Lessons Learned From the MV Rena: Reimagining Maritime and Resource Management Law

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Dedicated in loving memory to
Hine Jean Paul (Hinematioro Matehaere) and Bully Paul (Pomare Paora)
who first taught me the importance of caring for our environment.

For my hapū,
Te Patuwai o Motiti

HE KŌRERO WHAKARĀPOPOTO: ABSTRACT

Figure 1 Map 1 of the MV Rena grounding location

The main research question in this thesis is what lessons can Aotearoa New Zealand learn from the MV Rena grounding accident? This research is an historical account of the legal framework existing at the time of the MV Rena grounding. In addition, the thesis will outline the surrounding marine environment to examine the relevant regulatory system.

In the early morning of 5th October 2011, the MV Rena vessel struck Ōtāiti (Astrolabe Reef).[1] Initially, the accident concerned a response to the safety

[1] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 1-11; Transport Accident Investigation Commission Te

of the crew on board the MV Rena. However, the seriousness of the damage to the hull with part of Ōtāiti reef protruding through the keel, presented issues concerning the recovery strategy for the vessel and cargo from the coastal marine area.[2] The MV Rena grounding released oil, cargo, and equipment into the surrounding marine environment of Ōtāiti. The oil, cargo and equipment travelled by the ocean currents, spreading across large areas of the ocean. This caused environmental effects across the coastal marine area in the Bay of Plenty region. The grounding was the "worst maritime environmental disaster" Aotearoa New Zealand had ever seen.[3]

The government of the day and the MV Rena owner are committed to international obligations for preparing and responding to maritime disasters and marine pollution. However, the government of Aotearoa New Zealand was not a party to international obligations addressing groundings relative to bunker oil. In addition, when responding to environmental effects from the grounding the legal processes regulating the maritime and resource management system, caused distress to the local community in the Bay of Plenty region. Specifically, the people of Motiti Island ("Motiti"), relative to preserving and protecting their cultural and spiritual relationship with Ōtāiti and Motiti.

An analysis of maritime and resource management law at the international level and domestic level is explored in this thesis. Such as, marine pollution,

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Kōmihana Tirotiro Aituā Waka Interim Report Marine Inquiry 11-204 Container Ship MV Rena grounding on Astrolabe Reef, 5 October 2011 (November 2014) at 1.

[2] D R Schiel et al "Environmental effects of the MV *Rena* shipwreck: cross-disciplinary investigations of oil and debris impacts on a coastal ecosystem" (2016) New Zealand Journal of Marine and Freshwater Research, 50:1, 1-9 at 1..

[3] *Maritime New Zealand v Daina Shipping Company DC CRI-2012-070-001872, 26 October 2012* at [1],[2].

and indigenous peoples' rights (iwi Māori) in connection with the Maritime Transport Act 1994, the Resource Management Act 1991, the Waitangi Tribunal process and related planning and policy instruments.[4] The research concludes that, had the government of the day ratified relevant conventions prior to the MV Rena grounding incident, the outcome of the location of the ship may have been a completely different result, such as a full wreck removal, without opposition. Additionally, the research concludes that the gap in the laws regulating marine environments did not equip iwi Māori with protecting their interests, resulting in a spiritual injustice to the people of Motiti. This research reveals that maritime and resource management law still has a long way to go with supporting the indigenous people's voice in Aotearoa New Zealand for sustainable marine solutions. This thesis conclude with recommendations directed at better maritime and resource management regulations and indigenous peoples' involvement.

[4] Maritime Transport Act 1994; Resource Management Act 1991; and Treaty of Waitangi Act 1975.

NGĀ MIHI: ACKNOWLEDGEMENTS

Writing this thesis has been an extremely long journey. I thank everyone who supported me to completion. I wish to thank the members of my hapū, Te Patuwai. For the love and support during our time in tackling the MV Rena situation. I learnt a great deal from that experience, and I will enjoy sharing that knowledge to help others.

I wish to thank my whānau, thank you to my daughter Taimana Rewha for your love and support in walking this journey with me. I also want to acknowledge my son Reuben Rewha who has been living in Australia during this journey. I hope to take you back to Motiti someday, to reconnect you with Motiti and your whakapapa. Thank you to my partner Dean Verhoeven, who joined me in the last three years of this PhD journey. I appreciate your stable strength, love and support in the last stretch.

I also want to thank Katrina Werahiko and Rogena Stirling for your time, and endless conversations, when I really needed it. Your positive encouragement has got me through this journey.

Thank you to the University of Waikato for offering a scholarship to undertake this thesis in the first two years of the journey. I thank my PhD supervisors Professor Alexander Gillespie and Associate Professor Linda Te Aho for your time and patience in this journey.

KUPU WHAKATAKI: PREFACE

Ko Mataatua tōku waka
Ko Putauaki tōku Maunga
Ko Rangitaiki tōku Awa
Ko Ngāti Awa tōku iwi
Ko Patuwai tōku hapū
Ko Tamatea ki te huatahi rāua ko Te Hiinga o te ra nga Whare Tipuna
Ko Te Hinewai rāua ko Te Puna nga Whare Kai
Ko Maraea Hoete rāua ko Matehaere Petera Matehaere ōku Matua Tipuna
Ko Hine Matehaere rāua ko Pomare Paora ōku Matua
No te haupapa kōhatu no Motiti
Ko Atareta Paora taku ingoa[5]

I feel the need to introduce myself at the outset of this thesis. My pepeha above is my introduction of who I am and where I come from. My name is Adrienne Paul, I lovingly share my narrative and experience, as a person with direct whakapapa connection to the people of Motiti, the whenua (land) and to Tangaroa (God of the sea) and his ocean.[6]

I was born and grew up in the North Shore, Auckland region. My parents moved from the Bay of Plenty region in the 1950's urbanisation shift for work.[7] My mother, Hine Jean Paul was born and grew up on Motiti Island.

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[5] Pepeha is a way of introducing yourself in Māori. This is my pepeha to demonstrate to the reader of who I am by sharing my connections to people and places that are highly regarded and important to me, My pepeha is also my whakapapa (genealogical link) to my ancestors and the places that are connected to my whakapapa.

[6] Adrienne Paul, University of Waikato PhD candidate. I note that there are many other Māori descendants who whakapapa to Motiti, but here for consistency I adopt my personal perspective with the acknowledgement that other whānau/hapū/iwi members' of Motiti experience of the MV Rena disaster also have great significance in this context. I speak from my perspective only to protect Motiti and my people. I do not claim to speak for all people of Motiti.

[7] Metge, Joan. "The Maori People to-day." (1963) *Geography* 48, no. 2: 196–99 at 197.

She only knew the Motiti way of life. My father, Bully Paul was born and grew up in Te Teko, a very small town along the banks of the Rangitaiki River. He only knew the Te Teko (Texas) way of life. My father also had whakapapa links to Motiti through his great grandmother Te Waimanuka Umukotahi. Both my parents were strongly connected to Motiti. My mother rests in our urupa (cemetery) on Motiti, and my father rests in our urupa (cemetery) in Te Teko.

Both my parents were native speakers of Te Reo Māori (Māori language) and their upbringing was entrenched in Te Ao Māori (old traditional knowledge and practice – Māori worldview). Both my parents had a spiritual background and love for our environment.

I started the PhD journey in 2015, there have been significant political movement and legislative changes, such as the initiation of the Resource Management Act 1991 reforms introduced in 2020. As a result of the MV Rena grounding, constant debate has stirred amongst resource management practitioners and iwi Māori. While not as a main source for this shift, the MV Rena grounding can be seen as an indicator to cultivate legislative change. This debate has also included other areas within the resource management field such as conservation, fisheries and overall ocean governance.[8]

The resource management reform debate at its infancy stage is connected to this thesis. Whereby, this thesis outlines the examples of why the reforms came about, and why the Māori perspective on the environment is an

[8] Greg Severinsen, et al "The Breaking Wave A conversation about reforming the oceans management system in Aotearoa New Zealand" (August 2021) Working Paper at 56.

important factor when responding to marine problems. Particularly, for coastal iwi Māori and local communities.

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NGĀ KUPU: GLOSSARY OF MĀORI CONCEPTS

Term	Definition
accommodation block (*see figure below)	the part of the ship where crew accommodation was located, including the bridge, and consisting of 7 levels.
aft (*see figure below)	the back part of a ship
ahi kā	title to land through occupation by a group, generally over a long period of time. The group is able, through the use of whakapapa, to trace back to primary ancestors who lived on the land.
amenity	the attractiveness or value of an area
ara wairua	spiritual pathway
benign	having no significant effect, harmless (http://www.merriam-webster.com) not harmful to the environment (http://oxforddictionaries.com)
bow	the forward part of a ship
bulbous bow (*see figure below)	a protruding bulb at the bow of a ship just below the waterline that modifies the way the water flows around the hull, reducing drag and increasing speed, range, fuel efficiency, and stability
cargo	the freight carried by a ship, including containers and their contents
clingage	hardened remnants of oil adhered to a ship's structure, equipment or cargo
coastal marine area	the foreshore, seabed, and coastal water, and the air space above the water— (a) of which the seaward boundary is the outer limits of the territorial sea: (b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

	(i) 1 kilometre upstream from the mouth of the river; or (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5 (Section 2, Resource Management Act 1991)
contaminant	includes any substance (including gases, odorous compounds, liquids, solids, and microorganisms) or energy (excluding noise) or heat, that either by itself or in combination with the same, similar, or other substances, energy, or heat— (a) when discharged into water, changes or is likely to change the physical, chemical, or biological condition of water; or (b) when discharged onto or into land or into air, changes or is likely to change the physical, chemical, or biological condition of the land or air onto or into which it is discharged (Section 2, Resource Management Act 1991)
debris	the scattered remains of something broken or destroyed; rubble or wreckage
debris field	the extent of the seabed covered by debris between and around the split sections of the Rena as depicted in Figure 2 of the Description of Proposal.
debris management plan	a plan to set out how shoreline debris will be collected/recovered in the future to avoid visual effects or harm to the environment.
discharge	emit, deposit, and allow to escape
dump	(a) in relation to waste or other matter, its deliberate disposal; and (b) in relation to a ship, an aircraft, or an offshore installation, its deliberate disposal or abandonment;—but does not include the disposal of waste or other matter incidental to, or derived from, the normal operations of a ship, aircraft, or offshore installation, if those operations are prescribed as the normal operations of a ship, aircraft, or offshore installation, or if the purpose of those operations does not include the disposal, or the treatment or transportation for disposal, of that waste or other

	matter; and to dump and dumped have corresponding meanings (Section 2, Resource Management Act 1991)
ecotoxicity	the study of how chemicals affect the environment and organisms living in it.
environment	includes— (a) ecosystems and their constituent parts, including people and communities; and (b) all natural and physical resources; and (c) amenity values; and (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters (Section 2, Resource Management Act 1991)
equipment	parts of the ship that are not structural, for example, ship fittings, furnishings, wiring, ducting, etc
hapū	kinship group, clan, tribe, subtribe
harmful substance	means – any substance prescribed by regulations as a harmful substance for the purposes of section 2(1) of the RMA, including by regulation 3 of the Resource Management (Marine Pollution) Regulations 1998
hazardous	a possible source of danger or harm
hazardous substance	means, unless expressly provided otherwise by regulations, any substance— (a) with 1 or more of the following intrinsic properties: (i) explosiveness: (ii) flammability: (iii) a capacity to oxidise: (iv) corrosiveness: (v) toxicity (including chronic toxicity): (vi) ecotoxicity, with or without bioaccumulation; or (b) which on contact with air or water (other than air or water where the temperature or pressure has been artificially increased or decreased) generates a substance with any 1 or more of the properties specified in paragraph (a)
hold **(*see figure below)**	a space on a ship for carrying cargo

hull (*see figure below)	the watertight body of a ship or boat
iwi	extended kinship group, tribe, nation, people, nationality, race - often refers to a large group of people descended from a common ancestor
iwi authority	the authority which represents an iwi and which is recognised by that iwi as having authority to do so (Section 2, Resource Management Act 1991)
kai	food, meal
kaimoana	seafood, shellfish
kaitiaki	trustee, minder, guard, custodian, guardian, keeper.
kaitiakitanga	the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship
karakia	to recite ritual chants, say grace, pray, recite a prayer, chant
lowest astronomical tide (LAT)	the lowest sea level which can be predicted to occur under average meteorological conditions
mana	inherited status, prestige, authority, power, influence
mauri	the life force which all objects contain
mixing zone	a designated area of receiving water within which water quality standards are not met
moana	sea, ocean
monitoring plan	a plan that sets out the monitoring schedule that will be followed
PAH	polyaromatic hydrocarbon
rangatira	be rich, well off, noble, esteemed, revered
rangatiratanga	sovereignty, chieftainship, right to exercise authority, chiefly autonomy, self-determination, self-management, ownership, leadership of a social group, domain of the rangatira, noble birth
stern (*see figure below)	the rear part of a ship or boat

tāngata whenua	local people, hosts, indigenous people of the land - people born of the whenua
Tangaroa	God of the sea
taonga	treasured property, goods, possessions, effects
tapu	sacred, prohibited, restricted, set apart, forbidden
te moana a toi	iwi leaders forum
tikanga māori	Maori customary values and practices
tipua	enchanted, unusual
toka	Reef
transom	wide flat area at the back of a ship
waahi tapu	a place sacred to Maori in the traditional, spiritual, religious, ritual or mythological sense
whānau	extended family, family group, a familiar term of address to a number of people - in the modern context the term is sometimes used to include friends who may not have any kinship ties to other members
whanaungatanga	relationship, kinship, sense of family connection - a relationship through shared experiences and working together which provides people with a sense of belonging. It develops as a result of kinship rights and obligations, which also serve to strengthen each member of the kin group. It also extends to others to whom one develops a close familial, friendship or reciprocal relationship
waka	canoe
whakapapa	genealogy, lineage
whenua	country, land
wreck	the remains of the Rena ship and its cargo, including debris field material
wreckage	debris located in the debris field and in the holds
wreck access plan	a plan prepared to provide for safe visitor access to the wreck site

LIST OF ABBREVIATIONS

Maritime Transport Act 1994	MTA
Resource Management Act 1991	RMA
Maritime New Zealand	MNZ
Oil Pollution Compensation Fund	IOPC
International Maritime Organisation	IMO
United Nations	UN
United Nations Charter	UN Charter
United Nations Convention on the Law of the Sea	UNCLOS
International Convention for the Prevention of Pollution from Ships 1973 and 1978	MARPOL
United Declaration on the Rights of Indigenous Peoples	UNDRIP
International Covenant on Civil and Political Rights	ICCPR

International Covenant on Economic, Social, Cultural Rights	ICESCR
Convention on Biological Diversity	CBD
Exclusive Economic Zone	EEZ

1 ŪPOKO TUATAHI: CHAPTER ONE – INTRODUCTION

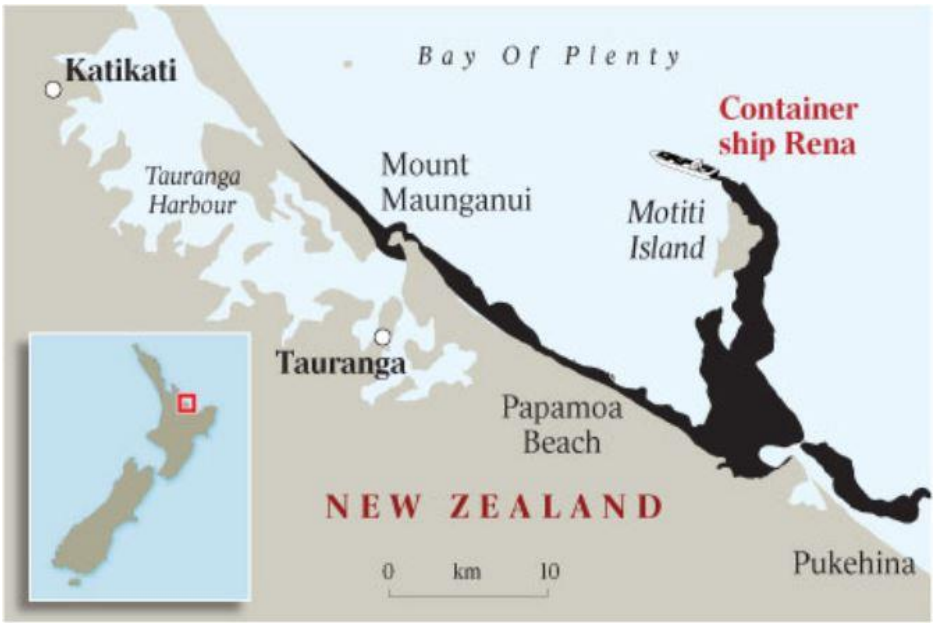

Figure 2 Map 2 of the MV Rena grounding location and oil discharge in the ocean

a. Introduction

Motiti Island is an offshore island in the Bay of Plenty region. Motiti Island ("Motiti") is a low-lying volcanic plateau with an area mass of ten square kilometres of open plains, which includes a water springs system dropping off into cliffs.[1] Surrounding the marine area of Motiti are scattered ecological network of islets and reefs including: islets Okarapu, Te Māmangi, Motu Haku, Motu Nau, and Tokoroa and Ōtāiti reef (also known as Astrolabe Reef).[2] This network of

[1] Waitangi Tribunal, *Motiti: Report on the Te Moutere Inquiry - Pre-Publication Version* (Wai 2521, 2022) at 2.

[2] At 2.

ecosystems in the surrounding coastal marine area is rich taonga species[3] and tangata whenua (indigenous people of the land) have a deeply held fundamental relationship with Motiti and its surrounding marine environment.

Motiti is very unique as it is one of a few off-shore islands permanently inhabited islands in Aotearoa New Zealand. Historically, Motiti was occupied by both Māori and Pakeha.[4] Today, the people of Motiti include the following hapū (subtribe), Te Patuwai hapū,[5] Ngāti Maumoana and Te Whānau a Tauwhao,[6] are supported by Te Tiriti o Waitangi ("Treaty of Waitangi") and Tikanga Māori values and practices with regard to maintaining their cultural and spiritual relationship with the surrounding environment of Motiti and Ōtāiti through cultural practices on the surrounding environment. The people of Motiti are the only local community located close to Ōtāiti.

This thesis include chapters that demonstrate the historic operation of domestic law up until the end of the Hearing Panel; and therefore, demonstrating the injustice that occurred to the people of Motiti Island. The importance of making aware of this injustice is to show the harm on the people of Motiti from the impact of the MV Rena in 2011. Equally important, this thesis represents an historical view point on whether Aotearoa New Zealand had sufficient marine regulations in place at the time of the grounding.

1 The Structure of this thesis

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[3] *Attorney-General v Motiti Rohe Moana Trust and Ors* [2019] NZCA 532; *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2016] NZEnvC 240 at [13] and Kura Paul-Burke "Cultural Monitoring Report" The Astrolabe Community Trust (22 December 2020) at xii.

[4] Ani Mikaere "Are we all New Zealanders now? A Maori response to the Pakeha quest for indigeneity" (2004) *Red and Green* 4:33-45 at 36.

[5] *Ngai Te Hapu Incorporated v Bay of Plenty Regional Council* [2017] NZEnvC 073 at [64]-[67].

[6] At [59]-[63].

The overall structure of this thesis cover the following chapters: firstly, an introduction to the thesis outlining the approach of the research describing the marine coastal area of Ōtāiti, Motiti and the cultural community of Motiti. Secondly, the chapter two will outline the Māori environmental philosophy that could be utilised to achieve robust environmental solutions. Thirdly, the next chapter provides the factual scope of the MV Rena grounding to provide the scientific approach to the issue. Fourthly, chapter four will outline the maritime and resource management system to explore the operation of the law at the domestic level. This will identify potential gaps in the law relating to responding to marine pollution and the inclusion of the indigenous voice in marine solutions. The fifth chapter will demonstrate the players involved in the response to the MV Rena grounding to show how each actor responded to marine pollution. Lastly, chapter six will outline the international obligations for marine pollution and indigenous peoples' rights. This will outline potential gaps in the law at the international level. The conclusion will provide the summary of the thesis in answering the research question "What lessons can Aotearoa New Zealand learn from the MV Rena grounding accident?" The thesis will conclude with potential recommendations for maritime and resource management regulation in Aotearoa New Zealand.

2 Research Methodology

In respect of the chosen research method used for this thesis, I provide the following statement. I personally whakapapa (genealogy links) to Motiti and Ōtāiti. I acknowledge that I have a subjective bias, due to my own perspective on the historical background of Motiti and Ōtāiti. The bias exists because of the way I

was brought up under the tikanga of my parents[7] who both whakapapa to Motiti and Ōtāiti. Therefore, to avoid the influence of subjective bias in this thesis, two research methods are utilised.

3 Chosen research methods

Research method is the method used by the researcher to gather data to produce the findings that will be analysed in order to answer the thesis topic or research question.[8] Research methods allow for the results to be generalised for future studies and examinations, as well as, providing the researcher to gain full understanding and clarity of the thesis question and outcome.[9] The research methods chosen for this thesis include: 1) Legal qualitative research and 2) Kaupapa Māori methodology.[10]

To emphasise, legal qualitative research is empirical research based on observations of the world (data/facts about the world); historical background, statute and case law; interviews; and outcomes of secondary and primary data collection. The aim of legal qualitative research is to achieve a conclusion based on what is found from observation.[11] Therefore, legal qualitative research is one

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[7] Māori way of living relative to tikanga Māori identity, customs, values, culture, ethic, etiquette, manner and behaviour. This way of living has been passed down through oral traditions and the practice of tikanga through each generation.

[8] Alan Bryman and Emma Bell *Business Research Methods* (3rd ed, Oxford University Press, New York, 2011) at 386 and Sharlene Nagy Hesse-Biber *Mixed methods research: Merging theory with practice* (Guilford Press, 2010) at 3.

[9] Sharlene Nager Hesse-Biber, at 3. See also Michael J Polonsky and David S Waller *Designing and managing a research project: a business student's guide* (3rd ed, Sage Publications, Los Angeles, 2015) at 167.

[10] Sharlene Nager Hesse-Biber, at 3. See also Michael J Polonsky and David S Waller *Designing and managing a research project: a business student's guide* (3rd ed, Sage Publications, Los Angeles, 2015) at 16 and Linda Tuhiwai Smith *Decolonizing methodologies: research and indigenous peoples* (Zed Books: Distributed in the USA exclusively by Palgave Macmillan, London and New York, 2012) at 187.

[11] Bryman and Bell, above n 3, at 386. Also see Michael McConville and Wing Hong Chui *Research Methods for the Arts and Humanities: Research Methods for Law* (Edinburgh University Press, 2007) at 42.

method that will be utilised for the gathering of data relating to the law and non-Māori aspects of this thesis.

The second research method will complement the observations of the legal qualitative research method. Kaupapa Māori methodology, involve collecting data in accordance with Māoritanga and/or Te Ao Māori.[12] It allows for research to be carried out by the researcher who 'is Māori', 'is connected to Māori philosophy and principles' and has 'awareness of the validity and legitimacy combined with the importance of Māori language and culture' and 'is concerned with the struggle for autonomy over cultural wellbeing'.[13] Therefore, Kaupapa Māori methodology is another research method used to gather data relating to the law and Māori aspects of this thesis.

In addition, as part of the research method, with regard to the te reo Māori terms throughout this thesis, to assist non-Māori readers who may be unfamiliar with te Reo Māori language a glossary is provided, for the reason that not all Māori terms in this thesis will have a direct English translation, because most Māori terms have multiple meanings. For example, the "essence of the Māori word Taonga (treasures) which in Māori encapsulates intangible items of value which extended beyond to the physical items translated into the English version".[14]

In summary, the researcher will utilise two research methods, to address the perspective of the Māori worldview ("Te Ao Māori") against the impact of legal

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[12] Māori culture, traditions, and the way of life.

[13] Linda Tuhiwai Smith *Decolonizing methodologies: research and indigenous peoples* (Zed Books: Distributed in the USA exclusively by Palgave Macmillan, London and New York, 2012) at 187.

[14] Kelly, H. Ē. M. I., and Andre Poyser. "Mapping the Te Reo Māori Translation Ecosystem: A Socio-Economic Perspective." (Te Ara Poutama - the Faculty of Maori and Indigenous Development, Auckland University of Technology, 2020) at 6.

frameworks or processes.[15] Utilising both research methods will, instead of dissipating the existing subjective bias, it will instead provide the platform to include the perspective of Te Ao Māori. As a result, the use of these research methods will cater to a balanced approach, as opposed to a hierarchical approach whereby one research method might supersede the other research method, when collating relevant data. Thus, engaging both research methods is utilised.

4 Setting the Scene

The focus of this chapter will briefly outline the legal problem of the grounding of the MV Rena on Ōtāiti; description of the marine coastal area of Ōtāiti, Motiti and the cultural community of Motiti to assist with understanding the full peripheral of the surrounding physical environmental area and the consisting aspects relating to the grounding of the MV Rena.

The reason for acknowledging Motiti in this thesis is highly relevant, due to the physical environmental locations of Ōtāiti and Motiti, and the cultural and spiritual connection the people of Motiti have with Ōtāiti. The MV Rena grounding delivered extensive impacts from the vessel releasing immense oil, debris and equipment into the surrounding coastal marine area of Motiti and the Bay of Plenty region.

Consequently, this chapter briefly sets out the position of the people of Motiti, which comprise of the following areas: cultural, environmental and economical facets that are a part of how Motiti operates. An illustration of this context particular to Motiti will assist with providing the bottom line to assess the law against the environment context.

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[15] The Māori world inclusive of language, tikanga, marae, waahi tapu and access to whanau, hapū and iwi.

