilities, and different interests of each interest group.[577] However, the notion of converting Māori rights is not a new concept. The Waitangi Tribunal identified that Māori had experience in the conversion of their legal rights in legislation concerning Māori fisheries and had a right to be concerned:[578]

> Māori have had previous experience of legislative intervention that converts legal rights into a right to participate in a process. One example is Māori customary fishing rights. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 extinguished all existing and future claims of Māori to commercial fishing rights. Customary fishing rights not captured by section 10(d) of the Act continued to exist and the Government undertook to develop policies and regulations to protect these rights and

[576] Kent McNeil "Legal Rights and Legislative Wrongs: Maori Claims to the Foreshore and Seabed" in Andrew Erueti and Claire Charters (eds) *Maori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) at 91-91.
[577] *Wai 2660, #A69(a),* above n 64, at 134.
[578] *Report on the Crown's Foreshore and Seabed Policy,* above n 27, at 115-116.

> recognise the special relationship between tangata whenua and places of customary food gathering importance. These rights, however, did not survive as an unrestricted legal right. Instead, the fisheries regulations and legislation put in place after the settlement limit the operation of the rights and control their management through two main mechanisms: taiāpure and mātaitai.

The Tribunal questioned whether Māori would have been better off if they had retained legal rights to their customary fisheries, rather than exchanging them for a process they had little control over, and no funding to implement. The Tribunal said Māori were right to feel dubious, adding "even if it all looks very promising at the outset, the reality can be quite otherwise."[579]

The discussion then turns to whether the new statutory regime appropriately provides for Māori rights and whether the regime is consistent with the treaty.

### 6.4.4 Customary marine title and protected customary rights are inconsistent with Article 2

Part 3 of the Act sets out the new statutory rights that "give legal expression" to customary interests in the common marine and coastal area. They are customary marine title under s 58 and protected customary rights under s 51. A review of the nature and scope of customary marine title and protected customary rights in the 2011 Act reveals that these rights are not an exchange for the common law rights that themselves have been taken away by the legislation. Not only are the rights a significant reduction on the scope of the customary rights awarded that may have been recognisable by the courts, but the level of authority provided to Māori under the new rights fails to provide for the authority encompassed in tino rangatiratanga under the treaty.

#### *Customary marine title*

The parameters for customary marine title and protected customary rights were scoped by the Attorney-General with reference to the common law of Canada and Australia. This was despite cautioning by the Ministerial Review Panel that the thresholds for those tests were restrictive and not necessary because New Zealand

[579] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 117.

has the treaty and its own body of law to draw on.[580] According to the Attorney-General's initial scoping, applicants for customary marine title would have to prove that they held an area of foreshore and seabed in accordance with tikanga since 1840 up until the present day, and without substantial interruption.[581] In terms of the statutory tests to be met by the applicants, the Attorney-General said "the level of prescription will be determinative of the outcome" and provided the following diagram:[582]

SPECTRUM OF TESTS THRESHOLDS/GEOGRAPHICAL OUTCOMES FOR EXCLUSIVE INTERESTS

| Low Thresholds | Moderate Thresholds | High Thresholds |
|---|---|---|
| ("Unrestrictive tests") | ("Moderate test") | ("Restrictive test") |
| Will likely result in large areas being awarded. | Will likely result in concentrated areas being awarded. | Will likely result in small discrete areas being awarded. |

**Figure 5: Spectrum of tests**

The Attorney-General also said the tests required to establish customary marine title "will be difficult to meet": [583]

> Applicants will be required to prove the elements of the tests. By the nature of the tests, customary marine title is unlikely to exist in any built-up or developed area with significant public traffic. I expect that customary marine title will only be able to be established over a small part of the New Zealand Coastline.

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[580] *Report of the Ministerial Review Panel,* above n 36, at 152. The Panel said a solution was needed that was based on New Zealand's own history legal development, not jurisdictions like Australia and Canada whose legal history is different to ours.
[581] The Attorney-General thought the addition of tikanga as part of the statutory test both acknowledged the traditional Māori system of authority over the takutai moana and mitigated the Panel's criticism of drawing on Australian and Canadian jurisdictions.
[582] *Wai 2660, #A69(a),* above n 64, at 32, 713.
[583] At 655-656.

An internal memorandum shows the Crown's own assessment was that Māori groups would only be able to meet the test for customary title for up to three per cent of the shoreline, and only a "fraction" beyond the coastline; this part of the paper reads:[584]

> *Likelihood of CMT Applications Meeting Test*
>
> …
>
> 30. Based on research, officials (sic) position to date, and noting that CMT decisions can only be made by the High Court of (sic) the responsible Minister, OTS estimate:
>
> a. 2-3% of the coastline would meet the test for CMT in any large parcel and this would be confined to isolated parts of the East Coast and Northland;
> b. smaller "pockets" of CMT are likely to exist in other places covering an estimated 0.5-1% of the coastline; and
> c. it is unlikely CMT can be established at all around urban areas such as Auckland, Wellington, Tauranga, Napier and in large parts of the South Island, North Taranaki, Bay of Plenty, and between Wellington and Wanganui.
>
> 31. There is also a question of how much of the Marine and Coastal Area (i.e. from high tide to 12 nautical miles offshore) in contrast to how much of the "shoreline" will meet the test. Officials consider it likely that only a small fraction of the Marine and Coastal Area beyond the "shoreline" will be able to meet the tests.

The Attorney-General considered that because customary title at common law included rights akin to land ownership, an award that drew on property rights and regulatory rights was appropriate: [585]

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[584] At 606.

[585] At 673. Note also the Attorney-General's position was that the Fisheries Act 1996 was a substantial stature governing the coastal marine and area and the awards under MACA should not provide for customary fishing rights as those rights are settled under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and non-commercial customary fishing rights are comprehensively provided for through regulations made under the Fisheries Act 1996.

In a no ownership regime, customary title will not amount to ownership of land, but the proposed awards have been developed to broadly reflect the interests and rights of a property owner. Awards are also proposed which would give the customary title holder a level of influence in the management of the area.

Where did matters ultimately fall for customary marine title under the 2011 Act? Section 58 reads:

**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.

Like 'territorial customary rights' under the 2004 Act, 'customary marine title' is both a new term and a new form of statutory right created by the legislation. Customary marine title takes away, and replaces, customary title that may have been gained at common law.[586] To be clear, while similarly termed, customary marine title under the legislation is not the same as customary title at common law because the Act reduces the property that could be recognised under common law.[587] This is another example of the Crown using wording in a misleading way.

The Crown adopted restrictive statutory tests that are likely to result in minimal reward. This is not materially different to the approach in 2004. Essentially, s 58 requires the applicant group to prove a four-pronged test, which resembles the

[586] Richard Boast, "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271-283 at 280-281.
[587] At 282.

tests for common law customary title. To achieve customary marine title under the 2011 Act, an applicant group must show that the area is:[588]

a) held in accordance with tikanga; and
b) has been exclusively used and occupied from 1840 to the present day; and
c) without substantial interruption; and
d) customary marine title has not been extinguished as a matter of law.

Section 59 sets out the matters that can be taken into account by the High Court or Minister when determining whether customary marine title exists in a specified area of the common marine and coastal area. Those matters include whether the applicant group, or any of its members:[589]

a) own land abutting all or part of the specified area and have done so, without substantial interruption, from 1840 to the present day; and
b) exercise non-commercial customary fishing rights in the specified area, and have done so from 1840 to the present day.

Section 59(2) clarifies the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 does not limit the consideration of whether a group exercises a non-commercial customary fishing right in the area. Section 59(3) also provides that the use of an area by persons, who are not members of an applicant group for fishing or navigation, does not preclude the applicant group from establishing the existence of customary marine title. The extent to which there has been ownership or the exercise of fishing rights in the specified area may also be taken into account.[590]

The requirement under the 2004 Act that customary title be recognisable in common law has been removed. However, elements of this test still feature in s 58(4), which requires the applicant to prove that customary marine title has not been extinguished as a matter of law. The most restrictive element of the test in the 2004 Act that claimants have continuous/contiguous title to land abutting the foreshore and seabed has also been removed. This is an improvement. Under s

[588] Marine and Coastal Area (Takutai Moana) Act 2011, s 58.
[589] Marine and Coastal Area (Takutai Moana) Act 2011, s 59.
[590] Marine and Coastal Area (Takutai Moana) Act 2011, s 59(1)(b).

58(9)(1), ownership of adjoining land is now a matter that can be taken into account by both the court and the Crown in determining whether customary marine title exists, but it is not a compulsory requirement as it was in the 2004 Act.

Boast's perspective is that the new customary marine title provisions are clearer and less restrictive, but there remains uncertainty with elements of the statutory tests that a group is required to prove. Boast states:[591]

> … it is fair to say that s 58 of the MCAA is clearer and less restrictive than its counterpart in s 32 of the FSA. The "continuous/contiguous" requirement has disappeared, but it remains necessary for an applicant group to show that the "specified area" is currently held "in accordance with tikanga" (Māori customary values and practices) and that it has been "exclusively used and occupied" from 1840 to the present day without substantial interruption.

***"In accordance with tikanga"***

The first test an applicant group must prove for customary marine title is that it "holds the specified area in accordance with tikanga".[592] It was the Minister's preference to include tikanga in the test for establishing customary marine title, but not specify in the legislation what tikanga can apply. The burden of proof is on the applicants, which means they must establish to the satisfaction of the High Court or Crown that a specified area is held in accordance with tikanga, and establish what those tikanga are.[593] Tikanga is defined broadly in s 9 of the Act as "Māori customary values and practices".[594] Under the 2011 Act, the High Court can refer tikanga matters to the Māori Appellate Court. The Crown can obtain the advice of a pūkenga or tikanga experts, but the final decision on what constitutes tikanga sits with the judges in the High Court and the Minister.[595] Decision-making as to whether a customary value or practice is or is not tikanga, and whether it sufficiently proves a group's claim to an area of takutai moana, sits outside of the group and is now in the realm of judicial and political decision-

[591] Richard Boast, "Foreshore and Seabed, Again" (2016) 9 NZJPIL 271-283 at 280
[592] Marine and Coastal Area (Takutai Moana) Act 2011, s 58(1)(a).
[593] Marine and Coastal Area (Takutai Moana) Act 2011, s 58(1)(a).
[594] Marine and Coastal Area (Takutai Moana) Act 2011, s 9(1).
[595] Marine and Coastal Area (Takutai Moana) Act 2011, s 99.

making. Here the concerns of the Hon Parekura Horomia and Mita Ririnui mentioned above take form.[596] When applications are determined, decisions on tikanga will be made within the confines of the statutory framework. Those decisions will comment on, and either validate or deny Māori evidence of tikanga; this threatens both Māori understandings and the ability and practice of tikanga over the takutai moana.

***Meaning of "exclusively used and occupied" and "without substantial interruption"***

Once an applicant group has established that they hold the area in accordance with tikanga, they must then prove they have "exclusively used and occupied it from 1840 to the present day", "without substantial interruption".[597] Exclusive use and occupation had a higher threshold to meet in the 2004 Act, where the applicants had to establish that the area was used and occupied to the exclusion of all persons who did not belong to the group.[598] This element of the test has been removed from the 2011 legislation; however, the requirement to show exclusive use and occupation from 1840 to the present day without substantial interruption remains. When considering this part of the test, Boast said that the legislation has to be construed in order to make it mean something and allow it to be workable in a range of situations.[599] In his view, "exclusivity" cannot be interpreted to mean 'to the exclusion of all persons' as it was clearly stated under the 2004 Act: "To impose such a standard to the test would mean that it would be virtually impossible for any group to satisfy the test." As a way of interpreting this test, Boast suggested looking to the scenarios that would destroy exclusive occupation, adding:[600]

> Clearly constructing a port installation or a freezing works or obliteration of the coast itself by reclamations will end exclusivity in the sense that a factual situation has come into being that it can no longer be said that the practical exercise of the aboriginal right is dominant in the locus in quo. Other types of uses are, it is suggested, not necessarily inconsistent with exclusivity. For example, a reasonably remote, if not wholly inaccessible,

[596] Above n 556-559.
[597] Marine and Coastal Area (Takutai Moana) Act 2011, s 58(1)(b)(i).
[598] Foreshore and Seabed Act 2004, s 74(1).
[599] Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271-283 at 281-282.
[600] Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 148.

> beach or strip of coast which is used by others for bathing, swimming and fishing could remain in "exclusive occupation" unless, perhaps the use reaches a level of intensity (such as the beach at Mount Maunganui) that any possibility of "exclusivity" has been obliterated.

What amounts to substantial interruption sufficient to destroy an applicant groups ability to hold an area in accordance with tikanga will be another subjective assessment by the High Court and Minister. Like Boast said in terms of the 2004 Act, for the legislation to mean something and be able to be applied, the test for substantial interruption would need to be more than contact and use by another person of another area. He speculated that built up areas and developments like ports and marinas might be considered as substantial interruption.[601] The requirement to establish exclusivity and no substantial interruption to coastal land will still likely be difficult for most Māori to establish where land alienation and coastal development since 1840 has been extensive. It will only be through a range of determinations by the High Court and Minister that parties will become clearer on what factors or thresholds demonstrate these tests are met.

***Scope of customary marine title award***

In terms of the scope of the award available for a group who is able to successfully prove the statutory tests as set out in the Act. Section 60 states that customary marine title provides the successful applicant with an interest in land and certain rights listed at s 62. In relation to s 62, those rights include a RMA permission right, a conservation permission right, a right to protect wāhi tapu, rights in relation to marine mammal watching permits, the ability to provide input into New Zealand coastal policy statements, the ownership of taonga tūturu, the ownership of non-nationalised minerals, and the ability to create a planning document.

The RMA permission right is the most significant award under customary marine title and is intended to increase the ability of Māori to participate in the management of the takutai moana. A group that holds customary marine title has the right to give or decline permission, on any grounds, for an activity that requires a resource consent to be carried out within the customary marine title

[601] Above n 458.

area.[602] A person who wishes to carry out an activity to which a RMA permission right applies must make a request for permission by notice to the customary marine title group.[603] The customary marine title group must then give notice in writing within 40 days of their decision for permission, specifying the activity, the applicant, and the duration of the permission.[604] The decision of the customary marine title group to give or decline permission cannot be appealed or objected to under the RMA.[605] The permission does not give Māori exclusive authority over determining applications, as consent authorities retain the discretion to decline a resource consent or impose conditions.[606]

There are significant qualifications or limitations on instances where an RMA permission right applies, which again reduces the scope of the managerial rights that the Act is said to provide Māori. An RMA permission right does not apply to the grant or exercise of a resource consent for an accommodated activity.[607] There are a broad range of accommodated activities specified in the Act, including an activity that is permitted under an existing resource consent, a minimum impact activity under the Crown Minerals Act 1991, accommodated infrastructure, existing marine reserves, wildlife sanctuaries, marine mammal sanctuaries and existing concessions, an emergency activity, scientific research or monitoring that is undertaken or funded by the Crown, a Crown agent or regional council carrying out statutory functions, or a "deemed accommodated activity". Section 65 further defines "deemed accommodated activities" as a construction or operation of infrastructure that is essential for national or regional social and economic wellbeing, an activity that is necessary for, or reasonably related to mining, an activity that is necessary for, or reasonably related to the exercise of a privilege of the rights associated with that privilege.

Customary marine title holders also gain a conservation permission right. A conservation permission right is similar to an RMA permission right. It enables a customary marine title group to give or decline permission, on any grounds, for

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[602] This includes controlled activities.
[603] Marine and Coastal Area (Takutai Moana) Act 2011, s 67(1).
[604] Marine and Coastal Area (Takutai Moana) Act 2011, s 67(2)(3).
[605] Marine and Coastal Area (Takutai Moana) Act 2011, s 68(2).
[606] Marine and Coastal Area (Takutai Moana) Act 2011, ss 66(5).
[607] Marine and Coastal Area (Takutai Moana) Act 2011, s 66(4). Under s 64, an accommodated activity may be carried out in part of the common marine and coastal area, even if customary marine title is recognised over that area.

the Minister of Conservation or the Director-General to consider an application or proposal for a conservation activity in a customary marine title area.[608] Those activities that are subject to a conservation permission right include an application to declare or extend a marine reserve, a proposal to declare or extend a conservation protected area, and an application for a concession.[609] Again, a conservation permission right, or permission given under such a right, does not limit the discretion of the Minister of Conservation or the Director-General from declining or imposing conditions on an application or proposal.[610] An additional limitation is that the Minister of Conservation is able to declare or extend a marine reserve without the permission of a customary marine title group if they are satisfied that the proposal is for a protection purpose that is of national importance.[611] In making such a decision, the Minister or Director-General "must have regard to" the views of the customary marine title group, whether the proposal minimises the adverse effects on interests groups, and whether there are no other practical options for achieving protection other than within the customary marine title area.[612]

There are two forms of property or ownership rights that a successful applicant will gain under a customary marine title award; the prima facie ownership of any newly found taonga tūturu; and ownership of non-nationalised minerals. Taonga tūturu is defined by the Protected Objects Act 1975 as an object that relates to Māori culture, history or society, and is more than 50 years old.[613] In terms of minerals, a customary marine title group is entitled to exercise ownership over non-nationalised minerals, receive royalties from the Crown (or due to the Crown), and royalties from the regional council for sand and shingle taken in the

[608] Marine and Coastal Area (Takutai Moana) Act 2011, s 71. Note: It is an offence for an activity to be carried out in a customary marine title area unless permission has been obtained from the relevant customary marine title group. Penalties of up to $600,000 and two-years' imprisonment can be enforced.
[609] Marine and Coastal Area (Takutai Moana) Act 2011, s 71(3).
[610] Marine and Coastal Area (Takutai Moana) Act 2011, s 71(5). The same notice requirements apply.
[611] Marine and Coastal Area (Takutai Moana) Act 2011, s 74(2).
[612] Marine and Coastal Area (Takutai Moana) Act 2011, s 75.
[613] A taonga tūturu must also either been modified by Māori, or brought to New Zealand by Māori, or used by Māori.

customary title area.[614] The Act is clear that petroleum, gold, silver, and uranium are not included in customary marine title and remain owned by the Crown.[615]

A customary marine title group also has a right to prepare a planning document in accordance with its tikanga.[616] The purpose of a planning document is to identify issues relevant to regulating the area, the regulatory objectives of the group, and policies for achieving those objectives.[617] Once a planning document is registered, the local authority must start a process and determine whether any amendments are necessary to the regional planning document to provide for and take into account the relevant matters in the document.[618] It must also take the planning document into account when making any decision under the Local Government Act 2002 in relation to the customary marine title area, and make the document publicly available and identify matters that relate to its functions.[619]

At the reading of the 2010 Bill, MP Metiria Turei expressed the concern that the 2011 Act treats customary title as a "secondary, lesser form of title".[620] In her view, customary marine title does not have the same rights as private ownership, and it will not be treated or valued in the same way by the Crown and relevant agencies.[621] Notwithstanding the limitations on customary marine title, Boast considers that the rights conferred by a customary marine title are much clearer and are substantially more worth having than those under the 2004 Act.[622] In his

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[614] Marine and Coastal Area (Takutai Moana) Act 2011, s 84(2)(b).
[615] Marine and Coastal Area (Takutai Moana) Act 2011, s 82 provides that any taonga tūturu found in a customary marine title area on or after the effective date is prima facie the property of the relevant customary title group.
[616] Marine and Coastal Area (Takutai Moana) Act 2011, s 85(1). The planning document can relate only to the customary marine title area, or an area outside of the customary marine title area where the group exercises kaitiakitanga.
[617] Marine and Coastal Area (Takutai Moana) Act 2011, s 85(2). The planning document may relate to any matter that is regulated under the Conservation Act, the Heritage New Zealand Pouhere Taonga Act 2014, the Local Government Act 2002 and the Resource Management Act 1991, including matters that are relevant to promoting the sustainable management of physical resources and the protection of cultural identity and historic heritage of the group.
[618] Marine and Coastal Area (Takutai Moana) Act 2011, s 93(6). If it determines that a resource consent application would directly affect the area to which the planning document applies, it "must have regard to any matters identified under subsection 2" (this only applies to matters where the regional council exercises discretion).
[619] Marine and Coastal Area (Takutai Moana) Act 2011, s 93(1) and (2).
[620] (15 March 2011) 670 NZPD 17181 (Marine and Coastal Area (Takutai Moana) Bill – In Committee, Speaker Recalled, In Committee, Tariana Turei). Minister Turei also said that if the legislation wanted to abrogate Māori rights then compensation should be paid.
[621] (15 March 2011) 670 NZPD 17181 (Marine and Coastal Area (Takutai Moana) Bill – In Committee, Speaker Recalled, In Committee, Tariana Turei).
[622] Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271-283 at 281.

view, the proprietary and managerial/consultative rights could be valuable and may appeal to some strategically placed coastal iwi.[623]

***Protected customary rights***

Protected customary rights are the second class of rights that Māori apply for under the 2011 Act, and the lesser of the two in terms of the scope of award. Iwi, hapū or whānau can seek recognition of certain customary activities, such as launching waka and gathering natural materials. Section 51 provides the meaning of a protected customary right:

> 51 (1) A protected customary right is a right that—
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> (a) has been exercised since 1840; and
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> (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.

Boast observed that the provisions relating to customary rights orders in the 2004 Act and the provision in the 2011 Act for protection customary rights "are more or less the same".[624]

Again, the Act does not define what protected customary rights are, rather it stipulates what activities are exempt from recognition and these appear to parallel the 2004 Act. Section 54 states that a protected customary right does not include an activity that is regulated under the Fisheries Act 1996, a commercial aquaculture activity, an activity that involves the exercise of any non-commercial Māori fishing right, relates to wildlife or marine mammals, or is based on a spiritual or cultural association (unless that association is shown by a physical activity or use of resources).[625]

The scope of a protected customary right award is set out in s 52 and is generally the ability of the applicant group to exercise the recognised right without resource

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[623] At 281.
[624] At 282.
[625] Marine and Coastal Area (Takutai Moana) Act 2011, s 54.

consent. The Minister of Conservation is able to impose conditions on the exercise of a protected customary right.[626] A consent authority must not grant resource consent for an 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.[627] Similar to customary marine title, protected customary rights do not limit the granting of a coastal permit under the RMA, a resource consent for an emergency activity, existing accommodated infrastructure, and deemed accommodated activities.[628]

In 2004, the Foreshore and Seabed Tribunal said that tino rangatiratanga guaranteed under Article 2 includes "possession, ownership, authority, self-regulation and autonomy".[629] The Foreshore and Seabed Tribunal also said that the policy would cause the loss of mana and property rights of Māori:[630]

> The number and quality of rights that the courts might uphold remain a matter for speculation, but it is our view that ample rights would at least be sometimes declared. There is no undertaking to pay compensation for the loss of rights. What is offered for their loss is a policy that we found gives lesser and fewer rights in respect of the foreshore and seabed, and a process to enhance Māori participation in decision-making affecting the coastal marine area. That process promises much, but we feel will deliver little.

These conclusions can equally apply to the 2011 Act. There is sufficient analysis in this chapter to demonstrate how the new rights contained in the 2011 Act will be difficult for applicants to achieve. In the event applicants are successful, the rights they are able to achieve are tightly constrained within Crown authority, and subject to legislative restrictions. The Act requires Māori to accept less rights than what were available at common law, and less authority than what is encompassed in rangatiratanga under Article 2 of the treaty.

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[626] Marine and Coastal Area (Takutai Moana) Act 2011, s 54(2). The Minister of Conservation can determine that a protected customary right is going to have an adverse effect on the environment and impose controls and conditions that the Minister thinks fit. Marine and Coastal Area (Takutai Moana) Act 2011, s 56

[627] Marine and Coastal Area (Takutai Moana) Act 2011, s 55(2).

[628] Marine and Coastal Area (Takutai Moana) Act 2011, s 55(3).

[629] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 16. It also said, "[w]here there is conflict or uncertainty, the Māori provisions of Te Tiriti, as they would have been understood by the Māori signatories, are to prevail".

[630] At 138.

## 6.5 The Act is inconsistent with the Article 3 principle that Māori are entitled to equity and equal treatment

The principle of equity and equal treatment provides further grounds for the 2011 Act to be considered inconsistent with the treaty. Both the Tribunal and Ministerial Review Panel said that under the principle of equity and equal treatment in Article 3 of the treaty, Māori are entitled to equal protection under the law. In relation to the takutai moana, this principle means that under Article 3, Māori are entitled to have their common law rights to the takutai moana defined by the courts. The Waitangi Tribunal said:[631]

> Post-Marlborough Sounds, Māori can choose whether to rely on common law principles and take their foreshore and seabed property rights to the High Court for definition and declaration. Alternatively, they can rely on the test of 'held according to tikanga Māori' and seek a status order and fee simple title from the Māori Land Court. Making the choice, and pursuing one or other course, is the exercise of both a Treaty right and a legal right. The Crown's policy proposes to remove these rights. Depriving one class of citizens of their right to go to court to have legal rights declared is a serious matter. It is, in our view, a breach of the Treaty principles of equity and options.

The effect of removing the jurisdiction of the courts is the removal of the right itself:[632]

> The Crown proposes to cut off the path for Māori to obtain property rights in the foreshore and seabed. All the opportunities that might have flowed to them as ownership of rights or title – affirmation of ancestral mana, the ability to exercise kaitiakitanga and manaakitanga, the ability to develop traditional uses and derive a commercial benefit as resource holders – will be lost.

The Tribunal said the 2003 policy, where it only affects Māori rights and not the rights of others, is also a breach of the principle of equity and options.[633] The Tribunal considered the policy violated the rule of law where it cut off Māori

[631] At 134.
[632] At 137.
[633] At 133-134.

access to the courts. It said this action "puts them in a class different from and inferior to all other citizens."[634]

Under the 2011 regime, Māori can apply to the High Court for the new rights under the Act, but the procedures and outcomes, where they are now prescribed in legislation, are different from the post-*Ngāti Apa* environment (see discussion in next chapter). Furthermore, Māori can no longer go to the Māori Land Court for recognition of their rights as this pathway has been completely removed by the legislation. There is a basis for the argument that the principle of equal treatment continues to be breached by the 2011 Act, because Māori are still precluded from making applications in the High Court or Māori Land Court for recognition of their common law customary rights, and therefore the 2011 Act still takes their common law rights away. Only the rights of Māori, not other interest holders are impacted in this way and it is reasonable to conclude Article 3 of the treaty has therefore been breached.

Another right which flows from the principle of equity and equal treatment is the right of coastal Māori to be treated consistently with Māori who have rights in lakebeds and rivers. The Tribunal talked about the principle of equal treatment as the need for the Crown to be consistent in its treatment of Māori, and recommended that the Crown consider river and lakebed negotiations for the takutai moana.[635] The Ministerial Review Panel also affirmed the importance of the principle of equal treatment:[636]

> There should be equal and consistent treatment for similar cases. The Act took away Māori property rights but not the private property rights of others in the foreshore and seabed. Similarly, there should be equal and consistent treatment between hapū and iwi, for example, where one has secured real engagement and influence over policy making at the national level (for instance, in the New Zealand Coastal Policy Statement).

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[634] At 136.
[635] At 133-134.
[636] *Report of the Ministerial Review Panel,* above n 36, at 153.

The Tribunal and Panel recommended options that would involve negotiations and legislation like those settlements which have occurred over lakebeds and rivers.[637]

Although the procedure contained in the 2011 Act gives the appearance of incorporating the Tribunal and Review Panel recommendation that a negotiation pathway be available in order to be consistent with how other Māori are able to negotiate settlements over rivers and lakes, the procedure in the 2011 Act is restricted and does not permit negotiation. Evidence on the Wai 2660 record of inquiry shows that there is no negotiation in the Crown engagement process, and the procedure in the Act is to be applied.[638] The High Court and Crown engagement processes in the current Act do not provide a procedure that would result in outcomes that put coastal Māori on an equal footing to river and lake Māori. Coastal Māori are therefore still prejudicially affected by procedures contained in the 2011 Act, and the principle of equal treatment is breached where it treats their rights differently from the way it treats other interest holders in the takutai moana, and differently from the way it treats other Māori who have recognised rights in lakes and rivers.

### 6.6 Concluding remarks

A consistent argument across submissions on the Bill and Parliamentary debates during the reading of the Bill, is that the legislation did not resolve the injustices suffered by Māori under the 2004 Act. Green Party MP David Clendon said the legislation treats Māori customary rights as "inferior", and Māori as "second class citizens".[639] Hone Harawira also said:[640]

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[637] *Report on the Crown's Foreshore and Seabed Policy,* above n 27, at 143; *Report of the Ministerial Review Panel*, above n 36, at 153.

[638] Wai 2660, #A69(a), above n 64, at 178. See also: Waitangi Tribunal *Appendices to Brief of Evidence of Doris Johnston* (Wai 2660, #A131(a), 18 March 2019) at 161.

[639] (15 September 2010) 666 NZPD 13997 (Marine and Coastal Area (Takutai Moana) Bill – First Reading, David Clendon). Clendon's comments are worth noting in full, where he states:

> Under this bill Māori remain second-class citizens. They do not have the same access to the courts to determine their property rights as holders of private title. Their customary title is determined not by tikanga but by the Government. The Government continues to own the foreshore, or at least to assert ownership of the foreshore. The construct of common space or non-ownership deceives no one. There are two sets of Crown-derived orders, accessible either through the court or through direct negotiation. The rights within those orders are determined by the Crown, and they are less than the rights held by existing fee simple owners of the 12,500 private titles in the foreshore and seabed. Large iwi with significant resources can lay claim to the mana moana held by small iwi, thereby entrenching injustice.

> It continues the original confiscation by vesting in the common space. It sets the use and occupation test too high. It limits the content of customary marine title. It introduces a costly adversarial and complicated court process. It remains discriminatory to Māori. It continues to breach Te Tiriti o Waitangi, tikanga Māori, common law principles, and international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples.

Boast questioned how much the Act would actually be used, noting there was little evidence of a flood of applications.[641] He said:[642]

> Maybe Māori people, like the rest of the country, have become tired of the whole subject of the foreshore and seabed; it is yesterday's controversy. Why worry about customary rights to collect hangi stones from the beach when so much more is at stake with respect to negotiating and settling historic [sic] claims? It is quite possible that the Act will result in nothing much.

The analysis in this chapter highlights the fact the Government approached the repeal of the 2004 Act, not in a manner to reinstate common law customary rights of Māori, but rather to limit the effect of the possibility that Māori rights might be recognised under the Act. The Act does this by continuing the removal of the jurisdiction of the courts to grant common law rights and through maintaining difficult statutory tests for applicants to meet. The extinguishment of Māori rights occurs where the courts no longer have the jurisdiction to award customary title at common law, meaning Māori must instead work within the strict confines of the 2011 Act for the limited awards available. Consistent with the Attorney-General's preferred approach, only a small portion of the foreshore and seabed (up to three per cent) will likely achieve awards under the Act.[643]

The discriminatory and unfair nature of the Act is further revealed when it is considered that Māori customary rights are treated differently from Crown, public

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[640] (8 March 2011) 670 NZPD 16976 (Marine and Coastal Area (Takutai Moana) Bill – Second Reading, Hone Harawira). Harawira's view was based on a review of submissions which he said clearly show Māori did not support the Bill.
[641] Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271-283 at 283.
[642] At 283.
[643] Above n 64, 583.

and private interests in the takutai moana. It is already acknowledged by the Crown that Māori interests are diminished by the continuation of Crown authority and the protection of public and private interests. In the Crown's "balancing" exercise, only Māori interests are reframed, meaning they come off second-best, whereas private and public interests remain intact and unchanged. No other interest group has had their rights changed by law, and no other interest group must go to the lengths that Māori are required to go to in order to have their rights recognised.

One way of assessing what is taken away from Māori in the reformulation of their rights under the Act, is to compare the rights available to Māori under that Act (limited property and managerial rights) to what is guaranteed to private owners (full ownership). That is essentially what is withheld from Māori under the Act, because following *Ngāti Apa*, were it not for the 2011 Act, Māori had the possibility of establishing customary title that was akin to fee simple title. Te Tiriti guaranteed Māori more again, yet rangatiratanga is not protected in the current regime. There are no references to the Article 2 guarantee of rangatiratanga in the Act, and the promise cannot be said to be provided for through the level of authority embodied in the new awards available to Māori under the Act.