5 Legal problem of the grounding of the MV Rena on Ōtaiti

The MV Rena was a 235 metre long container vessel weighing 37,209 tonnes, holding 1,368 containers and 1,733 tonnes of heavy fuel oil (including 200 tonnes of marine diesel oil on board the vessel).[16] At 2.20am on the 5 October 2011 the MV Rena vessel ran aground on Ōtaiti, off the Port of Tauranga in the Bay of Plenty, New Zealand.[17] Unfortunately, the "acts and omissions, including decisions, of the master and second officer of the MV Rena"[18] operating the vessel while sailing from Napier to Tauranga led to the grounding.[19]

The case of *Daina Shipping Company v Te Runanga O Ngati Awa,* known as the "Limitation application" addressed the arguments made by the plaintiffs to limit their liability in respect of claims arising from the grounding of the MV Rena.[20] The plaintiffs included: the registered owner of the MV Rena (Daina Shipping Company SA), two companies which provided management services for the owner of the MV Rena and the vessel (Costamare Shipping Company SA and CIEL Ship management SA), and lastly the insurer of the registered owner of the MV Rena (The Swedish Club).

Essentially, this thesis does not delve into the details of limited liability or criminal context of the MV Rena, for the reason that this thesis is focused on the legal framework relative to environmental and cultural effects aspect of the MV Rena. While this is the case, an explanation of the details relating to the cause of the

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[16] *Daina Shipping Co v MV Rena Claimants* [2013] NZHC 3450 at 3451. See also Maritime New Zealand "MV Rena" www.maritimenz.govt.nz.

[17] *Daina Shipping Co v MV Rena Claimants* [2013] NZHC 3450 at 3451.

[18] *Daina Shipping Company v Te Runanga O Ngati Awa* [2013] 2 NZLR 799 at [10].

[19] At 803.

[20] At 799.

grounding will be set up in order to compare the MV Rena grounding with other grounding examples that have occurred.

In *Daina Shipping Company v Te Runanga O Ngati Awa,* Justice Woodhouse, referred to the decision by Judge Wolff in the District Court at Tauranga on 25 May 2012 which dealt with the guilty plea of both the master and the second officer and the sentencing notes recorded that:[21]

> On the voyage, as the Judge put it, the Master became "obsessed with the need to arrive at the pilot station outside Tauranga Harbour by 3.00am". The Judge said that this "set in train a…series of events that ultimately resulted in" the grounding on the reef.

The High Court outlined the relevant facts regarding the actual cause of the MV Rena grounding that:[22]

> In order to ensure the 0300hrs arrival, the master had sanctioned various shortcuts that departed from the vessel's passage plan. At 0018hrs the vessel's course was back consistent with the passage plan, and on track to arrive at the pilot station by 0300hrs, although this would have been close. At 0027hrs Port of Tauranga radioed the Rena for an update on the vessel's progress and suggested that the vessel proceed at full speed. The second officer gave Port of Tauranga an ETA of 0300hrs. At about 0135hrs the second officer, without the prior knowledge of the master, as a further shortcut initiated what was the last course change. This put the vessel on a direct collision course with the reef…this was a substantial deviation from the passage plan. The master then failed to identify the problem until the vessel actually struck the reef at 0214hrs, some 40 minutes later. Factors in the final casualty included failing to plot the Rena's position accurately or at all, relying on GPS, and failing to consult charts and other resources available on board which clearly and accurately showed the reef and its position.

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[21] *Maritime New Zealand v Balomaga DC* Tauranga CRI-2011-070-7734 at [5] and *Daina Shipping Company v Te Runanga O Ngati Awa,* at [9]-[11].

[22] At 803.

Although the Master and Second officer pleaded guilty, the registered owner of the MV Rena was charged with an offence under the Resource Management Act 1991 ("RMA") in respect of the spillage of oil and pleaded guilty. Justice Woodhouse asserted that:[23]

> The actual cause of the collision with the reef was the result of poor navigational skills of the captain and second mate and a rust on their part to reach Tauranga, which proved to be an unnecessary rush. At no point during the course of the hearing in relation to them, or this, has there been any suggestion that the present defendant had put any pressure of time, or of operational requirements, on those persons actually responsible for the ship running aground, and that needs to be borne in mind…It also needs to be borne in mind that this is a single charge and that it is one of strict liability. That means that the owner cannot escape liability in such circumstances.

With clarity, the actions and omissions of the Master and second officer of the MV Rena confirmed poor navigational skills that led to shortcuts in reaching the Port of Tauranga. In diverting from the vessels passage plan, put the MV Rena on a direct collision with Ōtaiti. Therefore, the registered owner, the Master and the second officer were responsible for the MV Rena grounding on Ōtaiti. The grounding caused "significant risk of pollution from discharge of heavy fuel oil and other oils and lubricants on board".[24] Maritime New Zealand's Marine Pollution Response Service declared that the grounding was a Tier 3 Emergency.

On 6 October 2011, an investigation was carried out by Svitzer Salvage BV (an incorporated company in Netherlands) as the appointed salvor of the MV Rena under the Lloyds open form contract.[25] As a result of the investigation, the MV

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[23] At 801 – 805.

[24] *Svitzer Salvage BV v Z Energy Ltd* [2013] NZHC 2584 at [3]-[4].

[25] At [5]. The Lloyds open form sets out a regime for determining the amount of remuneration to be awarded to salvors for their services in salving property at sea and minimising or preventing damage to the environment. Under the Special Compensation P & I clause, Svitzer is entitled to be reimbursed for all of its costs and expenses, reasonably incurred. See also Ilian Djadjev "The SCOPIC clause as a

Rena could not be refloated unless the bunkers and containers on the ship were first discharged, which "became the immediate and critical priority, given the environmental and pollution risk from discharge into the sea" together with long-term adverse effects.[26] To remove the heavy fuel oil and marine diesel oil, the Awanuia was utilised to transfer the oil to Tauranga on the 9 October 2011.[27] However, over subsequent months, the MV Rena broke apart into two separate pieces. The High Court detailed the situation stating that:[28]

> [S]everal hundred tonnes of oil were spilt into the ocean and a significant number of containers were washed off the vessel. The break-up of the vessel and the scattering of cargo, debris and other pollutants was exacerbated by storm events, including Tropical Cyclone Pam…The Director of Maritime New Zealand issued a series of notice requiring the vessel and its cargo to be salvaged and removed as a "hazard to navigation" and as a "hazardous ship".

The legal problem arising from the MV Rena grounding, as well as, the break-up of the vessel gave rise to certain issues under statutory provisions, which include the following:[29]

> Part 7 of the Maritime Transport Act 1994 (the Act)…to limit their liability in respect of claims arising from the grounding of the Rena…s 65(1)(a) of the Act of operating a ship in a manner which caused unnecessary danger or risk; and an offence under the Resource Management Act 1994 related to the discharge of contaminants from the ship into the sea… ss 110 and 248 of the Maritime Transport Act 1994 (MTA) requiring the vessel and its cargo to be salvaged and removed…the parts of the wreck above the waterline and accessible cargo and debris with and around the wreck…At that point, s 467 of the MTA, which provides that ss 12,

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major development in salvage law: The SCOPIC clause in the context of the Lloyd's Open Form and the International Convention on Salvage (1989) at 3-5.

[26] *Svitzer Salvage BV v Z Energy Ltd* [2013] NZHC 2584 at [6].

[27] At [36]

[28] *Ngai Te Hapu Incorporated v Bay of Plenty Regional Council* [2018] NZHC 1710 at [4]-[7].

[29] *Daina Shipping Company v Te Runanga O Ngati Awa* [2013] 2 NZLR 799 at 799 – 803.

> 15, 15A and 15B of the Resource Management 1991 (RMA) do not apply to works done in accordance with notices issued…under the MTA.

Initially, the legal problem referred to issuing notices for the removal of the MV Rena vessel from the reef, as well as, the liability and criminal offence issues. But, for the reason that the vessel broken into two pieces causing more oil pollution and the spread of equipment and debris, resulted in further legal problems with respect of environmental and cultural impacts relating to the local community in the Bay of Plenty region. However, the main legal problem by local communities, specifically the people of Motiti, focused on the removal of the MV Rena vessel.[30] This legal problem went beyond the Hearing Panel decision in 2016. However, that development is not a part of the research in this thesis due to the time period in which this thesis overlaid because of the historic approach to the research.

With the regulatory provisions triggered when the MV Rena struck Ōtaiti, a number of environmental response mechanisms through certain government agencies, as well as, local communities worked together to address the impact from the grounding. The local community in the Bay of Plenty region, in particular, the people of Motiti compelled to evaluate, assess and deal with the oil pollution, equipment and debris from the grounding that surrounded Ōtaiti, which then washed up on the shores of Motiti, due to the tides of the ocean.

[30] Waitangi Tribunal, The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version (Wai 2391 2014) at 2.

b. Introduction of Ōtāiti and Motiti

Geographically, Ōtāiti is located 12 nautical miles north-east off Tauranga in the Bay of Plenty region. Ōtāiti is four nautical miles northeast from Motiti.[31] Accordingly, Motiti is eight nautical miles north-east off Tauranga and Ōtāiti is within Motitis coastal marine area.[32]

1 The cultural significance of Ōtāiti to the people of Motiti

In a cultural sense the significance of the connection to Ōtāiti by the people of Motiti explained in the Waitangi Tribunal Final Report asserting that:[33]

1. Ōtāiti is the equivalent of a maunga (mountain) and awa (river) for the people of Motiti;
2. Ōtāiti is a significant icon as a reef, which is viewed as a feature in the surrounding coastal marine area…
3. Ōtāiti is a tipua signifying its spiritual quality…
4. Ōtāiti…defines the relationship between people and place (the ocean)…
5. The belief system of the people of Motiti…Motiti people offer karakia to Ōtāiti, in acknowledgement of their taonga (Ōtāiti)…
6. The people who fished on or around Ōtāiti would offer karakia to acknowledge the preservation of the life force or mauri of Ōtāiti….
7. Ōtāiti has its cultural and spiritual significance through utilising traditional hapuka fishing around Ōtāiti…

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[31] John Julian *Black Tide: The story behind the Rena disaster* (Hachette New Zealand Ltd, Auckland, New Zealand, 2012) at 32.

[32] At 32.

[33] Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims: Pre=Publication version *Wai 2391, Wai 2393, 2014)* (Wai 2391, Wai 2393 Waitangi Tribunal 2014) at 17.

8. The people of Motiti's kaitiaki commitments to Ōtāiti are evident in both the historical and modern ways used to manage the kaimoana on and around …

The essence of a strong cultural relationship between the people of Motiti and Ōtāiti is substantial. Thus, cultural significance of Ōtāiti to the people of Motiti is clear.

2 The physical description of the coastal marine area of Motiti and Otaiti

Equally important, from an ecosystem perspective, the surrounding coastal marine area of Motiti is gifted with many reefs (inclusive of Ōtāiti shoal and rocks).[34] The physical coastal environment not only gave caution to mariners, but also supplied Motiti with bountiful sea creatures surrounding the area, inclusive of: crayfish, shark, swordfish, snapper, tarakihi, cod, kina, octopus, and whales since the late 1800s.[35] The surrounding reefs, shoal, and rocks of Motiti include Ōtāiti. The landscape of Ōtāiti encompass an environment consisting of sub-tidal habitats with a range of substrate[36] and topography,[37] on its shelving slopes. These shelving slopes consist of loose rounded boulders, rock blocks, sand, and sediment flats.[38]

Contrasting, Motiti is physically a small island with a land mass of 720 hectares inclusive of water springs allocated in different parts of the island.[39] Motiti has

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[34] AH Matheson *Motiti Island Bay of Plenty* (Whakatane and District Historical Society, 1979) at 79–83.

[35] At 79–83.

[36] A surface from which an organism lives, grows or obtains nourishment.

[37] The arrangement of natural and artificial physical features of an area.

[38] BIORESEARCHES GROUP LIMITED *Fisheries and Ecological Effects of the Proposal for leaving the wreck of MV Rena on Astrolabe Reef* (BIORESEARCH, 2014) at 6.

[39] *Hoete v Minister of Local Government [2012] NZEnvC 282* at 4.

been occupied and farmed for hundreds of years by Māori of Te Patuwai hapū[40] and Whanau of Tauwhao hapū.[41] Therefore, Motiti's landscape and surrounding marine area have a history strongly connected with Māori.

3 The ecosystem and ocean species of Ōtāiti

In addition to Motiti, Ōtāiti also consist of many species, which currently include the following species living in the surrounding environment: pelagic species such as kahawai, kingfish, trevally, snapper, blue and pink maomao, splendid perch, demoiselles (damselfish), and long finned boarfish.[42] Thus, Motiti and Ōtāiti has many ocean species of a vast range living in its specific environmental system that can be subject to possible marine impacts, such as mariners.

4 Past experience of mariners on Ōtāiti

To elaborate, past mariners have had difficulty navigating the coastal marine area of Ōtāiti and Motiti. A good example of difficult navigation can be showed through the mariner named Dumont D'Urville.[43] In 1827, the vessel *Astrolabe* navigated by Frenchman Dumont D'Urville experienced a violent storm in the Bay of Plenty near Ōtāiti. Another incident in 1828, experienced by Rev Henry Williams, in the C.M.S schooner *Herald* described Ōtāiti as a "very dangerous sunken rock".[44] Subsequently, in 1852-3 Ōtāiti was surveyed and charted correctly with warning

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[40] Ngāti Awa Claims Settlement Act 2005, 13. One of the 22 hapū within Ngati Awa iwi of Whakatane in the Bay of Plenty region.

[41] *Motiti Avocados Limited v The Minister of Local Government [2013] NZHC 1268* at [6]. Whanau of Tauwhao is one of 11 hapū within the Ngai Te Rangi iwi of Tauranga in the Bay of Plenty region.

[42] At 6.

[43] Matheson, above n 16, at 79.

[44] At 79.

that Ōtāiti at “high water in very fine westerly weather it might not show”[45] whereas, mariners were advised to avoid the area at both low-tide and at night.

Furthermore, an example of why Ōtāiti was cautioned not to approach was clearly illustrated in the event of the 67-tonne schooner named *Nellie*, which struck Ōtāiti on 13 January 1878 at 8:20pm on a clear, calm, moonlit night. Equally important, another of Motiti’s dangerous reefs named Okarapu situated 1 - 2 nautical miles off the northern end of the island, which only appears in heavy seas, was struck by the vessel *Golden Master* on 10 January 1959.[46] Therefore, the rocks, reefs and shoals in the surrounding waters of the Motiti and Ōtāiti have previously been known as a major hazard to shipping and/or mariners since the early 1800s to date, in the Bay of Plenty region.[47] Motiti being a unique place situated in the middle of a coastal marine area also provides wellbeing to people who live on Motiti.

5 The landscape of Motiti

The coastal marine environment of Motiti includes the pastoral landscape. Motiti has predominantly been used for farming and is highly fertile and productive, despite the fact that, Motiti has been ecologically insignificant because of exposure to excessive erosion of the surrounding cliffs in certain areas around Motiti.[48] Currently, the landscape of Motiti has been destocked largely in the northern section of the island. Whereas, the southern section, in contrast, is set up differently. In particular, the northern section of Motiti currently has a “rich tapestry” of Pa, also known as Marae (Māori meeting house), which also spread

[45] At 79.

[46] At 80.

[47] At 80.

[48] *Motiti Avocados Limited v The Minister of Local Government [2013] NZHC 1268*, above n 15, at [12].

across the rest of Motiti in certain locations. Additionally, there are certain wahi tapu areas[49] across the island, which includes outlying coastal rocks and other heritage sites.[50] Hence, there is a rich Māori cultural living on Motiti at present relative to the coastal marine and landscape areas.

Complementary to this, the southern section of Motiti is visibly an establishment of avocado orchards planted by the Wills family and the company named Motiti Avocado Limited ("MAL"). The majority of the landscape in the southern part are made up of avocado trees with coniferous shelter belts.[51] In contrast, the northern part, as mentioned above, is occupied by residents currently with Pa locations where the community gathers. Thus, Motiti, although quite small, is very diverse in terms of the way the landscape is operated by the people residing on the island.

Historically, Motiti was and still is held in accordance with tikanga by Māori.[52] A considerable portion of the southern part of the island was sold in 1884, which is presently occupied by members of the Wills family and MAL. Therefore, the northern portion of Motiti is currently held by Te Patuwai Māori (subtribe), and the southern portion is held by the Wills family and MAL, as well as, the people of Tauwhao heritage.[53]

6 The legal structure perspective on Motiti

In a regulatory form, for many years Motiti had no local body or government presence in respect of a regulatory framework to manage the environment on

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[49] Heritage New Zealand Pouhere Taonga Act 2014 s 6. Wahi tapu is a place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense)

[50] *Motiti Avocados Limited v The Minister of Local Government [2013] NZHC 1268*, above n 15, at [12].

[51] At [12].

[52] Maori Land Court *Maketu Minute Book 27 -35* (Maori Land Court, 1867–1868) at 27.

[53] *Motiti Avocados Limited v The Minister of Local Government [2013] NZHC 1268*, above n 15, at [6].

Motiti.[54] Specifically, there is no actual infrastructure and the residents of Motiti have continuously kept away from any involvement from the mainland, due to the island's remoteness and self-reliance of managing their own affairs. The people of Motiti continued their self-management even though in 1966 the Minister of Works presumed the functions and powers of a local authority for the island. Therefore, there exists a dichotomy of understanding with regard to the regulating or managing Motiti, due to the islands' self-reliance of the island, and the local government intention to bring Motiti under a regulatory framework for local government purposes.[55]

Subsequently, a chronological journey of the islands impact of implementing a regulatory framework, such as a district plan, to manage the environment has developed over the years. Since 1966 the government has subtly induced its presence in providing notice of its intention to implement such regulatory frameworks.[56] In 1980 the Tauranga County Council aimed to bring the Motiti under the Tauranga County. As a result, it was objected by the Te Patuwai Tribal Committee. In 1984, the Local Government Commissioned Motiti to be captured within a plan with other surrounding islands to be controlled by the Minister of Works and Development and the Tauranga County Council. In the following month, the Motiti Advisory Committee lodged a claim with the Waitangi Tribunal for assistance in preserving the status quo, and to set aside the regulatory scheme proposed.[57]

Unfortunately, the Waitangi Tribunal was unable to consider the relief sought because the issue brought did not fall within the Waitangi Tribunal's

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[54] At [8].

[55] At [8]; Waitangi Tribunal Te Ropu Whakamana I Te Tiriti o Waitangi *Report of the Waitangi Tribunal on a Motiti Island Claim (WAI12)* (12 Waitangi Tribunal 1985) at 1.

[56] At 1.

[57] At 1–2.

jurisdiction.[58]In the same way, in 1995 an application for subdivision arose in the Environment Court and the discussion of a regulatory framework for Motiti was once again in question.[59] The residents of Motiti were reluctantly subjected to processes for implementing a district plan for managing Motiti's environment.[60] This process continued and developed from 2004 to 2016 where a district plan became operative in May 2016.

At present, Motiti and its coastal marine area (inclusive of Ōtāiti) is referred to in the Bay of Plenty Regional Policy Statement ("BOPRPS"), as having a High Natural Character.[61] This status protects the area from certain environmental activities. Above the BOPRPS, is the New Zealand Coastal Policy Statement (NZCPS) which safeguards, preserves and protects Aotearoa/New Zealand islands within the marine area.[62] Within the hierarchy of plans and documents which supplement the Resource Management Act 1991, Motiti has some form of protection under this regulatory framework.[63] Further, the BOPRPS affirms that the territorial boundaries in relation to Motiti and Ōtāiti are governed by the Minister of Local Government ("the Minister") as an offshore island.[64] Therefore, the issue of environmentally regulating Motiti has currently been legally implemented and is very new to the people of Motiti, hence why there is a dichotomy of understanding relative to who actually regulates the island and how. This is the legal structure perspective on Motiti.

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[58] At 1–3.

[59] *Motiti Avocados Limited v The Minister of Local Government [2013] NZHC 1268*, above n 15, at [8].

[60] At [12].

[61] Bay of Plenty Regional Council *Bay of Plenty Regional Policy Statement* (2016) at pt 1.

[62] New Zealand Government *New Zealand Coastal Policy Statement 2010* (Department of Conservation, 2010) at 11.

[63] Marlene Oliver "Implementing Sustainability - New Zealand's Environment Court-Annexed Mediation" (Indian Society of International Environmental Law, paper presented to Fifth International Conference on International Environmental Law, New Delhi, India, 2007) at 11.

[64] above n 40, at pt 1.

7 The cultural perspective of Motiti

This section will explain from general Māori oral traditions of the world and then narrow down to the understanding to Ngāti Awa (a tribe in the Bay of Plenty region) and then refined to the hapū of the Motiti. As mentioned above, all information will derive from the available documentation provided to the court, as well as, relevant literature relative to the MV Rena situation and the establishment of the Motiti.[65]

The traditional stories passed down through the generations ("Taonga tuku iho") explain the cultural perspective on Motiti.[66] Hence, the story of Motiti was transmitted through certain creation stories. The creation stories provide an understanding of when all things in this world came to be.[67] There are many versions of the oral tradition. Essentially, the cultural and spiritual connection of Māori to the whenua (land) is derived from one common ancestral source, which is genealogically connected.[68] Ulrich Klein describes the general genealogy connection as, a genealogical web where the whakapapa (genealogy) from Te Kore unravels like a web through the descendants of Ranginui and Papatūānuku. Ranginui and Papatūānuku hold the role in the "creation and control of the natural world"[69] which form the ingrained "spirituality of all things in the universe and is the basis of their interconnection".[70] Thus, this creation story has many different

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[65] John Patterson "Respecting Nature: the Māori Way" (1999) 29 The Ecologist at 33. See also Michael King *Te Ao Hurihuri The World Moves On: Aspects of Maoritanga* (3rd ed, Longman Paul Limited, Auckland, New Zealand, 1981) at 156–161.

[66] Michael King *Nga Iwi O Te Motu 1000 Years of Maori History* (revised ed, Reed Publishing (NZ) Ltd, Auckland, New Zealand, 2001) at 7.

[67] At 9.

[68] Ulrich Klein "Belief-View on Nature-Western Environmental Ethics and Maori World Views" (2000) 4 NZJEnvtlL at 105.

[69] At 105.

[70] At 105; Joseph, Robert. "Legal Challenges at the Interface of Maori Custom and State Regulatory Systems: Wahi Tapu." (2012) Other Journal Article, JOUR. Yearbook of New Zealand Jurisprudence

versions and is passed down through oral tradition. Complementary to this, a more refined nature of the Māori worldview is expressed by one of the Kaumatua of Motiti provide their version of the perspective that:[71]

1. The hapū's of Motiti traditionally regard Ōtāiti as tapu (sacred). For the people of Motiti, Ōtāiti is a taonga and wāhi tapu and has considerable spiritual significance.
2. …Ōtāiti is the place where Ngātoroirangi paused in his journey and performed karakia to enter the spiritual dome of Maamangi. Secondly, Toka Tapu is the rock on the south side of Motiti from which Ngātoroirangi drew his spiritual energy…
3. In addition, all the other islands…in the sea surrounding Motiti is spiritually connected to a rock on Motiti known as Te Kopu Whakāiri (the womb of the sacred island)…
4. The mauri (essence or life force) is therefore of historical and cultural importance to the hapū's of Motiti…
5. The spiritual link between Ōtāiti and Motiti connects to the womb of Motiti and the umbilical cord of the heavens. The umbilical cord links to the spiritual dome of the Maamangi that feeds spiritual energy into the womb of Motiti, which in turn nourishes the spiritual life force of Motiti.

Over time, the above oral traditions have been passed down through the generations to outline how Māori of Motiti perceive, understand and experience

13/14: 160–193 at 162 and Stephen Duffin J "The Environmental Views of John Locke and the Maori People of New Zealand" (2004) 26 Environmental Ethics 381 at 390–392.

[71] Nepia Ranapia *Statement of Evidence of Nepia Ranapia on Behalf of Tribal Group Motiti Island and Korowai Kāhui o Nga Pakeke o Te Patuwai (Te Kāhui Kaumatua o Te Patuwai)* (Bay of Plenty Regional Council, 2015) at [4 and 6].

the environment in a cultural sense.[72] The oral traditions illustrate Te Ao Māori which gives the context of how Māori of Motiti view their physical and natural environment relative to Motiti and Ōtāiti. Therefore, this cultural perspective is deeply fundamental to the people of Motiti, because Māori oral traditions and the whakapapa (genealogy) link to every aspect of the natural and physical environment through Atua Tangaroa (God of the sea) and Tane (God of the forest). Combined with the cultural and environmental sense of Motiti in relation to Otaiti, there is also an economic presence.

8 The economic perspective of Motiti

The economic perspective relate to how the people of Motiti fund their living in relation to infrastructure, roading, drainage, and sewage for example. Economics is a very broad concept applied in an interdisciplinary fashion relative to the environmental context.[73]

Economics is about understanding the system in which we live in to decide how to deal with the resources, goods and services, in which that system provides, in order to distinguish which alternative options to pick, while being aware of the consequence of that decision.[74] In terms of the mainland, which is the coastline of the Bay of Plenty region the general application of environmental economics illustrating the economy in the Bay of Plenty region can be seen through the MV Rena resource consent application.[75] The resource consent application identifies

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[72] DNT King and Skipper W Tawhai "Māori environmental knowledge of local weather and climate change in Aotearoa - New Zealand" (2008) 90 Climate Change 385 at 387, in the context of climate change.

[73] Steven C Hackett *Environmental and Natural Resources Economics* (MESharpe, Inc, 2005) at 3.

[74] Sowell, above n 61, at 2.

[75] Beca Carter Hollings & Ferner Ltd *APPLICATION FOR RESOURCE CONSENT (MV RENA) VOLUME ONE* (Beca 2014, 2014) at 73.

the economy relative to the effects of the MV Rena vessel on Ōtāiti and surrounding local communities.

Tourism would form a crucial sector of this economy and of employment activity in the area. For example, the economic opportunities created by the resource consent application relates to the benefits for Local businesses, such as recreational and commercial diving operations.[76] Hence, in a regional coastal sense of Bay of Plenty the economy would stem from the association with primary industries relative to the tourism context. This economy would also extend to Ōtāiti and Motiti because of the proximity and connection with the MV Rena situation.

Furthermore, applying the economic notion to the area of Ōtāiti and Motiti can be found in the history of how Motiti was operated, as mention above in respect of how the land was predominantly used. Motiti was economically utilised for farming and its high fertile and productive landscape.[77] In particular, the southern part of Motiti is an established avocado orchard with the intention of production.[78] Thus, there is significant economic potential existing on Motiti that may form a part of the economy outlined in the MV Rena resource consent application due to the physical proximity to the grounding on Ōtāiti and the fact that Motiti is currently subjected to environmental regulations that could assist in establishing certain economic benefits.

[76] At 73.

[77] *Hoete v Minister of Local Government [2012] NZEnvC 282*, above n 13, at [12].

[78] *Motiti Avocados Limited v The Minister of Local Government [2013] NZHC 1268*, above n 15, at [12].

Consequently, the potential for economic sustainability on Motiti also involve certain barriers that require consideration, such as Motiti having no infrastructure currently in place, which include the following:[79]

- No road network;
- No water supply;
- No sewage system;
- No public roads or footpaths;
- No power or wired phone system; and
- Three existing private airstrips and limited coastal access (by boat)

The above list demonstrates the lack of resources on Motiti combined with practical and logistical issues, as well as, education of the implementation of environmental regulations for the people of Motiti, such as the district plan. However, it also illustrates possible economic potential that could occur from the implementation of a district plan presently operative since May 2016. Therefore, the economic context in relation to Motiti could possibly come into alignment with the mainland economy, as the people of Motiti are still catching up with the environmental legal frameworks currently implemented. There could be both advantages and disadvantages in the environmental context economically, but both Motiti and the mainland may require some form of a positive push that would benefit Motiti and its economy.

In summary, the above sections have addressed the cultural, environmental and economic aspects in relation to Motiti and Otaiti to provide an understanding of what exists prior to the actual grounding of the MV Rena vessel in 2011. The following section will outline other groundings within Aotearoa/New Zealand waters in contrast to the MV Rena grounding.

[79] above n 12, at 69.

c. The comparative perspective of groundings

This section demonstrates how the MV Rena grounding compares to other previous groundings in Aotearoa New Zealand. The comparison will demonstrate that there exist previous grounding events, but not to the significant extent as the MV Rena grounding accident.

Illustrating the comparison of other grounding events will provide context to the impact that occurred on Ōtāiti. The relevant information is drawn from Maritime New Zealand accident investigation reports. A description of relevant International groundings by different operational vessels are provided, which are categorised by size and weight closest to the size of the MV Rena vessel.

1 International vessel groundings

Previously, there are two reported grounding accidents by International vessels. Firstly, the grounding of the vessel *Jody F Millennium* just outside the entrance to **Port of Gisborne** on 6 February 2002.[80] The vessel was an international operated Bulk Carrier owned by Twin Bright Shipping Company: with the overall length of 159.84 metres; weighing 8964 tonnes and holding 638.83 tonnes of Fuel Oil and 62.30 tonnes of Diesel Oil. *Jody F Millennium's* port side was struck by a heavy swell which caused her to roll to starboard. The vessel immediately rolled back to port when the vessel made contact and heavily landed on the sea bed.[81] As a result of the grounding, the Director of Maritime Safety issued a Tier 3 oil spill response before any oil spill was visible for precautionary measures. This was the very first time in Aotearoa New Zealand that a 3 Tier oil spill response

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[80] Captain Roger Smith and Captain Mike Eno *Grounding of Bulk Carrier Jody F Millennium outside entrance to Port of Gisbourne* (Investigation Report 02 2828, 2002) at 2.

[81] At 22.

had been declared prior to any oil discharge. The consequence of the grounding showed heavy fuel oil leaked from the fractured tank losing 25-35 tonnes of heavy fuel oil (HFO), whereas the majority of the oil impacted on beaches in Poverty Bay.[82] The remaining oil was pumped from the vessel and transferred to oil disposal sites on the mainland. Further, the vessel was re-floated on the 24 February, and its content was lifted off the vessel by helicopter and placed on barges, and then *Jody F Millennium* was towed to Tauranga to deliver the remainder of the vessels cargo. And for repairs to be carried out before transferring the vessel back to Japan for permanent repairs.[83] Therefore, this is the first oil spill grounding issued with a 3 Tier response to the impact of an international vessel in Aotearoa New Zealand coastal marine waters. In contrast, there is a difference in the size of release of oil into the marine and coastal area, which meant that there was little recovery required. Also, the *Jody F Millennium* was able to obtain temporary repairs in order to be transferred back to Japan for further permanent repairs. Whereas, the MV Rena grounding permitted a larger scale of discharge of oil, debris and equipment requiring larger recovery plans and the MV Rena was unrepairable.

Secondly, the next international vessel reported was the *Capella Voyager*, which grounded on approach to the **Port of Whangarei**, New Zealand in April 2003.[84] The vessel was an international operated Crude Oil Tanker owned by Chevron Transport Corporation Ltd. The vessel had an overall length of 258.9 metres weighing a gross tonnage of 80, 914 tonnes and holding 107,800 tonnes of crude oil from the Persian Gulf.[85] The *Capella Voyager* grounded on the seabed as it approached the channel to her berth at the Marsden Point Oil terminal in

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[82] At 25.

[83] At 25.

[84] Michael Roberts *Maritime New Zealand Accident Report: Capella Voyager grounding in the Approaches to Whangarei on 16 April 2003* (Accident Report 03 3177, 2003) at 2.

[85] At 3.

Whangarei, New Zealand. The grounding was due to swell conditions and the movement of the vessel.[86] The outcome of the grounding by the Maritime Safety Inspector, on behalf of the Director of Maritime Safety, issued a Detention Notice under section 55 of the Maritime Transport Act 1994, for the reason that *Capella Voyager* was a real danger to property or persons and to the marine environment, while in its damaged condition.[87] Once the *Capella Voyager's* temporary repairs were complete: it was released from detention for it to continue to Singapore where permanent repairs were made. Therefore, the second reported grounding by an international vessel demonstrated that the *Capella Voyager* was able to be detained until temporary repairs were made for it to continue on its journey to Singapore. Whereas, the MV Rena was unrepairable and unable to continue its journey for permanent repairs.

In short, both grounding events of the *Jody F Millennium* and *Capella Voyager* international vessels, can be concluded from the accident/investigation reports, that both grounding events were not as extensive as the MV Rena grounding on Ōtāiti. The comparison between the MV Rena and both the *Jody F Millennium* and *Capella Voyager* vessels, illustrate the devastating impact the MV Rena had, and potentially continuing on Ōtāiti and the surrounding marine and coastal area of the Bay of Plenty region. The magnitude of the effects from the MV Rena grounding, flowed from the ship spreading the oil, and cargo equipment across a vast area heading toward Motiti, then to the mainland touching the shorelines from the Bay of Plenty and then moving out toward the Coromandel Peninsula, Hauraki Golf, and down as far as Te Kaha, which impacted sixteen associated iwi across the same areas.[88] Therefore, the MV Rena can be distinguished from

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[86] At 4.

[87] At 11.

[88] Bay of Plenty Regional Council "Rena Recovery Long-Term Environmental Recovery Plan" (June 2012) <http://www.renarecovery.org.nz/media/10615/finaljunenewsletterissue2.pdf> at 2, 3.

other groundings in Aotearoa New Zealand, as the largest disaster occurring in the coastal marine area impacting on many local communities. The substantial environmental impact of the Rena can also be emphasised through showing different groundings in different regions to demonstrate the movement of ships co-ordinating around Aotearoa New Zealand and how they remedied the groundings.

Subsequently, there are different situations in which other groundings have occurred within the marine and coastal area in Aotearoa New Zealand, which include the following from Maritime New Zealand Accident Reports:[89]

1. International vessel groundings – 2 reported accidents
2. Fishing vessel groundings – 17 reported accidents
3. Non-passenger groundings – 3 reported accidents
4. Passenger groundings – 9 reported accidents

To elaborate, the following 4 examples are provided to emphasis the extent of the MV Rena impact. The following vessels were demonstrated due to their large size and weight in order to show the navigation of large fishing vessel's around Aotearoa New Zealand, which also show the majority of ships arriving and departing with the marine and coastal area is commonly on the east side of Aotearoa New Zealand.

[89] Maritime New Zealand "Maritime New Zealand Investigation Reports" (2016) No te rere moana Aotearoa Maritime New Zealand <http://www.maritimenz.govt.nz/commercial/safety/accidents-reporting/accident-reports/default.asp>.

2 Fishing vessel groundings

There are seventeen reported accident/investigation reports involving grounding situations in Aotearoa New Zealand. Below are four examples of either the largest or heaviest vessels that come close to the size of the MV Rena.

1. On 17 May 2004, a coastal trawler called the *Recovery II* owned by Endurance Fishing Company Limited, with an overall length of 27.62 metres, a breadth of 6.85 metres and a gross tonnage of 138.[90] The *Recovery II* left Greymouth and then grounded 5 miles south of **Karamea,** New Zealand, hitting the seabed. There was little damage and some ingress of water around the stern gland. The *Recovery II* was towed back to Nelson for slipping and repairs. The grounding occurred due to an unqualified deck man on watch who fell asleep.[91]
2. In 11 August 2004, the fishing vessel *San Tongariro* owned by Sanford Ltd, with an overall length or 32 metres, and weighing a gross tonnage of 498. The *San Tongariro* departed **Port Nelson** bound for the Cook Strait travelling though the French Pass.[92] The skipper engaged the vessel in manual steering and navigated *San Tongariro.* But as he positioned the vessel 15 degrees to starboard the *San Tongariro* unusually did not respond immediately, whereas the skipper was unable to control the vessel while swinging to starboard. With all attempts to change course the *San Tongariro* grounded by the bow about 12-15 metres south of the Channel Point light.[93] An underwater survey of the vessel (the hull and

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[90] Maritime New Zealand *Accident Report Recovery II Grounding, approximately 5 miles of Karamea on 17 May 2004* (Accident Report 04 3465, 2004) at 6.

[91] At 5.

[92] Maritime New Zealand *Accident Report San Tongariro Grounding at French Pass on 11 August 2004* (Investigation Report 04 3528, 2004) at 3,4.

[93] At 5.

rudder) revealed serious damage to the box keel and rudderpost proving the vessel to be slipped.[94]

3. On 20 July 2006, a fishing vessel named the *Twofold Bay* owned by Twofold Bay Fishing Company, with an overall length of 22. 87 and weighing a gross tonnage of 155.[95] The *Twofold Bay* was brought into Whangawehi of **Mahia Peninsula** with the intention of anchoring. However, the *Twofold Bay* was dragging her anchor, which led to a grounding as she was considerably closer to the shore. No water ingress (vessel taking on water) occurred, but there was damage to a hull mounted transducer. The grounding occurred due to an unsatisfactory anchor watch by the skipper and the reason for dragging is that the anchor did not "bed in" when dropped.[96]

4. On 16 August 2006, a Coastal Trawler named the *Ariel II* owned by Otakou Fisheries, with an overall length of 21.94 metres, and weighing a gross of 55 tonnes. The *Ariel II* grounded on the rocks off **Shelter Point**, which is the eastern side of Stewart Island due to a fatigued skipper which made poor decisions relative to the selection of a correct course. In short, the vessel drifted off, which gave it the ability to reverse into safer waters. The *Ariel II* was then towed to **Port Adventure**, Half Moon Bay and then back to Bluff for repairs. The report recommended the implementation of various hazard management plans and fatigue management procedures, which would lead to training and upskilling employees.[97]

The above four examples, show an amount of variables concerning vessels entering or travelling around Aotearoa New Zealand marine environment. The

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[94] At 6.

[95] Maritime New Zealand *Summary Report Grounding Twofold Bay 20 July 2006* (Investigation Report 2006) at 5.

[96] At 2–4.

[97] Maritime New Zealand *Accident Report Grounding Ariel II 16 August 2006 Class A* (06 4145 2006) at 3.

variables include: weather conditions, vessel conditions, and knowledge and skill base of employees.

Significantly, the key point that is visible when comparing the other grounding situations against the MV Rena grounding is that; notwithstanding, there are similar variables between other groundings and the MV Rena in terms of the cause and how the grounding occurred. Therefore, it is apparent that the MV Rena is the most disastrous catastrophic environmental grounding in the marine history of Aotearoa New Zealand. The fact that the MV Rena is a major environmental disaster also illustrates the environmental effect on the surrounding marine and coastal area.

3 The grounding impact

This section is focused on how the MV Rena grounding impacted on the following cultural, environmental and economic aspects of Motiti and Ōtāiti, as indicated above. Displaying the impacts from the MV Rena will convey concisely the effect the oil disaster experienced.

4 Cultural impact

The cultural impacts from the MV Rena were clearly outlined in both the Waitangi Tribunal and MV Rena resource consent processes. The relevant arguments were brought by claimants who whakapapa (genealogy connection) to Motiti and Ōtāiti. Thus, a reoccurring theme or pattern that was argued in these processes clearly demonstrated the impact targeted the cultural relationship between the people who has a cultural connection with Ōtāiti. The applicable people who have

a strong connection with Ōtāiti are the people from Motiti and other surrounding hapū.[98]

Another essential point, the inclusion of affiliated hapū and iwi in the surrounding area of the Bay of Plenty region were placed in the position of arguing how the MV Rena impacted their cultural relationship through providing existing documentation, whether historical or not, to show the measure of the impact on that cultural relationship. This procedure provided a forum of competing interests between each hapū to show which hapū had the greater impact. This forum of competing interests played a toll on existing hapū relationships of the Bay of Plenty region by placing each hapū in the position of arguing as individual groups, which in a cultural aspect, is the complete opposite procedure in the context of finding a solution that everyone could possibly live with. Therefore, based on the processes that Māori groups were a part of to protect their cultural relationship to Ōtāiti showed a great distortion and diminution of their culture, Te Ao Māori and mana of their people, which can be demonstrated in the following points below:[99]

1. Tāngata whenua values were compromised. For example, preventing whānau, hapū and iwi from exercising their customary practices relative to Ōtāiti. Impacting on the people of Motiti, which is also named “Te Tau o

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[98] *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 Waitangi Tribunal 2014). Pouroto Ngaropo *Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa* (BuddleFinlay Barristers and Solicitors Wellington, 2015). Nepia Ranapia "Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust" (Robert Enright, Barrister, Auckland, 25 October 2017) at para [9]-[15]. Butler, above n 54.

[99] Waitangi Tribunal *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 1. Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015). Elaine Rangi Butler *"Submission from Elaine Rangi Butler on behalf of Ngai Te Hapu Incorporated"* (Bay of Plenty Regional Council, 2015) at 6–8; Environment Court “Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust” (RB Enright, Barrister, Auckland, 25 October 2017) at 7-9.

Ōtāiti" meaning the gateway or waharoa to Motiti. Also, impacting on the significance of Ōtāiti itself, because it was the place where Ngātoroirangi (is a prominent Tohunga (priest) at that time) performed karakia (prayers) before travelling onto Motiti.[100] All of which were compromised.

2. The specific values that were undeniably impacted by the MV Rena included the following:[101]
    a) Taonga (treasure or a highly prized possession) in relation to Ōtāiti and the relationship with Ōtāiti by the hapū of Motiti. As well as, the status as taonga in correlation with Māori values connected with Ōtāiti, which includes: the historical association of Māori with Ōtāiti; the spiritual association of Māori with Ōtāiti; and the physical association of Māori with Ōtāiti and
    b) Wahi Tapū (sacred place) – Ōtāiti is considered a taonga and therefore is a sacred place by Māori who have a relationship with Ōtāiti. The grounding was regarded as having a tantamount impact desecrating to the tapū state of Ōtāiti, which is genuinely viewed by Māori as intolerable; and
    c) Mauri (life force) in relation to Ōtāiti is overwhelmingly adversely affected by the collision of the MV Rena. The Mauri of Ōtāiti is claimed to continue to suffer while the ship remains on Ōtāiti, and no amount of cultural monitoring of the area would surmount to healing the Mauri of Ōtāiti; an
    d) Kaitiakitanga (guardianship responsibilities) over Ōtāiti was accepted that the hapū of Motiti kaitiakitanga outweighed other surrounding hapū. The kaitiakitanga responsibilities reflect their rangatiratanga (traditional authority) of the people of Motiti and the surrounding

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[100] At 9.

[101] Bay of Plenty Regional Council *Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016* (Bay of Plenty Regional Council, 2016) at 124.

environmental area. The MV Rena collision fiercely impacted the rangatiratanga of the people of Motiti; and

e) Mana (authority, prestige) relative to Ōtāiti is explained as being the most prized quality. Mana is not about how one perceives it, rather Mana is about how others perceive it or how mana is acknowledged by others in order to realise it. Relating Mana to Ōtāiti is to focus on the richness of the food resource that the moana provides. Thus, maintaining Mana over Ōtāiti for the surrounding area is paramount. To not have Mana over the area will reflect the impact of the MV Rena grounding on Ōtāiti; and
f) Manaakitanga (obligations as hosts and helpers) relate to the ability of Tangata whenua groups to look after (manaaki) visitors (manuhiri), which is taken very seriously. To be unable to perform manaakitanga would be a detriment to the mana of Tangata whenua groups. The hapū of Motiti were limited, as to cater for their visitors, because of the environmental impact on marine life (gathering seafood) by the grounding of the MV Rena; and
g) Mahinga kai (gathering places) relates to the gathering of seafood from the surrounding marine area, due to the impact of the oil, debris and equipment from the grounding of the MV Rena; and
h) Ara wairua (spiritual pathway) is the most significant value that was impacted by the MV Rena grounding. Ara wairua relates to the traditional stories surrounding the existence of a spiritual leaping place or pathway for the spirits of the dead to return to their ancestral home of Hawaiki. This tradition was not questioned by the decision makers of the MV Rena resource consent. However, the spiritual pathway was largely impacted by the MV Rena grounding, because the ship is perceived as blocking the spiritual pathway to Hawaiki.

The above points illustrate the impact on Māori values of affiliated hapū and iwi of the Bay of Plenty region by the grounding of the MV Rena. Therefore, indicating the impact of the MV Rena on cultural aspects. The MV Rena also made an impact on the environmental aspects.

5 Environmental impact

The environmental impacts from the MV Rena were clearly outlined in the environmental assessments provided by the MV Rena owner; the Crown; the Bay of Plenty Regional Council, and other participants in the MV Rena resource consent process.[102] These environmental assessments are details in more depth in Chapters Four in the context of resource consents and Chapter Five with regard to environmental impacts discussed in the context of the Maritime New Zealand and the Waitangi Tribunal process. With respect of this chapter the environmental impacts are introduced for the purpose of providing a comparative perspective of other groundings that have occurred in Aotearoa New Zealand.

More importantly, relevant assessments encompassed information reflecting the coastal marine ecosystem in terms of how the surrounding environment was impacted. The environmental assessments also provide a baseline in which all information would provide a form of measure to place against, in order to show the actual impact from the MV Rena ship.[103]

Views on the environmental assessment of the surrounding area of Ōtāiti were substantially argued by various scientists and consultants. The environmental assessments revealed the effects from the MV Rena grounding on the surrounding environment of Ōtāiti. The following environmental impacts are pointed out below: [104]

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[102] Simon Murdoch *Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011* (Ministry of Transport 2013). above n 12, at 1. Maritime New Zealand *Rena Response: Ministerial briefings - 5-31 October 2011* (2011) at 1.

[103] Resource Management Act 1991.

[104] Simon Murdoch *Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011* (Ministry of Transport 2013) at 1.

The following list of environmental areas were assessed in order to determine the impact of MV Rena grounding:[105]

- Ecology and Fisheries;
- Scouring, smothering and mechanical damage;
- Human health;
- Marine mammals;
- Avifauna;
- Coastal processes, oceanography and hydrodynamics;
- Natural character and landscape;
- Social impacts;
- Recreation and tourism;
- Recreational dive safety;
- Navigational safety;

Consequently, below is the most significant environmental effects that protruded from the MV Rena vessel. The environmental effects consist of the contamination of the coastal marine area beginning at Ōtāiti and dispersing out toward the mainland shores of the Bay of Plenty region.

The relevant broad contaminants – the contaminants consist of four categories which include:[106]

a) **Dispersed contaminants** with no apparent effect. For example, contaminants that were a low priority, because it was released and lost at sea with little environmental effect. It was found the contaminants would unlikely have any adverse effects to the environment.

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[105] Simon Murdoch *Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011* (Ministry of Transport 2013) at 1.

[106] Bay of Plenty Regional Council *Decision of Panel on MV Rena Resource Consent Applications: Volume One Appendix* (Bay of Plenty Regional Council, 2016) at 2.

b) **Broadly dispersed contaminants** with diminished effects. For example, released contaminants that impacted on the shoreline and biota subsequent to the grounding and the splitting of the ship, but have now dissipated. It was found that although the escaped oil had major impacts on the shoreline and biota immediately after the grounding event: the effect has now dissipated and any adverse effects negligible. Regarding the disbursement of the escaped beads, the consent conditions would address this. Thus, the effect on the environment from broadly dispersed contaminants will have no ongoing concerns.

c) **Locally dispersed contaminants** with ongoing effects. For example, released contaminants on Ōtāiti and surrounding biota and sediments. The effects of the contaminants are ongoing and localised on Ōtāiti, which have now become a part of the "existing environment". The relevant contaminants include:

- Antifouling constituents (including TBT, diuron, copper, zinc);
- Oil-derived polycyclic aromatic hydrocarbons (PAHs);
- Fluoride containing cryolite;
- Copper clove; and
- Other heavy metals, including chromium, lead and nickel

It was found that, despite the fact that the water and sediment quality was close to pristine before the MV Rena struck Otaiti: the contaminants released significantly adversely effected the quality of Otaiti, its biota and surrounding sediments. However, further definition of the scale, magnitude and ecological implications of these effects require further research. These effects are an ongoing impact on the entire reef and sediments, as well as, the area at least one kilometre from and around the reef edge. The greatest impacted area is located within a few hundred meters of the MV Rena. The proposed conditions of the resource consent have been stated to not remedy the adverse effects of the contaminants in this category, because the effects will be monitored and contingency measures would be triggered if any adverse effects arise.

d) **Potentially harmful contaminants** that have not been released. For example, contaminants that remain on the MV Rena ship, which has not released into the surrounding environment. These contaminants have potential to aggravate the effects of previously released contaminants. It was found that the remaining issues relate to the future release of copper clove and antifouling. Whereby, these effects would have the potential to increase the effects of contaminants. Relevant remedial actions would require monitoring and recovery if future release of contaminants are detected.

The above points indicate the environmental effects on the coastal and marine area of Bay of Plenty region, which form the actual environmental impact from the MV Rena on the environment. In addition, to the cultural and environmental aspect the following section will address economic impacts from the grounding event.

6 Economic impact

According to the general understanding of economics, stated above, there is limited economic impact on Motiti and Ōtāiti. The limited impact is due to a lack of resources combined with practical and logistical issues to provide an economic threshold, which would determine an economic impact. Nevertheless, there would be more economic impact locally in the mainland shores of the Bay of Plenty region. For example, the following list of areas that would have economic effects were addressed by the MV Rena resource consent application proposing positive economic benefits for the people and communities of the region, such as:[107]

[107] above n 68, at 53.

- Tourism – economic benefits for the local boat charter tourism industry;
- Commercial Fishing – only modest economic benefits apply, as commercial fishing is noted as a minimal component of the economy in the Western Bay of Plenty;
- Efficient Use of Resources – low economic benefits to the local and regional community;
- Restoration and Mitigation – provides benefits to local hapū to fund certain projects.

Evidently, there would be limited economic impact on Motiti; Ōtāiti and the local community of the Bay of Plenty region, if the MV Rena vessel remains on Ōtāiti. However, as noted above, the economic limits have an opportunity of becoming economic benefits for Motiti, Ōtāiti and local communities with in the Bay of Plenty region. For example, due to the implementation of a district plan on Motiti in terms of development purposes would prove to have a more valuable resource for consumers to benefit from. Therefore, on the basis that there is not an economy that is worthy of maximising opportunities for the people of Motiti and the local communities, there is no economic effect. Only if there is potential for developing an economy on Motiti, is when there would be an economic impact from the MV Rena situation.

In summary, the purpose of the first chapter was to provide the position of the people of Motiti, and why Motiti and Ōtāiti is significant to them. Providing the importance from the perspective of the people of Motiti demonstrates the extent of the oil disaster relative to the aspects of cultural, environmental and economic impacts from the grounding of the MV Rena ship on Ōtāiti. Furthermore, the explanation of each aspect, pulled together the context of which the rest of this thesis depends upon to illustrate whether the Resource Management Act 1991 has sufficient environmental and cultural protection mechanisms in place in Aotearoa New Zealand. Therefore, the MV Rena grounding event and all following processes will provide the prime example of a situation in which

Aotearoa New Zealand would require certain mechanisms in place to protect against potential future oil disasters occurring in our coastal and marine area.

2 ŪPOKO TUARUA: CHAPTER TWO – MĀORI ENVIRONMENTAL PHILOSOPHY

a. Introduction

The environment can be perceived from a non-Māori view on the one hand and a Māori on the other. Both perspectives influenced by pre-existing philosophical underpinnings. Literature refer to environmental philosophy as a "hybrid discipline drawing extensively from epistemology, ethics, and philosophy of science and analysing disciplines such as conservation biology, restoration ecology, sustainability studies and political ecology" as a result of a developing field of Environmental ethics within philosophy.[108]

The purpose of this chapter is to illustrate a different approach to environmental issues to promote better outcomes for sustaining marine environments in Aotearoa New Zealand. The approach posed is a cultural perspective and why that cultural perspective matters. Additionally, this chapter highlights the lack of protective mechanisms for cultural responses to environmental impacts, such as the grounding of the MV Rena on Ōtāiti.

The Anthropocene concept of Human activity influence the environment on all scales: through human responsibility for life of man and of nature.[109]

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[108] Sahotra Sarkar "Environmental philosophy: From theory to practice" (2014) Studies in History and Philosophy of Science Part C: Studies in History and Philosophy of Biological and Biomedical Sciences, Vol 45 89-91 at 89; and Hugh McDonald, *John Dewey and Environmental Philosophy* (State University of New York Press, 2003) at xiii.