Both the Foreshore and Seabed Tribunal and Ministerial Review Panel stressed that negotiation and agreement from Māori over a regime which impacted their customary rights to the foreshore and seabed was necessary for the regime to be consistent with the treaty.[644] However, the Act is inconsistent in treaty terms, with respect to the 2011 Act being prepared with little input from Māori and enacted without support from Māori. If it is accepted that an extinguishment of Māori rights occurs by the removal of the courts' prior jurisdiction, that Māori rights have been diminished, that compensation is not available for Māori, then the 2011 Act prejudices Māori and is in breach of the treaty.

[644] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 113-114, 123-124; *Report of the Ministerial Review Panel*, above n 36, at 25, 120, 149-158.

# CHAPTER 7: IMPLEMENTING THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT (2011-2019)

## 7.1 Introduction

The Marine and Coastal Area (Takutai Moana) Act 2011 contained a six-year statutory timeframe, or deadline of 3 April 2017, by which time all applications for customary marine title and protected customary rights had to be filed.[645] Māori engagement with the legislation during this six-year period was low. The Government expected the number of applications to increase as the 2017 deadline approached, however it seriously underestimated the number of applications that would be filed. For example, in May 2011, an internal paper scoped that the Crown could receive around 22 legitimate applications for customary marine title and/or protected customary rights before the statutory deadline.[646] By March 2017, application numbers had increased to 62 and the Crown then estimated this figure would triple to 250.[647] It was not until a few days prior to the expiry of the deadline that a huge number of applications was received.[648] In total, 385 applications for Crown engagement, and 202 High Court applications were filed.[649] The high number of applications presented political, legal and financial challenges for both the Crown and Māori. The Crown estimates an engagement application will take at least four years to process.[650] It said a strategy was required to deal with the high number of applications because at "the current pace

[645] Marine and Coastal Area (Takutai Moana) Act 2011, s 100(2).
[646] *Wai 2660, #A69(a),* above n 64, at 180, 565. That estimate was based on five groups that were already in negotiations with the Crown under the 2004 Act, 11 groups who had completed treaty negotiations that did not include foreshore and seabed negotiations and had coastlines, and six groups who were in negotiations and had coastlines. The Crown expected that only 10 groups would be engaged with the Crown by the end of 2016, and 35 by the end of the deadline. In terms of the High Court, the Crown estimated the number of applications to increase to 15 by the deadline. Fast-forward to March 2016, and only an additional seven groups expressed an interest in pursuing Crown engagement processes.
[647] *Wai 2660, #A69(a),* above n 64, at 597.
[648] All applications that had been made under the 2004 Act transferred automatically to the 2011 Act. By 30 November 2012, there were 10 applications before the High Court for protected customary rights and two applications for customary marine title. See: *Wai 2660, #A69(a),* above n 64, at 356-365.
[649] *Wai 2660, #A69(a),* above n 64, at 605. See also: *Wai 2660, #A131*, above n 53, at [45].
[650] Waitangi Tribunal *Hearing transcript* (Wai 2660, #4.1.2, 25-29 March 2019) at 617.

of progressing Ministerial determinations it will take an estimated 40-50 years to finalise all applications."[651]

In my view, there were two principal causes for low engagement by Māori prior to the statutory deadline. The first being a reluctance from Māori to make applications due to the abrogation of their customary rights and limited nature of the customary rights awards under the Act. The second being the uncertainty around the complex statutory processes for making applications, and the funding policy developed by the Crown. This chapter examines the years between 2011, when the Act came into force, and November 2019, when this research is due to be submitted. An exploration of the evidence in this chapter reveals the policy decisions made by the Crown for implementing the Act impacted the level of information and resources provided to Māori. Whether the issues and prejudice Māori faced during this period were a consequence of intentional Crown decision-making, or omission, the result is the same. Access to justice for Māori is restricted, procedural prejudice is suffered, and there is an ongoing denial of rangatiratanga over the takutai moana while the Crown and High Court reconcile how to implement the Act.

## 7.2 Slow policy development, a lack of information, and uncertainty in terms of funding

In September 2011, after the Act had passed, the Government began considering options for implementing the Act. The Crown's position was that while the Act was clear with respect to the evidential tests for recognising customary interests, the Act provided the Crown with "significant leeway" in terms of administrative systems and policies to implement it.[652] The Crown scoped three options for implementing the Act.[653] Option A was a 'pause and wait' approach and was considered to be reactive. Under Option B, the Government would get ready and show steady progress. Option C was the proactive approach and it would require the Government to prepare and fully drive progress. Option B was the Crown's preferred approach as it was said to be measured and budget neutral.[654] The Crown said efficiencies could be created by prioritising those applicants who were

[651] *Wai 2660, #A69(a),* above n 64, at 597.
[652] At 368.
[653] At 213-214.
[654] At 213-214.

already in historical negotiations or had completed settlements, and a more proactive approach could be taken as the April 2017 deadline approached.[655]

In terms of initial steps after the Act was passed, the Crown established the Marine and Coastal Area Unit within OTS (now known as Te Arawhiti) to implement the 2011 Act. Under the 'get ready' proposal, the Government then developed proposals to Cabinet on the tests to be applied in determining customary marine title, how Crown engagement applications should be prioritised, how the Crown would determine who it negotiates with, the level of funding for Crown engagement and High Court applications, and what information would be put on the website.[656] In 2012, the Crown developed an engagement model which set out the key steps in the Crown engagement process, and it also further developed methods for applying the statutory tests for Crown engagement applications.[657] Those methods and tests were withheld from the evidential documents released in the Wai 2660 inquiry on grounds of legal privilege, and therefore cannot be reviewed in this thesis. This means the Crown developed criteria for recognising customary marine title that Māori were required to follow but were not able to ascertain at that time.

An internal Crown paper showed the Crown was concerned with the initial low level of engagement by Māori with the Act. The paper noted a lack of quality applications, and that some groups had unrealistic expectations, thinking that there was a financial component to the customary rights awards.[658] The Crown's view was that applicants did not have a good understanding of the Act or its processes, and because of the overlapping nature of some applications, there was a concern that the Act was being "used as leverage by some applicants to further wider goals."[659] The Crown assessed that the risk of non-communication with Māori about the application process and the statutory deadline could include litigation, poor use of resources, inaccurate and inflammatory views, and a high volume of applications close to April 2017.[660]

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[655] At 213.
[656] At 213. The Crown reviewed the work programme at the end of 2012.
[657] At 695-705.
[658] At 480.
[659] For example, OTS said some applicant groups who appear to be continuing existing conflicts (through avenues such as the Environment Court) in their MACA applications. *Wai 2660, #A69(a)*, above n 64, at 367.
[660] *Wai 2660, #A69(a)*, above n 64, at 480.

In response to these perceived risks, in May 2015, the Government developed a regional pilot programme to provide information regarding the Act and the application deadline. With a directive to avoid negotiation sensitive areas, five pilot hui were held in regions including Taranaki and Manawatū.[661] Citing time constraints, in August 2015, the Crown decided not to continue with the pilot.[662] Instead, a Marine and Coastal Area Act communications project was developed. The communications objective of the project was to increase awareness of the Act and ensure that iwi, hapū and whānau had been given adequate opportunity to make applications under the Act.[663] The Crown sent letters to marae and iwi notifying them of the deadline. By October 2016, two information packs had been sent to iwi authorities and marae.[664] In addition, two videos were produced; the first being published on the Ministry of Justice YouTube channel in December 2015, and the second on 20 September 2016.[665]

In terms of the High Court process, there is less discussion in Crown papers about how the Crown would deal with High Court applications and support claimants with funding and information. The Crown produced a diagram outlining the High Court process and published it on the Ministry of Justice website.[666] The Crown says its approach to the High Court process is intended to reflect the independence of the High Court from the Executive.[667] However, this position does not account for the complexity of the legislation and the fact applicants needed support, in both pathways, under the Act.[668] The Crown's lack of attention to the High Court process, coupled with the complex nature of High Court procedure, could be a reason why there are half as many High Court applications as Crown engagement applications.

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[661] At 823-824. Seventy participants in total (at 498). Minutes show that the hui were not well-attended. Short notice was one of the reasons identified for the poor attendance.
[662] At 502. The project would include targeted consultation in 2016, and the offer to meet with the Iwi Leaders Forum and the New Zealand Law Society on the funding model for applications. The Crown also held a series of eight two-hour meetings to inform Māori in various cities. Six hundred groups were invited. Fifty-two individuals attended the hui, making up 31 identifiable groups.
[663] At 581.
[664] At 502 - costing $30,000. It was the Crown's intention that two more reminder letters would be sent before the April 2017 deadline. See also: 580.
[665] At 582. Cost of using media was $14,400. The Crown's view was that the feedback from the letters and videos suggested that engagement was working.
[666] See Appendix 3 – Diagram of High Court process.
[667] *Wai 2660, #A131,* above n 53, at [17], [181].
[668] For example, see: Waitangi Tribunal *Brief of Evidence of Hohipere Tihema Williams* (Wai 2660, #A69, 18 January 2019) at [122]-[131]; Waitangi Tribunal *Brief of Evidence of Kara Paerata George* (Wai 2660, #A70, 18 January 2019) at [8]-[35].

*Funding*

The Crown was slow to develop a funding regime for the implementation of the 2011 Act. This meant that there was no funding policy in place for applicants when the 2011 Act was first enacted. It was not until 2013 that the Crown considered different funding models. It determined that Crown funding would cover legal expertise, research and evidence gathering costs, internal communications and consultation, court fees, public notification and hearing costs. Funding would be allocated in ranges or tiers depending on the complexity and size of the application and coastal area and would be paid in instalments of no more than $50,000.[669]

The Crown believed that a cap on the upper funding limit would be a way to provide certainty to the Crown as to the total cost of applications.[670] The funding to be provided to applicants would therefore be a "contribution" towards the overall cost of an application. The Crown estimated the funding regime would contribute to covering 85% of applicants' costs.[671] It said:[672]

> Financial assistance will be a contribution towards the total expenses applicants incur in reaching an agreement. Paying a contribution rather than total costs should incentivise cost savings and efficiencies. Applicants would cover the remainder of costs themselves which will act as an incentive to be efficient.

The Minister approved the following upper limits for High Court and Crown engagement applications as follows:[673]

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[669] *Wai 2660, #A69(a)*, above n 64, at 321.
[670] *Wai 2660, #A131*, above n 53, at [122].
[671] I have not come across information to suggest the current Labour Government has reconsidered this aspect of the funding policy.
[672] *Wai 2660, #A69(a)*, above n 64, at 317.
[673] Waitangi Tribunal *Appendices to Brief of Evidence of Doris Johnston* (Wai 2660, #A131(a), 18 March 2019) at 254-255.

**Table 1:** Upper funding limit for applications

| Pathway | Low | Medium | High | Very High |
|---|---|---|---|---|
| **High Court** | | | | |
| **Maximum** | $156,750 | $202,750 | $260,250 | $316,750 |
| **Crown engagement** | | | | |
| **Maximum** | $162,000 | $226,000 | $318,500 | $412,000 |

It is unclear how the Crown estimated these costs or why High Court applications would incur less costs than Crown engagement applications.

In accordance with the 'prepare and get ready approach', in 2012/2013, $1,425,000 was approved by Cabinet to fund phase one of the Crown's work programme; the calculation of the figure was based on the assumption that the High Court would progress six applications and the Crown would be engaging with three groups.[674] For all new applicants who wanted to make applications under the legislation, funding would be paid retrospectively once an application was either accepted in the High Court or recognised by the Minister (the Minister would also have to be ready to progress the application). The Crown's decision that funding would be paid retrospectively after an application was filed meant applicant groups could not access funding for legal advice on their options under the Act. Applicants who could not afford to pay upfront for advice would have to find lawyers prepared to carry out the work, without certainty as to whether funding would be provided, and cover those costs until retrospective payments were approved.

It is unclear what regard the Crown had for the financial position of Māori groups and their capacity to cover any shortfall. It is also unclear whether the Crown considered the funding regime against its treaty duties of partnership and active protection, and whether it was fair that Māori should have to cover potential cost for pursuing their rights under the Act. The internal papers are silent on these considerations. The Crown also did not advise Māori that the funding contribution was estimated to be 85%, as this figure has only been identified as a result of evidence in the Waitangi Tribunal proceeding. Māori were therefore not aware of the level of exposure to financial risk when assessing their options under

[674] *Wai 2660, #A69(a),* above n 64, at 323.

the Act. Based on the Crown's estimates, the shortfalls that may have to be covered by the applicants can be estimated, at a minimum, as follows:[675]

**Table 2:** Estimate of shortfalls of upper funding limits

| **Pathway** | **Low** | **Medium** | **High** | **Very High** |
|---|---|---|---|---|
| **High Court** | | | | |
| **Maximum** | $156,750 | $202,750 | $260,250 | $316,750 |
| **Shortfall** | $27,661.76 | $35,779.41 | $45,926.47 | $55,897.06 |
| **Crown engagement** | | | | |
| **Maximum** | $162,000 | $226,000 | $318,500 | $412,000 |
| **Shortfall** | $28,588.24 | $39,882.35 | $56,205.88 | $72,705.88 |

With over 500 applications filed by April 2017, the Crown identified that there were fiscal risks.[676] The Crown estimated that the cost of progressing applications could exceed $200 million:[677]

> The large number of applications received at the deadline, coupled with publicly available information on the Crown contribution policy may lead to perceptions of a large financial burden on the tax payer. With upper limits on allocation ranging as high as $412,000 and there being over 500 applications under the Act, it may be argued by some that the Crown has a liability of over $200 million.

This revised cost assessment was an issue because the Crown's projected budget provided for only $5,540,000.00 between 2016 and 2021.[678] With an upper limit of $412,000.00 for a high complexity application, this budget would only fund 13 Crown engagement applications, or a small portion of partially completed applications. There would also be the Crown's own departmental budget which would need to be factored in. With the level of funding committed to the Marine

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[675] Note this calculation was done internally by a claimant group. See: Waitangi Tribunal *Brief of Evidence of Hohipere Tihema Williams* (Wai 2660, #A69, 18 January 2019) at [33].
[676] *Wai 2660, #A69(a)*, above n 64, at 610. Note the paper highlights a concern that "[t]here are public perception, fiscal and [privilege] risks arising from the Crown contribution policy and the higher than expected numbers of application under the Act." A Cabinet paper recommended that funding decisions be delegated from the Minister to the Director of the Office of Treaty Settlement because with the high number of applications it was impractical for the Minister to continue to make funding decisions.
[677] At 615.
[678] Waitangi Tribunal *Appendices to Brief of Evidence of Doris Johnston* (Wai 2660, #A131(a), 18 March 2019) at 627.

and Coastal Area Act department, few applications would be progressed in the next five years. This is not something that was communicated to applicant groups who were attempting to engage with the Act.

It is now over two years since the statutory deadline has passed, and there is a high level of complaint from applicants and their lawyers regarding funding, and associated access and cohesion issues between the two processes.[679] While funding is now being granted to High Court applicants, applicants seeking to progress their Crown engagement applications are somewhat worse off, because this funding is not available until the Minister has made a decision to recognise the mandate of individual applicant groups. In June 2018, the Minister advised applicants that at least 18 months would be required to assess the applications.[680] In June 2019, the Attorney-General advised that Te Arawhiti's focus was on those applications that the Crown had agreed to engage with as at 3 April 2017.[681] In the meantime, Te Arawhiti was developing a strategy and work programme that would be communicated to the applicants later in the year (2019). [682]

Only those few applicants who the Minister has decided to engage as a matter of priority, are receiving funding, and all other applicants will have to wait until the Minister makes a decision on whether to engage with their application. Applicants who filed in both the High Court and Crown engagement are encouraged to pursue the High Court process because that is the only pathway that is currently funded and moving.

### 7.3 Crown engagement

There were 385 applications received for the Crown engagement pathway by the statutory deadline. By May 2017, the Crown had carried out a preliminary

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[679] This is a core complaint being examined in the Wai 2660 Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry.
[680] *Minute No.5 of Collins J [First Case Management Conferences]* (CIV-2017-485-218, 18 July 2018) at [15]-[17]. Source: <http://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/marine-and-coastal-area-takutai-moana-act-2011-applications-for-recognition-orders/Marine%20and%20Coastal%20-Application%20by%20Elkington%20-Minute%20-No.%205.pdf>
[681] *Memorandum of Counsel for the Attorney General in Advance of Case Management Conferences* (CIV-2017-485-398, 7 June 2019) at [7].
[682] At [8].

assessment of the applications and said that "the entire coastline will be covered by at least one Ministerial determination application" and that:[683]

> These include around New Zealand's biggest coastal cities including Auckland, Tauranga, Wellington, Christchurch and Dunedin … [blocked out] … Most parts of the North Island are subject to multiple applications. These overlaps are due, to both, applications from neighbouring iwi and hapū that overlap and to hapū and whānau applications within wider iwi application areas.
>
> Even though there may be a small number of applications in some regions, such as [in] the South Island, in some instances the entire region is covered by just one application. Ngai Tahu has made an application [for] over 90% of the coastline of the South Island.

The Crown's initial analysis indicated that approximately: [684]

a) 25% of applications are from groups officials would consider to be iwi or iwi groupings;
b) 45% from hapū or groups of hapū; and
c) 30% from whānau or groups of whānau.

The Crown's assessment is that most coastal iwi had applications made by their iwi authorities on their behalf, and most had also made applications to the High Court.[685]

When the Crown was initially developing proposals and policies on how it would proceed with Crown engagement processes, it determined that it would limit its engagement to three groups while policies, criteria and models were developed.[686] The Crown identified that its overarching objective for Crown engagement applications was to make informed and unbiased decisions about the existence of

[683] *Wai 2660, #A69(a)*, above n 64, at 603-604.
[684] At 601.
[685] At 601.
[686] This was around 2013.

customary rights in line with the Act.[687] The Crown identified the principles for Crown engagement as being:[688]

- Transparency (determination procedures are clear and visible to all);
- Objectivity (evidential enquiry revealing relevant facts);
- Consistency (all parties should experience high quality service);
- Efficiency (timely and cost effective for affected parties); and
- Integrity (procedurally fair and trustworthy).

The Crown was cautious with regards to claimant expectations in the Crown engagement process and the need for these expectations to be well managed. The Crown stated that, while its processes would appear similar to a historical negotiation processes, "there is no 'negotiation' element."[689] It suggested a move away from using "negotiation" terminologies in relation to applications, saying instead that its role was akin to an impartial adjudicator:[690]

> Although the statutory tests differ to the tests under the Foreshore and Seabed Act 2004, the tests are similar and therefore the nature of the factual enquiry is unlikely to be materially different.
>
> Under the Act, the Crown is tasked simply with applying a statutory test to an application. If the Crown determines the test has been met, the outcome of that determination is set in legislation. This means that, at its simplest, it is a restricted legal and forensic factual inquiry.

Since 2017, the Crown, as previously mentioned, has been assessing engagement applications to determine which applicants it will engage with.[691] The Crown has not yet made its determinations and all applications that are not one of the 11 priority applications (applications filed under the 2004 Act) are on hold. Applicants do not know whether, or when, the Crown will accept their applications for Crown engagement. The Crown said it is considering how to

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[687] *Wai 2660, #A69(a),* above n 64, at 230.
[688] At 368.
[689] At 178.
[690] At 178, 662. Note, this approach would in theory mean that Crown engagement applicants should not be able to achieve more rights than what is available to High Court applicants. However, as the following section demonstrates, this would soon be tested by Te Rūnanga o Ngāti Porou and Pāhauwera who were able to negotiate outcomes which appear to fall outside the scope of the Act.
[691] *Wai 2660, #A69(a),* above n 64, at 695, 697-698, 700, 767.

progress the remainder of the applications with greater efficiencies, including potentially dealing with multiple overlapping applications at the same time.[692] The Crown's policy preference was to align engagement applications to those that have been settled or to those that are entering historical negotiations.[693] If this does happen, it is likely that those groups who have already settled or had a mandate recognised by the Crown will get priority handling of their applications. Groups who the Crown does not wish to engage with may be declined or required to work with those groups that are deemed to be representative.[694] This policy has caused major prejudice to Māori in historical settlement negotiations and is likely to cause division among Māori in terms of the takutai moana.

### 7.3.1 Crown engagement: A three-phase process

The Crown engagement process has been scoped to take place in three key phases: pre-engagement, determination and finalisation.[695] The pre-engagement phase involves the applicant making the application, an assessment by the Crown as to whether further information is needed, confirmation of the application, a preliminary appraisal (if required), applicant response to the appraisal, a ministerial briefing on the application, followed by the Minister's decision whether to formally engage.[696]

The recognition of the applicant group's mandate is dealt with in the second phase (determination), along with the collation of evidence to determine whether the tests for customary marine title and protected customary rights are met. This phase also includes a public submission process, and an exchange between the Crown and the applicant on the evidence/submissions.[697] Following public notification, there is provision in this phase for other people and third parties to provide information on the application.[698] The purpose of allowing third party participation is so the Crown is informed of relevant interests in the application

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[692] Waitangi Tribunal *Hearing Transcript* (Wai 2660, #4.1.2, 25-29 March 2019) at 852.
[693] *Wai 2660, #A69(a),* above n 64, at 697-698.
[694] In historical settlement negotiations, mandating issues are particularly contentious and the cause of numerous Tribunal and court proceedings. For example: *Ngāpuhi Mandate Inquiry* (Wai 2490, 2015); Waitangi Tribunal *Ngātiwai Mandate Inquiry* (Wai 2561, 2017).
[695] *Wai 2660, #A69(a),* above n 64, at 336. *Wai 2660, #A131,* above n 53, at [52]-[111].
[696] If the Minister had declined to engage prior to 3 April 2017, the group could apply to the High Court or reapply to the Crown.
[697] *Wai 2660, #A131,* above n 53, at [86]-[94].
[698] Other interested parties include local authorities, industry groups, and recreational and commercial users of the area of the marine and coastal area covered by the application. There is also an online submission form of Te Arawhiti's website.

area. Te Arawhiti will provide an 'information pack' on its website and to third parties, outlining the application, the process under the Act, a response to frequently asked questions, and a map and a diagram of the marine coastal area under application.[699] Officials from Te Arawhiti will then host at least one public information hui and present on the application and the 2011 Act. Te Arawhiti will receive submissions on the application and provide a summary of those submissions, along with evidential material to a Crown appointed independent assessor (if appointed) for their assessment.[700] The role of the independent assessor is to assist with the administration of the Act and provide an appraisal on whether the tests of the Act have been met.[701] Applicants have an opportunity to respond to the independent assessor's report prior to it being finalised.[702]

Once the Minister is provided with all evidence, reports and advice on the above process, and the respective position of the parties involved, the Minister will make a final decision on whether the tests of the Act have been met, and whether to enter an agreement to recognise customary marine title or rights.[703] If the Minister determines the tests are met, then an offer will be made to the applicant to enter into a recognition agreement, and the applicant needs to then agree whether to enter into the agreement with the Crown. If an agreement is reached, the agreement must go through a ratification process and be signed before proceeding through the legislative process to be given effect by an Act of Parliament.[704] If the applicant does not agree with the Minister's decision they may apply to the High Court for a judicial review, or if they have also made an application under the 2011 Act in the High Court for recognition of customary interests under the Act, they may also pursue that pathway.[705] When agreement is reached to enter a recognition agreement, Te Arawhiti will prepare the draft agreement for initialling and ratification (note ratification is a requirement of Crown policy, not the Act itself). The initialling is conditional on the applicants undertaking a ratification process which demonstrates the rights-holder, under the

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[699] *Wai 2660, #A131*, above n 53, at [90].
[700] At [94]. Te Arawhiti has undertaken three of these consultation processes since the MACA Act came into force; Ngāti Porou, Ngāti Pāhauwera and Ngāti Porou ki Hauraki (At [93]).
[701] The rate of the Independent Assessor would be $300-400 per hour.
[702] *Wai 2660, #A131*, above n 53, at [99].
[703] At [101]. Cabinet is informed of the Minister's decision.
[704] Or in the case of PCR an Order in Council. All agreements will be entered on the MACA register maintained by LINZ.
[705] *Wai 2660, #A131*, above n 53, at [105]

application, has sufficient support to hold the recognition agreement on behalf of the group. [706]

Ratification is carried out according to a strategy that is developed between Te Arawhiti officials and the applicant group and approved by the Minister for Treaty of Waitangi Negotiation and the Minister for Maori Development. [707] Ratification can be by ballot, postal vote or hui. The outcome of the ratification process will be considered by the Ministers and they will decide whether to sign and finalise the recognition agreement. An agreement for customary marine title is given legal effect through an Act of Parliament, whereas an agreement for protected customary rights is given effect through an Order in Council. [708]

What is interesting about the Crown engagement process and the policy that has been designed to facilitate the process, is that it is similar to the Crown's policy for historical Treaty of Waitangi negotiations. From pre-engagement to finalisation the process appears to be convoluted and much of the final decision-making is with the Minister. In theory the primary difference is there is no negotiation element or financial component which means at the end of such a complicated and resource intensive process, applicants only have the possibility of gaining the limited awards contained in the 2011 Act. However, a review of the first two agreements reached under the 2011 Act reveals some creativity in the awards applicants are able to agree with the Crown.

### 7.3.2 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019: The first Crown engagement application reached

Two applicant groups, Ngā Hapū o Ngāti Porou and Ngāti Pāhauwera, have advanced through the Crown engagement pathway to reach agreements with the Crown for their interests in the takutai moana. Both groups made applications under the Foreshore and Seabed Act 2004, with Ngā Hapū o Ngāti Porou first reaching agreement for what was included in the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill (No.1) that was introduced to the House on 29 September 2008. At that time, Ngāti Pāhauwera were still in the evidence gathering phase. The applications were stalled in 2009 when the Government commenced the

[706] At [107].
[707] At [108].
[708] At [110]-[111].

Ministerial Review of the Foreshore and Seabed Act.[709] Following the enactment of the Marine and Coastal Area Act in 2011, both groups engaged in a process to align their agreements with the new Act. From Te Arawhiti's perspective, Ngāti Pāhauwera are the first applicant group to be offered a recognition agreement for customary marine title under the 2011 Act.[710] By implication, this means Te Arawhiti considers the Ngā Hapū o Ngāti Porou Act to be something other than a Marine and Coastal Area Act agreement, although this is not entirely clear.

There is much that can be said about the unique Ngā Hapū o Ngāti Porou agreement, where both in process and substance it appears to sit outside the Crown's internal policy regarding Crown engagement applications, and the 2011 Act itself. A review of the agreement raises many questions which are worthy of examination however these questions go beyond the scope of this research. This section is focussed on highlighting inconsistencies with the Crown's approach to administering the 2011 Act and how this might impact other applicants.

Following the enactment of the 2011 Act, Ngā Hapū o Ngāti Porou and the Crown carried out a process of reviewing and amending the original Deed of Agreement (which was signed on 9 August 2017) to bring it into alignment with the new regime. On 29 May 2019, the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 ("Ngāti Porou Act") was enacted giving effect to the amended agreement. Despite the eight or so years spent aligning the agreement with the Marine and Coastal Area Act, and 46 references to the 2011 Act, it appears that the Ngā Hapū o Ngāti Porou Act is not a recognition agreement for customary marine title or protected customary rights under the 2011 Act. Rather, it appears to provide for certain rights and activities, akin to, but broader than protected customary rights under the 2011 Act, and terms and conditions or a framework for future customary marine title applications to be recognised.[711] The agreement also

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[709] Cabinet agreed to the contents of the Deed to Amend ("the Deed") on 9 November 2015, ratification hui were set down for 2017, and it was signed on 9 August 2017. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 9 defines 'deed of agreement' (dated 31 October 2008) and 'deed of amendment' (dated 9 August 2017).

[710] See: Te Arawhiti website "Agreements and Orders". Source: <https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications-made-under-the-marine-and-coastal-area-act/agreements-and-orders/>

[711] Section 6 of the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 provides that Parts 3 and 4 of the Marine and Coastal Area (Takutai Moana) Act 2011 do not apply to Ngāti Porou. Part 3 of the 2011 Act is entitled "Customary interests" and relates to protected customary rights and customary marine title. Part 4 is entitled "Administrative and miscellaneous matters" and relates to recognition agreements and recognition orders. These provisions are reframed

contains broader awards including relationship instruments and implementation funding which fall outside of the scope of the customary marine title and protected customary rights awards in the 2011 Act. The initial questions which arise are: What is the legal status of the agreement if it is not an agreement under the 2011 Act? What is the relationship between the Ngā Hapū o Ngāti Porou Act and the 2011 Act? Are future applicants for Crown engagement going to get the same treatment? What happens to High Court applications which are not privy to Ministerial discretion?

Under the Ngāti Porou Act, protected customary rights do not appear to apply and are instead covered by protected customary activities under Part 4 of the Act.[712] A protected customary activity is somewhat akin to the protected customary rights in ss 51 to 57 of the Marine and Coastal Area (Takutai Moana) Act 2011. A protected customary activity can be carried out, despite ss 9 to 17 of the RMA, or a rule in any Council plan.[713] Whereas under s 52(1) of the MACA Act, protected customary rights are only exempt from sections 12 to 17 of the RMA. This means Ngāti Porou are not subject to the restrictions under ss 9 to 11 of the RMA, like applicant groups under the 2011 Act.

The Ngāti Porou Act contains relationship instruments that provide Ngāti Porou with greater managerial and participatory rights in their rohe moana than what could be achieved by a regular applicant under the 2011 Act.[714] The Whakamana Accord is significant where it provides a space for Ngā Hapū o Ngāti Porou and the Crown to meet on an annual basis to discuss matters such as the state of their relationship, the operation of the Act, and proposed changes or issues relating to the coastal marine area in ngā rohe moana.[715] The relationship instrument agreements contained in the Act include the artefact relationship instrument, the conservation relationship instrument, the environment relationship instrument, the

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throughout the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 and are broader in scope and effect.

[712] Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 6.

[713] Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 34.

[714] Ngā Rohe Moana, o Ngā Hapū o Ngāti Porou Act 2019, Part 2, Subpart 8.

[715] Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 68: 'Whakamana Accord' is defined as, "… the instrument entered into by ngā hapū (Should capital letters be used here?) o Ngāti Porou and the Crown under paragraph 17 of schedule 2 of the deed of agreement, including any amendments to the instrument."

fisheries relationship instrument, and the minerals relationship agreement.[716] The relationship instruments, combined with the Whakamana Accord are intended to facilitate discussion between Ngā Hapū o Ngāti Porou, the corresponding Minister and their departments, as well as the Gisborne District Council and New Zealand Transport Agency, to establish binding agreements on the nature and extent of their relationships.[717] Key matters include participation in resource consents; environmental covenants and their inclusion in the Council's district and regional plans, policy statements and the long-term community council plan; decision-making processes under the Local Government Act 2002; appraisal of regulations or bylaws that impact Ngā Hapū o Ngāti Porou; monitoring protected customary activities; observing the provisions of the wāhi tapu instrument; alteration of maps or name changes; management by the council of sites that are significant to Ngā Hapū o Ngāti Porou; coastal occupation charges; and disposal of property by the council.[718] The broad effect of these provisions is that they provide for future negotiated outcomes; outcomes which are not attainable for applicant groups under the 2011 Act.

The "fisheries mechanism" allows for the making of new customary fishing regulations and enables Ngā Hapū o Ngāti Porou to manage customary fishing within ngā rohe moana.[719] This is quite different from the 2011 Act, which is tightly framed to ensure the awards capable of recognition do not cross into the customary fishing regime. Similarly the "extended fisheries mechanism" enables Ngā Hapū o Ngāti Porou to propose bylaws restricting or prohibiting the taking of fisheries' resources, by commercial, recreational and customary non-commercial fishers, in customary marine title areas and New Zealand fisheries within the Ngā Hapū o Ngāti Porou area of interest, for sustainable utilisation or cultural reasons.[720]

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[716] Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 68.
[717] Ngā Hapū o Ngāti Porou Deed to Amend Deed of Agreement (9 August 2017), Schedule 2, at [15], [16.1], at 80.
[718] At 83-84.
[719] At [19], at 85. The fisheries mechanism provides for the establishment of a fisheries management committee; the development of a fisheries management plan which outlines the rules and regulations for the taking of fisheries resources for customary non-commercial food gathering purposes; and the process for authorising and allowing the taking of fisheries resources for customary non-commercial food gathering purposes within a specified area of nga rohe moana.
[720] Ngā Hapū o Ngāti Porou Deed to Amend Deed of Agreement (9 August 2017), Schedule 4, at [6], at 203-204.