[109] Kopnina, H., Washington, H., Taylor, B. *et al.* "Anthropocentrism: More than Just a Misunderstood Problem" (2018) *J Agric Environ Ethics* 31 109–127 at 109. Mantatov, Larisa Mantatova,"Philosophical Underpinnings of Environmental Ethics: Theory of Responsibility by Hans Jonas" (2015) Procedia - Social and Behavioral Sciences,Vol 214,1055-1061 at 1055. See also Linda. H, Leib *Human Rights and*

Anthropocentrism has been the dominant philosophy in environmental ethics. This context convey a values belief that humans are at the centre and all other beings are a means to human ends (Human-centric view). Literature refer to debates on anthropocentrism while critics debate that this Human-centric view is ethically wrong.[110] This chapter will firstly outline the general environmental philosophy to highlight its underpinning application in Aotearoa New Zealand.

Second, the non-anthropocentric concept of moral standing beyond the human-centric view, whereby nature is intrinsically valued.[111] An exploration of the non-anthropocentric perspective to illustrate the contrasting view of anthropocentrism. This chapter will critically analyse the concept of non-anthropocentric approach as an avenue for recognition of the Māori environmental philosophy with equal weighting to anthropocentrism.

Lastly, the Māori perspective of the environment sustained through Te Ao Māori (the Māori worldview) and Tikanga Māori (practical and conceptual cultural practices) illustrate the strength of the existing indigenous peoples of Aotearoa New Zealand.[112] This chapter will explore the Māori perspective (indigenous view) indicating why the indigenous perspective should be given in environmental decisions, such as the MV Rena resource consent. An indigenous response to marine pollution is a regulating cultural practice supported by oral traditions,

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the Environment Philosophical, Theoretical and Legal Perspectives (ed, Martinus Nijhoff, Leiden, Boston, 2011).

[110] Kopnina, H., Washington, H., Taylor, B. *et al.* "Anthropocentrism: More than Just a Misunderstood Problem" (2018) *J Agric Environ Ethics* 31 109–127 at 109.

[111] Trond Gansmo Jakobsen "Environmental Ethics: Anthropocentrism and Non-anthropocentrism Revised in the Light of Critical Realism" (2017) Journal of Critical Realism 16:2, 184-199 at 186.

[112] Robert Joseph and Tom Bennion "Challenges of Incorporating Māori Values and Tikanga under the Resource Management Act 1991 and Local Government Bill – possible ways forward" Vol 6 Issue 1 (2002-2003) (Ed) YNZJ at 13; and Linda Te Aho. "Tikanga Maori, Historical Context and the Interface with Pakeha Law in Aotearoa/New Zealand." (2007) Other Journal Article, JOUR. Yearbook of New Zealand Jurisprudence 10: 10–14 at 10.

values and cultural practices.[113] This chapter will outline an alternative environmental philosophy that benefits all people in Aotearoa New Zealand.

1 The marine environment perspective

> "…Philosophy is therefore a first attempt at getting a somewhat better understanding than we at present have of ourselves and of the universe and of our place in it. This can be an intellectual adventure. If the reader is willing, it may result in his coming to look at things in an entirely new and fresh way…"[114]

Given the lack of existing marine environment protection, at the time of the grounding, some may consider that it is obvious why the resource consent to leave the MV Rena ship on Ōtāiti was granted.[115] But, this thesis explores an interplay of perspectives of the law connected with the MV Rena grounding. I argue that the council hearing process relating to submissions on marine regulation and cultural aspects were, at the time, insufficient. The reason being, that most submissions overpowered the opportunity for cultural submissions to have any force in a legal process dependant on scientific assessments. The indigenous voice of the people of Motiti may have been limited in such a legal forum. In order to outline those traditions this chapter will provide the non-Māori philosophy to illustrate that the underpinning philosophy of indigenous peoples, like the people of Motiti matter and their voice should have had equal standing against non-Māori philosophy, as outlined in chapters four and six.

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[113] Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at para 8(b)-(c).

[114] W Sinclair *An Introduction to Philosophy* (third impression ed, Oxford University Press, London, 1945) at 9.

[115] Maritime New Zealand *Summary Report Grounding Twofold Bay 20 July 2006* (Investigation Report 2006).

Philosophical narratives generally provide that in this complexed world an individual find ways to make sense of the world he or she navigates in order to survive and enjoy their surroundings.[116] Contrasting debates of philosophers were described as storytellers or fiction writers, as opposed to the academic expression of philosophy to align their notions with the demands of their market/audience as a technique to convey a perspective or understanding.[117] With this in mind, this technique examines and understands a particular reality, for the purpose of, achieving beneficial results through the following processes: by asking questions, thinking and discussing the world in measurements, observation and experimentation.[118]

The epistemology engaged by philosophers, navigate "theories of knowledge" or "theoretical approaches", which involve presenting a body of thought developed by the use of a philosophical technique in the pursuit of knowledge (or making sense of different kinds of beliefs/knowledge) to validate the distinction between justified belief on the one hand and opinion on the other.[119] Antonina Lukechuk and Baudelaire Ulysse outline the historical approach of philosophy that:[120]

> Until about the seventeenth century, in the West philosophy's domain included both physical and metaphysical concerns and its…was unquestionable… This started to change rapidly from the industrial revolution onward…by the end of the twentieth century, philosophy lost its ultimate authority in providing an all-encompassing picture of the world. This task was left to individual disciplines, whereas philosophy acquired a more supportive role in examining language statements and their meaning within these disciplines…

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[116] David Macauley *Elemental Philosophy: Earth, Air, Fire, and Water As Environmental Ideas* (State University of New York Press, 2010) at 13. See also GHR Parkinson *An Encyclopedia of Philosophy* (1st ed, Taylor and Francis) at 1.

[117] AL Motzkin "What is Philosophy?" (2001) 28 Philosophia 2001 66 at 69.

[118] Timothy Williamson *The Philosophy of Philosophy* (1st ed, John Wiley & Sons, Incorporated, 2008) at 1.

[119] Antonina Lukenchuk and Ulysse K Baudelaire "CHAPTER TWO: Epistemology and Philosophy of Science: Traditions, Perspectives, and Controversies." (2013) *Counterpoints* 436: 31–60 at 38.

[120] Antonina Lukenchuk, and Ulysse. K Baudelaire, "CHAPTER TWO: Epistemology and Philosophy of Science: Traditions, Perspectives, and Controversies." (2013) *Counterpoints* 436: 31–60 at 38.

The significance of Philosophy is questioning knowledge systems to create the context, in order to resolve certain problems.[121] This perspective of Western philosophy developed over time branching into different strands of philosophy, because different disciplines manifest into different strands that examine language statements and their meaning. This philosophical technique provide the reality of the environment, based on the "theories of knowledge", the language statements, and the attached meanings. Firstly, from a non-Māori perspective of the environment. Secondly, from a Māori perspective of the environment to illustrate the inclusion of the Māori perspective alongside the dominant environmental philosophical view.[122]

2 Environmental philosophy (non-Māori perspective)

The worldview of an individual can manifest conceptual narratives. Richard Tarnas present the conceptual narrative of the Western worldview, from a historic standpoint of ancient Greek "the foundation of Greek philosophical thinking was the quest to understand the nature of the cosmos up until the time of the Anthenian…". This understanding transformed into intellectual discussion, whereas "the Greeks believed that the universe was ordered by a plurality of timeless essences which underlay concrete reality giving it form and meaning. That is things were always in cosmic opposites (e.g male and female, good and evil etc) bringing us to the idea of constant flux…".[123] This idea closely align with the perspective of the oral tradition of the creation story, discussed in this chapter. In contrast, Andrew Brennan and Y. S. Lo assert that "Environmental

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[121] Sahotra Sarkar *Environmental Philosophy* (John Wiley & Sons, 2011) at 7.

[122] W Sinclair *An Introduction to Philosophy* (third impression ed, Oxford University Press, London, 1945) at 3. See also, Attfield, A. "Has the history of philosophy ruined the environment?" (1991) *Environmental Ethics* 13, no. 2: 127-137.

[123] Richard Tarnas *The Passion of the Western Mind: Understanding the Ideas That Have Shaped Our World View* (Ballestine Books, New York, 1993) at 1.

philosophers have often seemed to think that if people no longer believe that they are the most important things in the world, they will start to behave in more respectful ways towards non-human things and the environment at large".[124] The Western worldview indicate that in order to make sense of the present, an understanding of the past shown through an individual perspective of the world can amount to an individual reality, presenting a philosophical narrative.

The Western worldview narrative consists of worldly historical concepts that have been perceived as reality, such as:[125] Greek mythology (Greek World View); emergence of Christianity (Christian World View); the Renaissance; Reformation; Scientific Revolution (Modern World View); the Medieval Era, and the transformation of the Modern Era. This Western worldview narrative (which remains the continuing foundation of Western ethics in the environment despite opposing debates and arguments) branches off into many different philosophical strands and the particular strand relevant to this chapter is environmental philosophy.[126]

A great deal of philosophical debate underpin Western ethics within the environmental philosophy framework. Western ethical perspectives based on anthropocentric or the human-centric view, assign two aspects which include: 1)

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[124] Brennan, Andrew, and Y. S. Lo. *Understanding Environmental Philosophy* (Taylor & Francis Group, 2014) at 10.

[125] Richard Tarnas *The Passion of the Western Mind: Understanding the Ideas That Have Shaped Our World View* (Ballestine Books, New York, 1993) at 3, 223, and 325. See also Stephenson, P. Smith, *The lore of the Whare-wānanga; or Teachings of the Maori College On Religion, cosmogony, and History/ written down by H.T. Whatahoro from the teachings of Te Matorohanga and Nepia Pohuhu, [and other] priests of the whare-wananga of the East Coast, New Zealand; translated by S. Percy Smith* (Thomas Avery, New Plymouth, New Zealand, 1913-1915) vol 3, at ix-20.

[126] Richard Tarnas *The Passion of the Western Mind: Understanding the Ideas That Have Shaped Our World View* (Ballestine Books, New York, 1993) at xiii. See also Richard Sylvan et al *Environmental philosophy / edited by DS Mannison, MA McRobbie, R Routley* (Australian National University, Dept of Philosophy, [Canberra], 1980) at 96. See also Graham Oppy and NN Trakakis *History of Philosophy in Australia and New Zealand* (Springer Netherlands, Dordrecht, 2014) at 233.

they assign intrinsic value to human beings only or 2) they assign a large amount of intrinsic value to human beings rather than to any non-humans. The former known as strong anthropocentrism and the latter weak anthropocentrism.[127] The human centered approach has been the dominant view in the context of Anthropocentrism.

3 Anthropocentrism – a 'human centric' approach

Western ethics based on the anthropocentric perspective and understanding of philosophical paradigms can develop over time, providing a more substantial perspective of the environment. Antonina Lukenchuk, and Ulysse Baudelaire affirm that paradigm shifts have occurred, which shed light on the conception of science and scientific knowledge as being a "constellation of beliefs, values, and techniques shared by the members of a given scientific community" and further emphasised the importance of the process of observation and experiment, stating that:[128]

> Paradigms provide scientists not only with a map but also with some of the directions essential for map-making. In learning a paradigm the scientist acquires theory, methods and standards together, usually in an inextricable mixture. Therefore, when paradigms change, there are usually significant shifts in the criteria determining the legitimacy both of problems and of proposed solutions.

This scientific observation essentially aims to provide a process of learning and understanding a particular paradigm for directive map-making. In this chapter, the relevant paradigm is environmental philosophy, which could manifest another

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[127] Andrew Brennan, and Y.S. Lo *Understanding Environmental Philosophy*, (Taylor & Francis Group, 2014) at 11; Helen Kopnina *et al "*Anthropocentrism: More than Just a Misunderstood Problem". *J Agric Environ Ethics* 31: 109–127 at 109.

[128] Antonina Lukenchuk, and Ulysse. K Baudelaire, "CHAPTER TWO: Epistemology and Philosophy of Science: Traditions, Perspectives, and Controversies." (2013) *Counterpoints* 436: 31–60 at 40.

paradigm shift. For now, the current underpinning theory and methods of Western ethics include anthropocentrism. Helen Kopnina et al explains anthropocentrism as the underlining perspective:[129]

> Anthropocentrism, in its original connotation in environmental ethics, is the belief that value is human-centred and that all other beings are means to human ends. Environmentally concerned authors have argued that anthropocentrism is ethically wrong and at the root of ecological crises.

Emphasising the belief system underpinning the human centered approach, Alexander Gillespie quotes philosopher Mary Midgely's explanation of the core beliefs of the human relationship with the natural world amounting to the anthropocentric paradigm:[130]

> People have seen themselves as placed, not just at the relative centre of a particular life, but at the absolute, objective centre of everything. The centrality of MAN (sic) has been pretty steadily conceived both in the West and in many other traditions, not as an illusion of perspective, imposed on us by our starting-point, but as an objective fact, and indeed an essential fact, about the whole universe.

Anthropocentricism has justified arguments by rationalists conveying that the human perspective of the environment was a survival notion purporting that humans are different to and better than the natural world.[131] Alexander Gillespie illustrates this through the words of Protagoras (570-495 BCE) that 'man is the measure of all things' and Sophocoles (450-406 BCE) who stated that:[132]

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[129] Helen Kopnina *et al "*Anthropocentrism: More than Just a Misunderstood Problem". *J Agric Environ Ethics* 31: 109–127 at 109.

[130] Alexander Gillespie *International Environmental Law, Policy, and Ethics* (2nd ed, Oxford University Press, Oxford, 2014) at 4–10.

[131] W Sinclair *An Introduction to Philosophy* (third impression ed, Oxford University Press, London, 1945) at 5.

[132] At 5.

> Wonders are many on earth, and the greatest of these is man…He is master of ageless Earth, to his own will bending…He is lord of all things living; birds of the air, Beasts of the field, all creatures of sea and land.

These traditional western perceptions of the environment through the anthropocentric ideal assume that there is a distinct separation or division of humanity from nature.[133] Anthropocentrism has been the dominant philosophy for many decades.[134] However, literature increasingly challenges the dominance of anthropocentrism.[135] For example, Richard Routely posed the question "Do we need a new, an environmental ethic?" and answered with "Yes".[136] In response to Routely's view, John Passmore answered "No" proposing a strong contention that present environmental problems, such as pollution and environmental degradation can only be resolved within a framework of Western ethics, because there was no rational substitute to the human-centered ethics of the West.[137] Disagreeing somewhat with Passmore, Graham Oppy and N.N Trakakis assert that:[138]

> …[T]he only moral constraints on human manipulation of the environment are those that arise from obligations to other humans, yet they suffice to demonstrate the need for a change in environmental attitudes and policies. Call this the "Dominion View"…[I]rrational and mystical and present a greater threat to western civilisation than that posed by the environmental problems they seek to address.

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[133] At 5.

[134] Graham Oppy and NN Trakakis *History of Philosophy in Australia and New Zealand* (Springer Netherlands, Dordrecht, 2014) at 233, 545.

[135] At 248.

[136] At 220.

[137] At 221. See also John Arthur Passmore *Man's Responsibility for Nature* (Scribner, New York, 1974) at 5.

[138] Graham Oppy and NN Trakakis *History of Philosophy in Australia and New Zealand* (Springer Netherlands, Dordrecht, 2014) at 221. See also Michael E. Zimmerman, "The critique of natural rights and the search for a non-anthropocentric basis for moral behavior," (March 1985) Journal of Value Inquiry 19, 43-53 at 44, Michael Zimmerman discussed the connection of Natural Rights Theory in recognising the environmental crises but acknowledge that to solve these issues reform of current practices would be the solution.

Graham Oppy and N.N Trakakis's argument suggests an obligatory slant to the environment, without moral or spiritual aspects or any reason to preserve the environment for future generations. Richard Roultey's view on the other hand, contests the rights claimed for humans.[139] The two distinct views, indicate a development in Western of thinking which suggest that humans possibly asserting some form of rights or obligation to the environment: presenting the potential vision of the environment, with humans having a responsibility toward it.[140]

Another reaction to John Passmore's argument was for an overhaul of ethics and metaphysics because the Western approach is not adequate for the task. All environmental debates concerning whether the environment includes animals, plants, insects and if they are of an equal standing to humans, as well as, whether the natural world is of a higher level to humans were considered.[141] Environmental philosophy grew wider to encompass an understanding of the environment, affording a definitive understanding of a particular context, open to debate, despite the Western influence. The key point made is that Western culture has derived a strong Western ethic towards the environment. Richard and Val Routley affirm the Western ethics of human chauvinism or anthropocentricism as the major concept underpinning the Western understanding of the environment:[142]

> …[W]estern ethics are human (or person) chauvinistic, namely in the treatment accorded to and attitude taken towards the broader class of natural items such as

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[139] Graham Oppy and NN Trakakis *History of Philosophy in Australia and New Zealand* (Springer Netherlands, Dordrecht, 2014) at 206.

[140] At 207.

[141] At 249. See also Bo R. Meinertsen, "Metaphysics for Responsibility to Nature," (June 2018) Journal of Value Inquiry 52, no. 2: 187-198 at 187.

[142] Richard Sylvan et al *Environmental philosophy / edited by DS Mannison, MA McRobbie, R Routley* (Australian National University, Dept of Philosophy, [Canberra], 1980) at 96–110.

> trees and forests, herbs, grasslands and swamps, soils and waterways and ecosystems…Since natural items have no other value, there is no restriction on the way they are treated insofar as this does not interfere with others; as far as isolated natural things are concerned anything is permissible. It is, at base, because of these chauvinistic features of Western ethics that there is a need for a new ethic and value theory…

With the Western ethic is firmly in place, in terms of, how it affects human identity and attitudes/perceptions, by determining humanity's relationship with nature. The key correlation between the Western ethic (non- Māori) and Te Ao Māori (the Māori worldview) perspective of the environment are very different.

A key difference is that Western ethic is concerned about man being responsible for and more important than the environment, and prioritises use of resources for human interest. The environmental chauvinistic foundation permits the destructive use of the environment where human interests' are superior to the natural environment in order to allow that destruction to occur. Therefore, the current environmental ethic within environmental philosophical understanding of nature and our conceptual narrative of nature's value and entitlement assert that human interests supersede the environment's preservation and protection (value and entitlement).

Another essential point to consider is that environmental philosophy also includes the following core discourses of philosophy to assist with environmental inquiry:[143]

- Metaphysics (assumptions and structure about basic things);
- Epistemology (how we come to know and understand nature, which includes different epistemology to provide different aspects of the natural world);
- Aesthetics (the patterning that may be taken or not taken to confer meaning or value on nature); and
- Ethics (the morality of our treatment of living things and systems.

[143] Oppy and Trakakis, above n 124, at 543.

Environmental inquiry has evolved from general philosophical discourse with pure intention to rectify certain environmental dilemmas. For that reason, this branch of environmental philosophy evolved to resolve current environmental problems on earth. Problems that may bar the continuation of future generations (humanity).[144]

Environmental inquiry is crucial for providing context when clarifying an environmental issue for reaching an appropriate solution.[145] For example, environmental philosophy asks the questions needed to be answered; metaphysics provides the structure and assumptions that flow on from the philosophical inquiry; epistemology tells us how we understand the environment and ethics show how we treat the environment - all elements depend on each other to form a context to solve environmental issues.[146] An environmental model to approach environmental problems through inquiry, metaphysics, epistemology and ethics is beneficial.

Essentially, if environmental problems are misunderstood, or the precise clarification of the context incorrectly obtained, this processing may result in adverse environmental impacts. This process of environmental inquiry was applied to the MV Rena grounding and explains how the surrounding environmental issues were tailored to aligning with a legal framework. A potential finding of that environmental inquiry may have rendered a different outcome, one that could have prevented the on-going injustices to the people of Motiti. Further

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[144] Sahotra Sarkar "Environmental philosophy: From theory to practice" (2014) Studies in History and Philosophy of Science Part C: Studies in History and Philosophy of Biological and Biomedical Sciences, Vol 45 89-91 at 3.

[145] At 2-12.

[146] At 2–12. See also Oppy and Trakakis, above n 124, at 3–8.

development of this argument will follow in the legal framework in chapters two and four of this thesis.

In summary, anthropocentrism is the dominant environmental philosophy founded on Western ethics. Anthropocentrism asserts the separation of humans from natural world (animals, plants, insects, sealife ecosystems). It puts humans at the centre and assumes humans can use the natural world to their advantage because humans have more values and entitlement over the natural world for commercial benefit, despite that usage being destructive. This environmental philosophy is the dominant approach in Aotearoa New Zealand.

Contrasting anthropocentrism, questions and debate by environmentalists on how to alleviate the destructive part of environmental resource usage gave rise to a potential avenue in the Western belief system which have some similarities to Māori. These non-anthropocentric views acknowledge that the environment could be understood from a different perspective, such as a Māori perspective of the environment.

4 Non-anthropocentrism – similarities with Māori philosophy

Underpinning anthropocentrism is human chauvinism "when humans give preference to interests of members of their own species over the interest of members of other species for morally arbitrary reasons".[147] However, humans do care about the environment as Helen Kopnina et al note:[148]

[147] Helen Kopnina *et al "*Anthropocentrism: More than Just a Misunderstood Problem" (2018) *J Agric Environ Ethics* 31: 109–127 at 111.

[148] At 123. See also, Trond, G. Jakobsen "Environmental Ethics: Anthropocentrism and Non-anthropocentrism Revised in the Light of Critical Realism" (2017) Journal of Critical Realism Vol 16, No 2: 184-199 at 184.

> What we face as a society is deciding whether we want to insist that *all* value and ethics is limited to humanity, or whether value and ethics lie in the rest of life on Earth, as ecocentrism maintains. Anthropocentrism as an ideology is egotistical and solipsistic, obsessed only with humans. Yet humans actually *do* love animals, trees, rivers and landscapes, and many indigenous cultures attributed value and respect to them.

In contrast to the anthropocentric approach to the environment, is the opposing ideal of 'non-anthropocentric'. A non-anthropocentric approach has the potential for indigenous cultures, such as Māori culture, to occupy a space of its own for a cultural response.[149] The non-anthropocentric perspective requires a wider scope. Tisha Hupkes et al explain that there is a shift towards non-anthropocentrism, such as:[150]

> …shifting towards non-anthropocentrism within speculative design practices was furthered by entertaining concrete entanglement examples and by establishing diverse communicative relationships across boundaries of expertise. Collaborations across disciplinary boundaries were especially valuable within the context of finding adequate examples as well as engaging with speculative futures to imagine possible worlds with some measure of credibility.

To further the idea of non-anthropocentrism Li Huey-Li states that:[151]

> …the recognition of either the intrinsic values or the instrumental values of nature can commit us to solve ecological problems. Furthermore, the recent debates regarding anthropocentrism vs. nonanthropocentrism in the theorizing of environmental ethics actually reveals the interconnections between human ethics and environmental ethics.

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[149] Bryan G. Norton "Environmental Ethics and Weak Anthropocentrism" Environmental Ethics 6: Issue 2 at 131-148 at 133.

[150] Tisha Hupkes et al "Shifting towards non-anthropocentrism: In dialogue with speculative design futures" (2022) Volume 140 at 6.

[151] Li, Huey-li. "On the Nature of Environment Education: Anthropocentrism versus Non-Anthropocentrism: The Irrevelant Debate." (1996) *Philosophy of Education Archive*: 256-263.

The non-anthropocentric view indicate similar values to care for the natural world as Te Ao Māori. The perspective of Te Ao Māori (Māori worldview) and Tikanga Māori (practical and conceptual cultural practices) would be able to have equal recognition alongside non-anthropocentric as a standalone indigenous philosophy in the environmental context. This is because of the recognition the intrinsic values of nature and a commitment to solving ecological issues. This non-anthropocentric approach shifts the environmental inquiry from a 'human-centric' approach to an approach that puts the environment as the priority in order to protect and prevent ecological problems in the environmental context through recognising the interconnections of human ethics and environment ethics.

Further, the collaborative approach to communicative relationships across boundaries of valued expertise suits the flexible nature of environmental problems, as well as, Te Ao Māori and Tikanga Māori values (Māori perspective). Communicative relationships that iwi Māori (indigenous tribes of Aotearoa New Zealand) effectively exercise on a daily basis and the nature of the Te Tiriti o Waitangi (Treaty of Waitangi) partnership and its attached jurisprudence would be succeed alongside the non-anthropocentric approach. Alongside, the non-anthropocentric approach with equal weighting, the environmental ethic of the Māori perspective will supportively assist with cultural responses. For example, the response of the people of Motiti, due to its wide spectrum and involvement of cross-disciplinary expertise, such as the "Cultural Monitoring Report" carried out by Kura Paul-Burke who has whakapapa (genealogy links) connections to Motiti.

One rationale for a non-anthropocentric approach, is that aside from Christianity (placing God and man above nature),[152] scientific development has been the main cause of environmental issues, as noted by Peter Ottuh:[153]

> It may be said that scientific development is the main cause of environmental crisis…"This is due to the fact"…"that scientific knowledge of nature is secularized. This secularized knowledge of nature divorced from the vision of God in nature has become accepted as the sole legitimate form of science". The disharmony between man and nature is due to the destruction of harmony between man and God.

From a spiritual perspective, Peter Ottuh points out that this disharmony stems from the lack of respect toward the source of the environment:[154]

> [T]he Universe has some sacred aspect…Cosmos is a divine creation, coming from the hands of God where we find the world impregnated with sacredness. Due to vulgarisation of modem science, cosmos, which was pure and transparent has become opaque, i.e. it has lost its spiritual meaning…nature has lost it sacredness and divinity and has therefore become secular. Cosmology in its actual sense is a sacred science of the world connected to revelation and metaphysical doctrine, which has disappeared specially in the west due to general neglect of metaphysics…Since cosmology encompasses both physics and metaphysics and modern science ignores metaphysics…it therefore neglects cosmology in part…

Peter Ottuh's expression strengthens the argument for a shift toward non-anthropocentrism, which should include the Māori perspective, by rationalising the cause of destruction of the environment as forgotten spiritual knowledge and; therefore, a spiritual injustice.

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[152] Brennan, Andrew, and Y. S. Lo. *Understanding Environmental Philosophy* (Taylor & Francis Group, 2014) at 10.

[153] Peter O Ottuh, "Religious Approach to Non-Anthropocentric Ethics in Environmental Philosophy," (March, 2020) Cogito: Multidisciplinary Research Journal 12, no. 1: 7-24 at 7.

[154] At 8.

This spiritual injustice highlights that due to the disharmony caused by a secular approach to the environment, the common denominator of science, philosophy and religion, is the metaphysical doctrine required to bring harmony back into environmental philosophy.[155] Applying this proposition to the situation of the MV Rena grounding, iwi Māori could draw upon this forgotten spiritual knowledge, as the missing link for best practice solution of environmental problems. Therefore, I argue that the non-anthropocentric perspective can assist with opening up the space and opportunity for the Māori perspective to lead and provide for cultural responses to marine environment problems in Aotearoa New Zealand. From a moral responsibility to the environment, Bo Meinertsen explains that:[156]

> In order to be responsible to nature, a substantial notion of responsibility is required. It should be just as substantial as the notion of responsibility in ethics… By contrast, 'non-anthropocentric' environmental ethics considers nature to be a bearer of intrinsic value and/or literally a bearer of certain moral rights. By the same token, it also…sees nature as an entity human beings can and should be literally responsible to. In my view, all anthropocentric environmental ethics is flawed. It fails dramatically in taking into account the interests of animals and other non-human entities with morally relevant interests…

Critics stipulating the distinction between both environmental ethics (anthropocentric and nonanthropocentric) debated through the 1960s and 1970s have debated moral responsibility and the spiritual aspect connected to the environment.[157] The non-anthropocentric perspective clearly aligns with the notions of the Māori perspective relative to iwi Māori in Aotearoa New Zealand,

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[155] Kidd, Ian James. "Epistemic injustice and religion." (2017) In *The Routledge Handbook of Epistemic Injustice*, pp. 386-396 at 388.

[156] Bo R. Meinertsen, "Metaphysics for Responsibility to Nature," (June 2018) Journal of Value Inquiry 52, no. 2: 187-198 at 187.

[157] Francesco Allegri, "Exploring Non-Anthropocentric Paradigms," (2019) Relations: Beyond Anthropocentrism 7: 7-12 at 8.

due to the notions of moral responsibility and the spiritual connection of the environment to humans.

In summary, non-anthropocentrism in the context of environmental philosophy, has the potential to support the Māori perspective of the environment. Non-anthropocentric views assert the shift from a chauvinistic human-centered approach to a broader view. This broad approach includes the following elements: 1) the broad nature of recognising the intrinsic values of nature; 2) collaborative relationships across valued expertise; 3) protective and preventative environmental inquiry to ecological problems; 4) recognition of interconnections between human ethics and environment ethics; 5) re-enhancing the spiritual acknowledgement under the metaphysical doctrine; and 6) moral responsibility of humans to nature. This non-anthropocentric view aligns with the Māori perspective (Te Ao Māori and Tikanga Māori) on the environment. Therefore, the non-anthropocentric approach can be utilised as an avenue, for recognition of the Māori environmental philosophy with equal weighting to anthropocentrism.

b. Māori environmental philosophy

This section explores environmental philosophy from a Māori perspective and reaffirms that the similarities with the non-anthropocentric view may have provided a different outcome for the people of Motiti if Māori environmental philosophy (with the same weighting as anthropocentrism) existed at the time of the MV Rena grounding. This Māori environmental philosophy approach may enhance general environmental philosophy and practise for the marine environment in Aotearoa New Zealand. This section will explore the Māori perspective to employ its narratives for a better marine response to cultural effects in the environment in the future.

Generally, the Māori perspective entails Te Ao Māori and Tikanga Māori values. This perspective is expressed through historical literature by both Māori and non-

Māori writers. The Māori perspective at its heart is a deep and meaningful world that requires caution for careful consideration, when articulating the expression of Māoridom, in a culturally appropriate way. This section also expresses the personal cultural experience of the researcher, due to the whakapapa link to the people of Motiti Island, as a person of Māori descent, explained in the methodology section of chapter one. The literature in this section will draws upon prominent Māori academics in the area of Māori philosophy, science, environmental and legal disciplines writing for cultural awareness for the benefit of all people in Aotearoa New Zealand. Thus, setting the scene to explain issues of environmental philosophy and spiritual injustice to the people of Motiti from a cultural perspective. I argue that the Māori environmental philosophy recognised across different disciplines be given more strength for best practice in the environmental context.[158]

1 Te Ao Māori – the Māori worldview

Te Ao Māori is the Māori worldview way Māori see and make sense of the world. Te Ao Māori is the Māori worldview, infused with spiritual elements referring to the natural world.[159] Great emphasis is given to the cosmology surrounding the oral traditions which also includes spiritual elements of the natural world. This thesis is not equipped to enter into the depths of Te Ao Māori. However, this thesis highlights that this Māori scholarship exists and is best articulated by those able to express it: without the limitation of the legal system; structures; meanings; interpretations; understanding and perspectives. The use of Te Ao Māori in this

[158] Mere Roberts et al. "Kaitiakitanga: Maori perspectives on conservation". (1995) *Pacific Conservation Biology* 2, 7-20 at 7.

[159] Joseph, Robert. "Legal Challenges at the Interface of Maori Custom and State Regulatory Systems: Wahi Tapu." (2012) Other Journal Article, JOUR. Yearbook of New Zealand Jurisprudence 13/14: 160–193 at 162.

thesis conveys awareness, with a particular focus on the impact of the law on Te Ao Māori in the context of the MV Rena grounding.

Generally, Te Ao Māori ascribe to a cultures worldview. Robert Joseph quotes Māori Marsden's definition that:[160]

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

To explain Māori Marsden's definition of Te Ao Māori in more detail, Te Ahukaramū Charles Royal states that the use of Mātauranga Māori is "to communicate something essential about the Māori world, something distinctive and valuable" and affirms that:[161]

> The term mātauranga itself has two meanings. First…it is used broadly to mean 'knowledge'…Secondly, a less well known and historical meaning of the term mātauranga arises through its association with biblical knowledge. This meaning…arose through translations of the Bible and was popularly used in the 19th and early 20th centuries. The introduction of the bible into Aotearoa also facilitated the introduction of literacy and 'education' into iwi communities…

Te Ahukaramū Charles Royal further explains mātauranga Māori that:[162]

> [M]ātauranga Māori responds to the three great questions of life, namely:

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[160] Joseph, Robert. "Legal Challenges at the Interface of Maori Custom and State Regulatory Systems: Wahi Tapu." (2012) Other Journal Article, JOUR. Yearbook of New Zealand Jurisprudence 13/14: 160–193 at 162.

[161] Royal, Te Ahukaramū Charles. "Politics and knowledge: Kaupapa Maori and mātauranga Maori" (2012) *New Zealand Journal of Educational Studies* 47, no. 2: 30-37 at 34.

[162] At 34.

- Who am I?
- What is this world that I exist in?
- What am I to do?

> With respect to the first question, Mātauranga Māori assists the person in their understanding of their (usually) iwi and ancestral origins…the second question…explore ways in which mātauranga Māori explains and understands the world…and enables…traditional knowledge on…Te Tini-a-Tangaroa (sea, oceans, the biodiversity of the sea)…the third question (what am I to do?) leads the individual in…directions as they search out and are guided by their life purpose…This entails a study of mātauranga Māori approaches to the creation of knowledge…to communicate action taking leading to advancements…in various ways.

Effectively, Te Ao Māori encompass a culture of perceptions conceptualised to perceive a reality regarded as an actual reality that informs that particular culture and its members accept that reality which shape their value system. This worldview interacts with and influences all aspects of that culture. Mātauranga Māori is the knowledgebase that underpins Te Ao Māori and allows for each member of a particular culture to engage mātauranga Māori through self-assessment questions to assist with understanding of their culture and origins by exploring traditional knowledge that directs their life purpose through communication and action taking. Te Ao Māori and underpinning knowledge from mātauranga Māori interrelate by informing the cultural reality nourished by the people of Motiti, through the cultural practices of the marine environment.

Angus Macfarlane et al explain Te Ao Māori by theorising from within a Māori worldview, asserting that:[163]

> The concepts of *whānau* (extended family) and *Whakawhanaungatanga* (building family-like relationships) are central and critical because they underpin Māori understandings of human development and learning. They indicate both a sense of *belonging* to and a sense of relating to others, within a context of collective identity and responsibility. The *whānau* structure is a living entity, reaching across all contexts in Māoridom…

[163] Angus Macfarlane et al. "Indigenous epistemology in a national curriculum framework?" (1995) *Ethnicities*, *8*(1), 102–126 at 107.

The perceptions of reality is the conceptual basis of the worldview of a culture. Culturally centred on the assent of its Māori members, which reflect their system of values through their actions. This culture strengthens the whānau structure as a living entity. The connectedness of whakapapa as the matrix for understanding and relating to the world between Māori and the environment.[164] Holistically, this is a belief system.

A part of this belief system is wairua (spirit), influencing how people interact with their surrounding environment.[165] Byron Rangiwai explains how wairua connects and interacts with all things:[166]

> Wairua can be described as 'spirit', while the word means 'two waters'…wairua possesses both positive and negative elements…taha wairua is about faith in and communion with unseen and unspoken energies…"[t]he physical realm is immersed and spirituality governs and influences the way one interacts with other people, and relates to her or his environment". Taha wairua or spirituality is commonly thought to be the most critical aspect of Māori wellbeing because, if the wairua is not taken care of, a person is disposed to illness and misfortune.

Nepia Ranapia, kaumatua of Motiti verifies the Māori worldview relative to kaitiaki (guardian) in the marine environment surrounding Motiti Island, stating that:[167]

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[164] Byron Rangiwai. "Ko au ko te taiao, ko te taiao ko au–I am the environment and the environment is me: A Māori theology of the environment." (2018) *Te Kaharoa* 11, no. 1 at 639. See also, Stephenson, P. Smith, *The lore of the Whare-wānanga; or Teachings of the Maori College On Religion, cosmogony, and History/ written down by H.T. Whatahoro from the teachings of Te Matorohanga and Nepia Pohuhu, [and other] priests of the whare-wananga of the East Coast, New Zealand; translated by S. Percy Smith* (Thomas Avery, New Plymouth, New Zealand, 1913-1915) vol 3, at ii.

[165] At 642.

[166] At 642.

[167] Environment Court "Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust" (RB Enright, Barrister, Auckland, 25 October 2017) at 7-9.

> In our culture a kaitiaki is a spiritual guardian able to possess the physical form of a living creature. Its function is to protect the area and the people in that area. If it perceives something detrimental, including the activities of strangers, the kaitiaki can become agitated and is only able to be calmed by an appropriate karakia. In that way, the spiritual imbalance can be addressed, but balance will only be restored by the correct karakia performed by the right person (the Tohunga). In this respect kaitiaki only reveal themselves to those Tohunga whose ancestral blood they are bound to.

Nepia Ranapia goes on to say that, the people of Motiti are a sea people:[168]

> Nga hapu o Te Moutere o Motiti were and are a sea people. We depended on the sea for its resources, and kai moana (seafood) was our staple diet …[A]s sea people we studied and understood the life of the sea creatures in the surrounding moana…the Māori view of the sea is that…Tikanga comes from the connection of people to the living environment and it is the role and duty of tangata whenua turangawaewae to uphold the protection of the environment through the principles of the "Tapu"…Tapu are spiritually created rituals that place a protection on areas of great cultural significance for whatever reason. Only those descendants of the tribe who place the tapu can lift the tapu (kauwai runga kauae raro).

The people of Motiti hold a distinct spiritual connection to both the environment and each other. Through the cultural practices of kai moana gathering, story-telling and performing karakia to Ranginui (Sky father) and Papatūānuku's (Earth mother) son Tangaroa (God of the sea). The purpose for these cultural practices is protect and maintain the spiritual balance within the marine environment by showing appreciation; love and respect for the marine area consisting of kaitiaki (guardian) specific to Motiti, all protected by international obligations argued in chapter six and protected at the national level through marine regulation identified in chapter four of this thesis.

[168] Environment Court "Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust" (RB Enright, Barrister, Auckland, 25 October 2017) at 7-9.

To summarise, Te Ao Māori encompasses a Māori society or community in a structured way. It is through the whakapapa (genealogical links) connection that each person has to one another as a whānau (family and extended family ties) infused with wairua as the underpinning understanding of human development providing a sense of belonging and the sense of relating *to each other*. These patterns of reality that each person within the whānau structure has forms strong cultural perceptions of their reality bonded by their connections to each other and to their surrounding environment. Thus, the reality and belief systems that validate why these whānau structures are living entities indicating the Māori worldview of Māori society or community from a whānau-based structure.

2 Underpinning belief system – Spiritual Justice

Oral traditions are an essential element of Te Ao Māori, because it is the underpinning philosophy.[169] As an example to explain the underpinning philosophy is through oral traditions, such as the general creation story known throughout Aotearoa Zealand (with different variations from each hapū and iwi nationally). Oral traditions relating to Ōtāiti and Motiti, passed down through the generations by kaumatua (elderly man) and kuia (elderly woman) transmit this knowledge amongst the people.[170] This transmitted knowledge communicated through teaching valuable lessons from the oral about cultural practices relative to the marine environment, valuable to the people of Motiti. Specific Motiti oral traditions emphasise critical aspects of Māori wellbeing (taha wairua) through the

[169] Angus Macfarlane et al. “Indigenous epistemology in a national curriculum framework?.” (1995) *Ethnicities*, *8*(1), 102–126 at 107. See also, Byron Rangiwai. "Ko au ko te taiao, ko te taiao ko au–I am the environment and the environment is me: A Māori theology of the environment." (2018) *Te Kaharoa* 11, no. 1 at 642.

[170] Joseph Selwyn Te Rito "Struggles for the Māori language: He whawhai mo te reo Māori." (2008) *Mai Review* 2, no. 8 at 6. This is an example of transmission of te reo Māori through the use of recordings by kaumatua; Lorna Dyall et al "Navigation: Process of building relationships with kaumātua (Māori leaders)." (2013) NZMJ, Vol 126, No1368 at 65.

creation story about Ranginui (God of the sky) and Papatūānuku (God of the earth) and their Atua sons, expressing the belief system instilled in the people of Motiti.[171]

Outline in chapter three, “Te Rerenga o nga Wairua o Ngāti Awa” speaks of the oral tradition pertaining to Motiti itself and the people of Motiti when they pass on (die).[172] The narrative depicts two physical formations known as Te Paepae Ariki o Rehua (Ōtāiti) and Mata Rehua (Taumaihi Island) connected to Motiti Island. These formations depicted as the spiritual leaping place or “Te Rerenga o nga Wairua o Ngāti Awa”.[173] This spiritual leaping place is significant because when people of Motiti pass away; their physical bodies are buried at the Urupa (cemetery) on Motiti, located on the edge of the cliff, facing directly toward Ōtāiti. Their spiritual self will leap off the cliff and onto Ōtāiti, known as the “stepping stones of Hawaikinui” (ancestral homeland of Māori). Ōtaiti is the spiritual pathway back to Hawaikinui for the people of Motiti. This deeply held fundamental perspective was the pinnacle opposition argument in the MV Rena resource consent hearing, for leaving the vessel on Ōtāiti by the Cultural Advisor for Te Rūnanga o Ngāti Awa on behalf of Te Patuwai hapū.[174] The main argument outlined in chapter four strongly suggested that leaving the MV Rena vessel on

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[171] Michael King *Nga Iwi O Te Motu 1000 Years of Maori History* (revised ed, Reed Publishing (NZ) Ltd, Auckland, New Zealand, 2001) at 7. Te Ahukaramū, C Royal. *The Woven Universe: Selected Writings of Rev. Maori Marsden*. (Ed, Otaki NZ: Estate of Rev. Māori Marsden, 2003). See also Chanel Phillips et al. “Creation Narratives of Mahinga Kai” (2016) MAI Journal: A New Zealand Journal of Indigenous Scholarship. 5. 63-75 at 64.

[172] Environment Court “Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust” (RB Enright, Barrister, Auckland, 25 October 2017) at para [6]; Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at 2-3. See also Bay of Plenty Regional Council Toi Moana <final-hearing-statement-pouroto-ngaropo>.

[173] Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at 2-3. See also Bay of Plenty Regional Council Toi Moana <final-hearing-statement-pouroto-ngaropo>.

[174] At 2-3.

Ōtāiti would interfere with Motiti oral traditions.[175] As part of the oral tradition of 'Te Rerenga o nga Wairua o Ngāti Awa', katiaki (guardian) such as two dolphins that would appear at the foot of the Urupa (cemetary located on the cliffside facing Ōtāiti) waiting to escort spirits of those who passed over from the physical realm to the spiritual realm, outlined in chapter three.[176]

Figure 3 Kaumatua, Mr Harawira carrying out a karakia at Ōtaiti, taken by Adrienne Paul

The people of Motiti hold perceptions of reality through the oral traditions passed down through the generations pertaining to Motiti. This worldview lies at the very heart of the culture on Motiti.

[175] At 2-3. See also Bay of Plenty Regional Council Toi Moana <final-hearing-statement-pouroto-ngaropo>.

[176] At 2-3. See also Bay of Plenty Regional Council Toi Moana <final-hearing-statement-pouroto-ngaropo>.

Ani Mikaere support the belief system by articulating the underpinning philosophy as the interconnected universal worldview:[177]

> …the single most important message to emerge from our creation stories is that we are connected, by whakapapa, to one another and to all other parts of creation. Everything in the natural world, ourselves included, shares a common ancestry.

The common ancestry referred to are the children of Ranginui and Papatūānuku, akin to Tangaroa (God of the sea) as the connections of all living things. Byron Rangiwai quotes Māori Marsden, maintaining the existence of the Atua children that:[178]

> Papatūānuku's children live and function in a symbiotic relationship. From unicellular through to more complex multicellular organisms each species depends upon other species as well as its own, to provide the basic biological needs for existence. The different species contribute to the welfare of other species and together they help to sustain the biological functions of their primeval mother, herself a living organism

The creation tradition reveals a strong narrative held by Māori about how all things within the universe were created, inclusive of all the in-between detail.[179] Māori myths and legends are undoubtedly connected with the historical narrative. Creation stories, myths and legends are conveyed in different ways from different regions or hapū of Aotearoa New Zealand providing each region or hapū

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[177] Ani Mikaere. *Colonising myths – Māori realities: He rukurukuwhakaaro.* (Huia Publishers & Te Tākupu, Wellington New Zealand 2011) at 313.

[178] Byron Rangiwai. "Ko au ko te taiao, ko te taiao ko au–I am the environment and the environment is me: A Māori theology of the environment." *Te Kaharoa* 11, no. 1 (2018) at 642.

[179] Georgina Tuari Stewart "Mātauranga Māori: a philosophy from Aotearoa" (2022) Journal of the Royal Society of New Zealand, 52:1, 18-24 at 18.

understanding of Te Ao Māori.[180] This oral tradition is a fundamental part of the belief system that forms the reality of the people of Motiti. The reality of the people of Motiti stems from the creation story whakapapa (genealogical connection) outlined in chapter three of this thesis reaffirming as that:[181]

- In the beginning, there was only Io (supreme God, Creator) within the surrounding emptiness or nothingness in the realm of Te Korekore (the realm of potential being). Io's essence fertilised Te Korekore and created the world of becoming or being.
- Io created the night realms, Hawaiki (ancestral home), as well as, the supernatural gods Ranginui (Sky Father) and Papatūānuku (Mother Earth) who were embraced as one being. They produced their children who were also supernatural gods, who lived within Ranginui and Papatuanuku's close embrace. Each god is responsible for a specific part of the natural environment, for example:
- Tanemahuta – eldest born god of the forest and all things that inhabit them;
- Tumatauenga – the god of war;
- Rongomatane and Haumiaketike – the gods of cultivated and uncultivated food;
- Tangaroa – god of the sea
- Tawhirimatea – youngest born god of wind and storms
- The supernatural gods grew tired of being within the embrace of their parents Ranginui and Papatūānuku. They decided to separate their parents,

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[180] Royal, T. C. *The woven universe: Selected writings of Rev. Māori Marsden*. Ōtaki, New Zealand: Estate of Rev. Māori Marsden (Ed, 2003) at 20; Peter, H Buck. *The coming of the Maori / by Te Rangi Hiroa (Sir Peter Buck)* (2nd ed, Maori Purposes Fund Board; Whitcombe and Tombs, Wellington 1949) at 433.

[181] Ulrich Klein "Belief-View on Nature-Western Environmental Ethics and Maori World Views" (2000) 4 NZJEnvtlL 105 at 105–108. See also Stephen Duffin J "The Environmental Views of John Locke and the Maori People of New Zealand" (2004) 26 Environmental Ethics 381 at 390–392. See also Environment Court "Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust" (RB Enright, Barrister, Auckland, 25 October 2017) at para [6].

carried out by Tanemahuta. The separation caused immense pain for Ranginui and Papatūānuku; therefore, a war amongst the other gods arose. Tane defeated all the gods except for the youngest, Tawhirimatea.

- Subsequently, the gods sustained existence in a world that was created, as a result of separating their parents. Tane then created the first human being made from the earth and called Hineahuone (female form). Tane gave the "breath of life" to Hineahuone by breathing into her nostrils. Tane and Hineahuone then procreated the first human being. The first human was their daughter Hine-titama who continued the human life line with Tane.

The relevant Atua son in this context is Tangaroa (God of the sea), as affirmed by Motiti kaumatua Nepia Ranapia.[182] Tangaroa is respected by the people of Motiti because Motiti is an island surrounding by the sea and culturally this means that Tangaroa is the fundamental kaitiaki of Motiti that requires caring or kaitiakitanga (guardianship) to care for the surrounding marine environment of Motiti.

Linda Te Aho demonstrates that the principles and values informing a tangata whenua system of law from a Māori perspective existed during pre-colonial times:[183]

> Tangata whenua systems of law and government existed before colonization by the British. 'Tikanga Māori' and 'Māori customary law' are terms (not necessarily interchangeable) that embody the values, standards, principles, or norms that indigenous Māori have developed to govern themselves…the Resource Management act 1991 incorporate Māori principles and values, or make explicit reference to the principles of the Treaty of Waitangi…in the context of decision making in planning and environmental law.

[182] Environment Court "Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust" (RB Enright, Barrister, Auckland, 25 October 2017) at para [6].

[183] Linda Te Aho. "Tikanga Maori, Historical Context and the Interface with Pakeha Law in Aotearoa/New Zealand." (2007) Other Journal Article, JOUR. Yearbook of New Zealand Jurisprudence 10: 10–14 at 10.

The people of Motiti are living this tangata whenua system of Tikanga Māori values through their values, standards, principles and norms developed to govern themselves. These particular values, standards, principles and norms informed oral traditions, such as Te Rerenga o nga Wairua o Ngāti Awa: the pathway between the physical world and spiritual world, as mentioned in the chapters three and four outlining the cultural effects on Ōtāiti, Motiti and the Bay of Plenty region.

3 Two interpretations of oral traditions

There are two ways of looking at oral traditions like the creation story. Firstly, through the pre-colonial version starting from the story of Ranginui and Papatūānuku and their Atua sons. Secondly, through the post-colonial version, which starts from the belief of all things in this world deriving from Io (Supreme God), introduced when colonial settlement entered Aotearoa New Zealand.[184] The elaboration of Te Ao Māori from the pre-colonial perspective distinguishes any reference to Io and other Atua (Gods) in a structurally vertical representation of whakapapa, which is particularly important to acknowledge at this point, as the oral tradition of the creation story that this thesis will rely on is the former version.[185]

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[184] Stephenson, P. Smith, The lore of the Whare-wānanga; or Teachings of the Maori College On Religion, cosmogony, and History/ written down by H.T. Whatahoro from the teachings of Te Matorohanga and Nepia Pohuhu, [and other] priests of the whare-wananga of the East Coast, New Zealand; translated by S. Percy Smith (Thomas Avery, New Plymouth, New Zealand, 1913-1915) vol 3, at ii; Elsdon Best Some Aspects of Maori Myth and Religion (Dominion Museum, Wellington, New Zealand, Wellington, New Zealand, 1922) at 30. "Māori had not advanced to the stage in which religious intolerance and the punishment of the spirit after death are introduced, and that religion and morality have been plants of slow growth...”; Peter, H Buck. The coming of the Maori / by Te Rangi Hiroa (Sir Peter Buck) (2nd ed, Maori Purposes Fund Board; Whitcombe and Tombs, Wellington 1949) at 1–3 and 435.

[185] Peter, H Buck. *The coming of the Maori / by Te Rangi Hiroa (Sir Peter Buck)* (2nd ed, Maori Purposes Fund Board; Whitcombe and Tombs, Wellington 1949) at 435; “...that the people had no idea of a

Subsequently, acknowledgement is given to non-Māori literature of the 1800s, in the attempt to understand the Māori way of thinking, at the time. Without such knowledge recorded through literature, there would not have been the opportunity for Māori scholarship to shape and correct these interpretations with the indigenous experience articulated through oral traditions told by Māori and recorded by Māori researchers building Māori scholarship.[186] Writers such as Stephenson Percy Smith; John White; Elsdon Best, John Cowan and Johannes Carl Anderson recorded descriptions and interpretations of Te Ao Māori with a completely different lens to Māori. An observation through descriptions and interpretations of "personification" were given by non-Māori writers to explain their version of how Māori viewed the world. Meaning that, a human characteristic was projected onto nature or to something non-human to articulate how non-Māori writers understood the Māori worldview, looking from the outside in, Elsdon Best expresses:[187]

> …how slow we were to understand the personifications they contain and how we have misinterpreted them. In order to understand these myths and myth makers, he says, it is necessary to enter into their modes of thought, understand their symbolisms, to see things as they saw them, and to know them thoroughly and the surroundings in which they lived…

The imposition of what occurs when a particular worldview is used to interpret and describe another worldview i.e a Pākehā worldview used to describe the Māori worldview can have potential to misinterpret another cultures worldview.[188] The resulting impact from these particular interpretations and descriptions can be

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Supreme Being, the Creator of all things in heaven and in earth. The idea pervading all their narratives is, that all things have been produced by a process of generation, commencing with darkness and nothingness." Edward Shortland "A short Sketch of the Maori Races" (1868) 1 TNZI at 1.