One of the most interesting features of the Ngāti Porou Act is that Customary marine title does not appear to be recognised by the Act itself. Rather, the Act provides further timeframes for Ngā Hapū o Ngāti Porou to make customary marine title applications and for future customary marine title agreements to be reached. It reads:[721]

> The responsible Minister may, on application, determine whether 1 or more hapū of ngā hapū o Ngāti Porou have customary marine title in an area of ngā rohe moana o ngā hapū o Ngāti Porou.
>
> An application must be made by the relevant hapū no later than 2 years after the commencement of this Act.

The effect of this provision is that Ngā Hapū o Ngāti Porou can make applications to the Crown for recognition of customary marine title, despite the statutory filing deadline of the 2011 Act having passed. There does not appear to be a limit on how many applications can be made so long as they are within the two-year timeframe. The Act is also silent on the impact of the agreement on existing applications made under the 2011 Act.

Despite the Crown saying that the 2011 Act does not have a financial component, the Deed to Amend contains an agreement that the Crown will pay Ngāti Porou $15,530,000 (including GST if any) to assist Ngāti Porou to exercise their rights and perform their obligations under the Deed and the recognised legislation.[722] This implementation funding does not feature in the Ngāti Porou Act, however it would have to be presumed given the finality of Deeds, that the funding is to be provided to Ngāti Porou, raising serious questions of fairness and transparency.

It is likely the unique agreements and careful drafting of the Ngāti Porou Act reflect that the Crown and Ngāti Porou reached agreements under the 2004 regime and wished to retain them, but that is not clearly expressed in the Act. The Ngāti Porou Act appears to have been prepared in a manner that gives the appearance that it aligns with the Marine and Coastal Area Act 2011, but also provides for additional instruments and awards, which sit outside of the scope of the 2011 Act. The Ngāti Porou Act includes provisions that allow further customary marine title

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[721] Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 111.
[722] Ngā Hapū o Ngāti Porou Deed to Amend Deed of Agreement (9 August 2017), Schedule 8, Part D, at 261.

applications to be made. There is also the issue of the $15,530,000.00 implementation funding which was present in the Deed but not the Bill or the Ngāti Porou Act, as well as how much funding was provided to negotiate the agreement (which likely exceeded the Crown's funding policy). Whether or not the Ngati Porou Act sets a precedent for further applications will likely be a highly contested issue.

### 7.3.3 Ngāti Pāhauwera

Ngāti Pāhauwera's application under the 2004 Act was transferred to the Marine and Coastal Area (Takutai Moana) Act 2011 in 2011. On 23 August 2016, following an evidentiary process, public submissions and an independent report, the Minister determined the test for customary marine title had been met for a small stretch of the common marine and coastal area, approximately 16 km long, in rural Hawkes Bay.[723] The agreement has not yet been finalised in legislation. The area granted is significantly less than Ngāti Pāhauwera had applied for. The customary marine title area recognised under the agreement follows specific coordinates and does not extend to 12 miles out from the foreshore.[724] The agreement was limited to this area, because the Minister was not satisfied that Ngāti Pāhauwera maintained fishing grounds or used and occupied the entire application area out to 12 nautical miles.[725] The Minister also did not accept the tests for protected customary rights or wāhi tapu were satisfied citing a lack of sufficient evidence and the inability to identify discrete wāhi tapu locations in the application area.[726]

One peculiar factor is that the initialled Deed of Agreement shows that, along with the recognised customary marine title area, there is an amendment to be made to the Ngāti Pāhauwera Treaty Claims Settlement Act 2012 to extend Ngāti Pāhauwera's hāngi stone control area to match their application area for customary marine title.[727] This part of the agreement, where it provides for the

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[723] Te Arawhiti website, https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications-made-under-the-marine-and-coastal-area-act/agreements-and-orders/.
[724] Letter from the Hon Christopher Finlayson (Minister for Treaty of Waitangi Negotiations) to the Trustees of Ngāti Pāhauwera Development Trust regarding determination of customary interests under the Marine and Coastal Area (Takutai Moana) Act 2011 (23 August 2016), Appendix 1, at [55].
[725] At [43].
[726] At [11].
[727] Initialled version of the Deed of Agreement in relation to the Marine and Coastal Area 2017 at [10]. It looks as though a provision will be inserted into the Ngāti Pāhauwera Act that says to

ability to amend historical settlement legislation, appears to sit outside of the 2011 Act, and more importantly, challenges the Crown's apparent firm policy that settlements are full and final. Ngāti Pāhauwera's website sheds some light on this anomaly where it suggests the agreement to amend the hāngi stone area in the settlement legislation was a result of negotiation and compromise over the recognised customary marine title area:[728]

> The Minister has also agreed that if we accept the Customary Marine Title he has offered, he will extend the hāngi stones control that Ngāti Pāhauwera obtained over the Mohaka River in the Treaty Settlement. Ngāti Pāhauwera are currently in the ratification phase of the process. If approved, it will be introduced into Parliament.

Ngāti Pāhauwera are now pursuing the portions of their application that were declined by the Minister, including protected customary rights and a wider customary marine title area through the High Court.[729]

When comparing the Ngāti Porou and Ngāti Pāhauwera agreements it is clear in terms of Ngāti Pāhauwera, that the Crown followed a much more prescriptive application of the tests and awards in the 2011 Act, thereby confining the scope of future agreements. While perhaps less significant in terms of actual effect, the amendment to Ngāti Pāhauwera's historical settlement legislation for the extension of the hangi stone area still demonstrates the capacity for negotiated outcomes in the Crown engagement process that sit outside of the Marine and Coastal Area Act.

There is also a point to be raised on funding in that Ngāti Pāhauwera received $486,970.00 funding for their Crown engagement application, exceeding the Crown funding policy.[730] It is not clear whether additional funding was provided under the 2004 Act, or whether Ngāti Pāhauwera had to pay a contribution to

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amend s 57 of the Ngāti Pāhauwera Treaty Claims Settlement Act 2012 to extend the hāngi stone area.

[728] Ngāti Pāhauwera Development Trust website "Takutai Moana Ratification Booklet" (May-July 2010). Source: <http://ngatipahauwera.co.nz/wp-content/uploads/2017/07/Ngāti-Pāhauwera-Ratification-Booklet.pdf>.

[729] Ngāti Pāhauwera Development Trust website "Ngāti Pahauwera Development Trust | Takutai Moana" (2017). Source: <https://ngatipahauwera.co.nz/projects-taiao/takutai-moana/ >.

[730] Waitangi Tribunal *Index to Appendices accompanying Crown Memorandum* (Wai 2660, #3.2.83(a), 26 June 2019) at [57].

costs when the upper funding limit was exceeded. There is also a question as to whether Ngāti Pāhauwera will get additional funding to pursue their protected customary rights application in the High Court.

In summary, the agreements reached by Ngāti Porou and Ngāti Pāhauwera extend beyond the scope and effect of the protected customary rights and customary marine title contained in the 2011 Act. It remains to be seen whether other applicant groups will be able to negotiate similar discretionary awards as part of their Crown engagement applications. These unique features in the agreements raise questions around fairness and equal treatment amongst Māori groups, as well as the issue of consistency in the application of legislation between the Crown engagement and High Court processes. The agreements provide an unstable foundation for future applications and it is likely that applicants will dispute the relativity of the awards they are able to achieve against these agreements.

### 7.4 High Court

The High Court is facing a similar dilemma to the Crown in that it was not equipped to receive and manage the large number of applications that were filed in the few days prior to the April 2017 deadline.[731] As a preliminary point, the High Court application process was more difficult for applicants than the pro forma Crown engagement application process, and involved administrative costs to be met up front by the applicants like High Court filing fees. Applicants had to file originating applications outlining the detail of the protected customary right, and/or customary marine title sought, including descriptions of who they were and the area claimed, as well as the grounds on which the application was made.[732] Applications had to be supported by affidavits setting out in full the basis upon which the applicant group claimed to be entitled to the recognition order.[733] The application had to be filed in the High Court registry nearest to the common marine and coastal area sought in the application. It then had to be served on local authorities with statutory functions in the application area as well as the adjacent area, the Solicitor-General on behalf of the Attorney-General, and any other

[731] Waitangi Tribunal *Brief of Evidence of Jane Sandra Penney* (Wai 2660, #A130, 15 March 2019) at [9]-[13].
[732] Marine and Coastal Area (Takutai Moana) Act 2011, s 101.
[733] Marine and Coastal Area (Takutai Moana) Act 2011, s 101(h).

person who the court considers likely to be directly affected by the application.[734] Following service, applicants had to give public notice of the application no later than 20 working days after filing the application.[735]

Pre-application, most, if not all, applicants would have had to find a lawyer agreeable to act when funding was not guaranteed, or applicants would have had to cover their own costs or self-represent. Lawyers either had to take instructions on a pro-bono basis, carry out the work with the hope that legal fees would be retrospectively paid by the Crown, or require the applicants to pay upfront for application costs. The bigger ongoing issue that lawyers and applicants have to consider, for both the High Court and Crown engagement applications, is what happens in terms of payment of fees if the upper funding limit is reached, prior to the completion of a milestone for which funding is provided. What will happen to those applications at that point if applicants are not able to pay? It is not simply a matter of the claimants paying, because many groups do not have the financial resources. It is also not a matter of prudent management, so funding is not exhausted. Already, proceedings are delayed, and preliminary/interlocutory matters are taking longer than any party expected, including the Crown. Access to justice remains an issue until funding and cohesion issues between the two processes are properly addressed by the Crown.

Earlier in 2017, the Attorney-General identified that a large number of High Court applications were deficient and required further amendments or better particulars to comply with s 51(2) of the Act.[736] The Attorney-General sought that all applicants amend their applications to include draft recognition orders sought by the court, and to file a map showing accurate boundaries of the application area.[737] This was opposed by counsel for the applicants who argued that it was not a legislative requirement for draft orders or boundaries to be provided at this stage of the proceedings.[738] Collins J said it was premature to engage in those issues and that it may be more appropriate to deal with them at a later case management conference in 2019.[739] This is an example of differing perspectives between

[734] Marine and Coastal Area (Takutai Moana) Act 2011, s 102.
[735] Marine and Coastal Area (Takutai Moana) Act 2011, s 103.
[736] *Minute (No.2) of Collins J* CIV-2017-485-218, 21 March 2018 at [15].
[737] At [13].
[738] Waitangi Tribunal, *Brief of Evidence of Hilda Halkyard-Harawira* (Wai 2660, #A75, 18 January 2019), at [11].
[739] At [38].

counsel, the Attorney-General and the High Court on how the Act should apply, and how time and resources are consumed on preliminary matters as parties attempt to navigate the legislation.

Since April 2017, the High Court has held two rounds of case management conferences; one from May 2018 to February 2019 and another a year later in June 2019. Following the first round of case management conferences, Collins J adjourned all applications not identified in the eight priority applications that were filed under the 2004 Act, until June 2019.[740] Collins J stressed that even though the applications were adjourned, claimants should continue to work on compiling their evidence throughout the adjournment period, and expected evidence gathering to be substantially complete by the second round of case management conferences.[741] In relation to overlapping applications, the Judge acknowledged that this was generally a problematic issue, and that there may be some disputes which can only be settled by the court.[742] He strongly encouraged overlapping claimants to enter discussions in good faith to resolve overlapping claim issues outside of the court, and expressed hope that the majority of issues could be resolved in this manner.[743]

The second series of case management conferences were held around the country during June 2019. Applicants were asked to provide the court with an update in respect of their applications. Most applicants advised that attempts were being made to address overlapping claims issues but spoke to the difficulties of practically reaching final agreements. Churchman J granted a further 12-month adjournment for all applicants. The adjournment was to provide applicants with the opportunity to advance direct engagement with the Crown, and continue to assemble evidence in support of their claims.[744] The court directed applicants to progress discussions with overlapping claimants during the adjournment, or else face the possibility that the court may adjudicate overlaps by way of directions.[745] Churchman J warned that, where another entity, whether it is a trust board or a

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[740] *Minute (No.5) of Collins J [First Case Management Conferences]* (CIV-2017-485-218, 18 July 2018) at [93]. The Attorney-General identified eight priority proceedings under s 125 of the MACA; applications that were filed under the 2004 Act.
[741] At [81].
[742] At [20] – [22].
[743] At [22].
[744] *Minute (No.2) of Churchman J [Re Case Management Conferences 2019]* (CIV-2017-485-218, 25 July 2019) at [151].
[745] At [53].

post-settlement entity, is attempting to advance a claim on behalf of the same whānau, hapū or iwi, then it may be appropriate for the court to consider strike-out proceedings if the issue cannot be resolved by tikanga.[746] Pursuant to s 107(3) of the Act, the court may strike out all or part of an application for a recognition order if it discloses no reasonably arguable case, is likely to cause prejudice or delay, is frivolous or vexatious or is otherwise an abuse of the court. The implications of this are that an applicant group could seek a strike out application against all or part of the claims of one or more of the groups it overlaps with. Such an application might be made when an applicant group considers that an overlapping application has been made for vexatious purposes in order to frustrate their claim, rather than on its own merits. Potentially this could also be made on the grounds that the applicant group does not recognise that the overlapping group has any rights within their rohe, and thus considers that there is no "reasonably arguable case". If an application is struck out in whole or in part, then that part of the application can no longer proceed in the High Court and is at an end. An applicant group would have the right pursuant to s 112 to appeal a decision to strike out to the Court of Appeal.

In terms of the High Court, the Attorney-General has reserved his position in respect of the issue of mandate and representative status of applicant groups.[747] This means that the Crown will likely take a position on whether an applicant group in the High Court process has the mandate on a case-by-case basis. *Re Tipene* is the only case for customary marine title that has been determined by the High Court (discussed below), and the Crown challenged the mandate of the applicant saying he did not have the mandate to bring the application on behalf of the applicant group.[748] It appears from the court's judgment that a good portion of the proceeding was dedicated to hearing evidence on the issue of mandate, with the court finding in favour of the applicant. This case demonstrates mandating issues are going to be problematic.

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[746] At [47].
[747] *Memorandum of Counsel for the Attorney-General on case management matters applying to all applications* (CIV-2017-485-218, 7 March 2018) at [57].
[748] *Re Tipene* [2016] NZHC 3199; [2017] NZAR 559 at [8]-[9].

### 7.4.1 Re Tipene 2016: First High Court recognition order granted

The case of *Re Tipene* concluded in 2016 and is the only High Court application determined to date. The High Court granted the application for recognition of customary marine title within a 200-metre radius of the rock in front of the landing area used to access Pohowaitai and Tamaitemioka islands, to the south-west of Stewart Island (Rakiura). [749] The application was made by Mr Tipene in 2011 on behalf of all Rakiura Māori with customary interests in the islands of Pohowaitai and Tamaitemioka.[750] The application area was originally broader, but the application went through a number of amendments.[751] Following reductions/amendments to the customary marine title area, the Attorney-General accepted that the members of the applicant group held the specified area in accordance with tikanga and exclusively used and occupied it from 1840 until present day without substantial interruption.[752] However, the Attorney-General opposed the applicant's mandate to bring the application on behalf of the applicant group.[753]

The court found the evidence for exclusive use and occupation, without substantial interruption was "overwhelming."[754] The court went on to say:[755]

> This makes it unnecessary to consider in detail what may or may not constitute exclusive use and occupation without substantial interruption for the purposes of s 58 of the Act. It is sufficient to note, …, that the clear words of the Act need to be applied with an appreciation for the context in which the particular claim arises. Remoteness, the environment and changes in technology are all relevant when considering notions of occupation, use and continuity.

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[749] Note that the original application encompassed an area surrounding the islands to the outer limits of the territorial seas, but was amended twice, to the 200m radius area.
[750] *Re Tipene* [2017] NZAR 559 at [5], [45]-[48]. The application was deemed to be an application for protected customary rights and was transferred to the High Court. Mr Tipene served his application on Crown Law (for the Attorney-General), Environment Southland, Southland District Council ant Te Rūnanga. Public notice of the application was placed in the Southland Times on 10 December 2011. The Crown filed a notice of appearance opposing the application on 3 February 2012.
[751] *Re Tipene* [2017] NZAR 559 at [45] - [47].
[752] At [7].
[753] At [8], [53]. Te Rūnanga o Ngāi Tahu was an interested party and neither supported nor opposed the application, saying that it wished to ensure that any order made by the court properly recognised the rights of all who are entitled to exercise customary rights in the specified area. Also: [54].
[754] *Re Tipene* [2017] NZAR 559 at [149].
[755] At [149].

The court also found that the applicant had the authority to bring the application on behalf of the applicant group because notice requirements were met, the applicant had the majority support of owners consistent with tikanga, and was a member of the group and understood the group's tikanga.[756] Mr Tipene therefore met the requirements under s 58 of the 2011 Act, being Rakiura Māori with customary interests in the two islands. The matter of who would hold the order was subject to further submissions and an additional hearing.[757] At that hearing, the court was satisfied with Mr Tipene's suggestion that the Supervisors of the two islands, as appointed from time to time under the Titi (Mutton-bird) Islands Regulations 1978, were the appropriate holders of the customary marine title order.[758]

But for the Attorney-General's unsuccessful opposition to the mandate of the applicant, this case was uncontested. Additional factors also assisted the success of this application, including the nature of the small and remote area, the extensive historical evidence, and the applicant's willingness to amend the application following feedback.

It remains to be seen how the High Court will manage contested cases and/or applications with areas of overlap. As noted at paragraph 149 of the decision, the court did not have to consider in detail what may or may not constitute exclusive use and occupation without substantial interruption for the purposes of s 58 of the Act because the evidence presented for "exclusive use and occupation" was "overwhelming".

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[756] At [175].
[757] At [179]. See also: *Re Tipene* [2017] NZHC 2990, where the holders are three Supervisors elected according to tikanga.
[758] *Re Tipene* [2017] NZHC 2990 at [34].

## 7.5 Concluding remarks

The Crown and High Court were not equipped to deal with the high number of applications filed in the few days before the statutory timeframe passed in April 2017. The Crown has committed to progressing 11 priority applications, and the High Court has committed to processing eight. All other Crown engagement applications are on hold while being assessed by the Crown. The High Court has adjourned all non-priority applications until July 2020.[759] With estimates that a Crown engagement application will take at least four years to determine, nothing is moving fast. Crown engagement applicants are not funded. High Court applicants have live funding streams with funding being expended on interlocutory matters and questions of statutory interpretation. There is no certainty as to what will happen when applicants reach the upper limit of their funding grant. The Crown loosely determined that Crown funding was a contribution of approximately 85% of the costs of seeking recognition of customary interests under the Act. The point to be made is that Māori have to pay to have their rights recognised, and are exposed to financial risk in doing so, whereas other parties whose rights are preserved by the legislation do not. This is prejudicial.

In terms of Crown engagement, applicant groups are participants in a Crown-led process. From policy development through to implementation, the Crown dictates who, when and how it will engage, when funding will be approved, and what the outcome of that engagement will be. Matters are further confused when looking at the first Crown engagement application reached under the Act; the Ngāti Porou Act. A review of that agreement reveals valuable and creative redress is recognised outside of the scope of awards contained in the Marine and Coastal Area Act. This suggests that, despite the Crown's position, there is "no negotiation" component in Crown engagement, there is in fact a negotiation element to the resolution of applications. Has the Ngāti Porou agreement set a precedent for Crown engagement, or is further unfairness going to arise when the next applicants find the Crown unwilling to negotiate?

[759] *Minute (No.2) of Churchman J [Re Case Management Conferences 2019]* (CIV-2017-485-218, 25 July 2019) at [152].

A further question concerns what the Ngāti Porou agreement means for High Court applicants. The High Court has no discretion in terms of the scope of the awards it may grant applicants. High Court applicants have cause for concern that they might get less than those who have opted for Crown engagement. A lack of cohesion between the two processes arises in several other ways, including overlapping claims to the same area of foreshore and seabed, and a likelihood that applications will be progressed at different rates in each pathway. How the parties will communicate with each other and resolve overlapping issues in each pathway, let alone between pathways, is not clear. The Crown is yet to state its position on the mandate of each of the 500 plus applicants, and it will no doubt take a position in terms of overlapping disputes. If historical negotiations and the *Re Tipene* case are anything to go by, it is likely that the Crown will show preference to iwi applicants, and disputes will ensue.

In 2003, the Foreshore and Seabed Tribunal spoke about procedural prejudice in terms of "powerlessness through uncertainty".[760] It explained that post *Ngāti Apa* Māori could have their rights defined by the courts and would eventually come to know the quantity and quality of the rights they own, adding, "[t]his is a position of strength" and would provide Māori leverage for greater participation in the regulation of the foreshore and seabed.[761] The proposed policy in 2003 however, would thrust Māori into an environment of uncertainty, it said:[762]

> However, through the policy, the Crown proposes wholly to change the position for Māori, in ways that are new, untried, and only loosely described. As a result, a whole raft of new uncertainties is created. We have described them at length in chapter 4. The uncertainties will all be loaded on to Māori. The Crown, by contrast, has sheltered itself from risk.
>
> The prejudice to Māori is clear. If the Crown proceeds with the policy as currently framed, Māori will be delivered for an unknown period to a position of complete uncertainty about where they stand. This is a very weak position to be in, and the Government has ensured that Māori will have nowhere to turn for a remedy.

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[760] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 137.
[761] At 137.
[762] At 137.

The 2011 Act has again thrust Māori into an environment of uncertainty, and by all accounts they will be there for a very long time. No other group with recognised interests in the foreshore and seabed is required to seek recognition of their rights, through complex legal and political processes, only Māori. All other groups with interests in the foreshore and seabed enjoy certainty of the protection of their rights under the Act. Māori, however, are denied rangatiratanga over the takutai moana for an extended and unknown period, while the courts and Crown attempt to reconcile how to implement the Act. For these reasons, it is argued that the procedural arrangements contained in the 2011 Act are discriminatory, prejudicial, and inconsistent with the treaty.

# CHAPTER 8: TE KAPOTAI - TRIBAL CONTEXT TO THE TAKUTAI MOANA DISPUTE

Ko te moana ehara rawa i te wai kau
no Tangaroa ke tena marae
e maha ona hua
e ora ai nga manu o te rangi
te iwi ki te whenua

The sea is not any water
it is the marae of Tangaroa
it yields life for many things
the birds in the sky
and the inhabitants upon the earth[763]

## 8.1 Introduction

The Tribunal cautions that a preoccupation with legal questions can obscure the fact that the foreshore and seabed issue is "more fundamentally … about real people and their real lives".[764] For Māori, the foreshore and seabed issue centres on the understanding and preservation of tikanga. The Tribunal says:[765]

> Tikanga is both a consequence and a source of Māori identity. Unlike most Western law, tikanga is not a norm that is external to the person. Without his relationship through tikanga to land by whakapapa, in a fundamental sense, he does not exist. Tikanga defines him; protects him; shapes his idea of himself and his place in the world. If a regime is to be imposed on the foreshore and seabed that cuts across tikanga, that damages and undermines it, then every Māori person who maintains his or her connection with land in the foreshore and seabed of their tribal area is in some way diminished. Some will feel it more than others, of course,

[763] *Wai 1040, #F27(d)*, above n 14, at [1]. Extract from submission from Te Kapotai Kaumātua Hiawe King 23 May 1989; an appeal under the section 25 of the Soil and Conservation Act 1967, to stop the proposed sewage effluent discharge into the Moana.
[764] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 3.
[765] At 3.

because their lives are lived closer to tikanga, and closer to the land and sea.

The treaty requires the Crown to actively protect the cultural foundation of what it is to be Māori, and ensure their systems of authority that regulate the relationship the takutai moana are respected.[766] The Crown does not have a history of doing either in terms of Te Kapotai. This chapter examines how nearly two centuries of Crown law, policy and practice have operated to usurp the authority Te Kapotai held over the takutai moana at Waikare. Te Kapotai have never willingly relinquished their authority, and throughout colonisation they have sought fulfilment of te Tiriti. This chapter places the 2011 Act in a long history of Crown actions and omissions that deny Te Kapotai rangatiratanga today. The discussion explores the political and legal challenges Te Kapotai faced when they engaged with the 2011 Act. It demonstrates how the Marine and Coastal Area (Takutai Moana) Act 2011 continues the historical Crown grievances Te Kapotai have suffered in terms of their takutai moana.

## 8.2 Te Kapotai

Ko Mahuhukiterangi te waka
Ko Whiti te tupuna
Ko Kapowai te maunga
Titiro iho ana ki tona pā tū moana, ko Motukura
Ko Waikare te awa
Ko Te Turuki te marae
Ko Te Kapotai te hapū

Mahuhukiterangi is the waka
Whiti is the ancestor
Kapowai is the mountain
Look down to his pā on the sea, it is Motukura
Waikare is the river
Te Turuki is the marae
Te Kapotai is the hapū[767]

[766] At 3.
[767] See: Waitangi Tribunal *Transcript of Hearing Week 19* (Wai 1040, #4.1.24, 18-22 July 2016) at 547-555 where Tukaha Milne (of Ngāti Hine) explains that pepeha are the fundamental blueprint

**Figure 6:** Ko Kapowai te maunga – Kapowai is the mountain[768]

**Figure 7:** Ko Te Turuki te Marae – Te Turuki is the marae[769]

**Figure 8:** Ko Waikare te awa – Waikare is the river[770]

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of hapū linking hapū to the origin of their identity, to the legacies of their tupuna and to the land that they belong to.

[768] *Wai 1040, #F25(b)*, above n 15, at [43].

[769] At 22.

[770] At [43].

**Figure 9:** Ko Motukura te pa tu moana of Whiti – Motukura is the pā of Whiti[771]

**Figure 10:** Te Kura o Waikare kapa haka group[772]

**Figure 11:** Map locating Te Kapotai in wider region[773]


[771] At [43].
[772] *Wai 1040, #F28(c),* above n 103, at 1.
[773] Waitangi Tribunal *Te Kapotai Hapū Korero – Te Wāhanga Tuarua* (Wai 1040, #F26(b), 28 April 2014) [*Wai 1040, #F26(b)*] at 18.

**Figure 12:** Map identifying Waikare Inlet[774]

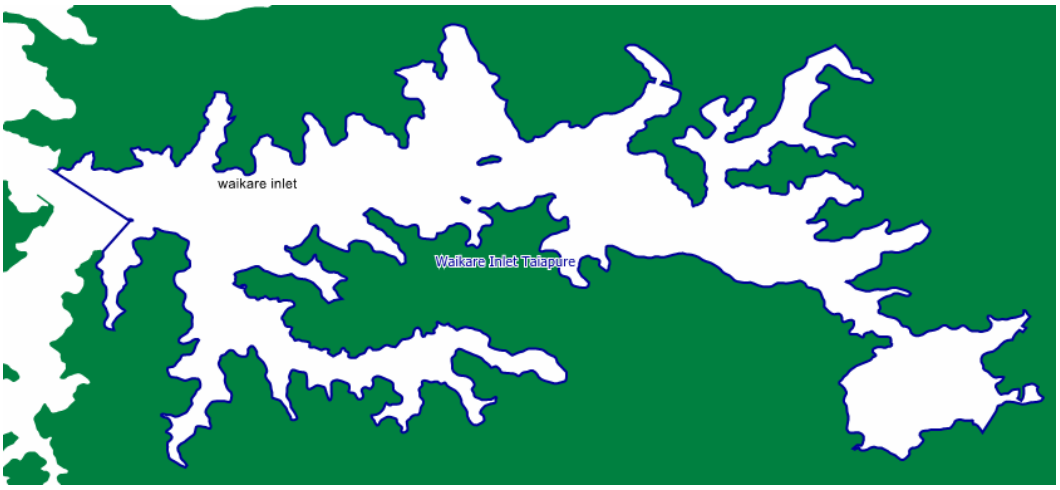
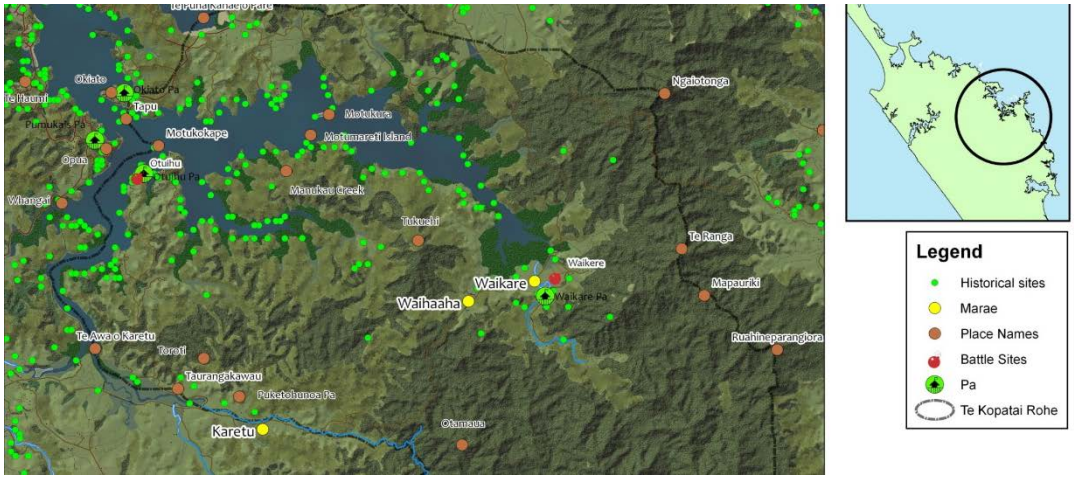



**Figure 13:** Map identifying sites of significance[775]




Te Kapotai's placement and origins were introduced earlier in this research. Te Kapotai is one of the many hapū within Ngāpuhi. The tribe is located at Waikare, in Te Taitamawahine or Te Pēowhairangi/Southern Bay of Islands region.[776] Kaumātua (elders) who are repositories of tribal knowledge maintain the practice of reciting kōrero tuku iho (oral tradition), which speaks to the indivisibility of their people to the land and sea. Their pepeha is a first reference point of the tribe's identity and it cites the Waikare Inlet as the river or sea of the Te Kapotai people: "Ko Waikare te awa – Waikare is the river".[777] "Ko Motukura te pā tu

[774] *Wai 1040, #F27(d)*, above n 14, at 35.
[775] Waitangi Tribunal *Te Kapotai Korero for the WAI1040 Initial Hearings, Appendix 2* (Wai 1040, #D5(b), 20 October 2010) at 9.
[776] It is estimated that there are approximately 150 hapū within Ngāpuhi.
[777] It is also referred to as Te Awa o Waikare (the Waikare River) and/or Te Moana o Waikare (the Sea of Waikare).

moana o Whiti" is Motukura Island which sits in the Waikare Inlet and is the historical pā of Te Kapotai tupuna Whiti.[778] The Inlet meets the Taumarere River at Opua and flows out into Te Moana o Pikopiko i Whiti, the Bay of Islands. Te Kapotai have whakapapa and historical connections to neighbouring tribes including; Ngāti Kuta and Patukeha to the east; Ngāti Wai to the south; Ngāti Manu, Ngāti Hau and Ngāti Hine to the west; and Ngāti Rāhiri, Ngāti Kawa, Ngāti Rēhia to the north.[779]

The Waikare Inlet is within Te Rohe o Te Kapotai, or the territory that is known to be under the rangatiratanga of Te Kapotai. The Waikare Inlet is the area of takutai moana that is the focus of this chapter. The significance of the Inlet to Te Kapotai cannot be overstated. Te Kapotai kuia Maude Clarke who is a "life timer" or resident of the Waikare Inlet simply explains the intergenerational connection of her whānau to the area: "My grandfather and his grandfather fished the inlet".[780] The historical connection of the hapū to the Inlet is also captured through the practice of naming these sites along it.[781] Ninety-two-year-old kaumātua Papa Hau Hereora has lived his life at Waikare, and recites the names of pā and kainga along the Inlet:[782]

> Motukura, Tamatāne, Kaurinui, Waikino, Ohineriria, Hororoa, Ongākau, Teā Kapa, Manukau, Tangitū, Motu Mareti, Te Kohekohe, Taiwawa, Kainamu, Kohure, Pahiko, Tautaranui, Te Roto, Tapere, Piritaha, Piripakonga, Totara, Taikapukapu, Opa, Tawhiti o Ngaru.