[186] Elsdon Best Some Aspects of Maori Myth and Religion (Dominion Museum, Wellington, New Zealand, Wellington, New Zealand, 1922) at 6.

[187] At 28.

[188] At 30.

seen through other Māori writers clarifying certain points.[189] Therefore, the utilisation of the previous non-Māori literature recorded aspects of Māoridom referring to interpretations of Io, are acknowledged. The approach in this chapter explores, as close as possible, to the pre-colonial version of the creation story to allow that oral tradition to shine through in this section and give support to the belief system of the people of Motiti.[190]

An extension of this oral tradition, encompass Mātauranga Māori exercised through action or tikanga Māori. Moana Jackson tikanga Māori the way that the people of Motiti understand it which state that:[191]

> Often out of very human personal interactions, our people develop a way of explaining the situation. The baseline of that explanation to me was the core values of whakapapa, Manaakitanga, Whanaungatanga and so on. Out of those values comes the truth, which guide the way we do things…My understanding about our relationship with Papatūānuku, is that it is a relationship of whakapapa. If Papatūānuku is our mother then the land, the beach, the seabed, the waters, and the rivers are part of our mana. That is, part of our tikanga, that in a sense she be kept and nurtured as a whole being. If decisions are made to chop off parts of our mother then it chops off to me parts of our tikanga. If you make tikanga unsafe you make us unsafe…

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[189] Ani Mikaere. "Tikanga as the First Law of Aotearoa" (2007) Yearbook of New Zealand Jurisprudence, 10, 24–31 at 28; Robert Joseph "Legal Challenges at the Interface of Maori Custom and State Regulatory Systems: Wahi Tapu." (2012) Other Journal Article, JOUR. Yearbook of New Zealand Jurisprudence 13/14: 160–193 at 162. See also "The Maori of yore felt and lived their religion...Religion...in the case of the Maori it was the strongest force in the tribal commune...it enters into every department of life, into every industry, every activity of the daily life of the individual...Albeit these powers, religion and superstition...have passed down the countless ages since Tane brought them down to earth in the days when the world was young. At 28–30.

[190] Sir Peter Buck, above n 44, at 433; "Probably the best known of the fireside stories of creation is the Maori version as related by Grey. Rangi and Papa, the heaven and earth, were regarded as the source from which all things, gods, and men originated." Andersen, above n 42, at 367.

[191] Moana Jackson "It's quite simple really" (2007) Yearbook of New Zealand Jurisprudence, 10, 32–40 at 34-35.

Tikanga Māori can be seen through cultural practices like Mahinga kai (Māori customary food gathering) Chanel Phillips et al describes mātauranga Māori, asserting that tikanga Māori:[192]

> "firmly embedded in mātauranga Māori, which might be seen as Māori philosophy as well as Māori knowledge"…"tikanga comes out of the accumulated knowledge of generations of Māori"..."Māori knowledge encompasses all branches of Māori knowledge, past, present and still developing"…

With mātauranga Māori encompassing Māori philosophy, traditional knowledge together with Tikanga Māori consisting of core values, it is relevant to consider how custom law operates or aligns with Mātauranga Māori. Deputy Chief Judge Caren Fox of the Māori Land Court articulates the definition of custom law in the context of legal anthropology, stating that:[193]

> …[L]egal anthropology is the study of law in society. It begins from the premise that all societies have law…A study of those systems indicates the following generalisations:
>
> - Law emerges with the beginning of social existence.
> - The complexity of law in a society will depend on the complexity or simplicity of that society…
> - All societies possess political power that relies to some degree on the coercive power of law…
> - Where the state exists, customs and ritual may have been codified or reduced to judgment by the instruments of the state…
> - In all societies law represent certain values and…functions; however, the common principles of law are:
>   - The search for justice; and
>   - The preservation of social order and collective security
> - Law is obeyed in different societies because individuals are socialised to obey, they believe in the just nature of the law, they seek the protection of the law, or they fear sanctions associated with non-observance.

[192] Chanel Phillips, Chanel & Jackson, Anne-Marie & Hakopa, Hauiti. "Creation Narratives of Mahinga Kai" (2016) MAI Journal: A New Zealand Journal of Indigenous Scholarship. 5. 63-75 at 72.

[193] Caren Fox. "Access to customary law: New Zealand issues" (2012) Yearbook of New Zealand Jurisprudence, 13/14, 224–237.

Judge Fox continued to outline the Māori customary law and demonstrate the evolution or development of Mātauranga Māori, Te Ao Māori, and Tikanga Māori within a legal context, but acknowledging that these elements together should be approached according to a particular iwi or hapū:[194]

> In my view, Māori customary law concepts can only be properly ascertained and applied by considering their historical evolution within a particular hapū or iwi from ancient times through to the present…What we do know…is that some emphasis has been given to conceptually framing Māori law in terms of "tikanga Māori". This term is being used to describe the norms that maintained law and order in Māori society…Māori operated by reference to tikanga and that was underpinned by philosophical and religious principles, goals and values. All combined to regulate the conduct of individuals, whānau, hapū and iwi and in this way social control was maintained by doctrines, such as the doctrine of tapu. It is the law that determined and still determines Māori proprietary customary law.

Customary law within the legal framework, under the banner of "Tikanga Māori" pulls together all notions relevant to Mātauranga Māori, and Te Ao Māori to capture those concepts nicely to provide clear direct social control to regulate individual behaviour.[195] This is very relevant to the people of Motiti, as they drew upon and captured all of the oral traditions – Te Ao Māori, Mātauranga Māori and Tikanga Māori values to argue the cultural effects on the surrounding environment around both Ōtāiti and Motiti in the matters relating to the MV Rena grounding.

A protective mechanism for supporting Māori customary law is found in Te Tiriti o Waitangi (Treaty of Waitangi). The jurisprudential evolution of the Treaty of Waitangi from 1840 to date, is entrenched in Aotearoa New Zealand and validated through common law.[196] Effectively, the Treaty of Waitangi is the

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[194] Caren Fox. "Access to customary law: New Zealand issues" (2012) Yearbook of New Zealand Jurisprudence, 13/14, 224–237 at 227.

[195] At 225.

[196] Treaty of Waitangi Act 1975; Anne-Marie Jackson "Erosion of Māori Fishing Rights in Customary Fisheries Management" (2013) 21 Waikato L.Rev. at 61; *R v Symonds* (1847) NZPCC 387 (SC); *Wi Parata*

platform for protecting Māori interests, including issues relating to the people of Motiti and the wider hapū within the Bay of Plenty region. Despite the Treaty of Waitangi jurisprudence and the points made by Judge Fox, the resource management legal framework failed to see the existing Māori society of Motiti. The outcome demonstrated that the legal process failed to give effect to the Treaty of Waitangi under the Resource Management Act 1991 (section 8) to support all of the history; oral traditions; cultural practices and real-time experiences of the people of Motiti in the decision made for the granting of the MV Rena vessel to remain on Ōtāiti. Therefore, an unfortunate and substantial injustice for the people of Motiti.

In summary, the Māori perspective of the environment entails the oral tradition of the creation story as the Māori worldview generally with respect of care taking responsibility of environment by, Rangi, Papa and their Atua sons, which form the whakapapa (genealogy) from which all other things within the universe derive from which human beings are included. With this worldview, encompass Mātauranga referring to all Māori philosophy, Te Ao Māori and Tikanga Māori, knowledge, traditions, practices, interpretations and descriptions of the customary laws that regulate human behaviour toward each other and the environment. All captured within the legal context, shaping all elements of Te Ao Māori, Mātauranga Māori under the umbrella of the term “Tikanga Māori” protected under Te Tiriti of Waitangi (Treaty of Waitangi). This Māori perspective is what can be included to inform environmental philosophy. With this inclusion provides for a substantial approach for a cultural response to environmental issues.

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v Bishop of Wellington (1877) 3 NZ Jur (NS) 72 (SC); *Nireaha Tamaki v Baker* (1901) NZPCC 371 (PC); *Wallis v Solicitor-General* (1903) NZPCC 23 (PC); *Hoani Te Heuheu Tukino v Aotea District Māori Land Board (1941); New Zealand Māori Council v Attorney-General* [1987].

4 Summary

This chapter set out the general environmental philosophy to highlight the historical development and its application in Aotearoa New Zealand. That being the strand of the Western ethic as the anthropocentric approach purporting a human-centered environmental ethic. Capturing these features amount to the general environmental philosophy perspective.

As a contrasting point to the anthropocentric perspective, the non-anthropocentric view of the environment illustrated commonalities the Māori perspective to value nature intrinsically.[197] This commonality provides an opportunity to argue that Māori environmental philosophy should be recognised with equal weighting to how the anthropocentric view is known generally. The reason for this recognition would fundamentally provide robust environmental ethic for resolving marine environment problems whereby the Māori perspective would have the ability to protectively and preventatively direct environmental philosophy to support cultural responses. Therefore, supporting the cultural perspective of the people of Motiti.

With such support, an explanation of the broadly fluid concepts within the Māori perspective to illuminate the cultural significance relative to the environment. The cultural significance includes: largely conceptual - Te Ao Māori (worldview), Tikanga Māori, Mātauranga as knowledge encompassing all things Māori, customary law, contrasting descriptions and interpretations of the Māori perspectives and its implications on the understanding of the environment. All of these elements are extremely important to the underpinning environmental philosophy in order to inform a cultural response to environmental issues in

[197] Trond Gansmo Jakobsen "Environmental Ethics: Anthropocentrism and Non-anthropocentrism Revised in the Light of Critical Realism" (2017) Journal of Critical Realism 16:2, 184-199 at 186.

particular place-based areas throughout Aotearoa New Zealand. The inclusion of a cultural response may have provided a different legal outcome, at the time, if these elements were given effect by the decision makers of the resource consent application process.

The inclusion of such an environmental philosophy may have enhanced the environmental ethics and practise for the marine environment in Aotearoa New Zealand under the Resource Management Act 1991, because if the Māori perspective was initially included in the underpinning environmental philosophy, then it would have been supported in the law.

More recognition of the Māori perspective on environmental philosophy would enable a Māori environmental philosophy approach to environmental issues and so permit preventative and protective approaches to avoid future environmental disasters. The law however, will need to be open to being informed by this type of environmental philosophy for Aotearoa New Zealand to assist with better cultural responses to the environment in future.

3 ŪPOKO TUATORU: CHAPTER THREE - THE MV RENA INCIDENT

a. Introduction

This chapter addresses the research question by outlining the following three aspects: the physical environment of the marine coastal area; the cultural perspective of the physical environment of the marine coastal area, and lastly the factual background of the MV Rena incident and environmental effects of the grounding on the surrounding marine coastal area.

Firstly, the chapter explores relevant literature on the physical surrounding marine coastal area of Astrolabe Reef (Ōtāiti), and Motiti Island (Motiti). An analysis of the physical location of the area is a prominent characteristic of resource management law. While resource management law is based on a regulatory effects system to sustainably manage the environment, at times the law does not or is incapable of understanding the cultural perspective of the environment. Whereas, literature focused on risk management of adverse effect may unintentionally take the focus away from the importance of how an environment is perceived by the people using it, such as the people of Motiti. The problem in this situation might suggest that the existing legal framework, at the time, may have been set up to exclude cultural recognition or the cultural philosophical perspectives of the environment further compounding the injustices that occurred to the people of Motiti. Hence, an explanation of the physical surrounding marine coastal area will illustrate the state of the pre-existing Marine coastal area.

Secondly, this chapter outlines the position of the people of Motiti, which include the physical environmental nature of the Motiti itself, the economic scope of Motiti at the time, which reflects the community culture of Motiti and how it operates. Each physical, economic and cultural facet of Motiti highlights why the impact of the grounding enhanced and emphasised the injustice on the people of Motiti and the surrounding coastal marine area.

Thirdly, this chapter examines the physical structure of MV Rena vessel and its cargo and equipment. Relevant literature from a range of disciplines (science, natural resources law) contribute to illustrating the extent of the enormous ship transporting goods to Aotearoa New Zealand. A description of what the MV Rena was carrying at the time of the grounding will outline and inform the extent of the environmental effects on the surrounding coastal marine area. Therefore, the extent of the injustices that occurred following on from the point of the incident on the people of Motiti.

Lastly, the grounding incident tested the existing legal framework to respond well to the environmental disaster in 2011. The MV Rena grounding delivered extensive catastrophic impacts from the vessel releasing immense bunker oil, debris and equipment into the coastal marine area of Ōtāiti and Motiti. The grounding is the catalyst used to answer the thesis question and to demonstrate that the existing laws in Aotearoa New Zealand at the time exposed the people of Motiti to injustices that were unavoidable.

1 The natural landscape of Ōtāiti

A physical description of the surrounding coastal marine area of Motiti and Ōtāiti will illustrate how the pre-existing marine environment stood prior to the grounding of the MV Rena.

Historically, the physical environment not only gave caution to mariners, but also supplied Motiti with bountiful sea creatures surrounding the area, inclusive of: crayfish, shark, swordfish, snapper, tarakihi, cod, kina, octopus, and whales since the late 1800s.[198]

[198] AH Matheson *Motiti Island Bay of Plenty* (Whakatane and District Historical Society, 1979) at 79–83.

To elaborate, past mariners have had difficulty navigating the coastal marine area of Otaiti and Motiti. A good example of difficult navigation can be showed through the mariner named Dumont D'Urville.[199] In 1827, the vessel *Astrolabe* navigated by Frenchman Dumont D'Urville experienced a violent storm in the Bay of Plenty near Otaiti. Another incident in 1828, experienced by Rev Henry Williams, in the C.M.S schooner *Herald* described Ōtāiti as a "very dangerous sunken rock".[200] Subsequently, in 1852-3 Ōtāiti was surveyed and charted correctly with warning that Ōtāiti at "high water in very fine westerly weather it might not show"[201] whereas, mariners were advised to avoid the area at both low-tide and at night.

Furthermore, an example of why Ōtāiti was cautioned not to approach was clearly illustrated in the event of the 67-tonne schooner named *Nellie*, which struck Ōtāiti on 13 January 1878 at 8:20pm on a clear, calm, moonlit night. Equally important, another of Motiti's dangerous reefs named Okarapu situated 1 - 2 nautical miles off the northern end of Motiti, which only appears in heavy seas, was struck by the vessel *Golden Master* on 10 January 1959.[202] Therefore, the rocks, reefs and shoals in the surrounding waters of Motiti and Ōtāiti have previously been known as a major hazard to shipping and/or mariners since the early 1800s to date in the Bay of Plenty region.[203] Motiti being a unique place situated in the middle of a coastal marine area also provides wellbeing to people who live on Motiti.

Judicial confirmation of the pre-existing state of the coastal marine are stated in the case of *Ngāi Te Hapu Inc v Bay of Plenty Regional Council* affirms that:[204]

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[199] At 79.

[200] At 79.

[201] At 79.

[202] At 80. See also Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014)* at 5; Beca Carter Hollings & Ferner Ltd *APPLICATION FOR RESOURCE CONSENT (MV RENA) VOLUME THREE* (Beca 2014, 2014) at 15.

[203] AH Matheson *Motiti Island Bay of Plenty* (Whakatane and District Historical Society, 1979) at 80.

[204] Ngāi Te Hapu Inc v Bay of Plenty Regional Council [2017] NZEnvC 073 at para [114].

> Prior to the wreck in 2011 the environment on the reef can be regarded as pristine for practical purposes. It could be regarded as similar to that of other reefs around Motiti and also Tuhua (Mayor Island). That said, there had been extensive fishing…suggesting that the existing fish stocks were something less than ten per cent of those which would have existed in the 1920's. It is clear that many species of fish previously inhabiting the Ōtāiti reef…

Clearly, the physical marine environment prior to the MV Rena grounding was known as a pristine environment and this view was extended to the other region of Ōtāiti, which included other reefs around Motiti and as far as Mayor Island. This is quite a large coastal marine area, as reflected in Figure 3.[205] The evidence suggests, the surrounding reef shoal, and rocks of Motiti include Ōtāiti, demonstrating the connection between both Motiti and Ōtāiti from a physical perspective and determining that this coastal marine area was in a pristine state prior to the grounding incident.

Another essential point, is the physical landscape of Ōtāiti itself, encompassing an environment that consists of sub-tidal habitats with a range of substrate[206] and topography,[207] on its shelving slopes.[208] These shelving slopes consist of loose rounded boulders, rock blocks, sand, and sediment flats.[209] The elements which describe the natural character of Ōtāiti, include the following:[210]

> 1 Dominant volcanic processes and formation of sub tidal reef system.
> 2 Dynamic coastal processes occurring.
> 3 The natural environment dominates the reef with the only visible modification due to the grounding and wreckage of the Rena.

[205] AH Matheson *Motiti Island Bay of Plenty* (Whakatane and District Historical Society, 1979) at 79–83.

[206] A surface from which an organism lives, grows or obtains nourishment.

[207] The arrangement of natural and artificial physical features of an area.

[208] BIORESEARCHES GROUP LIMITED *Fisheries and Ecological Effects of the Proposal for leaving the wreck of MV Rena on Astrolabe Reef* (BIORESEARCH, 2014) at 6.

[209] At 6.

[210] Ngāi Te Hapu Inc v Bay of Plenty Regional Council [2017] NZEnvC 073 at para [258].

The Environment Court *Ngāi Te Hapu v Bay of Plenty Regional Council* further explains the attributes of Ōtāiti, which include the elements that enhance and diminish natural character:[211]

> **Water:**
>
> 1 …
> 2 The reef breaks the water surface at low tide creating large breaking waves in rough seas.
> 3 Reef has regional significance for seal use and fish communities with high abundance and diversity.
> 4 …
>
> **Abiotic systems and landform:**
>
> 1 Water movement around the reef enhances natural character.
> 2 The physical structure of the reef remains largely unmodified. The rock formation is expressive of the formative natural processes created by volcanic activity and the ocean.
> 3 Vertical rock faces, underwater caves and tomes and large boulders are distinctive of the natural processes.
> 4 The Rena shipwreck has damaged a small part of the overall physical reef structure.
>
> **Perceptual:**
>
> 1 …
> 2 …
> 3 Breaking waves across the reef outcrops with remnant of shipwreck below the waterline.
> 4 Perceptions are of a natural reef system impacted by the Rena…

To emphasise the above elements of the natural character of Ōtāiti, Ian Mclean further explains the tides surrounding Ōtāiti:[212]

> The reef is well-marked on charts, but it sets below sea level a high tide and is not physically marked. Breaking waves are typical along this exposed coastline and the reef can often be see, even at night. But the sea was clam, and the reef would not have been apparent to an alert observer if there was one on the bridge at the time…there are many smaller islands and rocky atolls in the vicinity, some of which are wildlife reserves.

[211] At para [258].

[212] Ian G. McLean "Analysis of the grounding of the MV Rena in New Zealand, 5 October, 2011." PeerJ Preprints6 (2018) at 2.

To enhance the above outline of the surrounding physical marine environment of Ōtāiti, the Environment Court in *Ngāi Te Hapu v Bay of Plenty Regional Council* affirms that:[213]

> …[W]e conclude that the above identification was made in circumstances which would have had greater environmental impact that we are currently addressing. The important observation being that Ōtāiti is an OMC irrespective of the presence of the remains of the Rena.

To emphasise, the meaning for the abbreviation of ONC is "Outstanding Natural Character".[214] In summary of the physical landscape of Ōtāiti, the literature has shown that Ōtāiti is a reef connected with Motiti amongst other reef shoal and rocks. More specifically, Ōtāiti has the status of "Outstanding Natural Character".

As part of the landscape of Ōtāiti, a collection of species exist in the ecosystem surrounding the reef, both high profile and Taonga species.

2 The ecosystem surrounding Ōtāiti and Motiti: high profile species

In addition to Motiti, Ōtāiti also consist of many species, which currently include the following species living in the surrounding environment: pelagic species such as kahawai, kingfish, trevally, snapper, blue and pink maomao, splendid perch, demoiselles (damselfish), and long finned boarfish.[215] Thus, Motiti and Ōtāiti has many ocean species of a vast range living in its specific environmental system that can be subject to possible marine impacts.

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[213] Ngāi Te Hapu Inc v Bay of Plenty Regional Council [2017] NZEnvC 073 at para [260].

[214] At para [242].

[215] DR Schiel, PM Ross & CN Battershill "Environmental effects of the MV *Rena* shipwreck: cross-disciplinary investigations of oil and debris impacts on a coastal ecosystem" New Zealand Journal of Marine and Freshwater Research (2016) 50:1 at 7. See also Ian G. McLean "Analysis of the grounding of the MV Rena in New Zealand, 5 October, 2011." PeerJ Preprints6 (2018) at 9-14.

Essentially, the diverse existing marine life at the time of the grounding show a flurry of different species, an example fisheries is provided in Figure 3 to show the extent of the range of species as part of the ecosystem of the marine environment of Ōtāiti.[216]

Common Name	Scientific Name
Demoiselle	*Chromis dispilus*
Yellow moray	*Gymnothorax prasinus*
Snapper	*Pagrus auratus*
Scarlet wrasse	*Pseudolabrus miles*
Pigfish	*Bodianus unimaculatus*
Sandager's wrasse	*Coris sandageri*
Leatherjacket	*Parika scaber*
Grey moray	*Gymnothorax nubilus*
Goatfish	*Upeneichthys lineatus*
Hiwihiwi	*Chironemus marmoratus*
Jack mackerel	*Trachurus novaezelandiae*
Banded wrasse	*Notolabrus fucicola*
Green wrasse	*Notolabrus inscriptus*
Porae	*Nemadactylus douglasii*
Spotty	*Notolabrus celidotus*
Sweep	*Scorpis lineolatus*
Half-banded perch	*Hypoplectrodes sp.*
Black angelfish	*Parma alboscapularis*
Butterfly perch	*Caesioperca lepidoptera*
Trevally	*Pseudocaranx dentex*
Blue cod	*Parapercis colias*
Blue maomao	*Scorpis violaceus*
Combfish	*Coris picta*
Crimson cleanerfish	*Suezichthys aylingi*
Eagle ray	*Myliobatis tenuicaudatus*
John dory	*Zeus faber*
Kingfish	*Seriola lalandi*
Northern scorpionfish	*Scorpaena cardinalis*
Orange wrasse	*Pseudolabrus luculentus*
Short-tailed stingray	*Dasyatis brevicaudata*
Single-spot demoiselle	*Chromis hypsilepis*
Speckled moray	*Gymnothorax obesus*
Tarakihi	*Nemadactylus macropterus*

Figure 4 Specific fisheries list of species on Ōtāiti.

[216] PM Ross, CN Battershill & C Loomb "The wreck of the MV *Rena*: spatio-temporal analysis of ship-derived contaminants in the sediments and fauna of Astrolabe Reef" New Zealand Journal of Marine and Freshwater Research 50:1 (2016) 87-114 at 92.

These factors contribute many species relative to Motiti and Ōtāiti, which resonates with the people of Motiti. Figure 4 demonstrates the noted list from the Cultural Monitoring Report (2020) listing the Taonga species:[217]

Māori Name	Common Name	Scientific Name
Araara	**Trevally**	*Pseudocarnanx dentex*
Haku	**Kingfish**	*Seriola lalandi*
Hautere	Jack mackeral	*Trachurus novaezealandie*
Hiwihiwi	Kelp fish	*Chironemus marmoratus*
Hui	Sweep	*Scorpis lineolatus*
Kaeo	Cooks Turban	*Cookia sulcata*
Kahawai	**Kahawai**	*Arripis trutta*
Kaingārā	**Yellow moray**	*Gymnothorax prasinus*
Karengo	**Seaweed**	*Porphyra sp.*
Kehe	Marble fish	*Decapterus koheru*
Kina	**Sea urchin**	*Evechinus chloroticus*
Koheru	Koheru	*Decapterus koheru*
Koputotara	Porcupine fish	*Tragulichthys jaculiferus*
Koura	**Red rock lobster (crayfish)**	*Jasus edwardsii* (not observed)
Kuku or Kūtai	**Green lipped mussel**	*Perna canaliculus*
Kumukumu	Gurnard	*Chelidonichthys kumu*
Mata	Pink maomao	*Caprodon longimanus*
Matua-whāpuku	Scorpion fish	*Scorpanea cardinalis*
Maori	Black Angel fish	*Parma alboscapularis*
Maomao	Blue maomao	*Scorpis violaceus*
Marari	**Butterfish**	*Odax pullus*
Moki	Blue moki	*Latridopsis ciliaris*
Nanua	Red moki	*Cheilodactylus spectabilis*
Paakurakura	Pig fish	*Bodianus unimaculatus*
Paketi	Spotty	*Cotolabrus celidotus*
Pakirikiri	Blue cod	*Parapercis colias*
Patiri	Leather jacket	*Parika scaber*
Parore	Parore	*Girella tricuspidata*
Pāua	**Abalone**	*Haliotis iris*
Porae	Porae	*Nemadactylus douglasii*
Pūpū	**Cats eye**	*Turbo smaragdus*
Tāmure	**Snapper**	*Pagrus auratus*
Toitoi or Karaka	Cooks Turban	*Cookia Sulcata*
Whai	Short-tailed stingray	*Dasyatis brevicaudata*
Whai	**Long-tailed stingray**	*Dasyatis thetidis*
Whai repo	Eagleray	*Myliobatis tenuicaudatus*
Wheke	**Octopus**	*Pinnoctopus cordiformis*
	Big eye	*Pempheris adspersa*
	Two spot demoiselles	*Chromis dispilus*
	Knife fish	*Labracglossa nitida*

Figure 5 Specific list of Taonga species on Ōtāiti.