The map above (at 185, Figure 14) indicates the historical sites of significance along the Waikare Inlet, including tauranga waka, pā, kainga, traditional walking paths, wāhi tapu, and urupā. The relationship between Te Kapotai and the Waikare Inlet is one of interconnectedness and interdependence, where preservation of the Inlet was necessary for the survival of the hapū. Papa Hau

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[778] *Wai 1040, #F25(b)*, above n 15, at 21.
[779] Te Kapotai has strong links to other tribes in the Bay of Islands through whakapapa, intermarriage, alliances and shared histories.
[780] At 23.
[781] See: *Wai 1040, #F27(d)*, above n 14, at 4. In the rivers surrounding the inlet tuna, karewai, pipi, kanae, patiki and kahawai were a primary food source, and in the inlet itself an abundance of kanae, pātiki, and kahawai.
[782] At [2].

Hereora explains how kaitiakitanga or guardianship of the Waikare Inlet has been maintained through the generations:[783]

> Our ancestors were conservationists. There was a time for fishing and a time not to fish. Like in Motatau (Ngāti Hine) there was a time to catch eels. Our tupuna made it clear that there were not those treasures until the time was right. The reason? Some should be left for our descendants.

Te Kapotai is known for manaakitanga or hospitality through the sharing of kaimoana. The hapū regulated the use of the Inlet by other tribes and Pākehā. Aside from being an essential food source, the Inlet also had many practical uses for Te Kapotai because it was the only access to the homes of those who lived along the Inlet. The land along the Waikare Inlet remains landlocked and residents still travel by boat to get to town.[784]

Te Kapotai connect to the Waikare Inlet through the authority embodied in mana i te whenua, mana rangatira, rangatiratanga and tikanga. Te Kapotai tupuna describe mana rangatira as follows:[785]

> Mana rangatira – Ko te tikanga o tenei kupu o te mana rangatira he kore e tae mai no tetahi iwi ki te takahi i ana tikanga.
>
> Mana rangatira – the definition of the term 'mana rangatira' means that no other people can come in and trample on their mana.

### 8.2.1 The Waikare Inlet as a site of colonisation: Historical grievances over the Waikare Inlet

Te Kapotai tupuna Whiwhia signed he Whakaputanga on 28 October 1835.[786] Hikitene, Te Matatahi and Te Toro signed te Tiriti on behalf of Te Kapotai on 6 February 1840.[787] Both documents affirmed the tribe's sovereign authority over their lands, resources and affairs.[788] He Whakaputanga declared that no foreign authority could "make laws, and nor could anyone exercise any function of

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[783] At [14].
[784] At [60]-[61].
[785] *Wai 1040, #F25(b)*, above n 15, at 17.
[786] At [6].
[787] At [7]. Tawatawa was also another signatory; he was Te Kapotai/Ngāti Wai, a descendant of Te Rangiurahia and lived at Whangaruru and Waikare.
[788] *He Whakaputanga me te Tiriti*, above n 10, at 502-503, 527-529.

government" unless appointed by the rangatira.[789] Te Tiriti established a partnership of equals between hapū and the Crown, and guaranteed the right of hapū to continue to exercise rangatiratanga, or make and enforce law over their people.[790] Chapter 3 examined how, through the course of Crown colonisation, the intended partnership and commitments under te Tiriti never eventuated.[791] Each tribe's colonial history differs, and this will have a bearing on how they are impacted by the Marine and Coastal Area Act.

Shortly after te Tiriti was signed, tensions began to arise between the rangatira in the Bay of Islands and the Crown as it became clear that both parties held different understandings of what had been agreed to under te Tiriti. Te Kapotai continued to exercise mana and rangatiratanga as they always had, while at the same time the Crown also began to assert the sovereignty it assumed it had acquired under the treaty. The newly established colonial government began making laws that would displace Te Kapotai authority. For example, the Crown prohibited rangatira in the Bay of Islands from charging anchorage fees for trade ships.[792] This Crown action displaced the control that Te Kapotai rangatira had over their coastal area and trade and demonstrates that the takutai moana was one of the first sites of colonisation.

Assurances from the treaty debates on the evening before te Tiriti was signed in February 1840, that land "not duly acquired" and land "unjustly held" by Pākehā would be returned, were in fact empty promises.[793] Te Kapotai suffered from early and extensive land loss through pre-1840 land transactions known as Old Land Claims.[794] The colonial government established the Old Claims Commission to investigate pre-1840 'transactions', and upon investigation, the Commission granted the vast majority of lands claimed in the Bay of Islands to European settlers.[795] The taking of lands through the Old Land Claims process is a historical treaty grievance that impacted Bay of Islands Māori more so than

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[789] At 502.
[790] At 527.
[791] Above at [3.7].
[792] *Wai 1040, #F25(b)*, above n 15, at [125]; *Wai 1040, #F27(d)*, above n 14, at [17].
[793] Waitangi Tribunal, B Stirling with R Towers, *Not with the Sword but with the Pen: The Taking of Northland Old Land Claims, Part 1: Historical Overview* (Wai 1040, #A9, July 2007) at 16.
[794] Te Kapotai challenges to Old Land Claims date back to te Tiriti debates on 5 February 1840, where their tūpuna spoke in support of other rangatira who had raised land disputes.
[795] Stirling concluded that as a result of investigations by Old Land Claims Commissions, very few claims were disallowed, and fewer still were disallowed as a result of Māori opposition.

others, where over 106,000 acres were permanently alienated in the region during the mid-1800s.[796] Approximately 4,000 acres of coastal lands along the Waikare Inlet were granted to Pākehā and the Crown through Old Land Claims investigations.[797] The impact of this for Te Kapotai was early alienation from over 4000 acres of coastal lands, including one of their "maunga whakahi", their sacred maunga, Kapowai.[798]

An enduring legacy of colonisation is the Crown's labelling and treatment of Te Kapotai and other "rebel" tribes as "disaffected".[799] "Unruly", "dissipated", "rebels", "disaffected", are all terms used by the Crown to describe Te Kapotai.[800] It was a Crown tactic that arose during the war in 1845 to distinguish those who were loyal Māori from those who were rebels. Te Kapotai joined Heke and Kawiti in the felling of the British flagstaff at Kororāreka. The battle of Kororāreka, which occurred after the third time the flag was cut down by Heke and allies, is the backdrop to the sustained period of war known as the Northern War; the first land war in Aotearoa. Historian Ralph Johnson says the rangatira, who attacked the flagstaff, had seen first-hand the changing impact of British sovereignty and that land loss would have underpinned their protest.[801]

Rather than seek reconciliation with the chiefs following the attacks on the flagstaff, the Crown declared war on Ngāpuhi and commenced a naval blockade on trade in the Bay of Islands. The blockade was intended to deprive rebel Māori of necessary food stocks and bring them into submission.[802] Tensions escalated, and on 4 May 1845, the Crown ordered the British military to attack Te Kapotai

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[796] Waitangi Tribunal *Crown Statement of Position and Concessions* (Wai 1040, #1.3.2, 6 July 2012) at [32].
[797] *Wai 1040, #F26(b)*, above n 776, at [6], 7.
[798] *Wai 1040, #F25(b)*, above n 15, at [50]; *Wai 1040, #F26(b)*, above n 776, at 7-12.
[799] *Wai 1040, #A5*, above n 71, at 177, 224, 226, 244, 261, 353-354, 408.
[800] *Wai 1040, #F25(b)*, above n 15, at [204]; Waitangi Tribunal, D Armstrong and E Subasic *Northern Land and Politics: 1860-1910 An Overview Report Prepared for the Crown Forestry Rental Trust*, (Wai 1040, #A12, June 2007) at 193. The Kororāreka Magistrate reported that his Hundred might not compare favourably with others, as it contains both the Rawhiti and Waikare. – SP 1.1.650, 15 A 12, March 1862. "I wish to place upon the record in order that this hundred may not be compared hereafter to my disadvantage with the others in this district, that although the smallest, it contains both the Rawhiti and Waikare Natives, who are by far the most unruly and dissipated of any of the Ngāpuhi, and are so broken there exists no chief in either hapū of sufficient authority to exercise any effectual control; indeed the very men who by hereditary position should be able to Afford the Magistrate Assistance, are the most notorious for their drunkenness and vices".
[801] *Wai 1040, #A5*, above n 71, at 177.
[802] At 263.

and eight other pā in the Bay of Islands. The order of Colonel Hulme was to capture and kill all rebels:[803]

> …
>
> it is my sad duty to state my conviction that till the principal Pahs on the Kawakawa are destroyed, and till the majority of their rebellious inhabitants are killed, there will be no peace at the Bay of Islands, no security for other settlements. The Pahs to which I refer are (besides Pomare's) those of Kawiti, of Hori Kingi, of Ruku, of Waikadi, of Marupo
> …

On 15 May, Te Kapotai would experience the force of 192 British soldiers, and a taua (war party) of Crown friendly Māori who travelled up the Waikare Inlet at night to ambush the pā.[804] Kaumātua tell how ducks took flight on the Inlet, alerting people the war party was coming, allowing Te Kapotai to flee into the bush. The British sacked the pā, took their pigs, uprooted their gardens and raised their village to the ground. It is said that several men were killed and injured during the attack.[805]

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[803] *Wai 1040, #F25(b),* above n 15, at [141]. See also: Waitangi Tribunal *Crown Statement of Position and Concessions* (Wai 1040, #1.3.2, 6 July 2012) at [262]. Crown military forces subsequently conducted operations intended to capture or kill Heke and Kawiti.
[804] *Wai 1040, #F25(b),* above n 15, at [147] - [166]; *Wai 1040, #A5,* above n 71, at 265-271.
[805] *Wai 1040, #F25(b),* above n 15, at [147] – [166]. The Northern war included three major battles at Ohaewai, Puketutu and Ruapekapeka. It was following the final battle at Ruapekapeka that Kawiti called his people to peace through the Ōhākī that frames this research.

**Figure 14:** "View of attack on of the pah of the Waikadi on the morn of the 16th May 1845 by John Williams" (Alexander Turnbull Library"[806]

Johnson said the Northern War had its origins in the Crown's attempt to subsume hapū authority:[807]

> The roots of Ngāpuhi independence and authority do not derive from Te Tiriti. Ngāpuhi are tangata whenua. Their view of independence, authority, mana and tino rangatiratanga cannot be separated from the land, its resources or its people. It is a holistic relationship. And this is where the story of the Northern War has its origins. According to Ngāpuhi, the recognition of Ngāpuhi authority and rangatiratanga – as tangata whenua – can be found in the Declaration of Independence (He Whakaputanga) and the Māori text of the Treaty (Te Tiriti). This is what Hone Heke and others continued to appeal and refer to in their discussions and correspondence with the governor.

[806] *Wai 1040, #F25(b)*, above n 15, at 49.
[807] *Wai 1040, #A5*, above n 71, at 28.

The forfeiture of Te Kapotai (and other hapū) lands by rebel chiefs was a condition of Fitzroy's peace terms in July 1845. However, Kawiti of Ngāti Hine and Hikitene of Te Kapotai refused; Kawiti said:[808]

> If you say, let peace be made, it is agreeable; but as regards this you shall not have my land; no, never, never!
>
> I have been fighting for my land; if you had said that my land should be retained by myself I should have been pleased.
>
> Sir, if you are very desirous to get my land, I shall be equally desirous to retain it for myself.

After peace was reached the Crown turned to other coercive means to acquire land. The Bay of Islands region started with approximately 420,054 acres of Māori land. A quarter was alienated through Old Land Claims, and a quarter through Crown purchase before 1865. The Crown estimates 16% (67,208 acres) of the region remains in Māori ownership today.[809] Te Kapotai evidence provides that between 1865-2006, more than 16,000 acres of land at Waikare was alienated from tribal ownership.[810] Alienation of Te Kapotai lands by the Crown was sustained into the 1900s. As recently as the 1960s, Te Kapotai land was acquired under the Crown's use of monopoly purchasing powers for "scenic reserve" purposes.[811]

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[808] *Wai 1040, #E67*, above n 17, at 301.
[809] Waitangi Tribunal *Crown Statement of Position and Concessions* (Wai 1040, #1.3.2, 6 July 2012) at 21.
[810] *Wai 1040, #F26(b)*, above n 776, at [62].
[811] At [369] – [373],

**Figure 15:** Crown-owned land in Te Kapotai today[812]

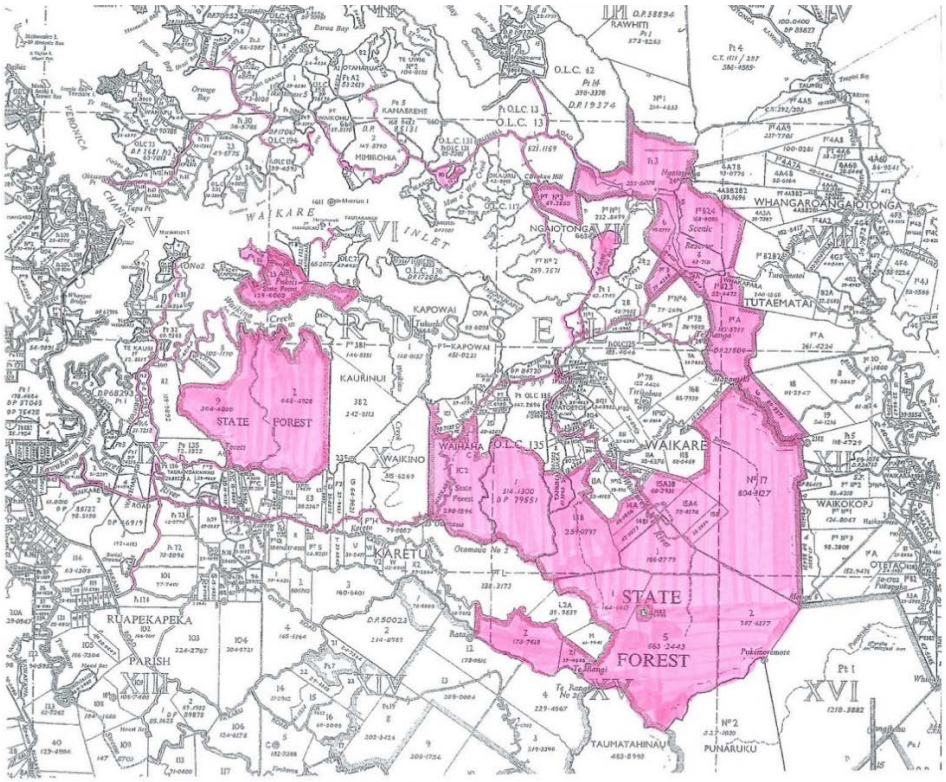
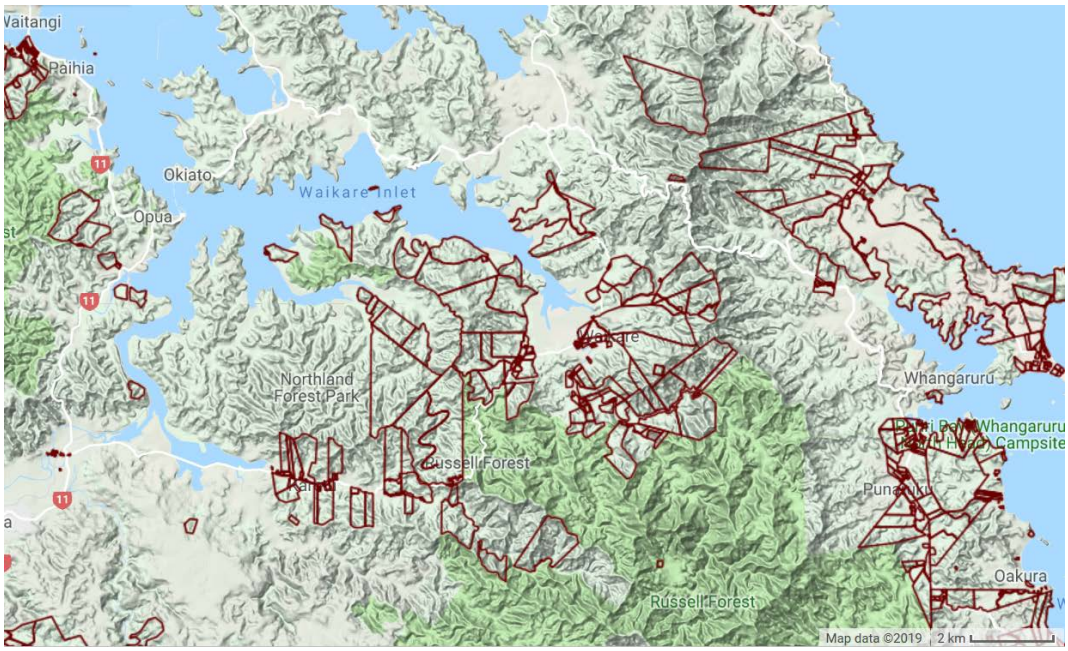



**Figure 16:** Remaining Māori land at Waikare[813]




[812] *Wai 1040, #F26(b)*, above n 776, at 186.
[813] Te Puni Kōkiri website, *Whenua Māori Visualisation Tool.* Source: <https://whenuaviz.landcareresearch.co.nz/>

After the 1860s, the Government established central and provincial government institutions, both without provision for Māori representation. This meant that the power to govern and regulate land and the Inlet rested with Europeans. Increasingly, the Government passed laws that changed the way Te Kapotai could live on and use their lands, and their rangatiratanga and kaitiakitanga roles over the Inlet were restricted. The Crown's taking of control of the timber trade at Waikare in the 1860s is an example of this. There were a series of complaints from Te Kapotai, during this time, who claimed that the Crown did not have the authority to cut the trees or exclude them from the industry. They said the floating of timber was destroying the Inlet. In January 1874, Wiremu Te Teete wrote to the Government and said, "[n]ow for the first time I am dead with hunger. I have no trees to buy food for myself, no clothes, no tobacco."[814] Te Matatahi sent another letter in May 1874 that read:[815]

> This is a word to you concerning the River Waikare, which is being broken (injured) by trees. Enough, I disapprove of that work, as our lands are consumed by the breaking (injury) caused by (floating) trees down. Enough, I am urging payment from the pakehas who are employed in the timber trade, because all our workings (cultivations) are carried away by the water and broken by the trees.

During the 1860s, the Crown also prohibited Te Kapotai from consuming and trading on their oyster resource, which was an important source of food and trade for the hapū.[816] The hapū had to travel to oyster reserves in the areas of other tribes to pick oysters. Historian David Alexander says that oyster legislation in the Bay of Islands was one of the first instances of the Crown extending its kāwanatanga into the foreshore and into a fishery.[817]

Today the remaining Māori land holdings at Waikare are generally small, uneconomic, involve multiple owners and are often landlocked. The marae reservation is the only remaining portion of customary land. Most of the hapū who reside in the area live on small portions of land at the head of the Inlet. The road in and out of Waikare is unsealed and of low quality, and is one of the few

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[814] *Wai 1040, #F25(b),* above n 15, at [234].
[815] At [237].
[816] See: *Wai 1040, #F27(d),* above n 14, at [20] – [33].
[817] Via the Oyster Fisheries Act 1866.

roads in the country where insurance is not provided in the event of an accident.[818] For Inlet residents, access to town remains an issue; they say they have issues with mooring their boats at the marina when they go to town.[819] Prior understandings with local councils that residents would have moorings reserved for their use seem to have lapsed.[820] Although Waikare has neighbouring townships in the Bay of Islands, power supply is limited at Waikare. There is no sewage or town supply of water, and cellular data is mostly unavailable.[821]

The impact of Crown colonisation is sorely felt by Te Kapotai. Historian Tony Hearn stated that "[i]f one term can summarise the outcome for most Māori in Northland of almost half a century of change, then it is immiseration" or impoverishment.[822] Armstrong and Subasic said that although Northland was the first region settled by Pākehā, and first to sign te Tiriti, it took the Crown a significant period of time to achieve lasting authority. In their view, Crown sovereignty prevailed through a long-term process of land alienation and the erosion of hapū rangatiratanga, adding that "[a]t almost every turn, especially after 1870, the Crown sacrificed Māori interests in pursuit of its own policy objectives".[823]

### 8.2.2 The Waikare Inlet as a site of resistance: Te Kapotai seeks fulfilment of te Tiriti in terms of their takutai moana grievances

Te Kapotai has a consistent record of challenging the Crown to uphold te Tiriti. This resistance can be seen by examining the early interaction of kāwanatanga and rangatiratanga between Te Kapotai and the Crown. Te Kapotai's role in the Northern War was active opposition to the imposition of Crown kāwanatanga over their hapū. Having agreed to peace, Te Kapotai sought ways to express rangatiratanga both within and outside of institutions of Pākehā government. In the 1880s, the southern Bay of Islands allegiance of hapū formed a proposal to

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[818] *Wai 1040, #F28(c)*, above n 103, at [81]-[82].
[819] *Wai 1040, #F27(d)*, above n 14, [60], [78].
[820] At [60]-[61].
[821] *Wai 1040, #F26(b)*, above n 776, at [496], [502] – [520]. See also: *Wai 1040, #F28(c)*, above n 103, at 28-37.
[822] Waitangi Tribunal, TJ Hearn *Social Economic Change in Northland c.1900 – c.1945: The Role of the Crown and the Place of Māori* (Wai 1040, #A3, June 2006) at 863.
[823] Waitangi Tribunal, D Armstrong & E Subasic, *Summary of Northern Land and Politics: 1860-1910. An Overview Report Prepared for the Crown Forestry Rental Trust*, June,2007 *(Wai 1040, A #12)* (Wai 1040, #A12(c), 23 May 2013).

achieve the "full implementation of the Treaty".[824] The intention of the tribes was to form a parallel Māori parliament. They constructed whare to discuss treaty issues, including Te Porowini at Taumarere in 1876, and Te Tiriti o Waitangi wharenui at Waitangi.[825] The tribes passed 25 resolutions relating to political authority and land alienation. Of note:[826]

. …

> 4. That they desire a Parliament of the leading chiefs of the Māori tribes to be constituted to carry out the intentions of the Treaty of Waitangi.
>
> 5. That without this Parliament our affairs will never be satisfactorily arranged as provided for by the Treaty of Waitangi.
>
> 6. That this Parliament is to be upheld by all Māori tribes so that the authority of the Parliament shall be made firm and shall maintain the name and rights of the Māori race.
>
> 7. That this Parliament shall make laws for the Māori race.
>
> …

The parallel parliament was not supported by the colonial government and the chiefs met without government support.[827]

Opposition to land alienation was the central focus of Te Kapotai's resistance through both centuries. A 5000-plus page document bank of Te Kapotai's colonial history shows sustained petition and appeals from Te Kapotai with respect to land alienation by the Crown.[828] Te Kapotai sought investigations from the Old Land Claims commissions and fought for 80 years for the successful return of the Kapowai Old Land Claim.[829] In 1920, a compromise deal saw 2,075

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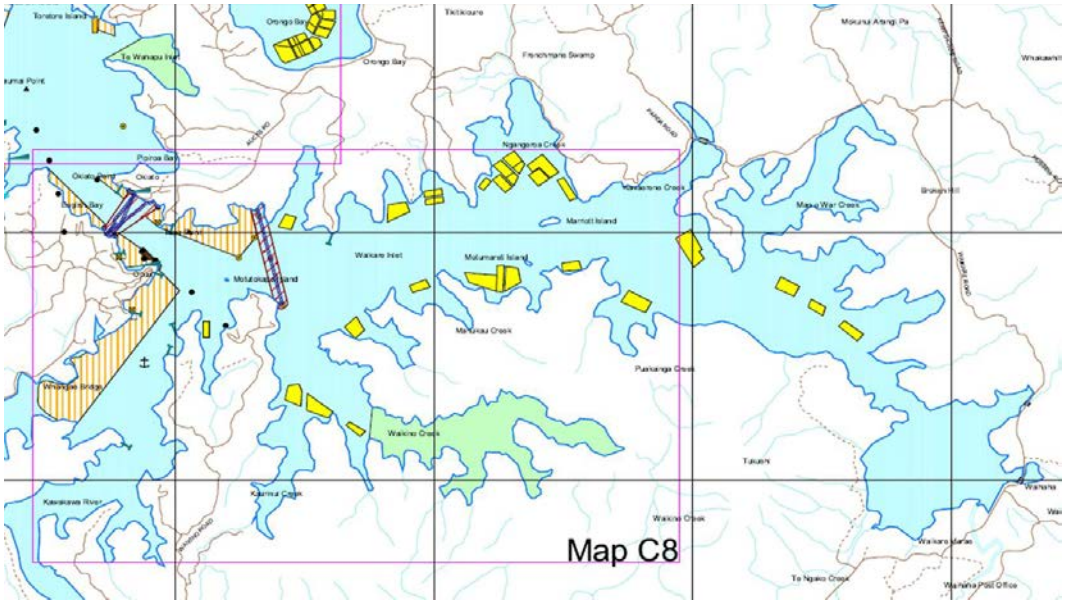
[824] *Wai 1040, #E67*, above n 17, at 154.
[825] At 367-368. Ngāpuhi reminded Lord Ranfurly in 1899 that 'the Treaty had been rained upon ... [and] exposed to the blast of the storm, but the words are still clear, they cannot be obliterated'.
[826] At 368-369.
[827] At 369.
[828] Waitangi Tribunal *Te Kapotai Hapū Korero – Index for Supporting Papers* (Wai 1040, #F41, 28 April 2014).
[829] *Wai 1040, #F26(b),* above n 776, at [16]-[32]. See also: Waitangi Tribunal, R Daamen, P Hamer, and B Rigby, *Rangahaua Whanui District 1,* Auckland (Wai 1040, #H2, July 1996) at 104.

acres of land adjoining the Waikare Inlet split between the Crown and Te Kapotai claimants.[830]

The Crown's taking of the native oyster resource at Waikare, and later commercial aquaculture, is a unique claim not suffered by all hapū. The grievance spans two centuries for the tribe. As mentioned, in the 1860s the Crown legislated to take control of gathering of native oysters. The issue continued in the 1900s when the Inlet was highly sought after by the Government and business as this was one of the few places suitable for aquaculture. In December 1968, the Waikare Māori Committee sent a petition to the Minister of Agriculture and Fisheries objecting to the permitting of all oyster farm leases. The hapū believed aquaculture would damage their association with the Inlet and interfere with their traditional food supply.[831] The tribe's concerns and opposition were dismissed. Where there were six oyster farms on the Waikare Inlet in 1988, there are 25 today.[832]

**Figure 17:** Oyster Farms on the Waikare Inlet[833]




[830] Waitangi Tribunal *Closing Submissions for Te Kapotai* (Wai 1040, #3.3.395, 25 July 2017) at [4.69].
[831] *Wai 1040, #F27(d)*, above n 14, at 11.
[832] At 11.
[833] At 12.

The impact of the Crown's regulation of the Waikare Inlet is captured in the letter from Te Kapotai kuia Anne Hereora in 1990. The letter was filed in opposition to an application for a resource consent for oyster farming on the Inlet:[834]

> The Waikare River
>
> It reeks with the history of the Kapotai people who live at the very beginning of it along its shore line are the remnants of our ancestor's pa sites, even on the island situated right in the heart of the river. Why did they live along the shores of the Waikare, Waikino and Taumarere Rivers one might ask?
>
> Well the answer is simple; the river was rich in seafood. The green lipped mussel, oysters, kokota (flat pipis), huwai (cockles), pupu, periwinkles. Then there was fish in abundance, snapper, mullet, flounder, karati, trevally, pākiri and many more, including kingfish and dolphins.
>
> Nine generations down and I witnessed this myself. I lived with my family for the best part of my childhood at the mouth of the Waikare River, to get to school a launch owned by Jack Lane picked up children from as far up the river as Motu-Kura (Marriots Island) then it went up the Waikino and on up the Taumarere River. If the tide was high when we arrived home the launch just eased up the beaches and let off the children. This beautiful river wasn't just home to me and many others who enjoyed it, it also supplied families with a living, fishing was their livelihood. My Dad did this and there were times when we as a family would follow him up the river and spend the day on one of its many little beaches sharing a picnic sometimes with friends.
>
> Now another generation has arrived and bringing my grandchildren down the river gives me so much sadness and pain as I see a heritage that belongs to them and their friends of many creed and colour fast disappearing from them. The cockles which remained so common and had sustained our forefathers are all gone, all that remains are the few scattered shells found in places which were once beaches we had picnics on, in

[834] At 13-14.

those sandy places are now oyster shells, silt and rocks too dangerous for children to even walk on.

As if this is not enough there is rubbish off the oyster farms scattered about and derelict oyster beds with rotting poles under and above the water.

It is no wonder the snapper are considerably smaller in size than what they used to be and so are the kingfish, and the dolphin used the river as a playground but are a rare sight now.

Even the pipi banks which were the feeding grounds for the snapper are no longer what they used to be. At high tide they could even be seen just under the high-water mark but they have become very silty and boggy. Watching television one night we heard one oyster farmer saying the people of Waikare were to blame because of their farms and digging but I say to him "Get your facts right. We've never seen you in Waikare, so where is your knowledge coming from." It has been twenty years since the last farmer milked. Before then there were eight farms in Waikare so why didn't this happen then if this was the case. We the Kapotai people are known through different organisations for our fight to keep the environment pollution free even our forests are in the hands of the Courts because people like this who just come into an area to make money do not know the love we have for the area.

I do not apologise if this letter seems strong as I sit writing this I shudder to think that a handful of mercenaries could do this to our river, try to point a finger at us and get away with it.

Soon after the first oyster bed started functioning up the river the pipis started dying. Now that's fact and no-one can say otherwise. Whatever is used to cure the poles that go into the mud is responsible, also the dumping of shells and rubbish from the oysters back into the river.

If I can, in some small way, help to stop this desecration of our beautiful Waikare River please do not hesitate to let me know.

> And also if there is someone out there who could help us [as] we would like to hear from you. We live off the sea and the land so we're not about to destroy it.
>
> There are far too many oyster beds, our flounder and mullet grounds are being swallowed up by these monstrosities and we've even been told to get away from the oyster beds while trying to net mullet. This quiet serenity and beauty of the river is being replaced by something that is not only foreign but also despicable to us.
>
> I end here but I remain.
>
> (Anna Hereora (nee George) 1990)

Further examples demonstrating the desire of Te Kapotai to maintain authority of the Inlet include an application the hapū made, in 1984, to the Māori Land Court for Motukura Island to be vested in hapū ownership. The application was granted.[835] It took the tribe eight years to negotiate with the Crown to establish the Waikare Inlet Taiāpure Management Committee under the Fisheries Act 1996.[836] The functions of the Committee include monitoring fishing and activities on the Inlet, and the ability to make regulations. However, Te Kapotai say that the committee is ineffective because there is no implementation funding or resourcing to support the committee. Kaumātua Sonny George, who led the establishment of the committee said:[837]

> We need funding for the Taiapure. We have no funding at all. MAF always gets the levies from the oyster farms. We need that too. For the committee to be able to function it needs financial resourcing. Not big money but at least money for reimbursements. We need a budget for activities.