The diverse list of species in the surrounding marine environment of Ōtāiti and Motiti is extensive. After examining the list of species demonstrate the connection

[217] Kura Paul-Burke "Cultural Monitoring Report" The Astrolabe Community Trust (22 December 2020) at xii. See also Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014)* at 14.

of marine life at Ōtāiti to the people of Motiti through the practice of food gathering (fishing). Hence, the reason why the people of Motiti are protective over Ōtāiti and its ecosystem, which reflects the reason why an injustice has been felt by the people of Motiti.

b. The Motiti and Ōtāiti connection

The following section sets out the position of the people of Motiti demonstrating the strong connection to their surrounding marine area. The relationship held by the people of Motiti to their environment shows the depth of their connection and therefore the distraught suffering endured when the realisation of the effects from the MV Rena grounding came to fruition, displaying an influx of injustice heavily felt and understood. Now, the people of Motiti continue to live with the consequence.

The importance of understanding the cultural connection held by the people of Motiti is crucial to answering the research question. Therefore, a description is provided of the cultural and spiritual connection held by the people of Motiti and the landscape of Motiti.

1 The cultural connection to Ōtāiti

From a cultural perspective, the name of Ōtāiti was given to Astrolabe Reef as affirmed in the case of *Ngāi Te Hapu Inc v Bay of Plenty Regional Council*:[218]

[218] Ngāi Te Hapu Inc v Bay of Plenty Regional Council [2017] NZEnvC 073 at 12. See also, Waitangi Tribunal The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 7. See also, Environment Court "Statement of Evidence by Nepia Ranapia on Behalf of the korowai Kāhui o nga Pakeke o te Patuwai (The Korowai)" (Ian Gordon, Stout Street Chambers: Nicky McIndoe Kensington Swan, Wellington 22 December 2016) at para [6.12].

> It is generally accepted that the name Ōtāiti was given to the reef by Ngātaroirangi, the Tohunga (priest and navigator) on board the Te Arawa waka. That traditional name was superseded in favour of the name given to the reef by the French explorer, Jules Dumond d'Urville after his ship (Astrolabe) nearly ran aground there on 6 February 1827. Thus, for nearly a decade shy of 200 years, the Māori name of the reef was left to the oratory of Motiti Island elders and the people who supported their ahi kā and Kaitiakitanga.

Additionally, Moana Jackson, as expert witness in the Waitangi Tribunal Te Moutere o Motiti Inquiry (WAI2521) explains the connection of the people of Motiti to Ōtāiti, stating that:[219]

> The Principle of Connective Use – Tūrangawaewae naturally implies patterns of use, and a long-established intimate association with a particular whenua and moana establishes the patterns of connective use which legitimise mana moana…regular and controlled use which indicate both the intimate association with th eland and moana and the connectivity between that use and a sense of belonging. In a very real sense they indicate the regular and kaitaiaki use involved in harvesting the resources of home as an expression of mana moana.

As indicated, in a cultural sense, the significance that Ōtāiti holds for the people of Motiti and their connection is clearly explained. Moana Jackson eloquently articulates an example of how Ōtāiti is utilised by the people of Motiti, as the "use of the fishing grounds around Motu Haku which has always been a rich source of Hapuku and Moeone…there is clear evidence of consistent use of the area…by deep knowledge of the species…"[220] Hence, the people of Motiti have always had strong connections to Ōtāiti, as well as, the naming of Ōtāiti was instilled upon the reef by one of the well-respected Rangatira (Chief/leader) of Te Arawa iwi

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[219] Te Moutere o Motiti Inquiry " Evidence of Moana Jackson" (Thorndon Chambers, Wellington and Harry Edward Law, Rotorua, 24 April 2018) at para [130] – [130.5]; Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015).

[220] At para [130] – [130.5]. See also Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014)* at 17.

and that particular mana has passed down the generations through the people of Motiti.

Another essential point, Pouroto Ngaropo who at the time of the grounding was the Cultural Advisor to the Chief Executive Office for Te Rūnanga o Ngāti Awa (the tribe in which the people of Motiti belong to)[221], explains the importance of the cultural and spiritual connection of Motiti and Ōtāiti to Ngāti Awa:[222]

> According to Ngāti Awa tikanga everything that exists has mauri. Mauri is the binding power that enables the spiritual presence of the creator Io to exist in all things. Mauri can be described as the spiritual presence of the creator, the spiritual presence of the atua, that being the children of Rangi and Papa and our connection to the environment, the land, the waterways and the ocean. Mauri can also describe the direct link that we have to creation itself.

Pouroto Ngaropo further states that:[223]

> Mauri translates to mean the life force, the life principles, the binding power that the spiritual and physical dimension connect as one. Mauri also means the pure energy of the creator that exists in us…Io created the universe the earth, environment, islands and the oceans it is Ngāti Awa's belief that the spiritual essence and presence exists there. It is for this reason that Otaiti is wāhi tapu. Wahi means – wa – is the continuum of time, the pathway of time. Hi is the energy and vibrations of everything that connects to each other. Tapu is the protection of Io and the Atua that enables the mauri to function and exist. Hence the term wāhi tapu.

Reiterating the points made, the significant cultural connection the people of Motiti have to Ōtāiti derive from both a physical and spiritual nature (tangible and

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[221] Te Rūnanga o Ngāti Awa Act 2005, s 3.

[222] Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at para 8(a).

[223] At para 8(b)-(c). K B, Morgan *Contract 12RF01 Final Report How can Mātauranga Māori contribute to the Rena disaster response?* Nga Pae O Te Maramatanga (April 2012) at 3.

intangible aspects) of creation itself and the continued customary practices to protect and enable that cultural connection.[224] A connection that holds tight to Tūrangawaewae, a place of standing due to patterns of utilising a particular place or area, which then manifest patterns of connective use, legitimising mana moana.[225] On this basis, the constant cultural practice of kai moana gather and karakia by the people of Motiti, continues that strong spiritual bond to Ōtāiti, which also strengthens and enables their inherent whakapapa connection to the land and environment at both Motiti and Ōtāiti marine coastal areas.[226] Therefore, stabilising and entrenching their unassailable connection to the coastal marine areas surrounding Motiti and Ōtāiti.

Subsequently, the Waitangi Tribunal Final Report on the MV Rena and Motiti Island claims adds to the cultural connection of the people of Motiti to Ōtāiti, declaring:[227]

1. Ōtāiti is the equivalent of a maunga (mountain) and awa (river) for the people of Motiti;
2. Ōtāiti is a significant icon as a reef, which is viewed as a feature in the surrounding coastal marine area infused in the essence of the people of Te Patuwai hapū on Motiti;

[224] Waitangi Tribunal Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 6.

[225] Te Moutere o Motiti Inquiry " Evidence of Moana Jackson" (Thorndon Chambers, Wellington and Harry Edward Law, Rotorua, 24 April 2018) at para [130] – [130.5]; Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at para 8(b)-(c); Waitangi Tribunal *Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014)* at 6.

[226] Waitangi Tribunal The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 7 and 17.

[227] Department of Internal Affairs "Motiti Island Environmental Management Plan" (May 2016) at ii. Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014)* at 13-15.

3. Ōtāiti is a tipua signifying its spiritual quality; the source of its naming, and of being the equivalent of a maunga or awa to the people on the mainland;
4. Ōtāiti is a visible marker that defines the relationship between people and place (the ocean) sets the day to day operation on Motiti;
5. The belief system of the people of Motiti sustain that Ōtāiti and the other surrounding coastal islands; surface reefs, and rocks are the stepping stones for the wairua of their deceased, back across the sea to the ancestral homeland named Hawaiki. Motiti people offer karakia to Ōtāiti, in acknowledgement of their taonga (Ōtāiti). The people believe that when the time comes for each person to leave life on earth: Ōtāiti is the beginning of their pathway home to their ancestors.
6. The people who fished on or around Ōtāiti would offer karakia to acknowledge the preservation of the life force or mauri of Ōtāiti. Preserving the mauri meant that Ōtāiti would continue to be a source of sustenance for the people. After performing karakia, the first caught fish would be released ‘as a thank you the Gods to maintain the mauri of the Ōtāiti and these karakia would be an acknowledgment of the peoples’ kaitiaki commitments to Ōtāiti.
7. Ōtāiti has its cultural and spiritual significance through utilising traditional hapuka fishing around Ōtāiti. Traditional kaimoana gathering of species include: pāua, kina and koura. The utilisation continued up until the MV Rena vessel grounded on Ōtāiti.
8. The people of Motiti’s kaitiaki commitments to Ōtāiti are evident in both the historical and modern ways used to manage the kaimoana on and around Ōtāiti. For example, after people would catch fish they would share the catch with the whanau or hapu groups. Sharing the days catch maintains whanau links and provides thanks to Tangaroa (God of the sea) for providing the catch. These activities are embedded in the way of life of the people of Motiti to ensure that ocean resources are preserved for future generations. The kaitiaki responsibility is infused in the commitment to sustain the coastal marine area of Ōtāiti to pass the same marine coastal area and activities onto the future generations.

The essence of a strong cultural relationship between the people of Motiti and Ōtāiti is substantial and confirmed by the Waitangi Tribunal stating that "the Crown does not seek to challenge the relationship of tangata whenua to the reef…the Crown accepts the reef is a taonga for the tangata whenua".[228] In emphasis, tangata whenua (people of the land) refers to the people of Motiti and; therefore, the people of Motiti, who are tangata whenua of Ōtāiti, hold an entrenched cultural and spiritual connection through their continued practice of kai moana gathering and karakia in the surrounding marine areas of Ōtāiti and Motiti.

As part of the cultural and spiritual connection, the landscape of Motiti is as important to the people of Motiti, akin to their connection to Ōtāiti.

2 The natural landscape of Motiti

> *Ko au ko Motiti, ko Motiti ko au [I am Motiti. Motiti is me].*[229]
>
> Umuhuri Matehaere (Kaumatua of Motiti)

Motiti is physically a small island with a land mass of 720 hectares inclusive of water springs allocated in different parts of the island.[230] Historically, Motiti was and still is occupied and farmed for many years. Today the people of Te Patuwai hapū,[231] Ngāti Maumoana and Whanau of Tauwhao hapū whakapapa

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[228] Waitangi Tribunal The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 13.

[229] Umuhuri Matehaere "Statement of Evidence of Umuhuri Matehaere on Behalf of Motiti Rohe Moana Trust" (Robert Enright, Barrister, Auckland, 25 October 2017) at para [9]-[15].

[230] *Hoete v Minister of Local Government* [2012] NZEnvC 282 at 4.

[231] Te Rūnanga o Ngāti Awa Act 2005, s 3. One of the 22 hapū within Ngati Awa iwi of Whakatane in the Bay of Plenty region.

(genealogical link) to Motiti.[232] Therefore, the landscape of Motiti and its surrounding marine area have a history strongly linked with Māori.

Figure 6 MV Rena at Ōtāiti and Motiti Island in the background, taken by Adrienne Paul

Further, the coastal marine area of Motiti includes the pastoral landscape. Motiti is predominantly used for farming because the soil is highly fertile and productive, despite the fact that, Motiti has been ecologically insignificant due to exposure to excessive erosion of the surrounding cliffs in certain areas around Motiti.[233]

Currently, the landscape of Motiti both the northern and southern parts of the island are set up differently. The northern section of Motiti currently has a “rich

[232] *Motiti Avocados Limited v The Minister of Local Government [2013] NZHC 1268* at [6]. See also Nepia Ranapia "Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust" (Robert Enright, Barrister, Auckland, 25 October 2017) at para [9]-[15]. Whanau of Tauwhao is one of 11 hapū within the Ngai Te Rangi iwi of Tauranga in the Bay of Plenty region.

[233] *Motiti Avocados Limited v The Minister of Local Government* [2013] NZHC 1268, above n 15, at [[12]]. Department of Internal Affairs “Motiti Island Environmental Management Plan” (May 2016).

tapestry" of Pa, also known as Marae (Māori meeting house)[234], which also spread across the rest of Motiti in certain locations occupied by existing residents. Additionally, there are certain wahi tapu areas[235] across the island, which include outlying coastal rocks and other heritage sites surrounding Motiti and Ōtāiti.[236] Hence, there is a rich Māori cultural community residing on Motiti at present.

Complementary to this, the southern section of Motiti is visibly an establishment of avocado orchards planted by the Wills family and the company named Motiti Avocado Limited ("MAL").[237] The majority of the landscape in the southern part of Motiti is made up of avocado trees with coniferous shelterbelts.[238] The Wills family and their business have been influential from an economic perspective and providing employment opportunities for the people residing on Motiti. Donald Wills articulates how he came to Motiti:[239]

> In 1979 my brother Vernon and I bought a farm on Motiti Island from Mr Patterson's family that comprised of approximately half of the land on the Island which has been converted from Māori title into freehold title in the late 1800's…My part of the Motiti farm was sold and is now owned by MAL Properties. This is run as a largescale commercial avocado orchard. I retained a portfolio of it (25 Hectares) and my son and I operate this as an avocado orchard as well.

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[234] At 4.

[235] Heritage New Zealand Pouhere Taonga Act 2014 s 6. Wahi tapu is a place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense)

[236] *Motiti Avocados Limited v The Minister of Local Government* [2013] NZHC 1268, above n 15, at [12].

[237] *A*t [12].

[238] At [12].

[239] Environment Court "Statement of Evidence on Behalf of MEMI INC by Donald Geoffrey Wills a Section 274 Part" (Kate Barry-Piceno, Barrister, Mt Maunganui: Chris Rejthar, Advocate Legal Limited, Tauranga, 22 December 2016) at para [2].

Thus, Motiti, although quite small, is very diverse in terms of the way the landscape is operated or managed by the people residing on the island. Historically, Motiti was and still is held in accordance with tikanga by Māori, as explained through the evidence of Pouroto Ngaropo.[240] A considerable portion of the southern part of the island was sold in 1884, which is presently occupied by members of the Wills family and MAL. Therefore, the northern portion of Motiti is currently held by Te Patuwai Māori, and the southern portion is largely held by the Wills family, MAL, Te Patuwai and the people of Tauwhao heritage.[241] The majority of Māori occupy the northern end of Motiti.

3 The people of Motiti

> Nga Hapu o Te Moutere o Motiti were and are a sea people. We depend on the sea for its resources, and kai moana (seafood) was our staple diet….As a sea people, we studied and understood the life of the sea creatures in the surrounding moana.…The Māori view of the sea is that…Tikanga comes from the connection of people to the living environment and it is the role and duty of tangata whenua turangawaewae to uphold the protection of the environment…[242]

The cultural perspective of Motiti embody the understanding and importance of how the natural and physical environment is perceived by the people of Motiti and their oral traditions passed down by their Atua (gods) through the generations.[243]

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[240] Maori Land Court *Maketu Minute Book 27 -35* (Maori Land Court, 1867–1868) at 27. See also, Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at para 8(b)-(c).

[241] *Motiti Avocados Limited v The Minister of Local Government* [2013] NZHC 1268, above n 15, at [6].

[242] Environment Court (ENV 2015 AKL 0000134) "Statement of Evidence of Nepia Ranapia on behalf of Motiti Rohe Moana Trust" (25, October 2017) at 7-9.

[243] John Patterson "Respecting Nature: the Māori Way" (1999) 29 The Ecologist at 33. See also Michael King *Te Ao Hurihuri The World Moves On: Aspects of Maoritanga* (3rd ed, Longman Paul Limited, Auckland, New Zealand, 1981) at 156–161. See also Michael King *Nga Iwi O Te Motu 1000 Years of Maori History* (revised ed, Reed Publishing (NZ) Ltd, Auckland, New Zealand, 2001) at 7.

From a personal perspective, as previously mentioned, I have whakapapa links to Motiti through both my mother and father. Through my childhood memories, of swimming, kai moana gathering (diving), fishing off the rocks, working on the Marae, helping other whānau members (garden/building maintenance) and having heard the plethora of oral traditions passed down by my Kaumatua (elderly man) and Kuia (elderly woman) has instilled the aroha (love) and strength to continue sharing the knowledge with others, as this manaakitanga value is a continued practice that has been taught by my elders. These memories, customs/practices and oral traditions are respectfully cherished, as a way of living and belief system that drives my passion to express it throughout this thesis, which will give it cultural value and purpose in this legal context. With this in mind, the following section reflects the general cultural importance of Motiti. Thus, the spiritual connection from Motiti to Ōtāiti, and then the joining pathway to Hawaikinui (ancestral homeland/heavens).

4 The pathway between the physical world and spiritual world

For Motiti, transmitting oral traditions or narratives through the generations have been through certain creation stories about Ranginui (God of the sky) and Papatūānuku (God of the earth), which is a belief system instilled in people's learning and to help make sense of the world around them. The creation stories provide an understanding of when all things in this world came to be.[244] There are many versions of the oral tradition. Therefore, the underpinning philosophy of the Māori worldview through the creation story will be exemplified and then refined to the view of the people of Motiti.

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[244] Michael King *Nga Iwi O Te Motu 1000 Years of Maori History* (revised ed, Reed Publishing (NZ) Ltd, Auckland, New Zealand, 2001) at 7. Royal, Te A. C. (Ed.). *The Woven Universe: Selected Writings of Rev. Maori Marsden*. Otaki: Estate of Rev. Maori Marsden, 2003. See also Chanel Phillips, Chanel & Jackson, Anne-Marie & Hakopa, Hauiti. "Creation Narratives of Mahinga Kai" (2016) MAI Journal: A New Zealand Journal of Indigenous Scholarship. 5. 63-75 at 64.

Generally, the understanding of the cultural and spiritual connection of Māori to the whenua (land) is perceived by Māori, as a unified whole. A unified whole, as being all elements derived from one common ancestral source, which is genealogically connected (whakapapa).[245] According to a discussion addressing the clash between Western and Māori culture in the context of environmental law and policy, Ulrich Klein describes the genealogy connection as, a genealogical web where the whakapapa (genealogy) from Te Kore (the nothingness/darkness) unravels like a web through the descendants of Ranginui and Papatūānuku. Ranginui and Papatūānuku hold the role in the "creation and control of the natural world"[246] which forms the ingrained "spirituality of all things in the universe as the basis of their interconnection".[247]

Byron Rangiwai explains the matrix of whakapapa confirming that:[248]

> Whakapapa is a matrix for understanding and relating to the world. Whakapapa literally means to layer up. It describes and illustrates the connections between Māori and the environment from the creation to the present.

[245] Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at para 8(b)-(c). See also Ulrich Klein "Belief-View on Nature-Western Environmental Ethics and Maori World Views" (2000) 4 NZJEnvtlL at 105.

[246] Ulrich Klein "Belief-View on Nature-Western Environmental Ethics and Maori World Views" (2000) 4 NZJEnvtlL at 105.

[247] At 105.

[248] Rangiwai, Byron. "Ko au ko te taiao, ko te taiao ko au–I am the environment and the environment is me: A Māori theology of the environment." *Te Kaharoa* 11, no. 1 (2018) at

Further, the creation story begins at the realm of Te Korekore or Te Kore which is referred to as the void or the nothingness, Reverend Māori Marsden affirms that:[249]

> Te Korekore is the realm between non-being and being: that is, the realm of potential being. This is the realm of primal, elemental energy or latent being. It is here that the seed-stuff of the universe and all created things gestate. It is the womb from which all things proceed…

Equally, for Motiti the whakapapa matrix is reflected through Tribal creation stories (oral tradition) passed down through the generations to enhance and maintain their connection with the environment further clarifying why their experience and perspective of the world is genealogically interconnected with the environment like a genealogical web. Therefore, the following whakapapa from a version of the creation story illustrate the general experience and understanding of the Māori worldview:[250]

- In the beginning, only Io (supreme God, Creator) within the surrounding emptiness or nothingness in the realm of Te Korekore (the realm of potential being). Io's essence fertilised Te Korekore and created the world of becoming or being.
- Io created the night realms, Hawaiki (ancestral home), as well as, the supernatural gods Ranginui (Sky Father) and Papatūānuku (Mother Earth) who were embraced as one being. They produced their children who were

[249] Royal, T. C. *The woven universe: Selected writings of Rev. Māori Marsden*. Ōtaki, New Zealand: Estate of Rev. Māori Marsden (Ed, 2003) at 20.

[250] "Belief-View on Nature-Western Environmental Ethics and Maori World Views", at 105–108. See also Stephen Duffin J "The Environmental Views of John Locke and the Maori People of New Zealand" (2004) 26 Environmental Ethics 381 at 390–392.

also supernatural gods, who lived within Ranginui and Papatuanuku's close embrace. Each god is responsible for a specific part of the natural environment, for example:

- Tanemahuta – eldest born god of the forest and all things that inhabit them;
- Tumatauenga – the god of war;
- Rongomatane and Haumiaketike – the gods of cultivated and uncultivated food;
- Tangaroa – god of the sea
- Tawhirimatea – youngest born god of wind and storms

- The supernatural gods grew tired of being within the embrace of their parents Ranginui and Papatūānuku. They decided to separate their parents, carried out by Tanemahuta. The separation caused immense pain for Ranginui and Papatūānuku; therefore, a war amongst the other gods arose. Tane defeated all the gods except for the youngest, Tawhirimatea.

Subsequently, the gods sustained existence in a world that was created, as a result of separating their parents. Tane then created the first human being made from the earth and called Hineahuone (female form). Tane gave the "breath of life" to Hineahuone by breathing into her nostrils. Tane and Hineahuone then procreated the first human being. The first human was their daughter Hine-titama who continued the human life line with Tane.

Evidently, the creation story has many different versions by iwi Māori in Aotearoa New Zealand, passed down through oral tradition. For Ngāti Awa, this oral tradition of the creation story aligns with their belief of 10 heavens existing within the realm Io (supreme god). The oral tradition describes the cultural connection

between Motiti and Ōtāiti expressed by the Cultural Advisor to the Chief Executive Office for Te Rūnanga o Ngāti Awa:[251]

1. There are 10 heavens that represent the following:
    - Kikorangi – home of the winds and storms
    - Wakamaru – home of rain and sunshine
    - Ngaroto – home of lakes whose spray forms the rain
    - Hauora – birthplace of mauri from the spring Waiora o Tane
    - Ngatauira – home of the spiritual attendants of the lower realms
    - Nga Atua – birthplace of Ranginui, Papatuanuku, and their children
    - Autoia – the soul and wairua of all things created
    - Aukume – dwelling place of the souls and spirits of the departed
    - Wairua – home of the protectors of Io-Whatukura and Mareikura
    - Naherangi – supreme home of Io-Matangireia.

2. Subsequent to the separation of Ranginui and Papatūānuku, their children (supernatural gods) lived in the lower realms of Te Ao Marama (daylight). Io wanted to learn, who out of Ranginui and Papatūānuku's children could retrieve the four baskets of *Knowledge* from the 10th heaven and bring them to Te Ao Marama.
3. Io entrusted his attendant Rehua Ariki to proceed to the lower realm of Te Ao Marama to find who could make that journey. Rehua Ariki used a waka named *Te Waka o Tamarereti* to assist with his journey from the heavens. Rakahore (spirit of stones and islands) the son of Tangaroa (god of the sea) prepared for Rehua Ariki's arrival. Rakahore used stepping stones and ancient talismans to pave the way for Rehua Ariki. Rehua Ariki used the

[251] Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at 2-3. See also Bay of Plenty Regional Council Toi Moana <final-hearing-statement-pouroto-ngaropo>.

stars and Rakahore's talisman to provide guidance to the lower realm of Te Ao Marama.

4. When Rehua Ariki arrived in the lower realm of Te Ao Marama; he places one foot on a rock named *Te Papae Ariki o Rehua*. Te Paepae Ariki o Rehua is currently known as Ōtāiti. Then Rehua Ariki places his other foot on Mata Rehua (Face of Rehua). The story behind this event says that many years later this rock formation was renamed by Ngatoroirangi (Tohunga, Priest, and Chief) also known as, "heaven's runner or traveler in the heavens"[252] from Hawaiki (ancestral home of Māori) who guided the Te Arawa waka (canoe) to New Zealand.
5. Further, Rehua Ariki chose Tawhaki as the potential one to retrieve the 4 baskets of knowledge from the 10 heavens. Hence, Tawhaki and his younger brother Karihi set out to obtain the baskets by climbing the vine called Te *Aka Matua* from the sacred rock named *Otuawhaki* (Whakatane). But as Tawhaki and Karihi ascended the vine, their uncle Whiro challenged Tawhaki, because Whiro wanted the glory and honour from retrieving the baskets. A battle broke out between Tawhaki and Whiro (this event influenced the meaning of Makutu – sorcery). In observation, Rehua Ariki pulled a kutu (small flat bodied insect – lice) from his hair, this kutu had the power of a protection shield for Tawhaki to proceed on his journey up *Te Aka Matua.* However, as Tawhaki climbed, his brother lost his grip on *Te Aka Matua* and fell to the ground.
6. Tawhaki continued the ascent and came across a blind woman counting 12 Taro, her name was Whaitiri. Tawhaki slowly took away Whaitiri's taro and gave her Karihi's eyes to restore her sight. In return, Whaitiri gave Tawhaki one of her grand-daughters named Maikuku Makaka to marry. Tawhaki and

[252] Evelyn Stokes *The Legacy of Ngatoroirangi: Maori Customary Use of Geothermal Resources* (The University of Waikato 2000) at 24.

Maikuku Makaka lived there for some time on the condition that he was not to sleep with his wife in the open, outside their whare. Tawhaki broke this condition and as a result, Maikuku Makaka's family took her to the upper level of the heavens. Tawhaki then followed, by using a kite given by Whaitiri. However, Io did not approve of Tawhaki using the kite to ascend to the heavens and sent down a great bird named *Hokio kia Io* to stop Tawhaki. The kite fell to the ground and Tawhaki continued his journey to the heavens. Finally, Tawhaki arrived at the uppermost heaven and received the four Baskets of Knowledge from Rehua Ariki.