Another way that Te Kapotai attempts to maintain rangatiratanga over the takutai moana in their rohe is by exercising kaitiaki roles within the current legislative systems. In 2000, the hapū vested land on the Inlet in Ngā Whenua Rāhui

[835] At [63(d)].
[836] At [65].
[837] At [67].

conservation status.[838] Te Kapotai also monitor customary fishing permits through the Rohe Moana Collective established under fisheries legislation.[839] With no resourcing, the tribe also attempts to maintain oversight of resource consents over the Waikare Inlet. Hapū members do not speak positively about their relationship with local councils and say that their interests are not respected by those who make decisions in local government.[840] Kaumātua Eddie Cook explains: "Of greatest importance is that our hapū and the District and Regional Councils build a relationship that is based on mutual respect. We need to understand each other much better".[841]

The dispute between hapū and local government over the resource consents for the Opua Marina development has spanned nearly 40 years and is still live. The Marina issue goes to the core of hapū complaints about council and has damaged the relationship in a way that will have long-term effects. Proposals for establishing a marina at Opua, by a company that is part-owned by the Far North District Council, commenced in the 1980s and ignited opposition from local hapū leadership. Sir James Henare championed the protest in the last years of his life. He explained to former Prime Minister Helen Clark (who was the Minister of Conservation at the time) that the development would desecrate the river that was regarded by the Ngāpuhi people as their "fountains of life".[842] In 1989, he said:[843]

> The beautiful Bay of Islands is beautiful. Once these marinas are established it is my guess, in spite of what the developers say, that it will not benefit one single Māori. Tell me any Māori who can afford to buy boats and can afford the funds required to pay for a mooring. It serves, they say: the marina will benefit all people here. It will benefit some and when people say we are all born equal, let us remember some are more equal than others. And in this case, others are the Māori people in this area.

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[838] An agreement was reached between Te Kapotai and the Minister of Conservation to put 918 hectares of land along the Waikare Inlet and within Te Rohe o Te Kapotai under Ngā Whenua Rāhui special conservation status. See: *Wai 1040, #F26(b)*, above n 776, at 175.
[839] Based on author's personal knowledge.
[840] *Wai 1040, #F27(d)*, above n 14, at [63]-[67].
[841] At [42].
[842] Waitangi Tribunal *Evidence for Crown Breaches of Te Tiriti o Waitangi in regards to the ownership and management of Te Awa Tapu o Taumarere and Te Moana o Pikopiko i Whiti* (Wai 1040, #M30(a), 12 September 2014) at 45-46, 50-51. See also: [93].
[843] At [95]-[96].

The marina developments were authorised by the Council, and Stage Two extensions have been carried out during the last 10 years.[844] Tensions between the hapū and local authorities over the development remain, and discussions continue about how to recognise the rights of tangata whenua over the area.[845]

Te Kapotai have turned to the Waitangi Tribunal several times as an avenue for protecting their rights to the Inlet. In October 1993, the first Waitangi Tribunal claim was made by Te Kapotai elder Hiawe King on behalf of Te Kapotai. He sought an inquiry into the Crown's taking of ownership and subsequent mismanagement of the Waikare Inlet. The claim reads:[846]

> Our utmost concern is to secure our taonga and its environment from being further plundered by profit driven ethics of the Government and the market place. Our aim is to conserve and maintain our taonga tuku iho for the well-being of present and future generations.

Additional Waitangi Tribunal claims were filed by Te Kapotai kaumātua in 2008.[847] The Wai 1546 claim specifically concerns the Crown's failure to actively protect the historical, cultural, spiritual and economic significance of the Waikare Inlet.[848] Te Kapotai's claims were heard in the Wai 1040 Te Paparahi o Te Raki (Northland) Inquiry between 2008 and 2018.

In May 2009, Te Kapotai was involved in the first phase of consultation on the review of the Foreshore and Seabed Act 2004. The hapū made written and oral submissions to the Ministerial Review Panel at Otiria marae. Later, in April 2010, the Waikare Māori Committee filed a written submission to the Government on its consultation document for the Bill. A hapū submission was also filed in November 2010 in opposition to the Marine and Coastal Area Bill 2010.[849]

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[844] At [119]-[123]. In 2013, Far North Holdings proposed to expand Opua Marina and construct an additional 173 berths immediately to the south of the existing marina berths. This Stage Two construction will require a significant level of dredging to provide the new berths and reclamation will occur adjacent to the dredged area, including construction of a new sea wall.
[845] At [119]-[123].
[846] *Wai 1040, #F27(d)*, above n 14, at 3.
[847] Wai 1464 and Wai 1546 are claims by kaumātua Te Riwhi Whao Reti, Hau Tautari Hereora, Romana Tarau and Edward Cook on behalf of all descendants of Te Kapotai and Ngāti Pare.
[848] Waitangi Tribunal *Statement of Claim* (Wai 1040, #1.1.226, 26 August 2008).
[849] Waitangi Tribunal *Appendices to Brief of Evidence of Willow-Jean Prime* (Wai 2660, #A3(a), 21 December 2016) at 18-24.

Te Kapotai's history demonstrates consistent resistance to the imposition of Crown kāwanatanga over the takutai moana in their rohe. There are multiple sites of struggle against land alienation, and the establishment of central and local government without Māori representation. There has always been a tension between kaitiakitanga and Crown priorities for commercial development of the Waikare Inlet. With no resourcing and no power within these new institutions, any success Te Kapotai has achieved in terms of retaining authority over the Waikare Inlet has been in spite of, not because of, the Crown. Their resilience should be considered a triumph. It is not an exaggeration to say that Crown colonisation has devastated Te Kapotai, and that the level of authority and quantity of land that remains with the hapū is significantly less than what they had in the past. This is the context from which Te Kapotai arrive at the Marine and Coastal Area (Takutai Moana) Act 2011. It is an Act the Crown now confidently says provides for the "mana tuku iho" of Te Kapotai. This is a bold assertion from a treaty partner that has no history of acting to protect the hapū.

### 8.3 The 2011 Act: Perpetuating the historical grievances of Te Kapotai

It was around 2013 that Te Kapotai began considering their options under the 2011 Act.[850] In 2014, Te Kapotai decided at their monthly hapū meeting to file both Crown engagement and High Court applications. They felt like they were forced into a 'take it or leave it' position; they either had to make an application by the statutory deadline, or accept that what little rights were contained in the 2011 Act would no longer be available after the statutory deadline had passed. The decision of the hapū to make applications under the Act was done reluctantly and with the view to making it clear to the Crown, and others, that the takutai moana at Waikare was a customary area under claim by the hapū. At the same time as preparing their applications for the 2011 Act, Te Kapotai filed an application with the Waitangi Tribunal for an urgent inquiry into the consistency between the 2011 Act and the treaty (discussed in more depth below). Te Kapotai hoped that favourable findings and recommendations from the Tribunal would compel the Crown to engage and reconsider the 2011 regime as a whole.

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[850] Waitangi Tribunal *First Amended Statement of Claim* (Wai 1040, #1.1.226(a), 13 October 2011) at [25.4]. See also: *Wai 1040, #F27(d)*, above n 14, at 3. The hapū included the 2011 Act as part of their Wai 1464/1546 Amended Statement of Claim, claiming that the Act continued the loss of ownership and control, and undermined the mana and rangatiratanga of Te Kapotai over the Waikare Inlet.

An immediate barrier for Te Kapotai when they considered their options under the 2011 Act was their inability to pay for legal support. There was little information available about the statutory processes and how to access funding. A table prepared by the Marine and Coastal Area Unit identified the tiers of funding that may be approved retrospectively after an application had been filed, but it did not resolve the uncertainty around the funding regime. In early 2016, the lawyers who acted for Te Kapotai's historical treaty claims, covered costs and travelled to Wellington to meet with OTS staff. The purpose of the meeting was to better understand the legislation and the Crown's approach to implementation.[851] The meeting did not provide much more clarity on the procedure under the Act, as OTS staff were still coming to terms with the legislation themselves.

Following that meeting, a cost analysis was carried out internally within the law firm that was advising Te Kapotai at that time, and there was a concern that funding would not cover actual legal costs of advising applicants on the legislation and the preparation of their applications.[852] There was also the concern of agreeing to act for a group, knowing the applicant group did not have the ability to pay for services if funding was not approved, or if the upper funding limit was exceeded. A broader consideration was that most treaty lawyers have experienced issues with Crown funding regimes, including low-rate work (compared to commercial law areas), delayed payments, and/or non-payment. These factors mean that representing Māori clients is often not viable for legal practices.

With the statutory deadline fast approaching, other hapū in Ngāpuhi were also concerned to know what their rights were under the Act. Each group needed specific advice on which pathway or application was best suited to their specific circumstances, however many were struggling to get legal assistance.[853] I was asked, as part of regular monthly treaty claims updates at Te Kotahitanga o Ngā Hapū o Ngāpuhi hui,[854] to provide advice on how hapū could protect their customary rights to the takutai moana under the Act. The High Court process was

[851] Based on author's personal knowledge.
[852] Based on author's personal knowledge.
[853] Other hapū in Ngāpuhi have also not reached settlement so, like Te Kapotai, most had no financial resources to engage with the legislation.
[854] Te Kotahitanga o Ngā Hapū o Ngāpuhi was a claimant collective from across Ngāpuhi that met monthly between 2009-2018 to plan, prepare and coordinate for the Wai 1040 Te Paparahi o te Raki (Northland) Waitangi Tribunal Inquiry and wider settlement issues.

daunting for hapū, and they feared the complexity of taking an application through the High Court. Hapū were reluctant to apply under the Crown engagement option because most do not have a sound relationship with the Crown; an impact of the current historical settlement context in Northland. Most groups, like Te Kapotai, have recently been in active litigation with the Crown in respect of mandate issues for historical negotiations which remain unresolved. They feel indignant that they are now being asked to engage with the Crown on their takutai moana rights, when their historical treaty claims are outstanding.[855]

From my perspective, one which I know is shared by other legal advisors in the treaty sector, the 2011 Act is a particularly difficult piece of legislation to understand. It is a highly complex and confusing Act. The Act does many things. It creates a new land status for the foreshore and seabed. It also takes away long-standing common law rights, and it creates new rights that can be recognised as Māori rights. These new rights interact with other legislation governing the environment. It establishes a new jurisdiction for the High Court, and a new stream of political engagement. The Crown's policy towards implementing the Act further complicates matters because it is largely unknown and still evolving. For groups who may be successful with their applications under the Act, they will have to grapple with new legal rights, but they will have no funding to administer those rights.

The whole post-2011 Act environment is new and untested. The environment is constantly shifting as the Crown develops new policy, and parties attempt to move applications forward. Advising Māori on how the 2011 Act impacts their customary rights is a difficult task because the Act poses so many restrictions. Prior to the statutory deadline, hapū felt like they were in a 'take it or leave it' position and felt they had already been defeated. The grievance caused by the 2011 Act was evident in the hearts and minds of the people who were reeling because they were going to suffer further loss of land and authority as a consequence of the 2011 Act. The people did not have to delve too far into the legislation to validate their concerns, because they knew from their experience that the Crown did not have the will to recognise their rangatiratanga. They also feared that the legal and political processes that follow from the Act would divide

[855] For instance, see: Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015); Waitangi Tribunal *Ngātiwai Mandate Inquiry Report* (Wai 2561, October 2017).

their people. People simply did not want to make applications, but the statutory deadline meant they had little choice.

### 8.3.1 Making an application: Tikanga, substantial interruption, exclusivity

For Te Kapotai, the High Court pathway was preferred over Crown engagement because they did not want to engage with the Crown over the takutai moana, when the Crown refused to engage with them over their historical treaty claims.[856] Their applications under the 2011 Act were not prepared until December 2016 when Te Kapotai transferred to my law firm, Tukau Law.[857] Te Kapotai's application to the High Court was filed on 23 March 2017, 11 days before the statutory deadline.[858] The work was carried out on the basis that fees would be paid retrospectively under the Crown's funding policy when funding was approved. Funding levels would be monitored as the application progressed.

Affidavit evidence setting out the basis upon which Te Kapotai was entitled to the order was filed in support. Evidence for the application was provided by Ms Karen Herbert, Mr Edward Cook and Mrs Willow-Jean Prime. The application sought orders recognising customary marine title and protected customary rights over the Waikare Inlet in the name of the Waikare Māori Committee on behalf of Te Kapotai. The customary marine title area sought in the application was the same as the area currently under the function of the Waikare Taiāpure Committee. The protected customary rights area includes the Inlet, and the wider Bay of Islands; a shared interest area where customary rights have been carried out by the hapū. Mrs Willow-Jean Prime was nominated as the holder of the orders. Per the statutory requirements, the application was filed in the Whangarei High Court, publicly notified, and served on relevant parties.[859]

Applicants were required to establish that they satisfy the statutory tests contained in the Act for customary marine title and protected customary rights. This section

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[856] If there is a time when the Crown changes its position and recognises the mana of the hapū to enter historical negotiations, Te Kapotai will reconsider whether the High Court remains the best pathway for their application.
[857] Waitangi Tribunal, *Statement of Claim* (Wai 2660, #1.1.1, 21 December 2016).
[858] *Application for recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011* CIV-2017-485-349, 23 March 2017.
[859] As per Marine and Coastal Area (Takutai Moana) Act 2011, ss 102 and 103. When I went to file the application at the High Court in Whangarei, the court staff were unsure how to receive the applications. They were date-stamped and sent to Wellington to be processed with all other applications. The sheer number of applications meant that the court had to set up systems for the interlocutory matters.

does not make a case either way for Te Kapotai, but it does provide some observations about the tests. Under their customary marine title application, Te Kapotai had to demonstrate that they held the Waikare Inlet in accordance with tikanga; that the hapū had exclusively used and occupied the Inlet from 1840 to the present day without substantial interruption; and that customary marine title has not been extinguished as a matter of law.[860]

The ability of Te Kapotai to have held the Waikare Inlet in its entirety in accordance with tikanga since 1840, has been seriously compromised by their colonial history outlined above. This chapter has discussed how early land loss along the Inlet, the taking of the oyster fisheries, commercial fishing, the imposition of a customary fishing permit system and commercial developments, means Te Kapotai's connection to the Inlet has been undermined. The Crown's view is that areas of foreshore and seabed that are developed and have commercial aquaculture may not be able to satisfy exclusive use and occupation "without substantial interruption".[861] There are extensive marina and housing developments, and 25 commercial oyster farms on the Waikare Inlet. The short point is that for most Māori, including Te Kapotai, colonisation may defeat their ability to satisfy the statutory tests.

### 8.3.2 Funding concerns

In August 2017, Te Kapotai submitted a self-assessment complexity application for High Court funding with the Marine and Coastal Area department at OTS.[862] Later that month, OTS advised that the application had been determined and assessed as being of very high complexity and therefore an upper funding limit of $316,750.00 was approved. The funding available for legal services and project management, under this tier of funding includes:[863]

[860] See Marine and Coastal Area (Takutai Moana) Act 2011, s 58.
[861] See discussion above at 141-142.
[862] Now known as Office for Māori/Crown Relations - Te Arawhiti ("Te Arawhiti")
[863] Waitangi Tribunal *Appendices to Brief of Evidence of Doris Johnston* (Wai 2660, #A131(a), 18 March 2019) at 254.

**Table 3:** Funding for High Court application

| **Milestone** | **Legal** | **Project Management** |
|---|---|---|
| Appointment process | - | $50,000.00 |
| Application and notification | $15,000.00 | $6,000.00 |
| Pre-hearing/evidence gathering | $40,000.00 | $5,000.00 |
| Interlocutory hearing | $3,000.00 | - |
| Hearing | $30,000.00 | $2,000.00 |
| Determination | $8,250.00 | $2,000.00 |
| TOTAL | $96,250.00 | $65,000.00 |

For Te Kapotai, concerns regarding levels of funding are already arising. Applications are adjourned in the High Court while priority applications filed under the 2004 Act are heard. Te Kapotai are amenable to the adjournment because a priority for the hapū is the Waitangi Tribunal Inquiry into the 2011 Act (discussed below). However, it has been over two years since their applications were filed and, although hearings are adjourned, approximately 75% of the funding for the current milestone has been expended on interlocutory matters.[864] For example, the assessment of overlapping claims and filing of 16 notices of appearances on other applications was unexpected work that used funding. There is also a proposal being led by counsel for one applicant group to run a test case on behalf of 38 Ngāpuhi applicants.[865] The applicants propose to provide a test case, with factual and evidential foundations, so that the courts can determine what criteria are required to prove customary title. The second part of the application asks the court to state a case to the Māori Appellate Court on whether the applicants hold the test case area "in accordance with tikanga" per s 58 of the Act. The test case is opposed by the majority of affected applicants, including Te Kapotai, because of the risk that the test case could set a precedent for their applications. A hearing for submissions on the proposal was held in June 2019, and in subsequent directions the test case was declined by the court. The

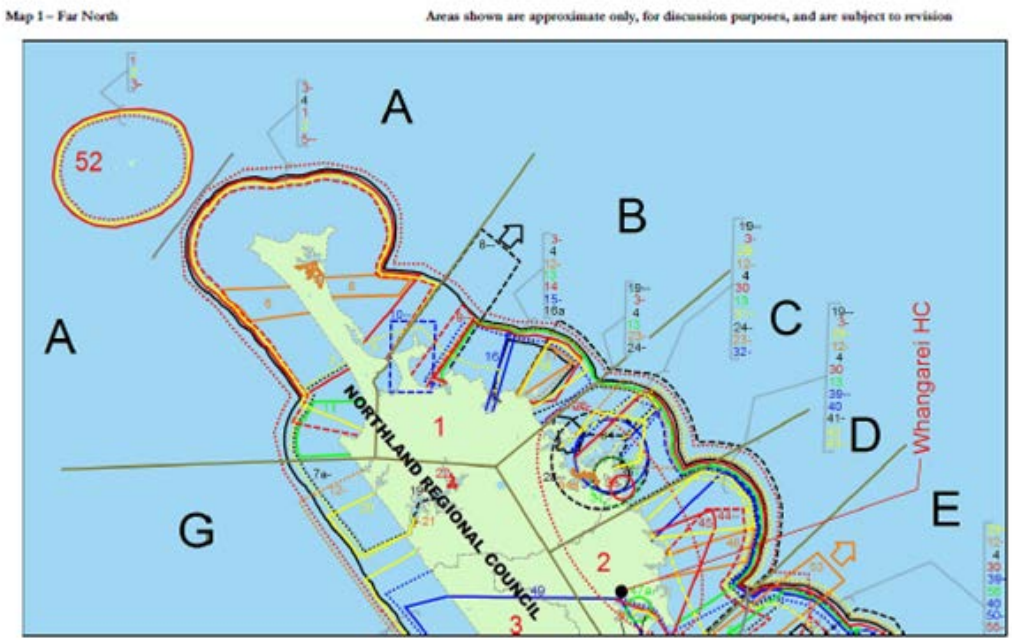
[864] Waitangi Tribunal, *Brief of Evidence of Kara Paerata George* (Wai 2660, #A70, 18 January 2019), at [49].
[865] All together there are 38 CMT applications in the Proposal Area. Six of the overlapping parties have indicated that they wish to collaborate with the Ngāpuhi Applicants on the Proposal, four have indicated that they do not oppose and will abide the decision of the Court, six have not expressed a view, and 20 have objected. The Crown has also opposed the Proposal.

applicants have since sought leave to appeal this decision. The test case proposal is another example of an unanticipated interlocutory step that has not been factored into the Crown's funding model. The Crown's current position is that it will not pay for legal attendance in response to the test case.[866] This means any legal costs lawyers incurred for responding to the test case application will have to be met by the applicants or written off counsel.

### 8.3.3 Cohesion / overlapping claims issues

Since the filing of applications, the court has issued directions to manage the high number of applications. Applications were grouped into 21 regional groups throughout the country (Groups A to U).[867] The Northland region has the most High Court and Crown engagement applications with approximately 50 High Court and 161 Crown engagement applications. Twenty-three other applications were placed in Group C along with that of Te Kapotai.[868]

**Figure 18:** Northern map of grouped High Court applications[869]




[866] For example, see: Waitangi Tribunal *Hearing Transcript* (Wai 2660, #4.1.2, 25-29 March 2019) at 699-701.
[867] *Minute No.5 of Collins J [First Case Management Conferences]* (CIV-2017-485-218, 18 July 2018) at [10]-[11], [39]-[76].
[868] It is noted that applications could be placed in more than one group.
[869] *Annexure A to Memorandum of Counsel for the Attorney-General in response to Minute dated 1 June 2017 of Mallon J: Revised Maps of High Court Application Areas* CIV-2017-485-218, (30 June 2017) Map 1 at 2.

Following the grouping of applicants into regions, applicants were required to file notices of appearances for applications which overlapped or were of interest. This became a cumbersome process, during which some Crown engagement applicants joined the proceedings of the High Court applicants, as well as local authorities and other interested parties.[870] Te Kapotai filed 16 notices of appearances on other High Court applications. The Crown has not yet provided a process for Crown engagement and High Court applicants to identify their interests on other Crown engagement applications.

Overlapping claims will be one of the greatest issues for Te Kapotai and others in Group C to resolve. An added difficulty is that there are no mechanisms or policies in place to assist claimants to reconcile overlapping issues. There are multiple overlaps that Te Kapotai and neighbouring hapū are having to manage. For example, there are two applications that claim the entire coastline of New Zealand.[871] These applications will potentially be denied or struck out, but at the moment they are live. There are 16 High Court applications that have been assessed to have an actual or potential overlap. There is still an unknown number of Crown engagement applications where there will undoubtedly be overlaps. The requirement to establish exclusivity for customary marine title presumably means that if claimants are not able to agree between themselves where each other's customary marine title area begins and ends, it will ultimately be a matter for determination by the High Court or the Minister.

Adding to the complexity of the ability to resolve overlapping claims is the current historical settlement environment in Northland. Whānau, hapū and iwi have not yet entered negotiations, and while each tribe knows their territory, areas of overlap and shared interest have not been addressed and are contentious. For instance, there are multiple hapū claims to the Opua area which is at the entrance of the Waikare Inlet. The Opua area involves old land claims, Crown purchases, compulsory public works takings for railways, and extensive marina and tourism developments.[872] It is a hotspot for treaty claims, and now Marine and Coastal Area Act applications, as it is now subject to multiple applications under the Act.

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[870] Note, Ngāti Rēhia, a Crown engagement applicant, is an interested party in the High Court applications filed on behalf of Te Kapotai, Ngāti Hine and several other applicant groups.
[871] There are two applicants who have sought recognition orders for the entire New Zealand coastline, namely Rihari Dargaville (CIV-2017-404-000538) and Cletus Maanu Paul (CIV-2017-485-000512).
[872] For instance, see: *Wai 1040, #F27(d)*, above n 14, at 26-30.

In the Marine and Coastal Area Act environment, it will be difficult for hapū to reach agreements for risk that agreements under the 2011 Act, will impact historical claims and vice versa. Hapū are meeting to address the issues; however, it is not likely that timely and permanent agreements will be reached.

### 8.4 Waitangi Tribunal Inquiry into the 2011 Act

There are few avenues available to Māori to challenge the Crown when they believe a breach of their treaty rights has occurred. The Waitangi Tribunal is a quasi-judicial commission of inquiry and has the exclusive jurisdiction to inquire into whether an Act, action, omission, policy or practice of the Crown is inconsistent with the treaty.[873] On 21 December 2017, as mentioned, Te Kapotai filed an application for an urgent inquiry by the Waitangi Tribunal into the prejudicial effects of the 2011 Act on their customary and treaty rights.[874] They alleged the Crown had breached te Tiriti by enacting the 2011Act as it erodes their customary and common law rights, and fails to uphold their right to exercise rangatiratanga over the takutai moana in their rohe.[875] Te Kapotai kaumātua, Patu Hohepa, explained that the Marine and Coastal Area (Takutai Moana) Act 2011 is "an issue that stabs into the heart of our rights as Te Kapotai, Ngāti Hine, Ngāti Rehia and all those who have inherited rights that come from ancestors".[876]

The Chief Judge of the Waitangi Tribunal, Judge Isaac, declined to hear the applications under urgency on the basis that the applications were made too close to the statutory deadline and there was an alternative remedy because claimants were able to make applications to the High Court and Crown under the Act.[877] It was acknowledged that the issue was of national significance, and the Tribunal agreed to hear the claims by establishing the Wai 2660 Marine and Coastal Area (Takutai Moana) Act 2011 Kaupapa Inquiry.[878] The Tribunal noted the claimants' case for granting priority centred on "a likelihood that future prejudice will arise from a statutory framework that is in breach of the Treaty, with current

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[873] Treaty of Waitangi Act 1975, ss 6, 8.
[874] Waitangi Tribunal *Statement of Claim* (Wai 2660, #1.1.1, 21 December 2016).
[875] Waitangi Tribunal *Statement of Claim* (Wai 2660, #1.1.1, 21 December 2016).
[876] Waitangi Tribunal *Brief of Evidence of Patu Hohepa* (Wai 2660, #A1, 21 December 2016), at [79].
[877] Waitangi Tribunal *Decision of the Chairperson on applications for an urgent hearing concerning the Marine and Coastal Area (Takutai Moana) Act 2011* (Wai 2660, #2.5.5, 16 March 2017) at [36] – [42].
[878] Waitangi Tribunal *Memorandum-Directions of the Chairperson on applications for a priority kaupapa inquiry into takutai moana claims* (Wai 2660, #2.5.8, 25 August 2017) at [50] – [55].

procedural obstacles an exacerbating factor."[879] The Chief Judge said that the Tribunal must "… weigh the risk of future prejudice and especially so where Māori customary interests and rights in land and other taonga protected by the Treaty are alleged to be affected."[880] The effect of the Tribunal granting priority is that the Wai 2660 Inquiry would be heard before other inquiries in the kaupapa inquiry programme. The granting of priority to the Inquiry is a partial win for the claimants, because the Tribunal had not made a decision of this nature before. Judge Miharo Armstrong and Tribunal members Dr Hauata Palmer, Ron Crosby and Professor Rāwinia Higgins are the panel for the Inquiry.[881]

The Inquiry is proceeding in two phases, addressing two questions: [882]

> **Stage One**
>
> Do the procedural arrangements and resources provided by the Crown under the MACA Act prejudicially affect Māori holders of customary marine and coastal area rights in Treaty terms when they seek recognition of their rights?
>
> **Stage Two**
>
> To what extent, if at all, are the MACA Act and Crown policy and practice inconsistent with the Treaty in protecting the ability of Māori holders of customary marine and coastal area rights to assert and exercise those rights?

Approximately 150 applicants and interested parties have joined the MACA Inquiry. The Stage One hearing into procedural issues under the Act was held in March 2019, with a further hearing for closing submissions held in July 2019. In terms of the Stage One hearing, evidence was presented from claimants throughout the country. The claimants' evidence demonstrated the immense difficulties being experienced by applicant groups under the Act. Key points from Te Kapotai and other claimant evidence can be summarised as follows:

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[879] At [39].
[880] Waitangi Tribunal *Memorandum-Directions of the Chairperson on applications for a priority kaupapa inquiry into takutai moana claims* (Wai 2660, #2.5.8, 25 August 2017) at [46].
[881] Waitangi Tribunal *Memorandum-Directions of the Chairperson appointing Tribunal panel members* (Wai 2660, #2.5.12, 2 March 2018).
[882] Waitangi Tribunal *Memorandum-Directions of the Chairperson on applications for a priority kaupapa inquiry into takutai moana claims* (Wai 2660, #2.5.8, 25 August 2017) at [52]. The full statement of issues for the inquiry is contained at Appendix 4.

a) Insufficient and "patchy" information sharing and poor "consultation" by the Crown in the lead-up to the statutory deadline, and in relation to the development of the funding guidelines;

b) Difficulties in making the application itself, particularly in the High Court, and pressure to comply with the statutory deadline despite misgivings about the Act itself;

c) Ongoing funding problems, including delayed payments causing cashflow issues, differential application of funding policies, insufficient funding for legal advice at every stage in the High Court process but particularly in the interlocutory and evidence gathering stages, poor advice from OTS/Te Arawhiti, and problems in appointing experts; and

d) Uncertainty about the resolution of internal and external overlapping claims, including how such resolution would be funded within the existing guidelines, and how reasonable it is for the Crown to expect resolution of these issues.

There were two Crown witnesses. The first was Jane Penney who works in the High Court registry and gave evidence regarding the processes developed by High Court staff to accept, register and categorise the Marine and Coastal Area Act applications when they came in.[883] The second witness was Doris Johnston, a senior public servant who has occupied various roles within OTS/Te Arawhiti.[884] Through evidence and cross-examination, a number of acknowledgements were made by the Crown, including, perhaps most significantly, that there are issues with the funding regime. The Crown has committed to a review in 2019 of the funding guidelines and funding levels, which it says will include claimant engagement and feedback.[885]

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[883] See: Waitangi Tribunal *Brief of Evidence of Jane Sandra Penney* (Wai 2660, #A130, 15 March 2019).
[884] See: *Wai 2660, #A131*, above n 53.
[885] Waitangi Tribunal *Hearing Transcript* (Wai 2660, #4.1.2, 25-29 March 2019) at 603-604. The Crown acknowledged from what it had heard in evidence that there does seem to be an issue with insufficient funding levels, particularly for those groups in the High Court process currently where case management conferences are putting strain on applicant funding levels. More detail on this review and the parameters of the review will be released soon.

The Crown said it was surprised by the number of applications under the Act and the extent to which they overlapped.[886] It had expected a much smaller level of engagement with the Act, due in part to what they understood to be discontent about the Act itself.[887] The Crown acknowledged there was little done by way of preparing the High Court staff for the influx of applications and how these applications should be processed, and that the Crown had adopted a 'hands off' approach to the High Court pathway.[888] Notably, there was nothing formally done to communicate the statutory deadline to registry staff by the Crown.[889]

Cross-examination reveals that the development of Crown policy around key issues such as how the Crown prioritises applications, how it funds applications, its interpretation of the tests under the Act, and the interplay between the two pathways, has been slow, "ad hoc", and in some cases entirely absent despite the Act being in force since 2011.[890] As mentioned in Chapter 7, some policy areas are still under development, including how the Crown will deal with the large number of Crown engagement applications. On this, the Crown said the processes will not be quick. The Crown estimates that a Marine and Coastal Area Act application may take four years to process, and with current resourcing within Te Arawhiti could even take 12-16 years.[891] The Crown indicated it was looking at policy around a "regional approach" to try and reduce the time it is currently taking for Crown engagement applications to be progressed.[892]

In terms of the statutory tests, the Crown is still considering whether several groups with overlapping interests in a stretch of coastline would automatically mean that there can be no customary marine title due to lack of "exclusive" use and occupation per the test. The Crown took a position based on statutory interpretation in 2016 that overlapping interests would mean that the exclusivity test could not be met. Comments by witness Doris Johnston suggest that the Crown considers that interpretation may no longer be correct and that they may need to revisit that interpretation in 2019.[893] Overall, the cross-examination of

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[886] Waitangi Tribunal *Hearing Transcript* (Wai 2660, #4.1.2, 25-29 March 2019) at 602.
[887] At 738-739.
[888] At 593.
[889] At 738-739.
[890] At 598.
[891] At 617, 852.
[892] At 615.
[893] At 718-720.

Crown witnesses served to highlight the claimants' position that what has been created under the Act is a flawed system that is still under development, and not fit for the purpose of recognising and protecting Māori rights.

A final point to note regarding the Stage One Inquiry is the way in which the Crown chose to frame what it considers to be its treaty duties to Māori in terms of the takutai moana. The Crown primarily relies on the *Lands* case of 1987 as a basis for its treaty framework.[894] By way of summary, the treaty principles cited by the Crown include the principle of partnership, the duty to make informed decisions, and the principle of active protection.[895] Throughout the Crown's closing submissions it refers to an overarching duty of reasonableness and argues that the treaty standard to be applied to the consideration of Stage One issues is whether the Crown has acted reasonably in the circumstances.[896] The Crown cites *Taiaroa,* where the court said: "The test is reasonableness, not perfection. What was done was far from perfect but passes the test of reasonableness." The Crown relies on this as the test for measuring whether applicable treaty principles have been met.

The issue with the Crown's approach is that the authorities relied upon by the Crown do not support the narrow and restricted interpretation of treaty principles advanced by the Crown. The Crown also omits relevant and more recent jurisprudence that should apply and be given weight to by the Stage One Tribunal. There is only one reference in the Crown's submissions to the Waitangi Tribunal's 2004 Report and it is in reference to a citation from the Muriwhenua Tribunal on active protection.[897] The Foreshore and Seabed Tribunal states high thresholds and expectations for the Crown's treaty obligations to Māori in terms of the takutai moana. The Tribunal speaks to respect for te tino rangatiratanga, and to the Crown's obligations to "actively protect" and "give effect to"/"give meaningful effect" to Māori self-regulation.[898] For the Crown not to apply, distinguish or comment either way on the findings in the Foreshore and Seabed Report when expressing what it considers to be its treaty obligations for Stage One issues, presumably means the Crown does not accept them.[899]

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[894] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664 ("*Lands*").
[895] Waitangi Tribunal *Crown closing submissions* (Wai 2660, #3.3.58, 26 July 2019) at [42]-[53].
[896] At [42]-[53].
[897] At [71].
[898] *Foreshore and Seabed Report,* above n 27, at 130-131.
[899] See: Waitangi Tribunal *Crown closing submissions* (Wai 2660, #3.3.58, 26 July 2019).

The Stage Two inquiry on the substantive issue of treatment of Māori rights under the 2011 Act will likely run through 2019/2020. Te Kapotai's initiating of the Waitangi Tribunal Inquiry into the 2011 Act continues a history of resistance to the imposition of Crown kāwanatanga over the takutai moana in their rohe. It is part of a wider attempt by the tribe to create a pause to the implementation of the 2011 Act in order that a further review can take place.

### 8.5 Concluding remarks

Te Kapotai's relationship with the Waikare Inlet is defined by tikanga or "cardinal values" of Māori society.[900] The Inlet is held in accordance with mana, tapu, utu, rangatiratanga, whanaungatanga and kaitiakitanga; values which regulated its use and ensured its preservation and sustainability for future generations.[901] Te Kapotai rangatira coordinated hapū activities, determined fishing, food gathering, trade, the use of coastlines and navigation of the sea.[902] For Te Kapotai, a history of war or ringa kaha, continued occupation, pepeha, place names, wāhi tapu and manaakitanga, were assertions of mana and rangatiratanga over the takutai moana within their rohe.[903] Through generations of use and occupation of the Waikare Inlet, the tribe's identity is embedded in the takutai. The Inlet is their way of life, their identity, and their wellbeing.

Colonisation was carried out by the Crown in a manner which caused the alienation of land and resources, and the usurpation of Te Kapotai authority by the Crown. Dr Knox says there have been "literally hundreds of legislated restrictions on customs, property rights and business activities".[904] Crown laws and policies relating to the foreshore and seabed since 1840 are part of this colonial matrix. Since the first encounters, the Waikare Inlet has been a site of struggle and resistance for Te Kapotai, who have sought fulfilment of te Tiriti and the ability to express their fundamental right of rangatiratanga as guaranteed by Article 2.

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[900] Waitangi Tribunal *Brief of Evidence of Dr Manuka Arnold Henare* (Wai 1071, #A86, 12 January 2004) at [13], [31] – [32], [106].
[901] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 24-26.
[902] Cited in: *He Whakaputanga me te Tiriti*, above n 10, at 30-31: "the Hapū held the mantle of guardianship of the land and other possessions. It was also the Hapū that held the mantle of governance of the customs and things to be done".
[903] For example, see: *Wai 1040, #F25(b)*, above n 15, at [48]-[49]; *Wai 1040, #F27(d)*, above n 14, at [3]-[4], [68]-[70].
[904] Dr Colin Knox 'Māori Land Development and the Treaty: The Erosion of Tino Rangatiratanga', in V Tawhai, K Gray-Sharp, *Always Speaking, The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011) at 213.

The Marine and Coastal Area (Takutai Moana) Act 2011 is the current law governing the takutai moana. The Act required Te Kapotai to make applications for the recognition of their customary interests by 3 April 2017. In the month before the statutory deadline passed, Te Kapotai reluctantly filed an application in the High Court and Crown engagement. Aggrieved by the Act, Te Kapotai also filed an application with the Waitangi Tribunal for an urgent inquiry into whether the 2011 Act was inconsistent with te Tiriti. The Wai 2660 Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry is currently underway and will likely conclude in 2020, following that, the Tribunal will release its findings on the Act.

The 2011 Act prejudicially impacts Te Kapotai in several ways. The Act takes away their common law customary rights and replaces them with rights of less value. The scope of rights available for Te Kapotai under the Act are much less than the authority embodied in rangatiratanga under Article 2 of te Tiriti. Significantly, the Crown believes that only 2-3 per cent of the coastline will be able to meet the requirements for customary marine title under the legislation.[905] The Crown framed the tests for establishing customary interests with little regard for colonisation and the likelihood that it would defeat the ability of hapū like Te Kapotai to satisfy the tests under the Act. Beyond this, the 2011 Act exposes Te Kapotai to financial risk because the funding regime put in place by the Crown only provides for an 85% contribution to the overall costs of progressing a customary interest application. The statutory processes for recognising customary interests are adversarial and political. The potential for damage to inter-tribal relationships and the Crown Treaty partnership is likely, as groups are required to establish exclusive use and occupation to coastal areas. There is no sign of immediate relief for Te Kapotai and other coastal Māori. The Marine and Coastal Area Act has created an environment of risk and uncertainty, and by all accounts these factors will continue to impact Māori for some time to come, while the Crown and courts reconcile how to implement the Act. So long as this risk and uncertainty continues, Te Kapotai are denied their customary rights to the takutai moana and are prejudiced.

[905] Above n 64, 583.

# CHAPTER 9: RESISTANCE – A MULTIFACETED APPROACH TO ADDRESSING THE TAKUTAI MOANA ISSUE

## 9.1 Introduction

If it is accepted that the Marine and Coastal Area (Takutai Moana) Act 2011 breaches te Tiriti, then the next step for this research project should be to consider what can be done to bring the regime back into alignment with te Tiriti. Overhauling an oppressive law, which is a product of a colonial past and operates in a legal system where the Crown is sovereign, is no small task. Prejudice arising from the erosion of common law rights may be restored by providing access to the courts. Options like repealing the 2011 Act and returning to the post-*Ngāti Apa* position, where Māori can access the common law jurisdiction in the courts, may be a pathway forward. Compensation for the rights that are taken away may be part of the discussion. However, when addressing the failure of the Crown to ensure the regime upholds te Tiriti, involves a discussion about how te Tiriti can apply, and how rangatiratanga can be recognised in terms of the takutai moana today. This discussion can only be had when there is a genuine willingness between the Crown and Māori to confront the issue of sovereignty and review how authority is shared over the takutai moana.

This chapter explores options Māori could pursue to create a pause in the implementation of the 2011 Act to prevent further prejudice from being entrenched. The multifaced approach discussed in this chapter, identifies mechanisms and processes that are currently available to Māori and have shown to be of some value in the protection and preservation of their rights. This multifaceted approach includes completing the proceedings before the Waitangi Tribunal on the 2011 Act, conducting research, and understanding how international law can apply to protect Māori customary rights to the takutai moana. It also involves implementing legal options contained in the current environmental legislation, to improve Māori participation in the management of the takutai moana. The options identified in this chapter are situated in the current legal and political landscape with the intention of achieving greater compliance with existing treaty principles. However, the options do not go so far as to resolve

the question of how rangatiratanga over the takutai moana should be appropriately returned. This research is about a transformational approach to the takutai moana; where there is a commitment to the implementation of te Tiriti and where Māori are returned to a position of authority. It is my view that this transformation can only occur when the Crown is prepared to confront the issue of sovereignty under te Tiriti. This multifaceted approach acknowledges that a te Tiriti-based transformational approach to the takutai moana issue will take time. It creates a pause and safer position for Māori, while the Crown and Māori work through a process that will enable a wider application, and which addresses some of the underlying issues with respect to how the treaty is interpreted and applied today.

## 9.2 Why a multifaceted approach to addressing the takutai moana issue?

Under the 2011 Act, Māori customary rights to the takutai moana are constrained by the Crown's application of sovereignty and within the existing environmental legislative regime governing the coastal area.[906] It is unlikely the Crown will change the regime in favour of Māori rangatiratanga on its own accord. It will come down to the commitment of Māori to push for reform to the current regime. In confronting this challenge, Māori should take confidence from the struggle of envisioning a better future; is a long-held practice of our people. Since 1840, Māori have shown a resilience in the face of Crown authority and an expectation to exercise their rights under te Tiriti. During early colonial times, as Kawiti's ōhākī has demonstrated, he was already conceptualising what was happening around him and across the broader political horizon in Aotearoa.[907] His message was that so long as our tikanga and rangatiratanga survive, so do we as a people. He encouraged our people to resist assimilation and secure a future where we thrive as a people in our lands. Within his ōhākī, te Tiriti is a mechanism for transformation, and transformation for our people – a metaphor that exists beyond the taumata or horizon of the sea.

Māori are challenged to consider how the current power arrangements and instruments of oppression, in this case the Marine and Coastal Area (Takutai Moana) Act 2011, can be overcome. Judge Fox explains it in this way: "the Māori rhythm was to naturally unify, to confront threats to their tribal sovereignty

[906] See discussion above at 147.
[907] *Wai 1040, #AA81*, above n 1, at [69]-[77].

or autonomy".[908] Action, or a movement toward transformative outcomes should also be applicable to a wider range of Māori issues.[909] Linda Te Aho states that in an ongoing attempt to restore rights and fulfil the promise of the treaty, Māori require a "full arsenal of strategies, including recourse to the courts".[910] There are many examples where Māori have successfully defended their rights, changed the direction of Crown policy, and caused the repeal of legislation. The repeal of the Foreshore and Seabed Act 2004 is a recent example which highlights that, despite the apparent finality of legislation, law can be changed. Te Aho also explains how Māori have persevered with a range of strategies over many years to have their grievances addressed by the Crown, resulting in the establishment of the Waitangi Tribunal and the ability to negotiate settlements.[911] There is therefore precedent for change in terms of the takutai moana, including amendment to or repeal of the 2011 Act, negotiation towards a new framework, and discussion on broader sovereignty issues.

### 9.2.1 Halt the implementation of the 2011 Act and complete Waitangi Tribunal Inquiry

A priority for this multifaceted approach must be to ensure that Māori rights to the foreshore and seabed are reinstated. Te Kapotai are concerned that the implementation of the 2011 Act, through the determination of applications by the courts and Minister, will entrench the legislation and make a full review of the Act more difficult.[912] Each time customary marine title is awarded by the courts or the Crown it is given effect through court order or legislation, and precedents are set which are likely to impact other applicant groups. Therefore, the implementation of the Act, and determination of applications needs to be paused while a review takes place. A pause was promoted by the Foreshore and Seabed Tribunal, which said the Government had made assumptions about how to recognise Māori interests, and said a holding pattern should be legislated while the

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[908] Caren Fox, 'Change, past and present' in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) at 43, 127, 138.
[909] Graham Smith, 'The dialectic relation of theory and practice in the development of Kaupapa Māori Praxis', in *Kaupapa Rangahau*, above n 84, at 19.
[910] Linda Te Aho, 'Judicial creativity', in Malcolm Mulholland and Veronica Tawhai (eds) Weeping Waters: The Treaty of Waitangi and Constitutional Change (Huia Publishers, Wellington, 2010) at 110.
[911] At 113.
[912] Waitangi Tribunal *Statement of Claim* (Wai 2660, #1.1.1, 21 December 2016) at [3.0].

bigger picture was sorted out.[913] The Ministerial Review Panel also recommended interim legislation, which would be developed while the Crown developed options with Māori.[914] The Crown's failure to review the wider legislative regime for the coastal area, meant that the new rights provided for in the 2011 Act were inserted into a system that already fails Māori, and without proper regard for whether the rights are consistent with Treaty guarantees to Māori. Pausing the implementation of the Act would allow for a comprehensive review to take place and these issues to be addressed.

The Crown is unlikely to willingly agree to a pause and Māori will need a basis to lobby for a further policy review. The current Waitangi Tribunal Inquiry into the 2011 Act is a mechanism to create a pause and an essential pathway for the Crown to better understand the issues. The Tribunal is an important avenue for claimants because it has the jurisdiction to consider allegations of Crown breaches of te Tiriti.[915] Since 1975, the Tribunal has clarified and evolved the meaning and effect of the treaty and its principles and, furthermore, its reports have provided robust guidance to the Crown on compliance with the treaty across a range of issues. In most instances, as Te Aho states, the Tribunal's recommendations form the basis of settlement negotiations and it is hoped that this would be one outcome of the Wai 2660 Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry.[916] Te Aho's analysis of the Tribunal's findings in relation to the Māori interest in petroleum has application to the takutai moana also. In the petroleum inquiry, the Tribunal found that Māori had a right to petroleum and that the Crown expropriation of that right was done in a way that was "riddled" with treaty breaches, resulting in Māori rights to a valuable resource being lost. Te Aho explains that where a breach of the treaty is found by the Tribunal, a treaty interest is generated:[917]

> When a Treaty interest arises, there will be a right to negotiated redress for the wrongful loss of the legal rights. Importantly, a Treaty interest creates entitlement to a remedy for that loss additional to any other entitlement to

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[913] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 140.
[914] *Report of the Ministerial Review Panel*, above n 36, at [7.6.5].
[915] Funding is also available for claimants to prosecute their claims in the Waitangi Tribunal.
[916] Linda Te Aho, 'Judicial creativity', in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) at 113.
[917] At 119.

redress. The effect of 'Treaty interests' is yet to be seen, but the finding provides an example of the Tribunal's creativity in what might be seen as an attempt to address the vulnerability of Māori in the constitutional context of parliamentary supremacy.

The Māori treaty interest in the takutai moana has already been recognised by the Foreshore and Seabed Tribunal in 2004. What remains to be examined by the Wai 2660 Marine and Coastal Area Tribunal is whether the current legislation appropriately provides for that interest and if not, what steps need to be taken by the Crown and Māori. Te Kapotai hopes that a favourable report from the Tribunal, and findings that the Act is inconsistent with te Tiriti, will give them the support they need to lobby the Crown to engage on the takutai moana issue and achieve a more robust resolution.

It is acknowledged that the Tribunal's functions are not without limitations. The Tribunal's powers are recommendatory only and are non-binding on the Crown.[918] This means the Crown has discretion about what weight, if any, it will accord to the Tribunal's findings and recommendations.[919] The Crown can and does reject Tribunal reports and has chosen not to implement its recommendations. This is probably best demonstrated in this case by the Crown's disregard of the Tribunal's 2004 Foreshore and Seabed report and enactment of the 2004 Act after the report was released. This said, the 2004 report remains an important part of the chronology and a valuable resource as Māori attempt to address the issue today.

It is difficult to say what it will take to convince the Crown to create a pause and that a further review is necessary. It may be that the Government will not agree to pause the implementation of the Act and will proceed with the applications of those groups who wish to continue under the Act. The progression of High Court and Crown engagement applications is slow. It is possible the Tribunal's reporting timeframe on the 2011 Act will mean there is an opportunity for parties to consider the Tribunal's report before too many (if any) applications under the 2011 Act are determined by the Minister and High Court. Given the limited legal

[918] Treaty of Waitangi Act 1975, s 6(3).
[919] Treaty of Waitangi Act 1975, ss 5-6. It is noted however, that in 1988, the Treaty of Waitangi Act 1975 was amended, conferring power on the Waitangi Tribunal to make binding recommendations in respect of state-owned assets, forestry and some railway land (see: Treaty of Waitangi (State Enterprises) Act 1988; Treaty of Waitangi Act 1975, ss 8A-8HJ.

avenues available to Māori to challenge the Crown on the 2011 legislation, the Waitangi Tribunal and its inquiry into the Act needs to be completed before other legal pathways or options are considered.

### 9.3 Conduct research

The Waitangi Tribunal and Boast affirm that the foreshore and seabed issue is both highly complex and not well understood.[920] A possible reason for this situation is the lack of information on the issue. The literature on Māori customary rights to the foreshore and seabed is primarily written from a Western legal perspective and focusses on the treatment of common law customary rights. There is a limited amount of literature on international law implications for the Crown's foreshore and seabed policy. Furthermore, the amount of literature beyond the Waitangi Tribunal and Panel's reports is minimal, and there does not appear to be many sources on the Marine and Coastal Area (Takutai Moana) Act 2011. This may correlate with the lack of engagement by Māori with the legislation, and the observation by Boast that people are fatigued with the issue, or that more pressing issues have since arisen.

Graham Smith argues that the struggle against colonialism is multifaceted and involves the need for constant reflection and acknowledgement that both injustice and oppression exist.[921] He says we must first understand the structural impediments to transforming the oppression: it is not enough to generalise things and simply say "the system" fails Māori.[922] Māori must find meaningful strategies which deal with their structural concerns and respond to why they have not been able to detach from the constraints of the system.[923] Therefore, further research is needed to inform discussions between Māori and the Crown with respect to the development of future options for the takutai moana. Existing research would be the starting point, followed by the identification of research gaps. A helpful exercise would be the compilation of a comprehensive bibliography of existing research. This would need to include relevant literature

[920] See discussion above at [4.1].
[921] Graham Smith, 'The dialectic relation of theory and practice in the development of Kaupapa Māori Praxis', in *Kaupapa Rangahau*, above n 84, at 7-9.
[922] At 18-23.
[923] At 21-27. See also: *Decolonising Methodologies*, above n 82, at 24-25, 40.

on the treaty, sovereignty, resource management, indigenous rights, and international law. Where gaps are identified specific research could be commissioned by the Crown and Māori. However, for research to be of value, the make-up of such a research commission and the choice of researchers would need to be mutually agreed between Māori and the Crown, or alternatively Maori would need to have influence over project briefs.

An issue which has emerged in the Waitangi Tribunal Inquiry into the 2011 Act is that there is no claimant funding to commission research. Upon direction from the Tribunal, the Crown produced an overview report and supporting documents covering all relevant Crown policy decisions for the development of the 2011 Act.[924] In September 2019, the Crown released the draft overview report and provisional document bank prepared by Ms Lucy Mouland, a senior historian at Te Arawhiti.[925] A review of this report against the document bank highlights that this approach to the research is and will be problematic for claimants. For example, the report is silent on key issues and evidence, and fails to directly address the Tribunal's questions. The Cabinet papers from the document bank contain important information and decision-making from the Attorney-General for the 2011 regime, and that information would be useful for the Tribunal's consideration of the issues, however this information is omitted from the report.[926] Had a claimant-commissioned researcher prepared the report, it is likely that issues would be considered from a different lens.

In Chapter 2 of this thesis, the concept of 'praxis', or the process that brings about transformation of oppression was discussed.[927] Graham Smith identifies general elements of effective transformative praxis, explaining how transformation is organic and must be located within our own experience and practice.[928] Further tangata whenua research is needed as part of achieving transformative praxis. Where this research has examined the impact of Crown sovereignty over the takutai moana, against notions of hapū rangatiratanga in Ngāpuhi, other tribes will

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[924] Waitangi Tribunal *Memorandum-Directions of Judge M P Armstrong* (Wai 2660, #2.6.7, 21 May 2019).
[925] The final report was filed by the Crown on 25 November 2019. See: Waitangi Tribunal *Amended Brief of Evidence of Lucy Jane Mouland* (Wai 2660, #B3, 25 November 2019).
[926] See discussion above at [7.2].
[927] See discussion above at 28-31.
[928] See discussion above at 30-31. While these are discussed in respect of education, they are general in nature and able to be applied to the foreshore and seabed issue.

have their own stories and perspectives on authority. In *Matike Mai*, the Iwi Constitutional Working Group states that: "Iwi and Hapū all have their own stories to tell of colonisation and the ongoing costs and trauma it has exacted upon them".[929] It is important that there is space for those experiences to inform the development of a new regime. Commissioned research could be a vehicle for collating tribal knowledge and perspectives. Conversations need to be had with Māori across the country about the nature of their authority and how to recognise and protect their rangatiratanga over the takutai moana in their rohe.

### 9.3.1 Interim options for Māori participation in the management of the takutai moana

This section examines options within the existing legislation to increase Māori participation in the management and regulation of the takutai moana.

The RMA provides mechanisms for Māori participation in environmental management including matters relating to the takutai moana. Iwi authorities are able to prepare and lodge environmental planning documents with local government. A planning document outlines the environmental, cultural, economic and spiritual aspirations of the relevant iwi; areas of cultural significance; iwi/hapū expectations around the management, development and protection of resources; and the nature and extent of iwi/hapū engagement and participation in resource management processes.[930] There is no set procedure or standardised form for a planning document so there is flexibility in how they are developed. Where an iwi authority has lodged a planning document, local authorities must take the document into account when preparing a policy statement or plan.[931]

The RMA also provides for Māori participation in resource management processes through the Mana Whakahono a Rohe: Iwi Participation Arrangements.[932] The purpose of Mana Whakahono a Rohe is to provide a forum for iwi authorities and local authorities to determine how tangata whenua can

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[929] Matike Mai Aotearoa, *He Whakaaro Rere Whakaumu mō Aotearoa: Report of Matike Mai Aotearoa - the Independent Working Group on Constitutional Transformation* (January 2016), at 36. Source: <http://www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf>

[930] Ministry for the Environment website "Iwi/hapū management plans" (15 March 2019). Source: <https://www.mfe.govt.nz/rma/national-monitoring-system/reporting-data/m%C4%81ori-participation/iwi-hap%C5%AB-management-plans>.

[931] Resource Management Act 1991, ss 61(2A), 66(2A)(a), and 74(2A).

[932] Resource Management Act 1991, Part 5, Subpart 2. Note there are different corresponding requirements for new collaborative or streamlined planning processes under Part 4 and 5 of Sch 1.

participate in resource management and decision-making processes under the Act; and ensure treaty compliance of local authorities in their statutory duties.[933] When councils are preparing proposed policy statements and plans, they are required to consult with potentially affected tangata whenua through iwi authorities.[934] Where a Mana Whakahono a Rohe exists, the proposed policy statement or the plan that is prepared must take the agreement into account.[935] In these instances, the local authority must show regard to feedback received on the proposed policy statement or plan from the relevant iwi authorities, and allow adequate time to think about the draft and provide advice.[936] Significantly, a local authority can also transfer any part of or all of its functions, powers, or duties under the RMA to a public authority, including an iwi authority.[937] If good partnerships were developed with whānau, hapū and iwi, Councils could foreseeably use this function to increase Māori involvement in the governance of the takutai moana.

Section 4 of the Local Government Act 2002 recognises the Crown's responsibility to take account of the principles of the Treaty of Waitangi and to provide opportunities for Māori to contribute to local government decision-making processes. Section 81 (along with Schedule 10, clause 8) requires local authorities to establish processes for Māori to contribute to decision-making; foster the development of Māori capacity to contribute to decision-making; and provide the information needed to participate. Section 82(2) requires local authorities to have a process for consulting with Māori. These provisions, if applied, have the potential to enhance relationships between local government and Māori and increase Māori decision-making and authority over the takutai moana.

Cultural redress within Treaty of Waitangi settlement negotiations includes mechanisms to enhance Māori participation in the management of the takutai moana.[938] Mechanisms include vestings, overlay classifications, statutory acknowledgements, deeds of recognition and joint advisory. The statutory instruments provide a broad range of rights and relationships, from ownership and

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[933] Resource Management Act 1991, s 58M. Ngāti Hine has such an MOU with Far North District Council and Northland Regional Council.
[934] Resource Management Act 1991, clause 3(1)(d) of Sch 1.
[935] Resource Management Act 1991, clause 1A of Sch 1.
[936] Resource Management Act 1991, clause 4A(2) of Sch 1.
[937] Resource Management Act 1991, s 33.
[938] *Red Book,* above n 268, at 94.

use rights to representation on governing bodies and relationships with government departments.[939] These options can already improve the participation of Māori in the regulation of the natural environment including the takutai moana.

An additional point to be made is that the above-mentioned options for increasing Māori participation in the regulation of the takutai moana are comparable to a number of the awards under the 2011 Act. Māori could secure a similar level of participation in the management and control of the takutai moana under these Acts, without having to continue down the fraught pathways of the 2011 Act. As identified above, Māori can lodge planning documents, develop Memoranda of Understanding and relationships, and provide their perspective and advice to relevant authorities, and potentially influence outcomes. If the Crown were to repeal the 2011 Act, the options under the existing legislation, could maintain a level of Māori participation and decision-making over the takutai moana, until something more robust is agreed on. The extent of Māori participation in the regulation of the takutai moana comes down to a willingness of the Crown and its local authorities and departments to involve Māori, and there is already legislative provision for Māori participation outside of the 2011 Act.

### 9.3.2 International law as an instrument for change

At the time when Te Kapotai filed their application in the Waitangi Tribunal, Te Kapotai kaumātua, Dr Patu Hohepa, spoke about how the 2011 Act breached international instruments that were intended to protect Māori. He said: [940]

> As Māori, and as Te Kapotai, we regard what the Crown has done under the MACA as trampling on our rights in terms of Te Tiriti, in terms of He Whakaputanga, in terms of the Universal Declaration of Human Rights ("UDHR") and in terms of the rights of first discovery. The Crown has a duty under the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") to protect our ability to self-govern. … The Crown has accepted that document and, in my view, the Crown is bound to uphold it. If the Crown was genuine it would say "Māori of the takutai, you look after your area, you tell us what the rules are, and we will work with you".

[939] At 94.
[940] Waitangi Tribunal *Brief of Evidence of Patu Hohepa* (Wai 2660, #A1, 21 December 2016) at [68] – [71].

Current literature speaks to a trend where international law is growing in its capacity to protect indigenous rights around the world and here in Aotearoa. Claire Charters considers the role international law has played in the foreshore and seabed issue and whether it may have implications for any future regime.[941] Charters says that the Government cannot treat Māori issues as an exclusively domestic concern, and that it cannot hide from its international legal obligations to protect indigenous peoples' rights, especially if it wants to live up to its own "rhetoric" that New Zealand "is strongly committed to the protection and promotion of international human rights".[942]

The Iwi Constitutional Working Group has discussed the similarities between the principles of international law and he Whakaputanga and te Tiriti. It says all three documents "express the right for Māori to make decisions for Māori that is the very essence of tino rangatiratanga".[943] Charters also states that while there is some uncertainty, the treaty and international law do overlap, and she argues that the treaty, international law, and the New Zealand Bill of Rights Act 1990 are "mutually, and cumulatively, supportive".[944] Article 2 of the treaty protects the right of Māori to exercise tino rangatiratanga, and Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, which is said to be the "cornerstone of the Declaration", also provides for the right of self-determination.[945]

In theory, international law should operate as a protective mechanism for their indigenous rights. However, it is not clear, and there is a lack of precedent, about how it applies domestically. Upon signing up to international treaties, the Government has an obligation, though not binding, to ensure that its law and policy is consistent with those treaties, otherwise it risks coming under scrutiny

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[941] Claire Charters "Developments in Indigenous Peoples' Rights under International Law and their Domestic Implications" (2005) 21 NZULR 511 at 515.
[942] At 540-541. While international law can apply to protect indigenous peoples' land rights, Charters says there are some complexities that make international law difficult to protect indigenous rights here in Aotearoa. For example, international law is fast-moving, there is not an established body of international law on human rights, and there is a high level of uncertainty about how to interpret and apply international law on indigenous rights.
[943] Matike Mai Aotearoa, *He Whakaaro Rere Whakaumu mō Aotearoa: Report of Matike Mai Aotearoa - the Independent Working Group on Constitutional Transformation* [January 2016], at 44. Source: <http://www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf>
[944] Claire Charters "Developments in Indigenous Peoples' Rights under International Law and their Domestic Implications" (2005) 21 NZULR 511 at 541.
[945] United Nations Declaration on the Rights of Indigenous Peoples, Article 3.

from international human rights bodies.[946] Cabinet minutes also require Government ministers to vet Bills for consistency with New Zealand's international obligations. There is also the general principle that international law is enforceable domestically if incorporated into New Zealand law, and that legislation should be interpreted consistently with international law.[947] In terms of the common law, there is the principle that all legislation is to be interpreted by the courts consistently, and as far as possible, with the rights and freedoms in the New Zealand Bill of Rights Act 1990.[948] In light of the standards of international law, the courts should interpret the Bill of Rights Act 1990 to provide the greatest recognition possible of Māori customary interests in the foreshore and seabed.

In April 2019, Hon Nanaia Mahuta, Minister of Māori Development, announced that the Government would be undertaking a process to measure progress towards the aspirations of UNDRIP, including inviting a delegation from the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) to Aotearoa to provide advice on the development of a plan. The Minister said:[949]

> There are a range of policies and strategies already in place that are relevant to the Declaration, but there is no overall plan. EMRIP's visit will help the Crown and Māori work together to create a plan to guide the implementation of the Declaration.

Māori need to be involved in the development of these kinds of policies and plans and ensure they have application to the takutai moana issue.

### 9.4 Concluding remarks

The discussion in this chapter has identified how a multifaceted approach to addressing the takutai moana issue may be employed by Māori and the Crown for the purpose of bringing about a pause in the implementation of the 2011 legislation. This multifaced approach is proposed as an interim measure, to persuade or require the Crown to engage in another review of the wider regime as

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[946] Claire Charters "Developments in Indigenous Peoples' Rights under International Law and their Domestic Implications" (2005) 21 NZULR 511 at 540.
[947] At, 539.
[948] *Report of the Ministerial Review Panel*, above n 36, at 133.
[949] Hon Nanaia Mahuta "Government moves on UN Rights Declaration" (New Zealand Government website, Press Release, 31 March 2019). Source: <https://www.beehive.govt.nz/release/government-moves-un-rights-declaration>.

it applies to the foreshore and seabed. Any interim measures, like increasing Māori participation through the RMA and Local Government Act 2002, need to be considered and applied by the Crown in a treaty-compliant way. The options in this chapter are considered to be interim options because they fall short of transformational outcomes and full implementation of te Tiriti. They are proposed as interim because it would be illogical to conduct a review of the foreshore and seabed issue, or to attempt to implement a new regime, in a manner that falls short of the guarantees to Māori under te Tiriti.

# CHAPTER 10: NGA TAUMATA O TE MOANA – A TRANSFORMATIONAL APPROACH TO THE TAKUTAI MOANA ISSUE

## 10.1 Introduction

When Kawiti prophesied "Titiro atu ki nga taumata o te moana", "Look beyond the sea to the transfiguration of the future", his instruction to his people was to look beyond the constraints of colonialism to liberation.[950] Te Tiriti, and the wisdom, values and intent that it represents, is the foundation for the transformation he envisaged for his people.[951] This research now looks beyond the horizon of the sea, which is itself, beyond the constraints of the 2011 legislation, and envisages a return to rangatiratanga over the takutai moana. This final chapter examines some of the elements that I believe are essential to any discussion of what a Tiriti-based transformational process could look like, and how this broader approach has the potential to transform and liberate Māori and Aotearoa in terms of the takutai moana and other issues.

This chapter is about establishing an underlying process that will support transformational outcomes for the takutai moana issue. It does not propose the actual structures for the sharing of authority, or the final outcomes that may be negotiated between the Crown and Māori over the takutai moana. In line with the authority that is rangatiratanga, it is for whānau, hapū, iwi and the Crown to collectively reach agreements on the detail of future arrangements. The proposals in this chapter are about creating an environment where the conversation between Māori and the Crown can succeed, with respect to how Māori rights can be properly recognised over the takutai moana. The proposed process is based on the 1840 te Tiriti agreement itself, and involves a staged dialogue between Māori and the Crown on the following key issues:

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[950] *Wai 1040, #AA81*, above n 1, at [69].
[951] At [185]-[191].

> PHASE 1: That te Tiriti – the Māori text – applies and that sovereignty was not ceded under te Tiriti;
>
> PHASE 2: That the Crown/Māori te Tiriti partnership, including the sharing of authority, be established to reflect te Tiriti; and then
>
> PHASE 3: That a negotiation over the takutai moana take place to give effect to te Tiriti.

The conversation is about creating a place where Māori are free of colonialism, where the te Tiriti partnership with the Crown has mana, and where we can stand on our rangatiratanga in our ancestral lands – our takutai moana.

## 10.2 Rangatiratanga and the takutai moana

This thesis is underpinned by a Ngāpuhi perspective of what te Tiriti and the promise of rangatiratanga means in terms of hapū authority and rights over the takutai moana. The intention is to contextualise the takutai moana issue by providing an account of how a hapū, namely Te Kapotai, has been impacted by the Crown's taking of the takutai moana within their rohe, and then offer options for hapū to reclaim their rangatiratanga over it. Cognisant of Freire's theory, that only the oppressed can liberate themselves, this research puts Māori conscientisation and stories of resistance at the forefront.[952] It also aligns with kaupapa Māori and critical theory methodology, which, in order to achieve transformation or liberate Māori from a position of oppression, must involve an understanding of how this oppression occurred and is sustained by the current State. Graham Smith states that Māori are a subordinated people and depend on the goodwill of the Crown for change:[953]

> The harsh reality is that we exist in the political context of unequal power relations. As a consequence, Māori are often engaged in the politics of distraction, in being captured by reactive politics which distracts us from being positive and proactive about our own aspirations. This is part of the colonisation process – it distracts us from the real business of developing change by being continually involved in multiple struggles, in multiple

[952] *Pedagogy of the Oppressed*, above n 127, at 44. See discussion above at 27-29.
[953] Graham H Smith, in S Katene (ed) *Fire that Kindles Hearts: Ten Māori Scholars* (Steele Roberts, Wellington, 2015) at 116.

> sites, often simultaneously. We need to at least understand the rules of the game, then you can get more done in a transparent, honest and appropriate way.

The examination of the historical and legal context of the takutai moana issue places the issue within the constructs of colonialism and assimilation, where the Crown first, wrongfully assumed sovereignty under the treaty and then, based on that wrongful assumption, legislated and took steps to usurp Māori authority or rangatiratanga over the takutai moana. The colonial objectives that underpinned the Crown's approach to the takutai moana precluded genuine power sharing with Māori.[954] In the Taranaki Inquiry Report, the Tribunal said:[955]

> … the single thread that most illuminates the historical fabric of Māori and Pākehā contact has been the Māori determination to maintain Māori autonomy and the Government's desire to destroy it.

A consistent record of opposition from tribes like Te Kapotai demonstrates that they were not complacent and, throughout history, they have resisted the imposition of Crown sovereignty over the takutai moana.[956] Te Tiriti has long been the basis for their claims and they have sought fulfilment of the guarantee of rangatiratanga under Article 2. To reiterate, te Tiriti is not the source of rangatiratanga itself, but recognition by the British Crown of the right of Māori to determine their own affairs; a level of authority that Māori and the Tribunal consider is akin to Crown sovereignty.[957] There are many opinions on the nature or scope of authority embodied in rangatiratanga; however, regardless of what version of the treaty you look at, the guarantee of rangatiratanga affords a very high level of Māori autonomy. Mason Durie provides:[958]

> Māori aspirations for greater control over their own destinies and resources are variously described as a search for sovereignty, autonomy, independence, self-governance, self-determination, tino rangatiratanga,

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[954] Richard S Hill *State Authority / Indigenous Autonomy: Crown-Māori Relationships in New Zealand/Aotearoa 1900-1950* (Victoria University Press, Wellington, 2004) at 20.
[955] Waitangi Tribunal *The Taranaki Report – Kaupapa Tuatahi* (Wai 143, June 1996) at 6.
[956] See discussion above at [8.2].
[957] *He Whakaputanga me te Tiriti*, above n 10, at 514.
[958] *Te Mana, Te Kāwanatanga*, above n 194, at 218. Durie notes that the debate is complicated by confusion over semantics and notes the term sovereignty as an example. He says that the notion of indivisible sovereignty is not as meaningful as it assumed and that there is already a dispersal of so-called sovereign power.

> and mana motuhake. There are important distinctions between those terms, though they all capture an underlying commitment to the advancement of Māori people as a people, and the protection of the environment for future generations. And all reject the notion of an assimilated future.

The most recent legislative steps, including the Foreshore and Seabed Act 2004 and Marine and Coastal Area Act 2011, deny Māori rangatiratanga and ensure the recognition of Māori rights is constrained within the confines of Crown sovereignty. The 2011 Act needs to be viewed as part of the wider legislative history of Parliament which promoted Crown sovereignty. Kim Workman says that rangatiratanga has always been constrained within Government rules and whatever degree of autonomy that has been handed over, the Crown has always ensured that it has retained the upper hand.[959] For example, in the context of resource management law, which the 2011 Act was drafted to align with, Rachell Bell says that "innovations" in environmental regimes have tended to be formulated in ways that do not seriously threaten institutional control.[960] Bell notes, this has serious consequences for Māori:[961]

> Environmental management remains within the firm grip of local authorities, and, as Workman, Belgrave and Cybele Locke all note, Māori economic and social disparity has become more, rather than less, entrenched under these reforms, which Locke describes as having 'pushed many New Zealand families into poverty.

The national response from Māori to reclaim rangatiratanga over the takutai moana in recent years is impressive and has involved the largest collective response in our history. This resistance sits within its own 30-40-year context, described by many as a renaissance by Māori to reclaim and decolonise. From the 1980s, Māori have achieved a number of transformational outcomes, including the kohanga reo and kura kaupapa movements, along with the establishment of the

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[959] R Bell, M Kawharu, K Taylor, M Belgrave and P Meihana (eds) "Introduction: The Treaty at the Coal Face" in *The Treaty on the Ground: Where we are headed and why it matters* (Massey University Press, Auckland, 2017) at 24: "For Workman and Belgrave, and for April Bennett also, in her consideration of the Resource Management Act, the checks and balances have been dominated by a contradictory reluctance by the state, or local government in the case of resource management, to release sufficient control to realise the true autonomy and self-determination for Māori that may have mitigated some of these effects."

[960] At 24.

[961] At 24.

Waitangi Tribunal. Although progress has been made, Māori remain disproportionally impacted; we are the poorest in our country, suffering inequity in health, high incarceration, and high unemployment. Despite achieving what can be considered as transformational outcomes within the current state system, we need to do more if we are to thrive as tangata whenua.

It is the further abrogation of Māori rights under the 2011 Act, when Māori are already in a marginalised state, that means transformational change is desperately needed. When talking in terms of the takutai moana, we are not just talking about the loss of common law customary rights, we are talking about the loss of land; the ability of Māori to retain their connection to the takutai moana, the ability to live freely as Māori in accordance with our tikanga, and the ability to self-sustain, develop and live well. It is about preserving and protecting rights of current and future generations. The takutai moana is one of multiple sites of struggle, and it is apparent that today Māori are battling a number of issues simultaneously. Unfortunately, the struggle must be had, because to accept subjection by legislation like the 2011 Act, and further breaches of te Tiriti, is not something Māori can bear. In the struggle for change, Graham Smith prefers the term "transformational" over transformation because it denotes that the process is live and ongoing. He says, "there is a transforming job to be done and we all need to do it".[962] The question is how do we tackle these big issues when we are not on a level playing field with the Crown? Where do we begin? For the hapū of Ngāpuhi, the starting point is te Tiriti.

### 10.3 PHASE 1: Agreement that te Tiriti is the starting point

> Under Te Tiriti o Waitangi, our rangatiratanga, our sovereignty was guaranteed to us, not taken away. Ngāpuhi do not and has never, seen Te Tiriti as a cession of sovereignty. At the same time by Te Tiriti, our tupuna bound themselves to the queen and agreed to the queen's governor remaining here to look after her subjects. What exists for Ngāpuhi is He Whakaputanga and Te Tiriti and on the basis of these kawenata here ki te rangi, here ki te whenua. [bound to the heavens, bound to the land.]

[962] Graham H Smith in S Katene (ed) *Fire that Kindles Hearts: Ten Māori Scholars* (Steele Roberts, Wellington, 2015) at 115.

> The Treaty has always been seen as part of honour and we want to uphold that honour in everything that we do moving forward with the Crown. When they put their sacred marks on Te Tiriti, drawn as they were from the ngū of the nose, our tupuna sealed a pact of honour with the Queen.
>
> (Erima Henare)[963]

Phase 1 of the three-staged transformational approach to the takutai moana issue first seeks that Māori and the Crown should reach an agreement that te Tiriti – the Māori text – applies and that sovereignty was not ceded under te Tiriti. During the hearings on he Whakaputanga me te Tiriti, Pou Korero Erima Henare spoke about the inherent bias and myths that accompany the Crown's assumption of sovereignty, saying, "[t]he history invoked is not the Māori history. The Treaty invoked is the English version, not the Māori version".[964] His statement above explains that when our tūpuna affixed their tohu tapu from the ngū of their noses (sacred marks of their noses), te Tiriti became a tapu or sacred document.[965] In Ngāpuhi, it is te Tiriti, the Māori text of the treaty, that is sacred and holds mana, not the English Treaty. Hapū seek recognition and fulfilment of te Tiriti by the Crown to resolve their historical grievances and protect their rights into the future. Erima Henare's view was referred to and reinforced by the Tribunal in *He Whakaputanga me Te Tiriti,* where the Tribunal found that Māori signed te Tiriti, not the Treaty, and under te Tiriti, sovereignty was not ceded by the rangatira.[966]

The Wai 1040 Tribunal's finding on the point of sovereignty was ground-breaking because no prior Tribunal had had reached this finding. What can be seen in much of the literature and jurisprudence over the past 30 years is an attempt to reconcile the meaning of the two texts to find a way for the treaty to have application today. For example, some Tribunal reports have acknowledged the right to exercise rangatiratanga as a high level of authority, but an authority that sits within, and therefore below the Crown's kāwanatanga right to govern. The Foreshore and Seabed Tribunal maintains the Crown's right to exercise sovereignty/kāwanatanga, while qualified by rangatiratanga, includes the ability to

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[963] Waitangi Tribunal *Transcript of Hearing Week 1* (Wai 1040, #4.1.6, 18-22 March 2013) at 57.
[964] Waitangi Tribunal *Brief of Evidence of Johnson Erima Henare* (Wai 1040, #A30(c), 10 September 2010) at [31]. Also cited in: *He Whakaputanga me te Tiriti,* above n 10, at 527.
[965] At [33].
[966] Waitangi Tribunal *Transcript of Hearing Week 1* (Wai 1040, #4.1.6, 18-22 March 2013) at 57. See also: *He Whakaputanga me te Tiriti,* above n 10, at 527.

govern and make laws for all New Zealanders.[967] In the Tribunal's view, there is also a narrow range of circumstances where it is said that Crown sovereignty can override rangatiratanga.[968] The issue with this approach is that it puts Māori in a position where they are expected to accept the imposition of kāwanatanga over and above their own rangatiratanga and this is inconsistent with what was agreed in 1840. Furthermore, there is an expectation that Māori will continue to be tolerant of an incorrect interpretation and application of the treaty.

During the hearings on he Whakaputanga me te Tiriti, counsel for Ngāti Hine argued that "[t]he modern New Zealand state is built upon a false premise", and said: [969]

> The idea that rangatira who signed Te Tiriti agreed to cede sovereignty to the British Crown is historically wrong, yet it remains the foundation upon which the nation rests. So long as this is so New Zealand is weakened by a moral, political and legal deficit.

The discussion on historical and legal context to the takutai moana issue shows the takutai moana issue largely, if not entirely, arises from the incorrect interpretation and misapplication of the treaty agreement in 1840. The incorrect interpretation and application of the treaty has caused Māori serious harm, and I cannot think of a legitimate reason for this kind of middle-ground interpretive approach to continue**. Therefore, a central argument of this research is that, on the fundamental point of cession of sovereignty, the two texts are irreconcilable. Te Tiriti must be the starting point of any approach to resolving the takutai moana issue if it is to be fair, enduring and effective. There must be a robust understanding of what the treaty and more specifically te Tiriti means and how it can be applied today.**

The following section explores the Tribunal's findings in *He Whakaputanga me Te Tiriti* and how the recalibration back to the actual agreement that was reached in 1840 will provide the foundation and principles for a transformative process to return rangatiratanga over the takutai moana.

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[967] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 127.
[968] *He Whakaputanga me te Tiriti*, above n 10, at 528.
[969] Waitangi Tribunal *Closing Submissions for Te Runanga o Ngati Hine* (Wai 1040, #3.3.23, 21 January 2011) at [1] – [3]. Also cited in: *He Whakaputanga me te Tiriti*, above n 10, at 481.

### 10.3.1 Key conclusions in *He Whakaputanga me Te Tiriti*

The conclusions of the Waitangi Tribunal in *He Whakaputanga me Te Tiriti* clarify the meaning and effect of the treaty agreement. The Tribunal says the agreements can be found in what the rangatira who signed were prepared to assent to under the Māori text (te Tiriti), based on the proposals put by Colonial representatives and the assurances that the rangatira sought and received prior to signing. The Tribunal reached the following conclusions:[970]

> The rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories.
>
> > The rangatira agreed to share power and authority with Britain. 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. 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.
> >
> > The rangatira agreed to enter land transactions with the Crown, and the Crown promised to investigate pre-treaty land transactions and to return any land that had not been properly acquired from Māori.
> >
> > The rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary.
>
> 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

[970] *He Whakaputanga me te Tiriti*, above n 10, at 529.

> 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.

The important elements of the 1840 agreement are that the Māori text (te Tiriti) applies, that sovereignty was not ceded, that Māori and the Crown were to be equals and authority was to be shared, and where the two authorities overlapped the relationship would be worked out through negotiation.

Some of the elements of the 1840 agreement are acknowledged within existing jurisprudence and treaty principles expressed by the Waitangi Tribunal. However, there remains differing views on the point of cession of sovereignty and the principle of reciprocity. For example (as discussed in Chapter 6), in the Tribunal's Foreshore and Seabed Report where findings were in favour of Māori claims, the Tribunal found that the Crown has the power under sovereignty or kāwanatanga to regulate the coastal marine area for the benefit of everyone, saying "kawanatanga carries with it a power to regulate the coastal marine area for the benefit of everyone".[971] The Tribunal considered issues from the starting point that Crown sovereignty or kāwanatanga gave the Crown the right to develop the foreshore and seabed policy, but that sovereignty was qualified by rangatiratanga.

When the te Tiriti agreement recognised by the Wai 1040 Tribunal is applied, it challenges this type of analysis and requires those involved in applying te Tiriti to reconsider the nature of the "fundamental exchange" under the 1840 agreement. The starting point is not that the Crown has the right to make laws for everyone including Māori, rather that Māori and the Crown had equal power in different spheres. The takutai moana would be considered Māori customary land, and therefore land that comes under the authority of Māori rangatiratanga. If the Crown had a claim to coastal land, then the two authorities (Māori and the Crown), in partnership, would negotiate on a case-by-case basis how that area would be governed. This type of approach is quite different to how the Crown has exercised sovereignty/kāwanatanga over the takutai moana to date, and how earlier Tribunals have considered sovereignty/kāwanatanga and rangatiratanga under the treaty.

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[971] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 481.

### 10.3.2 Support for a te Tiriti-based approach

It may seem logical that if te Tiriti was the agreement that was signed, that te Tiriti should apply. However, the Crown has operated under the English text for 180 years. The legitimacy of the Crown's acquisition of sovereignty under te Tiriti will need to be addressed, as well as a shift away from the concept of sovereignty as has been maintained by the Government. While there has been no shift in the Crown's current position, there may be more hope that progress can be made on the discussion regarding te Tiriti and sovereignty under the current Labour Government. During an interview on TV One during the 2017 General Election, Leader of the Labour Party Jacinda Ardern said if she were Helen Clark, she would not have passed the 2004 Foreshore and Seabed legislation.[972] By Waitangi Day on 6 February 2018, Jacinda Ardern had been elected Prime Minister, and she spoke metaphorically about the distance between Te Whare Rūnanga and the Treaty House at Waitangi as the inequality that can be understood to exist between Māori and Pākehā. The Prime Minister said that if things are to change, Māori and the Government need to work in partnership and speak freely and openly "kanohi ki te kanohi". She made an important commitment:[973]

> … I can guarantee you particularly as this government goes out to hui amongst everyone, that there will be no marae too small for us, there will be no marae where we don't ask for that help and to work alongside us.

Māori need to hold the Government to this commitment and ensure the issues we consider are important are part of that conversation; the ownership and governance of the takutai moana being one of those issues. In September 2019, the Government also committed to including history on the New Zealand land wars in the school curriculum.[974]

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[972] Editorial *Recap: Ardern and English face off for the second leaders' debate* (Stuff website, 4 September 2017). Source: <https://i.stuff.co.nz/national/politics/96456820/live-on-the-campaign-trail-monday>

[973] Jacinda Ardern "Prime Minister's Waitangi powhiri speech" (New Zealand Government website, 5 February 2018). Source: <https://www.beehive.govt.nz/speech/prime-ministers-waitangi-powhiri-speech>

[974] Jessica Long *New Zealand history to be taught in schools by 2022, says PM Jacinda Ardern* (Stuff website, 12 September 2019). Source: <https://www.stuff.co.nz/national/education/115712569/new-zealand-history-to-be-taught-in-schools-by-2022-says-pm-jacinda-ardern>

It is also promising that a growing body of jurisprudence and scholarship is aligning to long-held Māori perspectives. There is increasing support for a treaty-based approach as a way of creating a fairer and just society. Roy Clare says that we have a shared responsibility to educate ourselves about the treaty so that we can "confidently contribute and fully participate in shaping our treaty nation".[975] Mason Durie says the starting point for transformation is a commitment to the treaty's intentions, provisions and principles, as well as the validation of Māori knowledge, beliefs and values.[976] Mason Durie says that the whole purpose of the treaty was to establish a relationship of trust and mutual benefit, and that it has the capacity to provide for the interests of both parties and our country as a whole:[977]

> … after a fair amount of trial and error, there has been recognition that the Treaty of Waitangi provides a touch-stone upon which two world views, two sets of traditions, and two understandings can create a society where indigeneity and democratic practices can meet.

Mason Durie goes on to say that Māori are actively engaging with the Government to seek a degree of tino rangatiratanga or authority that allows them to have control over the decisions that affect them and to ensure that the treaty is observed.[978] He adds:[979]

> The common message underpinning Māori efforts toward the Treaty of Waitangi in public policy is clear – policy honouring the Treaty is policy that can better deliver positive outcomes for Māori communities and thereby to wider New Zealand. Although some progress has been made, past government's performance in ensuring the rights and wellbeing of Māori is protected has been disastrous. There is yet to be full recognition that effective public policy for Māori is built upon Māori priorities, cultural values and aspirations.

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[975] Kerry Taylor and Roy Clare "Forward" in R Bell, M Kawharu, K Taylor, M Belgrave & P Meihana (eds) *The Treaty on the Ground: Where we are headed and why it matters* (Massey University Press, Auckland, 2017) at 13.
[976] M Mulholland and V Tawhai *Weeping Waters, the Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) at 66.
[977] *Te Mana, Te Kāwanatanga*, above n 194, at 233-240.
[978] Mason Durie "Forward" in M Mulholland & V Tawhai, *Weeping Waters, the Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) at xi.
[979] *Te Mana, Te Kāwanatanga*, above n 194, at 233-240.

Rachel Bell adds that the Treaty has grown "dramatically" in importance and in ways that were probably not foreseen.[980] She argues that the Treaty sits at the heart of Crown/Māori relations, government, public and institutional life, and that it is a guide to the present and a "potential blueprint for the future".[981] In her view, if we are to progress as a nation then both Māori and Pākehā have to come to the conversation.[982]

Haami Piripi specifically refers to te Tiriti and says that te Tiriti provides a guideline for achieving a quality relationship between Māori and Pākehā, and that "its potential is yet to be fully realised as a template for the effective administration of state."[983] The report of the Independent Iwi Constitutional Working Group also concludes that the "imperative is to work towards a new constitutional order that is based on Te Tiriti rather than one which merely tries to assimilate it into the existing Westminster system".[984] The report calls for a sequence of further meetings and consultative processes and ultimately says that 2040 would be a realistic timeframe by which to achieve some form of constitutional transformation based on te Tiriti.[985] This research encourages discussion on how to give effect to te Tiriti o Waitangi and re-establish the Crown/Māori partnership based on the terms of te Tiriti.

In summary, it is argued that for any process to be transformational in terms of returning Māori authority over the takutai moana, there needs to be more discussion and envisioning of what a te Tiriti-based approach would involve. There needs to be a shift from trying to reconcile the two texts of the treaty, and instead discussion on what an approach could look like if it was based on te Tiriti agreement itself. Through this approach, the misapplication of the treaty that has occurred for the past 180 years stops, and the original intent of the document is

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[980] R Bell, M Kawharu, K Taylor, M Belgrave & P Meihana (eds), *The Treaty on the Ground: Where we are headed and why it matters* (Massey University Press, Auckland, 2017) at 25.
[981] At 19-20.
[982] At 20.
[983] Haami Piripi "Te Tiriti o Waitangi and the New Zealand Public Sector in V Tawhai & K Gray-Sharp *Always Speaking, The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011) at 239.
[984] Matike Mai Aotearoa, *He Whakaaro Rere Whakaumu mō Aotearoa: Report of Matike Mai Aotearoa - the Independent Working Group on Constitutional Transformation* (January 2016) at 103.
[985] At 11 - it was suggested that 2040 would be a good year to set as a goal for some form of constitutional transformation.

respected, with "two peoples living together in one nation, sharing authority and resources, with fundamental respect for each other".[986]

### 10.4 PHASE 2: Establish a new te Tiriti partnership

Once there is an agreement that te Tiriti is the correct starting point and that sovereignty was not ceded by Māori, then there is a basis to begin discussions on re-establishing the partnership between the Crown and Māori. Again, *He Whakaputanga me Te Tiriti* provides a starting point for considering the nature of the authorities recognised under te Tiriti and how they could operate today. In the letter of transmittal to the Minister in *He Whakaputanga me Te Tiriti,* the Tribunal said: [987]

> …they agreed to share power and authority with the Governor. They agreed to a relationship one in which they and Hobson were to be equal – equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā.

If it is accepted that sovereignty was not ceded, then this starting point will raise questions as to the accuracy of past jurisprudence, precedents will be challenged, historical settlements may be reopened, and the current governing arrangements may be called into question. The Crown must be willing to revisit the institutions, and laws that are based on the incorrect assumption of sovereignty. The Crown also needs to be prepared to move away from its concept of indivisible and absolute sovereignty and be open to genuine power sharing that gives Māori the space to exercise rangatiratanga. While this might seem unreasonable or impractical, it is important to remember te Tiriti was signed in good faith and with a commitment to establish an equal partnership. The Iwi Constitutional Working Group says "[t]e Tiriti represented the values of political and social inclusiveness" and that it was the values base from which other broader ideals were discussed, from which specific ideas about constitutional models would eventually emerge.[988] The Crown and Māori need to have confidence in each other that

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[986] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 144.
[987] *He Whakaputanga me te Tiriti*, above n 10, at xxii.
[988] Matike Mai Aotearoa, *He Whakaaro Rere Whakaumu mō Aotearoa: Report of Matike Mai Aotearoa - the Independent Working Group on Constitutional Transformation* (January 2016) at 62.

discussions regarding a new te Tiriti partnership and changes to power sharing can be conducted in good faith and can lead to positive change for the country as a whole.

In re-establishing the te Tiriti partnership, the Crown and Māori need to develop proposals that find common ground. The Law Commission has examined tikanga Māori and the law and said that Article 2 promised protection of Māori custom and values and the right of Māori to possess and control that which is theirs in accordance with their cultural preferences.[989] The report speaks of the ability of tikanga and the capacity of law to evolve and enrich our society, saying:[990]

> A critical promise of the Treaty was to develop a secure place for two cultures, where two people could fully belong. As the Mangonui Report states "To achieve that end the needs of both cultures must be provided for, and where necessary reconciled".

The Commission reinforces the point made by previous Tribunals that the treaty relationship is reciprocal and that both Māori and the Crown both have obligations.[991] The Commission discusses future work required for the treaty in law. It says past grievances suffered by Māori need to be resolved. The Commission then promotes the restoration of Māori authority and greater recognition of tikanga, which will inevitably lead to a conversation about the constitutional place of te Tiriti. It goes on to say:[992]

> If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Māori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Māori is, how it is practised and applied, and how integral it is to the social, economic, cultural and political development of Māori, still encapsulated within a dominant culture in New Zealand society.

One of the key factors in the establishment of a te Tiriti partnership with Māori, for Ngāpuhi is that te Tiriti partnership must be between the Crown and hapū.

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[989] Law Commission, *Māori Custom and Values in New Zealand Law* (NZLC R55, 2001) at 69.
[990] At 78.
[991] At 78.
[992] At 95.

Hapū hold rangatiratanga or autonomy in Ngāpuhi, and te Tiriti was an agreement between the Queen's representatives and rangatira on behalf of their hapū.[993] The Ngāpuhi Mandate Tribunal advised the Minister that:[994]

> The strength of Ngāpuhi itself is embedded in its many constituent hapū. Within Ngāpuhi, the rangatiratanga of the hapū has always been respected and Ngāpuhi has only ever acted in concert with the agreement of the hapū.

Professor Mason Durie also cautions against the Crown desire to work with iwi and pan-tribal entities, saying that the creation of a national body politic will not itself achieve tino rangatiratanga: "Māori society is too complex to have total authority vested in a single institution".[995] In a te Tiriti-based partnership for the takutai moana, the Crown would need to move away from its preferences to deal with iwi and have an openness to work with all te Tiriti partners.

### 10.4.1 Sharing of authority between the Crown and Māori

When te Tiriti partnership is reset, and there is agreement that te Tiriti promised a partnership of equals, it is possible to then discuss how authority can be shared under the new partnership. This does not mean that the institutions or representation remain as we know them today, because, as a result of discussion between Māori and the Crown they may shift in part or entirely. The underlying principle or right is that Māori, are empowered to fully participate in the development and application of law and policy that affects them.

Law and policy have the capacity to show creativity and commitment towards the treaty and many say that the treaty should have a central place in the role of legislation and public policy.[996] Hill discusses the idea that the treaty envisages the coexistence of two sovereigns or dual sovereignties:[997]

> **…** there is considerable evidence to suggest that Māori have frequently regarded the Treaty's endorsement of rangatiratanga as a guarantee to Māori of the type of sovereignty that the Crown saw itself holding. It

[993] *He Whakaputanga me te Tiriti*, above n 10, at xxi-xxiii.
[994] Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015) at x.
[995] *Te Mana, Te Kāwanatanga,* above n 194, at 238.
[996] At 2.
[997] Richard S Hill *State Authority / Indigenous Autonomy: Crown-Māori Relationships in New Zealand/Aotearoa 1900-1950* (Victoria University Press, Wellington, 2004) at 13.

> seems, at the very least that for Māori Article Two was in effect an affirmation that two sets of sovereignty's (sic) could co-exist in some kind of partnership arrangement, a 'declaration of independence'.

Hill says that despite what the Crown may think, Māori have always believed in their own authority and that structures could co-exist.[998]

Potaka describes the legislative process and exercise of public power as being incoherent, and the legal force of the treaty as inconsistent.[999] He says that "a vortex exists where everyone knows the treaty is important, but nobody agrees about the level of its importance or applicability to law making".[1000] In his view, the most important constitutional and legal challenge is to find how to better express Treaty promises of partnership in our legislative framework. Potaka suggests the issue is Parliament determines if the Treaty is included in legislation, and the legislation-making process itself is not subject to formal Treaty compliance.[1001] He believes there is a significant opportunity to modify the operation of the legislature and to achieve a more enduring Treaty dialogue with our national legislature and that this could be done with or without a written constitution.[1002]

In tackling the question of how to better express the treaty's promises, Potaka explores a range of ideas for reforming Parliament and parliamentary sovereignty.[1003] One proposal is to establish a legislative chamber that has both a sovereign and a Māori representative. Under this model, both representatives would exercise shared sovereignty and be expected to protect rangatiratanga. He says this revised sovereignty would better reflect Treaty partnership and leave the constitutional monarchy intact.[1004] There was also the idea of establishing two legislative chambers; one for Māori and one for the Crown, entrenching the Māori

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[998] Richard S Hill *State Authority / Indigenous Autonomy: Crown-Māori Relationships in New Zealand/Aotearoa 1900-1950* (Victoria University Press, Wellington, 2004) at 23-24. Hill believes that, at any time, the Crown could have chosen to behave better and share power and still can; however, he says it acts so as to preserve its own rhythms and principles and has "seldom conceded any significant power to Māori".

[999] Tama Potaka "Legislation and the Legislature" in M Mulholland & V Tawhai (eds) *Weeping Waters, the Treaty of Waitangi and Constitutional Change*, (Huia Publishers, Wellington, 2010) at 100.

[1000] At 101.

[1001] At 92-93.

[1002] At 84.

[1003] At 85.

[1004] At 94-96.

seats, and changing the symbols and procedures of Parliament. Select committees could also be required to operate from the starting point that all legislation must be drafted and considered consistently with the treaty and approval can only be given to legislation when it is treaty compliant. Potaka says that amendments of this nature would give better expression to the treaty and provide greater protection of rangatiratanga.[1005]

With a sound te Tiriti partnership in place, Māori and the Crown are more likely to successfully navigate options for sharing authority over the takutai moana. There should be scope within the discussion for options of power sharing with Māori to be discussed that sit both within and outside the existing legal and political structure of our country.

### 10.4.2 A review of treaty principles: towards te Tiriti principles

Treaty principles have emerged from the Waitangi Tribunal, the courts and the Crown to assist with understanding how the treaty can be interpreted and applied in different contexts.[1006] The 1987 *Lands* case marked the emergence of treaty principles in the higher courts and, to a great extent, set the framework upon which treaty principles have evolved.[1007] In the *Lands* case, the Court of Appeal declared a set of treaty principles in order to be able to apply the s 9 Treaty of Waitangi provision in the State-Owned Enterprises Act 1986, and create a framework from which to measure whether the Crown's actions had been inconsistent with that section.[1008] The court articulated the following general principles:[1009]

> (a) The acquisition of sovereignty in exchange for the protection of rangatiratanga;
> (b) The Treaty established a partnership, and imposes on the partners the duty to act reasonably and in good faith;
> (c) The freedom of the Crown to govern;
> (d) The Crown's duty of active protection;

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[1005] At 98.
[1006] Treaty principles have been discussed in common law since 1840, throughout the series of Waitangi Tribunal reports that have been released since 1983, and through principles established by the Labour Government in 1989.
[1007] *New Zealand Māori Council v Attorney-General* [1987] I NZLR 641 (CA).
[1008] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 663
[1009] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 663. The *Lands* judgment includes more discussion on these principles and qualifications to each.

(e) Crown's duty to remedy past breaches;

(f) Māori to retain rangatiratanga over their resources and taonga, and to have all the rights and privileges of citizenship; and

(g) Duty to consult.

Principles that have emerged from Tribunal jurisprudence were to a large extent informed by the *Lands* case. The core principles have derived from the courts and Tribunal's interpretation of the two texts of the treaty, and the surrounding circumstances that the treaty agreement was entered into.[1010] Various Tribunals have maintained the principle that the treaty partnership is a reciprocal one, involving exchanges for mutual advantage and benefits.[1011] The principle has been based on the understanding that Māori ceded to the Crown the sovereignty/kāwanatanga (governance) of the country in return for a guarantee that their tino rangatiratanga (full authority) over their land, people, and taonga would be protected.

In relation to the principles and their application generally, it is consistently said that the treaty must be interpreted so as to apply to today's circumstances, and that compromise is required if it is to respond to our evolving society.[1012] In *Always Speaking*, Piripi says the notion of principles remain important because they have already created precedence and initiated effective dialogue between treaty partners. This has promoted a national awareness of the need for justice to be done in order for partners to move forward together on a positive basis:[1013]

> … the presence of principles read alongside the letter of Te Tiriti can only strengthen a case and provide more policy and operational opportunities for innovative solutions to correct generations of injustice …

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[1010] See: Waitangi Tribunal "Principles of the Treaty" (19 September 2016) <https://www.waitangitribunal.govt.nz/treaty-of-waitangi/principles-of-the-treaty/>

[1011] For example, see: *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 130; Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims, Stage One, Volume 1* (Wai 1200, 16 June 2008) at 173-174; Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, 23 August 2019) at 16-17.

[1012] Law Commission *Māori Custom and Values in New Zealand Law* (NZLC R55, 2001) at 79.

[1013] Haami Piripi "Te Tiriti o Waitangi and the New Zealand Public Sector" in V Tawhai & K Gray-Sharp (eds) *Always Speaking, The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011) at 239.

Piripi goes on to talk about the deficit of perpetuating incorrect assumptions about sovereignty for effective public policy:[1014]

> It can be read from the Court of Appeal principles that a number of assumptions have been made about the Crown's moral and legal right to acquire sovereignty". The Crown's 1989 principles took matters further by interpreting rangatiratanga as "self-management", appropriating any Māori sovereign interest there may have been and relegating Māori, as tangata whenua, to a mere self-managed interest group. These principles relied on good will and mutual cooperation as the methodology by which a quality treaty partnership would be achieved. Unfortunately, neither of these qualities had been evident in any of the Crown's constitutional actions to date, and the principles eventually lacked durability. Even so, the Crown's principles became a critical pre-requisite in the development cycle of all government policy and services.

Hayward in *Flowing from the Treaty's Words', The principles of the Treaty of Waitangi* questions whether Treaty principles provide for the treaty to be applied in different contexts, or water down its original terms.[1015] Consistent with the evolution of treaty principles to date, Hayward notes that there may be new dimensions to treaty principles, or entirely new principles developed in respect of a particular issue.[1016]

*He Whakaputanga me te Tiriti* provided that it is from the 1840 te Tiriti agreement that treaty principles must flow:[1017]

> It suffices to reiterate that, in February 1840, an agreement was made between Māori and the Crown, and we have set out its meaning and effect. It is from that agreement that the treaty principles must inevitably flow.

The effect of *He Whakaputanga me Te Tiriti* is that treaty principles, where they have emerged from the incorrect understanding that there was a cession of sovereignty under te Tiriti and that rangatiratanga was an authority which sat under sovereignty or kāwanatanga, need to be revised to align with the 1840 te

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[1014] At 238.
[1015] J Hayward and Nicola R Wheen (eds) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget William Books, Wellington, 2004) at 30.
[1016] At 30.
[1017] *He Whakaputanga me te Tiriti,* above n 10, at 527.

Tiriti agreement. A revision of the core treaty principles against *He Whakaputanga me Te Tiriti* will ensure treaty principles and standards that are applied to issues like the takutai moana are based on the correct interpretation of the agreement that was signed in 1840. The conclusions in *He Whakaputanga me Te Tiriti* now reinforce a heightened right for Māori to exercise full rangatiratanga, and that this right is not qualified by Crown sovereignty. The principle or standard is not one of Crown protection of Māori autonomy within the current system of Crown sovereignty. Rather, the standard required under the 1840 agreement is that Māori must be able to exercise rangatiratanga in the development of law and policy which impacts them. Treaty principles that are based on a cession of sovereignty in exchange for rangatiratanga need to be reviewed and corrected. Similarly, any treaty principles that qualify or limit the exercise of rangatiratanga based on the assumption of Crown sovereignty need to be reviewed.

### 10.5 PHASE 3: A negotiation over the takutai moana

The transformational approach proposed in this chapter is intentionally sequential. If the historical issues concerning the treaty, which are the root of the takutai moana issue can be overcome and mutually agreed to, then there is a greater chance that a negotiation over a specific issue or resource like the takutai moana will result in transformational outcomes. Again, the following discussion does not attempt to set the parameters or scope of the negotiation over the takutai moana, rather it draws on relevant literature to highlight factors that will likely lead to a successful te Tiriti compliant negotiation for the takutai moana.

In 2004, the Foreshore and Seabed Tribunal said that where the Crown does not give effect to some rights in a regime, compensation is essential, and the Government would need to negotiate a settlement with Māori. The Ministerial Review Panel proposed both national and regional negotiation options for the foreshore and seabed. The national model proposed that a one-off settlement could provide for the allocation of rights held by iwi and hapū and develop co-management options. The regional proposal involved negotiations directly between the Crown and hapū or iwi. Negotiations would deal with customary

usages and authority, the issue of ownership and if necessary, compensation.[1018] The Government unilaterally decided there would be no incentive for Māori to enter negotiations for a settlement over the foreshore and seabed, and developed awards and tests with no negotiation and compensation element. The Crown's approach was fundamentally inconsistent with the treaty.

Following on from the discussion in Chapter 9, there must be new values and principles if negotiations are to be consistent with a te Tiriti based approach. As a starting point, the Foreshore and Seabed Tribunal said that the treaty standard for a regime to be compliant is that outcomes should be negotiated and agreed with Māori:[1019]

> In putting forward the options, we note up front that full compliance with the Treaty would require the Crown to negotiate with Māori and obtain their agreement to a settlement, as happened with respect to commercial fishing and Rotorua lakes. All the other options involve a compromise between Treaty principles, claimant preferences, and what the Government might regard as practicable. They are, to borrow Professor Mutu's phrase, 'least worst' options.
>
> ….
>
> They also proceed on the premise that any action that the Crown takes unilaterally, short of full restoration of te tino rangatiratanga over the foreshore and seabed, will breach the principles of the Treaty. As we see it, it is critical that the path forward is consensual.

In a te Tiriti-based approach, a negotiation is not about compensation for the abrogation of rights. The focus should be on the retention of resources and promotion of the existence of rangatiratanga over those resources, not abrogation. Circumstances where compensation would be acceptable would be where Māori have agreed to some type of limitation of their rights, or circumstances where the Crown is incapable of recognising the rights of Māori because of a historical factor. The negotiation should be focused on how prejudicial elements of the regime can be overcome, and what new arrangements can be put in place to

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[1018] *Report of the Ministerial Review Panel*, above n 36, at 13. The Panel also suggested that it was possible to combine elements of both national and regional options.
[1019] *Report on the Crown's Foreshore and Seabed Policy*, above n 27, at 139.

uphold te Tiriti. Like the Ministerial Review Panel suggested, there are a spectrum of options for co-governance and there will be additional options that can be developed to align with a te Tiriti framework.[1020] The discussion is then about what resourcing and financial support is needed for the arrangements to be effective. Again, a move away from past environmental management models which the Tribunal has criticised because they "promise much", but "deliver little" will be necessary.[1021]

Future negotiations over the foreshore and seabed need to avoid transplanting the model for historical treaty settlement negotiations into the negotiation model for the takutai moana. Aside from the fact that the historical negotiations framework requires that Māori acknowledge Crown sovereignty in settlement legislation, there are numerous other issues with the way the negotiation policy is applied by the Crown. For example, redress is provided for rights that have been breached or taken away. Historical and contemporary treaty settlements have also reshaped Crown-Māori relations, and it can already be seen that this is influencing the Crown's approach to applications under the 2011 Act and its preference to deal with existing iwi governance entities. If a negotiation model for the takutai moana model is to be enduring, the Crown's current practice of recognising mandates of large natural groupings and dealing with overlapping areas needs to change. The Crown must ensure it is negotiating with the group that has rangatiratanga over a specific area of takutai moana. Furthermore, the Crown should be prepared to engage at a partnership level with hapū. The Ngāpuhi Mandate Tribunal reminded the Crown that "there is no one-size-fits-all formula for Treaty compliance in mandating processes", which stresses that flexibility from the Crown is essential.[1022]

Article 2 of te Tiriti guaranteed tino rangatiratanga to hapū. Tino rangatiratanga is the authority to "determine their own leadership and land and resource entitlements, and to make such decisions according to their own customary laws".[1023] The quality of the te Tiriti partnership matters, and the Crown for its part has an obligation to understand rangatiratanga and tikanga, and "act at all times to enhance rangatiratanga" and improve the social, economic and political

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[1020] *Report of the Ministerial Review Panel*, above n 36, at 144-159.
[1021] *He Whakaputanga me te Tiriti*, above n 10, at 138.
[1022] Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015) at 22.
[1023] At 29.

position of Māori.[1024] These are the basic factors that must be respected in a future negotiation over the takutai moana if it is to be transformative and uphold te Tiriti.

## 10.6 Final word: Ngā Taumata o te Moana – A return to rangatiratanga over the takutai moana

At Waitangi on the 6 February 2018, the Prime Minister Jacinda Ardern likened the distance between the two houses to the inequality between Māori and Pākehā. A year later on 6 February 2019, she explained that she does not claim perfection, rather she seeks "considerable" advances on the past. In her speech, she referenced Kawiti's saying below, while at the same time acknowledging that his signature sat at the top of te Tiriti. Her speech reads: [1025]

> Me he kino whakairo au e hurihia ki te toki mata iti.
>
> I would be a poor tattoo indeed if I flinched at the first tap of the chisel.

The Prime Minister added:[1026]

> I will not give up on the challenges that we face together. We will keep building the foundations to bring our two houses together and that ultimately will be the foundation for which Te Arawhiti will be formed. The bridge between our two houses."

Te Tiriti is that bridge where it envisaged a partnership of equals. For Ngāpuhi hapū this is something they have always known, as te Tiriti is captured in the ancient prophesies of our tūpuna, who, amidst the trials of war, had the foresight and capacity to see beyond colonialism.

The final task is to envisage, as Kawiti did for his people, what a return to rangatiratanga over the takutai moana might look and feel like. This is an exciting exercise with a range of possibilities. A tribe who has their rangatiratanga respected by the Crown will no longer have to litigate against their Tiriti partner

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[1024] At 30, 32.
[1025] Jacinda Ardern "Prime Minister's 2019 Waitangi speech" (New Zealand Government website, 5 February 2019). Source:<https://www.beehive.govt.nz/speech/prime-ministers-2019-waitangi-speech>
[1026] Jacinda Ardern "Prime Minister's 2019 Waitangi speech" (New Zealand Government website, 5 February 2019). Source:<https://www.beehive.govt.nz/speech/prime-ministers-2019-waitangi-speech>

to have their basic Tiriti rights upheld, or even their right to be engaged as a partner acknowledged. Time and resources would not be wasted on the question of whether a hapū has the right to make decisions over their takutai moana, because there would be a mutual understanding that those rights already exist. Instead, resources would be shared fairly, and the focus would be on fostering a vibrant te Tiriti partnership and empowering tribal decision-making over the takutai moana. The values and principles embodied in te Tiriti would guide the engagement between Māori and non-Māori in terms of the takutai moana.

For tribes like Te Kapotai, they would be empowered to operate under tikanga. This would mean that the whare at Waikare would not be too small, and it would not be an inconvenience for the Crown to go to their marae. In accordance with long held tikanga, decisions made in the whare there would hold mana. Instead of Te Kapotai having to plead their case in a Western court that an activity carried out by the hapū is customary, under their rangatiratanga they would have the ability to use their inlet in ways that support the wellbeing of the whānau who live there, and the community as a whole. The Crown and Pākehā would not live in fear that Māori do not have the skill or knowledge to manage their takutai moana properly, because through education and the re-establishment of the te Tiriti partnership, tikanga Māori would be understood and celebrated as a valid system of law and management.

An environment of negotiation, cooperation and respect is possible in a space where rangatiratanga is recognised and where Māori are empowered. To the extent that the leader of one house can acknowledge the leader of the other, the future is hopeful, and transformation is possible. As Kawiti said at Pukepoto after the battle of Ruapekapeka in 1846:[1027]

> "Titiro atu ki nga taumata o te moana, ka hua mai i reira he ao hou."
>
> "Look beyond the sea, to the transfiguration of the future."

[1027] *Wai 1040, #AA81*, above n 1, at [69].

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# APPENDIX 1: Relevant provisions of Foreshore and Seabed Act 2004

**32 Meaning of territorial customary rights**

(1) In this Act, territorial customary rights, in relation to a

group, means a customary title or an aboriginal title that could be recognised at common law and that—

(a) is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed by the group; and

(b) entitled the group, until the commencement of this Part, to exclusive use and occupation of that area.

(2) For the purposes of subsection (1)(a), a group may be regarded as having had exclusive use and occupation of an area of the public foreshore and seabed only if—

(a) that area was used and occupied, to the exclusion of all persons who did not belong to the group, by members of that commenced in 1840 and ended with the commencement of this Part; and

(b) the group had continuous title to contiguous land.

(3) In assessing, for the purposes of subsection (1)(b), whether a group had exclusive use and occupation of an area of the public foreshore and seabed, no account may be taken of any spiritual or cultural association with the area, unless that association is manifested in a physical activity or use related to a natural or physical resource.

(4) For the purposes of this section, the right of a group to exclusive use and occupation of a particular area of the public foreshore and seabed is not lost merely because rights of navigation have from time to time been exercised in respect of the area.

(5) If the area of the public foreshore and seabed over which a group claims a right to exclusive use and occupation was at any time used or occupied by persons who did not belong to the group, the right must be regarded as having been terminated unless those persons—

(a) were expressly or impliedly permitted by members of the group to occupy or use the area; and

(b) recognised the group's authority to exclude from the area any person who did not belong to the group.

(6) In this section, — **contiguous land** means any land that is above the line of mean high water springs and that—

(a) is contiguous to the area of the public foreshore and seabed in respect of which the application is made or to any significant part of that area; or

(b) would, but for the presence of any of the following kinds of land, be contiguous to that area or to any significant part of that area:

(i) a marginal strip within the meaning of section 2(1) of the Conservation Act 1987:

(ii) an esplanade reserve within the meaning of section 2(1) of the Resource Management Act 1991:

(iii) a Māori reservation set apart under section 303 of Te Ture Whenua Maori Act 1993:

(v) any railway line within the meaning of section 4(1) of the Railways Act 2005:

(vi) any reserve similar in nature to any land of a kind described in any of subparagraphs (i) to (v) **continuous title** means a title to any contiguous land that has at all times, since 1840, been held by the applicant group or by any of its members (whether or not the nature or form of that title was, at any time, changed or affected by any Crown grant, certificate of title, lease, or other instrument of title).

(7) To avoid any doubt, in this section, a reference to a member, in relation to a group, includes a past member and a deceased member of the group.

### 48 Applications for orders

(1) A whānau, hapū, or iwi, through its authorised representative, may apply to the Māori Land Court for a customary rights order that relates to a specified area of the public foreshore and seabed.

(2) An application under subsection (1) must be made not later than 31 December 2015.

### 49 Limits to jurisdiction of Māori Land Court under this Part

(1) Despite section 46(1), the Māori Land Court must not inquire into or determine an application for a customary rights order to carry on, exercise, or follow an activity, use, or practice—

(a) that involves the exercise of—

(i) any commercial Māori fishing right or interest, being aright or interest declared to be settled in section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; 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

(ab) that involves the exercise of any right or interest of Maori in commercial aquaculture activities on or after 21 September 1992, being a right or interest declared to be settled in section 6 of the Maori Commercial Aquaculture Claims Settlement Act 2004; or

(b) that is regulated by or under the Fisheries Act 1996; or

(c) if the subject of the application is—

(i) wildlife within the meaning of the Wildlife Act 1953, together with any animals specified in Schedule 6 of that Act:

(ii) marine mammals within the meaning of the Marine Mammals Protection Act 1978.

(2) A customary rights order must not be made in respect of an activity, use, or practice on the basis of a spiritual or cultural relevant whānau, hapū, or iwi in a physical activity or use related to a natural or physical resource. Section 49(1)(ab): inserted, on 1 January 2005, by section 60(3) of the Maori Commercial Aquaculture Claims Settlement Act 2004 (2004 No 107).

**50 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; 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

(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.

(2) A prohibition referred to in subsection (1)(b)(iv) does not include a prohibition or restriction imposed by a rule in a plan or proposed plan.

(3) The Māori Land Court may, in respect of the whole or part of the same area of the public foreshore and seabed, grant customary rights orders to—

(a) more than 1 whānau, hapū, or iwi:

(b) any combination of 1 or more whānau, hapū, and iwi.

**51 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.

(2) For the purpose of section 50(1)(c), a right to carry on, exercise, or follow an activity, use, or practice has been extinguished if, in relation to the area of the public foreshore and seabed specified in the application, —

(a) legal title has been vested by any means in a person or group other than the whānau, hapū, or iwi on whose behalf the order is sought, including —

(i) Crown grants made by or under any lawful authority, including ordinances, statutes, or the prerogative; or

(ii) the common law; or

(iii) a statutory vesting; or

(iv) administrative action; or

(b) there has been a lawful reclamation of the relevant part of the public foreshore or seabed; or

(c) an interest has been established that is legally inconsistent with the activity, use, or practice for which the customary rights order is sought.

(3) For the purpose of subsection (2)(c), a resource consent that relates to an area of the public foreshore and seabed specified in an application for a customary rights order does not, of itself, extinguish a right to carry on, exercise, or follow an activity, use, or practice.

(4) Subsection (2) applies whether or not legal title has subsequently been resumed by the Crown.

**52 Effects of customary rights order**

(1) The effects of a customary rights order made under this Part are—

(a) to confer a right on the whānau, hapū, or iwi on whose behalf the order is made to carry out a recognised customary activity in accordance with sections 17A and 17B and Schedule 12 of the Resource Management Act 1991; and

(b) to enable protection of recognised customary activities under the Resource Management Act 1991.

(2) A customary rights order may also entitle the whānau, hapū, or iwi on whose behalf the order is made to derive a commercial benefit from carrying out a recognised customary activity under the order.

(3) However, the exercise of any recognised customary activity, whether or not a commercial benefit is derived from carrying out the activity, is subject to the scale, extent, and frequency specified for the recognised customary activity in the customary rights order.

(4) To the extent that the exercise of a recognised customary activity exceeds the scale, extent, or frequency specified for the activity under the customary rights order, section 17A(1) of the Resource Management Act 1991 does not apply.

**53 Powers of holder**

(1) The holder of a customary rights order may —

(a) determine who, in accordance with tikanga Māori, may carry out a recognised customary activity under the order:

(b) limit or suspend, in whole or in part, a recognised customary activity carried out under the order —

(i) if written approval is given for a resource consent, as provided for by section 107A(1) of the Resource Management Act 1991; or

(ii) for any other reason that accords with tikanga Māori.

(2) In exercising the functions or carrying out the duties of the holder under this Act, the holder must act in the best interests of the whānau, hapū, or iwi on whose behalf the relevant customary rights order is made.

(3) The Māori Land Court may, —

(a) if application is made by a member of the whānau, hapū, or iwi on whose behalf a customary rights order has been made, review the exercise of powers by the holder of that order by requiring the holder —

(i) to file in the court a written report:

(ii) to appear before the court for questioning on that report or on any matter relating to the holder's exercise of his or her functions, duties, and powers under this Part; and

(b) at any time, enforce the duties of the holder by giving directions.

# APPENDIX 2: Relevant provisions of Marine and Coastal Area (Takutai Moana) Act 2011

**4 Purpose**

(1) The purpose of this Act is to —

(a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and

(b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and

(c) provide for the exercise of customary interests in the common marine and coastal area; and

(d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).

(2) To that end, this Act —

(a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and

(b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and

(c) gives legal expression to customary interests; and

(d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and

(e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area—

(i) for its intrinsic worth; and

(ii) for the benefit, use, and enjoyment of the public of New Zealand.

**7 Treaty of Waitangi (te Tiriti o Waitangi)**

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

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

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

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

**11 Special status of common marine and coastal area**

(1) The common marine and coastal area is accorded a special status by this section.

(2) Neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of this Act.

(3) On the commencement of this Act, the Crown and every local authority are divested of every title as owner, whether under any enactment or otherwise, of any part of the common marine and coastal area.

(4) Whenever, after the commencement of this Act, whether as a result of erosion or other natural occurrence, any land owned by the Crown or a local authority becomes part of the common marine and coastal area, the title of the Crown or

the local authority as owner of that land is, by this section, divested.

(5) The special status accorded by this section to the common marine and coastal area does not affect —

(a) the recognition of customary interests in accordance with this Act; or

(b) any lawful use of any part of the common marine and coastal area or the undertaking of any lawful activity in any part of the common marine and coastal area; or

(c) any power to impose, by or under an enactment, a prohibition, limitation, or restriction in respect of a part of the common marine and coastal area; or

(d) any power or duty, by or under an enactment, to grant resource consents or permits (including the power to impose charges) within any part of the common marine and coastal area; or

(e) any power, by or under an enactment, to accord a status of any kind to a part of the common marine and coastal area, or to set aside a part of the common marine and coastal area for a specific purpose; or

(f) any status that is, by or under an enactment, accorded to a part of the common marine and coastal area or a specific purpose for which a part of the common marine and coastal area is, by or under

an enactment, set aside, or any rights or powers that may, by or under an enactment, be exercised in relation to that status or purpose.

(6) In this section, enactment includes bylaws, regional plans, and district plans.

**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 Maori 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).

(3) An applicant group does not need to have an interest in land in or abutting the specified part of the common marine and coastal area in order to establish protected customary rights.

### 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.

## 53 Delegations and transfers of protected customary rights

(1) A delegation or transfer may only be made under section 52(4) to a person identified in a protected customary rights order or an agreement as a person to whom a right may be delegated or transferred.

(2) A delegation or transfer of a protected customary right must be—

(a) notified to each of the persons or bodies referred to in section 110(2)(b); and

(b) registered in accordance with section 114.

(3) A delegation or transfer does not take effect until, —

(a) in the case of a protected customary rights order, the order is varied in accordance with section 111; and

(b) in the case of an agreement, the agreement is varied.

## 54 Limitations on exercise of protected customary rights

(1) A protected customary right does not include any right or title over the part of the common marine and coastal area where the protected customary right is exercised, other than the rights provided for in section 52.

(2) A protected customary right must be exercised in accordance with—

(a) any terms, conditions, or limitations on the scale, extent, and frequency of the activity specified in the order or in the agreement; and

(b) any controls imposed by the Minister of Conservation under section 56.

## 55 Effect of protected customary rights on resource consent applications

(1) This section applies if an application for a resource consent for an activity to be undertaken wholly or in part within a protected customary rights area is lodged on or after the date that—

(a) a protected customary rights agreement comes into effect under section 96(1)(a); or

(b) a protected customary rights order is sealed in accordance with section 113.

(2) 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 —

(a) the relevant protected customary rights group gives its written approval for the proposed activity; or

(b) the activity is one to which subsection (3) applies.

(3) The existence of a protected customary right does not limit or otherwise affect the grant of—

(a) a coastal permit under the Resource Management Act 1991 to permit existing aquaculture activities to continue to be carried out in a specified part of the common marine and coastal area, —

(i) regardless of when the application is lodged or whether there is any change in the species farmed or in the method of marine farming; and

(ii) provided that there is no increase in the area, or change to the location, of the coastal space occupied by the aquaculture activity for which the existing coastal permit was granted; or

(b) a resource consent under section 330A of the Resource Management Act 1991 for an emergency activity (within the meaning of section 63) undertaken in accordance with section 330 of that Act, as if the emergency activity were an emergency work to which section 330 applies; or

(c) a resource consent for an existing accommodated infrastructure (within the meaning of section 63) if any adverse effects of the proposed activity on the exercise of a protected customary right will be or are likely to be —

(i) the same or similar in character, intensity, and scale as those that existed before the application for the resource consent was lodged; or

(ii) if more than minor or temporary in nature; or

(d) a resource consent for a deemed accommodated activity (within the meaning of section 65(1)(b)(i)).

(4) In the case where a deemed accommodated activity within the meaning of section 65(1)(b)(i) applies, the consent authority must, when considering applications for a resource consent relating to that activity, have particular regard to the nature of the protected customary right.

(5) The provisions of Part 1 of Schedule 1 apply for the purposes of subsections (2) and (3).

**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.

**59 Matters relevant to whether customary marine title exists**

(1) Matters that may be taken into account in determining whether customary marine title exists in a specified area of the common marine and coastal area include —

(a) whether the applicant group or any of its members —

(i) own land abutting all or part of the specified area and have done so, without substantial interruption, from 1840 to the present day:

(ii) exercise non-commercial customary fishing rights in the specified area, and have done so from 1840 to the present day; and

(b) if paragraph (a) applies, the extent to which there has been such ownership or exercise of fishing rights in the specified area.

(2) To avoid doubt, section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 does not limit subsection (1)(a)(ii).

(3) The use at any time, by persons who are not members of an applicant group, of a specified area of the common marine and coastal area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of customary marine title.

(4) For the purpose of subsection (1)(a)(i), **land abutting all or part of the specified area** means —

(a) land that directly abuts the specified area; or

(b) land that does not directly abut the specified area, but does directly abut any of the following:

(i) a marginal strip (as defined in section 2(1) of the Conservation Act 1987) that directly abuts the specified area:

(ii) an esplanade reserve (as defined in section 2(1) of the Resource Management Act 1991), but only to the extent that it directly abuts the specified area:

(iii) a reserve (as defined in section 2(1) of the Reserves Act 1977), but only to the extent that it directly abuts the specified area:

(iv) a Māori reservation (as defined in section 2(1) of the Reserves Act 1977) that directly abuts the specified area:

(v) a road that directly abuts the specified area:

(vi) a railway line that directly abuts the specified area.

**60 Scope and effect of customary marine title**

(1) Customary marine title —

(a) provides an interest in land, but does not include a right to alienate or otherwise dispose of any part of a customary marine title area; and

(b) provides only for the exercise of the rights listed in section 62 and described in sections 66 to 93; and

(c) has effect on and from the effective date.

(2) A customary marine title group —

(a) may use, benefit from, or develop a customary marine title area (including derive commercial benefit) by exercising the rights conferred by a customary marine title order or agreement, but is not exempt from obtaining any relevant resource consent, permit, or approval that may be required under another enactment for the use and development of that customary marine title area; and

(b) is not liable for payment, in relation to the customary marine title area, of —

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

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

(3) A customary marine title group may —

(a) delegate the rights conferred by a customary marine title order or an agreement in accordance with tikanga; or

(b) transfer a customary marine title order or an agreement in accordance with tikanga.

**61 Delegation and transfer**

(1) A delegation or transfer permitted by section 60(3) may only be to persons who —

(a) belong to the same iwi or hapū as the customary marine title group making the delegation or transfer; and

(b) are specified in the relevant customary marine title order or agreement.

(2) A delegation or transfer of customary marine title recognised by an order or in an agreement takes effect only when, as the case requires, —

(a) the order has been varied in accordance with section 111; or

(b) the agreement has been varied.

(3) If customary marine title is delegated, the applicant group remains the holder of the customary marine title.

(4) If customary marine title is transferred, the persons to whom the title is transferred become the customary marine title group.

**62 Rights conferred by customary marine title**

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

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

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

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

(d) rights in relation to —

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

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

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

(f) the ownership of minerals other than —

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

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

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

(2) Subsection (3) applies if a person applies for a resource consent, a permit, or an approval in relation to a part of the common marine and coastal area in respect of which —

(a) no customary marine title order or agreement applies; but

(b) either —

(i) an applicant group has applied to the Court under section 100 for recognition of customary marine title and notice has been given in accordance with section 103; or

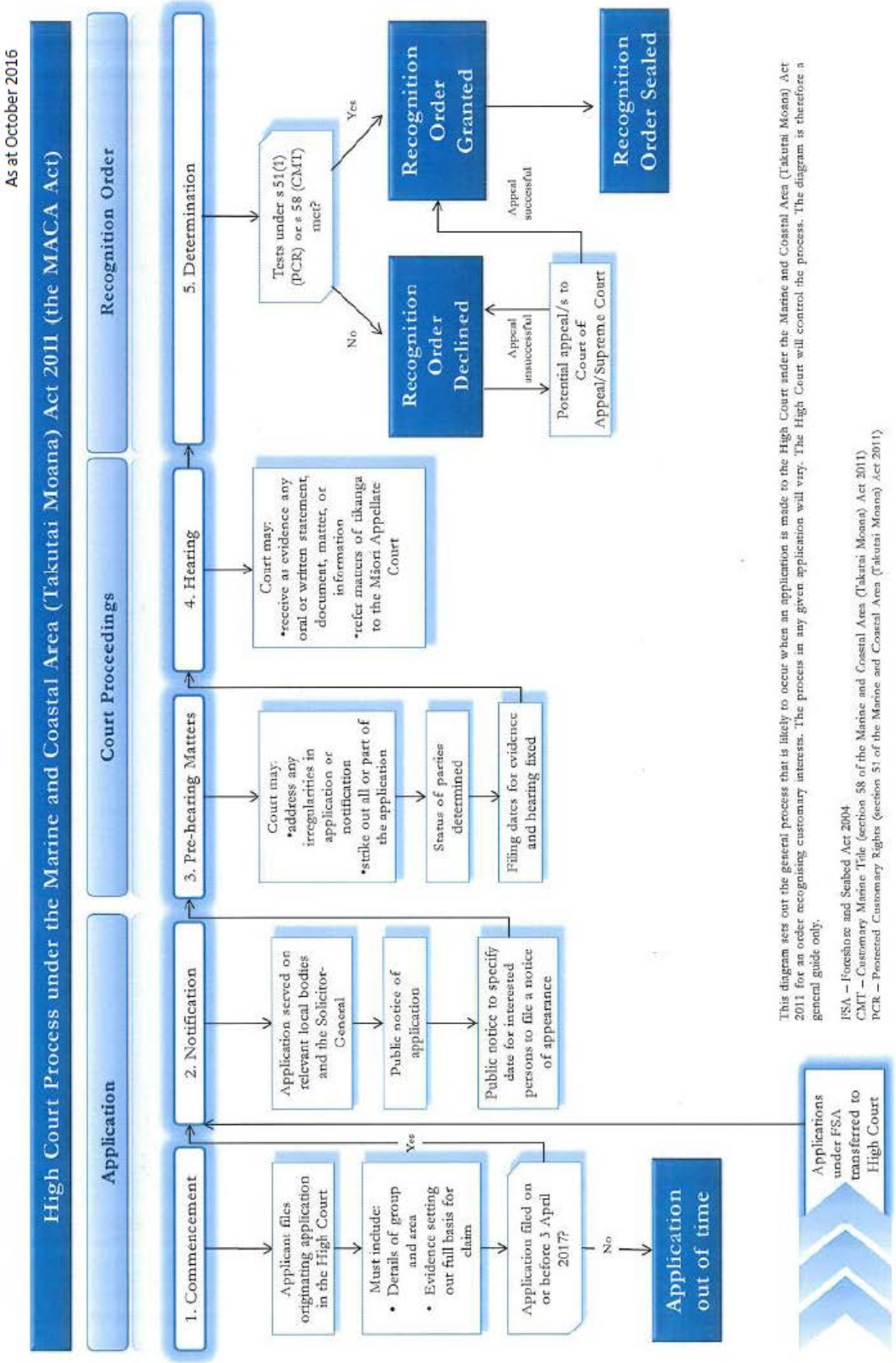
(ii) an applicant group has applied to enter negotiations under section 95.

(3) Before a person may lodge an application that relates to a right conferred by a customary marine title order or agreement, that person must —

(a) notify the applicant group about the application; and

(b) seek the views of the group on the application.

# APPENDIX 3: Diagram of High Court process



# APPENDIX 4: Wai 2660 – Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry – Tribunal Statement of Issues

## Scope of inquiry

The Wai 2660 Marine and Coastal Area/Takutai Moana Inquiry (the Inquiry) is inquiring into the legislative framework and applications process established under the Marine and Coastal Area (Takutai Moana) Act 2011 (the MACA Act).

The Inquiry will address two main questions (Wai 2660, #2.5.8 at [52]):

(a) Question One - To what extent, if at all, are the MACA Act and Crown policy and practice inconsistent with the Treaty in protecting the ability of Māori holders of customary marine and coastal area rights to assert and exercise those rights?

(b) Question Two - Do the procedural arrangements and resources provided by the Crown under the MACA Act prejudicially affect Māori holders of customary marine and coastal area rights in Treaty terms when they seek recognition of their rights?

## Issues for inquiry

Preliminary Questions

1. What are the interests of Māori in the takutai moana?

2. What Treaty/Te Tiriti principles apply to Māori interests in the takutai moana? What Crown duties arise from these principles?

Question One

3. What framework does the MACA Act create to recognise and provide for Māori interests in the takutai moana?

4. In developing the policy that underpins the MACA Act, what considerations did the Crown take into account? To what extent did the

Crown consider the findings and recommendations of the Wai 1071 Foreshore and Seabed Tribunal and Ministerial Review Panel?

5. What is the effect of the MACA Act on Māori interests in the takutai moana?

6. To what extent, if at all, are the MACA Act and the Crown's policy and practice inconsistent with the principles of the Treaty/Te Tiriti?

7. To what extent does the MACA Act recognise and provide for tino rangatiratanga and Māori interests in the takutai moana?

8. To what extent, if at all, do the MACA Act and the Crown's policy and practice prejudicially affect Māori, including in relation to:

    a) the statutory deadline for filing an application on or before 3 April 2017; and

    b) dissension caused, if any, between Māori, between the public, and between Māori and the pubic?