7. Io then gave Rehua Ariki two sacred mauri stones called *Te Mawe a* Tane and *Te Mawe a Tangaroa*. These yellow coloured stones were used to enable the four Baskets of Knowledge to transform from the spiritual realm to the physical realm of Te Ao Marama (daylight).
8. The sacred mauri stones and the four Baskets of Knowledge were taken from the heavens. Tawhaki used the sun to descend into the physical realm and he then climbed onto a rainbow where he saw the guidance of the Talisman rocks used by Rehua Ariki to guide him. Once Tawhaki neared the ocean, he used *Te Aka Matua* (the vine) to land on the ground. This pathway Tawhaki used was called *Matangaireia.*
9. Tawhaki then planted into the ground the two sacred mauri stones from Io, so that the four Baskets of Knowledge could transform. A tree with yellow flowers instantly grew. Tawhaki named the tree *Turitea Matakatia* to commemorate his descent from the heavens. At present, the yellow trees of Tawhaki are still present on Motiti, as the yellow Pohutukawa.
10. As a result of planting the sacred mauri stone, Tawhaki named the landmass *Te Whatukura a Tawhaki* (the resting place of the mauri stones of Io – where Tawhaki brought the knowledge to mankind). Currently, *Te Whatukura a Tawhaki* is now known as Motiti Island.
11. Rehua Ariki then summoned Tangaroa (god of the sea) to offer him with the Karakia Tawhito (prayer) named *Uruuru Whenua* in respect of placing a mauri over Tangaroa's sacred whare (house) *Hauteananui*, all fish, mammals, and plants with the realm of Tangaroa.

12. Rehua Ariki then left from the physical realm, to return to Io in the uppermost heaven to let Io know about Tawhaki's journey of retrieving the four Baskets of Knowledge. Once Rehua Ariki left, Tangaroa (god of the ocean) directed his nephew Te Makoirangi, who descend from the patupaiarehe (fairy-spirits), to retrieve the rock formation where Rehua Ariki stood when he arrived in the physical realm.
13. When Te Makoirangi carried out this task, it demonstrated Tangaroa acknowledging the presence of Io and Rehua Ariki in the physical realm at *Te Paepae Ariki o Rehua* (Ōtāiti) and *Mata Rehua* (currently known as Taumaihi Island, which is connected to Motiti Island). Both of the formations gift the presence of the spiritual leaping place or *Te Rerenga o nga Wairua o Ngāti Awa*. It is accepted as true, that the spirits depart from Otaiti and follow the same journey, as Rehua Ariki took on his return back to the 10th heaven of Io (in the house of *Matangaireia*).
14. At that time and also currently, Kaitiaki (guardians of the natural area) of this sacred place is known as the following:
    - Ruamano and Tutarakauika (Whale)
    - Hinekorito and Hinemekehu (Dolphins
    - Mangopare (Hammerhead Shark) and
    - Te Whai (Stingray)
15. It is said by the hapū of Te Patuwai that during the time a tangihanga (funeral) is carried on Motiti Island two dolphins or Kaitiaki always appear at the foot of the Urupa (cemetery located on the cliffside facing Ōtāiti) waiting to escort the spirits of those who have passed over from the physical realm to the spiritual realm.

Based on the above Te Ao Māori oral traditions of the creation story regarding Io (Supreme Being), and the whakapapa (genealogical connection): from Io to the supernatural beings responsible for specific areas of the environment (e.g Tane and Tangaroa) through to the creation of the first human being all connected to each other holistically. This underpinning belief system gives the in-depth

understanding and experience of why Māori in general and specifically Motiti Māori are one and the same with their surrounding environment.

The significance of the founding belief system relative to Ōtāiti is *Te Rerenga o nga Wairua o Ngāti Awa*, which is the spiritual pathway back to Hawaikinui (Ancestral homeland/heavens), guided by the stepping stones placed by Rakahore (Ōtāiti and Mata Rehua) for Rehua Ariki (Io's attendant) to travel between the physical world and the spiritual world (lower level of Te Ao Marama). This pathway is physically expressed through the tangible location of Ōtāiti and Mata Rehua. The connection top Motiti occurs when people of Motiti pass away, their spirit leaps off the cliff, where the Urupa (cemetery) is situated, and their spirit uses the stepping stones to travel along *Te Rerenga o nga Wairua o Ngāti Awa* back to the home to Hawaikinui. The stepping stone at Ōtāiti is the pathway back home for the people of Motiti.

5 The spiritual connection to Motiti

Complementary to *Te Rerenga o nga Wairua o Ngāti Awa* (leaping onto the stepping stones of Ōtāiti along the spiritual pathway back to Hawaikinui), additionally the nature of the Māori worldview expressed by Nepia Ranapia, Kaumatua of Motiti relative to the significance of Ōtāiti declares:[253]

> 6.1 The hapū of Motiti have traditionally regarded Ōtāiti as tapu and have ensured that tapu is lifted and replaced when gathering Kaimoana there.
>
> 6.2 For the hapū of Motiti, the surround rohe moana, with its numerous rocks and reefs is particularly important both spiritually and for food gathering.
>
> 6.3 Ōtāiti is a taonga and wāhi tapu, and has considerable cultural significance as Ngatoroirangi's spiritual entry to the island and for the culturally important practice of catching the Karutataka for special occasions on the mainland, or when visitors were invited to Motiti…

[253] Environment Court "Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust" (RB Enright, Barrister, Auckland, 25 October 2017) at para [6].

6.5 Ōtāiti, together with the other islands, reefs and toka (rocks) in the sea surrounding Motiti, is spiritually connected to the rock on Motiti known as Te Kopu Whakāiri/Tu Whakāiri – the womb of this sacred island. In this way, ōtaiti is one of a number of physical anchors which hold the spiritual essence – the mauri – which allows te kaitiaki to exist.

Nepia Ranapia further emphasises the spiritual connection to Ōtaiti through an expression of ancient Karakia declaring that connection:[254]

6.6 Spiritually, the mauri of Ōtāiti is connected to the people of Motiti and their traditions…

6.9 The spiritual importance of Ōtāiti to Motiti is touched on in an old karakia that begins:

> Ko te raa whakatau whakataa whakaiti ko maamangi hia nga puke wharuarua ki te potaka o te upoko o karapu ki te moana o tuhua ee, ko te raparapa ki te whenua o te kopu whakaairi, ko motu iti hia ra tena, ko to pito o te ao, ko te tokoroa kua haangai tatai arorangi ko motu nau hia, ko te raparapa kua haangai ki te tapatoru o te puwerewere, ko te ara whakareretanga e whaiatu nei ko nga hutu o te rangi, …

6.10 This Karakia has links to many spiritual cultural areas on land and sea, and with the elements of nature. It speaks of the connection of …the island itself…and to the whakapapa of the ancestors in the spiritual world.

The mauri (essence or life force) is therefore of historical and cultural importance to the hapū of Motiti. As a result, the spiritual link from Ōtāiti connects to the womb of Motiti and the umbilical cord of the heavens. The umbilical cord links to the spiritual dome of the Maamangi (the sea area to the north of the island – including Ōtāiti, with Motiti and the sacred rocks on the island itself) that feeds spiritual energy into the womb of Motiti, which in turn nourishes the spiritual life force of Motiti and the people of Motiti. Reflecting on the creation story from the perspective of the people of Motiti (oral tradition), their oral traditions strongly

[254] Environment Court "Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust" (RB Enright, Barrister, Auckland, 25 October 2017) at para [6].

connect them to Ōtāiti as a founding belief system and knowledge-base that feeds into their customs and practices infused within a spiritual nature.

Over time, the above oral traditions that have passed down through the generations outlining how the people of Motiti perceive, understand and experience the environment in a cultural sense.[255] The oral traditions illustrate Te Ao Māori giving context to their physical and spiritual environment of Motiti and Ōtāiti. Therefore, this cultural context explaining the environment and their kaitiaki (guardians of the ocean i.e string rays, sharks, octopus etc) existing to protect the surrounding natural environment of Motiti and Ōtāiti. It is natural for the people of Motiti to protect the environment, due to situations akin to the MV Rena grounding. These factors contribute to an understanding of why the people of Motiti would consider the grounding impact as an injustice.[256]

Other relevant oral traditions explaining the nature of kaitiaki (protective guardians of a specific area) by one of the kuia from Motiti, Elaine Butler emphasised that:[257]

1. There is an older kaitiaki korero tradition around Motiti and Otaiti known to Ngai Te Hapu, which relates to taniwha. For Otaiti, the kaitiaki taniwha is a pioke, known as, a white shark. Another is the whai, known as, a white stingray taniwha at Marumaru on the northern end of Motiti. The other kaitiaki taniwha is a giant wheke, known as, an octopus. The role of these kaitiaki taniwha is to protect the area against man because in their world

[255] DNT King and Skipper W Tawhai "Māori environmental knowledge of local weather and climate change in Aotearoa - New Zealand" (2008) 90 Climate Change 385 at 387, in the context of climate change.

[256] Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at para 8(b)-(c).

[257] Elaine Rangi Butler *"Submission from Elaine Rangi Butler on behalf of Ngai Te Hapu Incorporated"* (Bay of Plenty Regional Council, 2015) at 6–8.

(Tangaroa's world – the ocean) these kaitiaki taniwha were superior to man, in a physical sense.[258]

2. Accordingly, it is nga Tamariki o Tangaroa nga kaitiaki (children of Tangaroa – god of the ocean) Tangaroa's children who are the proper kaitiaki of the Moana (ocean). This is the korero tuturu (established or spoken before) and reflects the korero of Tawhito. It is when nga Tamariki o Tangaroa nga kaitiaki is unable to defend itself when our role as, human beings, is when kaitiaki it triggered. We must act as the protectors of the tuturu Tawhito world because that world is not equipped to protect itself from events such as the MV Rena.[259] Therefore, the role of being Kaitiaki for Otaiti which was passed down by those who have gone before must be executed to protect Te Ao Māori.

In addition, another kuia from Motiti, Eunice Evans, emphasised the role of Kaitiaki on Ōtāiti, stating that:[260]

> …its significance to many who consider themselves to have a Kaitiaki duty towards this issue. It is accepted that all of us with whakapapa to Motiti consider we have a strong Kaitiakitanga obligation to protect Otaiti as a Toanga.

Elaine Rangi Butler and Eunice Evans, reflect the oral tradition for Kaitiaki Taniwha (guardians), for Ōtāiti the white shark and for Motiti the stingray and octopus. All Kaitiaki having a protective role over their particular environmental marine area against human activity. Additionally, having a Kaitiaki Taniwha protecting the marine area means that for the people of Motiti, their role is to

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[258] At 6.

[259] At 6–7.

[260] Environment Court "Statement of Evidence on Behalf of MEMI Inc a Section 274 Party by Eunice Evans" (Kate Barry-Piceno, Barrister, Mt Maunganui: Chris Rejthar, Advocate Legal Limited, Tauranga, 22 December 2016) at para [30].

protect the Kaitiaki Taniwha to enable their roles within the surrounding ecosystem. Protecting the Kaitiaki Taniwha aligns with environmental ethics.

According to Stephen Duffin, the environmental ethics trend has clearly criticised the traditional Western anthropocentric attitude toward nature, as being the opposite of the Māori perspective of the environment.[261] Therefore, because Te Ao Māori reflects the cultural, spiritual and physical importance of the landscape: the people of Motiti have a strong connection with both Motiti and Ōtāiti in a substantially holistic way.[262] Mindfully, this connection is an in-depth link of the people to place. Combined with this environmental landscape of place and the people of Motiti relative to Ōtāiti, there is also an economic presence.

6 Why is economics important to Motiti

Focusing on the economic context of Motiti, this relates to how the people of Motiti fund their living in relation to infrastructure, roading, drainage, and sewage for example.[263] This section will explain in its basic form what the economic context entails and then apply this context to Motiti to demonstrate aspects economic importance.

Initially, economics is a very broad area and can be applied in an interdisciplinary fashion if it is put to practical use in the environmental context.[264] While this is the case, economics will be explained from the basic understanding which will lead

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[261] Duffin, above n 50, at 381.

[262] Patterson, above n 44, at 33. See also Michael King *Te Ao Hurihuri The World Moves On: Aspects of Maoritanga* (3rd ed, Longman Paul Limited, Auckland, New Zealand, 1981) at 156–161.

[263] Umuhuri Matehaere "Statement of Evidence of Umuhuri Matehaere on Behalf of Motiti Rohe Moana Trust" (Robert Enright, Barrister, Auckland, 25 October 2017) at para [20].

[264] Steven C Hackett *Environmental and Natural Resources Economics* (MESharpe, Inc, 2005) at 3.

into environmental economics. Therefore, economics can be explained by first understanding the economy in order to interpret it's meaning.[265]

Subsequently, Thomas Sowell explains that in order to know "what economics is, we must first know what an economy is"[266] and to view the economy as being a system for the production and distribution of the goods and services used in day to day operation.[267] Additionally, the classic definition of economics states that it "is the study of the use of scarce resources which have alternative uses".[268] The key point is to study *how* scarce resources, goods and services are allocated amid competing uses. Applying scarce resources, goods and services, Motiti is a remote island 4 nautical miles from the mainland beach of Tauranga, which illustrates that resources are scarce and the people of Motiti rely on the surround marine environment.[269]

Further, allocation depends on the condition of scarcity. Scarcity means there is a lack of resources to provide for consumer demand. Whereby, scarcity makes choices unavoidable, and compels a consumer to choose from a group of alternative options, based on what the consumer decides as the best option for their situation.[270] For example, when you choose to buy a slice of cake, as an alternative to a salad, that choice is an economic decision. When a consumer has to decide based on what scarce options are available, that decision requires a system of value from which to compare the alternative options and being aware

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[265] Thomas Sowell *Basic Economics: A Common Sense Guide to the Economy (5)* (Basic Books, New York, 2014) at 2.

[266] At 2.

[267] At 2.

[268] At 2.

[269] Umuhuri Matehaere "Statement of Evidence of Umuhuri Matehaere on Behalf of Motiti Rohe Moana Trust" (Robert Enright, Barrister, Auckland, 25 October 2017) at para [21].

[270] Alfred Endres and Iain L Fraser *Environmental Economics: Theory and Policy* (Cambridge University Press, 2010) at 1.

of the consequences of that decision. Therefore, economics is about understanding the system in which we live in to decide how to deal with the resources, goods and services, in which that system provides, in order to distinguish which alternative options to pick, while being aware of the consequence of that decision.[271]

In application of the economic allocation measure to the people of Motiti, Umuhuri Matehaere explains the practical options available to the people of Motiti:[272]

> Motiti has always been a place of plenty…there were no fridges or anything like that on the island. We lived a subsistence lifestyle, trading for essentials we could not grow or catch ourselves. Everything we ate came off the land (kumara, potatoes, maize) and from the sea. Both women and men fished, depending on who was available…Men spent most of their time during the day cultivating the land for maize and kumara, repairing plant and equipment and occasionally going venture boat fishing and rock fishing at night.

Clearly, the practical economic aspect in respect of allocation measures for resource, goods and services where practiced in a very different way to how Thomas Sowell explains. As a result, the people of Motiti, being an isolated island, had to work together in a subsistent way to provide for the whole community of Motiti, while knowing that their rare resources was to the land and sea, demonstrating how important their marine environment is to their community, culture and way of living.

To extend, the notion of economics into an environmental context Steven Hackett explains sustainability in relation to cultures, calls for a more inclusive view of development and well-being, which takes into account: ecological health, natural

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[271] Sowell, above n 61, at 2.

[272] Umuhuri Matehaere "Statement of Evidence of Umuhuri Matehaere on Behalf of Motiti Rohe Moana Trust" (Robert Enright, Barrister, Auckland, 25 October 2017) at para [21].

resources stacks, just communities and democratic processes. For instance, sustainability is where the roots of an individual can be traced back to primary origins which developed over time based on decisions that relate to the well-being of tribal people seven generations into the future.[273] Equally important, sustainability viewed within the discipline of economics refers to issues of intergenerational equity and constraints on economic growth and capital. Therefore, environmental economics is about managing the environment in a way that maximises the value of environmental decision making, which is then measured in money. For the people of Motiti, sustainability is entrenched in the cultural practices of mahinga kai (food gathering) as indicated by Umuhuri Matehaere:[274]

> Historically, it is the wāhine of Motiti that have gathered and hunted the Kaimoana. Women would go diving for crayfish, kina and paua at least three times a week, or even daily. This is still the custom on the island today.

As indicated, the people of Motiti were and still are extremely sustainable with regard to gathering resources from the ocean. Hence, how important the surrounding marine environment is to the people of Motiti. Generally, environmental economics in terms of illustrating the economy in the Bay of Plenty region can be seen through the MV Rena resource consent application.[275]

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[273] Steven C Hackett *Environmental and Natural Resources Economics* (MESharpe, Inc, 2005) at 324.

[274] Umuhuri Matehaere "Statement of Evidence of Umuhuri Matehaere on Behalf of Motiti Rohe Moana Trust" (Robert Enright, Barrister, Auckland, 25 October 2017) at para [21].

[275] Beca Carter Hollings & Ferner Ltd *APPLICATION FOR RESOURCE CONSENT (MV RENA) VOLUME ONE* (Beca 2014, 2014) at 73.

The evidence of James Fairgray explains the economic concepts relevant to the MV Rena:[276]

> Such assessment of outcomes and their distribution is at the core of economics regarding welfare (or utility) of individuals and groups. A considerable part of the study of economics is devoted to identifying and understanding, and quantifying where possible, the nature and incidence of welfare gains and losses as a result of different policies or actions and their outcomes…The Rena grounding has implications for cultural values, insofar, as the impacts represent a diminution of pre-Rena values – that is, a loss, or reduction in welfare (or utility).

Applying the economic perspective to the grounding links with the consequence of the resource consent application, which then identifies the economy relative to the effects of the MV Rena vessel on Ōtāiti demonstrating the potential welfare loss as a result. The economy describes the associated with Primary Industries and the Port of Tauranga. Whereas, Tourism would form a crucial sector of this economy and of employment activity in the area. For example, the economic opportunities created by the resource consent application relates to the benefits for Local businesses, such as recreational and commercial diving operations.[277] Therefore, in a regional coastal sense of Bay of Plenty the economy would stem from the association with primary industries relative to the tourism context. This economy would also extend to Ōtāiti and Motiti, because of the proximity and connection with the MV Rena situation.

Furthermore, applying the economic notion to the area of Ōtāiti and Motiti can be found in the history of how Motiti was operated, as mention above in respect of

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[276] Environment Court "Primary Statement of Evidence of James Douglas Marshall Fairgray for Iwi Appellants" (RA Makgill, Barrister, Auckland: JA Carr, Burton Partners, Auckland, 3 January 2017) at 21-23.

[277] At 73.

how the land was predominantly used. Motiti was economically utilised for farming and its high fertile and productive landscape.[278]

In particular, the southern part of Motiti is an established avocado orchard with the intention of production.[279] Thus, there is significant economic potential existing on Motiti that may form a part of the economy outlined in the MV Rena resource consent application due to the physical proximity to the grounding on Ōtāiti and the fact that Motiti is currently subjected to environmental regulations that could assist in establishing certain economic benefits.

Consequently, the potential for economic sustainability on Motiti also involve certain barriers that require consideration, such as Motiti having no infrastructure currently in place, which include the following:[280]

- No road network;
- No water supply;
- No sewage system;
- No public roads or footpaths;
- No power or wired phone system; and
- Three existing private airstrips and limited coastal access (by boat)

The above list demonstrates the lack of resources on Motiti combined with practical and logistical issues, as well as, education of the implementation of environmental regulations for the people of Motiti, such as the district plan. However, it also illustrates possible economic potential that could occur from the implementation of a district plan presently operative since May 2016. Therefore,

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[278] *Hoete v Minister of Local Government [2012] NZEnvC 282*, above n 13, at [12].
[279] *Motiti Avocados Limited v The Minister of Local Government [2013] NZHC 1268*, above n 15, at [12].
[280] At 69.

the economic context in relation to Motiti could possibly come into alignment with the mainland economy, as the people of Motiti is catching up with the environmental legal frameworks currently implemented. There could be both advantages and disadvantages in the environmental context economically, but both Motiti and the mainland may require some form of a positive push that would benefit Motiti and its economy.

In summary, the above sections addressed the cultural, environmental and economic aspects in relation to Motiti and Ōtāiti to provide an understanding of what existed on Motiti prior to the actual grounding of the MV Rena vessel in 2011. This section illustrates why the people of Motiti was severely affected by the grounding incident and therefore the flow of injustices that occurred. Thus, a description of the MV Rena grounding of and its environmental impacts are explored.

7 The physical structure of the MV Rena

The owner of the MV Rena vessel, Daina Shipping Company, a Liberian-based one-ship subsidiary company of the Greek shipping company Costamare Shipping Group (MV Rena owner/the owners).[281]

A twenty-two year old large container vessel, with the length of 236m, a weighing 38,788 tonnes; a breadth of 32.2 metres, and a draught of 12 metres when fully laden.[282] The MV Rena carried the capacity of 3,352 standard containers in seven

[281] The MV Rena was registered in Liberia. The owner is a Greek company, a subsidiary company of the Costamare Shipping Company; *Daina Shipping Company v Te Runanga o Ngati Awa (No 2)* [2013] NZHC 500 at [13]; Simon Judd, "Compensation for Pollution from the Rena," New Zealand Journal of Public and International Law 12, no. 2 (2014): 261-290 at 267.

[282] Tumanako, N. Fa'aui', Te Kipa Kepa, B. Morgan "restoring the Mauri to the Pre-MV Rena State" Vol 3 MAI Journal (2014) at 4. *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 1. See also Toni Dobson "The Maritime Transport Act 1994 and the MV

holds. More specifically, holding 1,368 containers of various cargoes, equipment and approximately, 1733 tonnes of heavy fuel oil on board.[283] Bunker oil is oil loaded into bunker tanks used for use as fuel.[284] With respect to the containers, eight hundred and twenty-one containers were located below deck and 547 containers were stowed on deck. More importantly, thirty-seven of those containers were identified as holding 'potentially harmful cargo', which included cryolite (a by-product of aluminium smelting), copper clove, and plastic beads, amongst other items.[285]

The MV Rena was an enormous seaworthy international shipping liner tasked with transporting goods for the people of Aotearoa New Zealand.

Another essential point, as part of transporting goods while en route, the vessel struck Ōtāiti.[286] Hence, the beginning of the injustice that the people of Motiti suffered. Undoubtedly, this particular incident was not only unknown to the people

Rena disaster - How effective is the Act in dealing with bunker oil spills?" [2013] RM Theory and Practice 174.

[283] *Maritime New Zealand v Daina Shipping Company DC CRI-2012-070-001872, 26 October 2012* at [2]. See also Waitangi Tribunal *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 1. See also HFE Jones, MTS Poot, JC Mullarney, WP de Lange & KR Bryan "Oil dispersal modelling: reanalysis of the *Rena* oil spill using open-source modelling tools" (2016) New Zealand Journal of Marine and Freshwater Research, 50:1,at 10.

[284] *Maritime New Zealand v Daina Shipping Company DC CRI-2012-070-001872, 26 October 2012* at [2]. See also *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 1. See also HFE Jones, MTS Poot, JC Mullarney, WP de Lange & KR Bryan "Oil dispersal modelling: reanalysis of the *Rena* oil spill using open-source modelling tools" (2016) New Zealand Journal of Marine and Freshwater Research, 50:1,at 10.

[285] Waitangi Tribunal The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 5; Beca Carter Hollings & Ferner Ltd APPLICATION FOR RESOURCE CONSENT (MV RENA) VOLUME THREE (Beca 2014, 2014) at 15.

[286] Waitangi Tribunal The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 5; Beca Carter Hollings & Ferner Ltd APPLICATION FOR RESOURCE CONSENT (MV RENA) VOLUME THREE (Beca 2014, 2014) at 15.

of Motiti. It was also unknown to the people of Aotearoa New Zealand who had no idea of what they were going to be involved in the aftermath of the incident.[287]

Consequently, the reason why the grounding was a destructive environmental event was due to the release of the cargo, debris, equipment, and the tonnes of oil entering the surrounding ocean where two main islands, reefs, plateaus and rocks belong.[288]

8 The grounding of the MV Rena and subsequent events

Figure 7 Taken from Motiti, the MV Rena vessel aground on Ōtāiti, taken by Pita Paul.

The grounding of the MV Rena container vessel on Ōtāiti was the "worst maritime environmental disaster" in Aotearoa New Zealand and the "second most expensive salvage operation in Maritime history".[289] The event occurred in the

[287] Personal account from the researcher, due to whakapapa connection to Motiti and its people.

[288] Craig L. Stevens, Joanne M. O'Callaghan, Stephen M. Chiswell & Mark G. Hadfield "Physical oceanography of New Zealand/Aotearoa shelf seas – a review" (2021) New Zealand Journal of Marine and Freshwater Research, 55:1 at 6.

[289] *Maritime New Zealand v Daina Shipping Company DC CRI-2012-070-001872, 26 October 2012* at [1],[2]. Mike Schuler "MV Rena Shipwreck: New Zealand's worst Maritime Disaster in Photos" GCaptain (5 October, 2021) at 1. GCaptain <gcaptain.com>; Hunter, SA & Tennyson, AJD et al "Assessing avian

early morning at approximately 2.14am on October 5th 2011, whereby the MV Rena vessel struck an offshore reef (Otaiti), at maximum speed, en route from Gisborne to Tauranga.[290] The location of Otaiti is twelve nautical miles north-east off Tauranga and 4 nautical miles north off Motiti. More specifically, figure 2 above depicts the approximate location as: Lat/Long: 37° 32.439' S, 176° 25.692' E.[291] Clearly, the location of the grounding site is close to Motiti and the surrounding coastline of Tauranga.[292] Therefore, the grounding site, illustrates the logistical sense of the extent the significant environmental effects had on the coastal marine area.

mortality during oil spills: a case study of the New Zealand MV 'Rena' oil spill, 2011" (2019) Endangered Species Research at 304.

[290] *Maritime New Zealand v Daina Shipping Company DC CRI-2012-070-001872, 26 October 2012* at [2]. See also Waitangi Tribunal *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 1. See also, Craig L. Stevens, Joanne M. et al "Physical oceanography of New Zealand/Aotearoa shelf seas – a review" (2021) *New Zealand Journal of Marine and Freshwater Research* 55:1 at 10.

[291] John Julian *Black Tide: The story behind the Rena disaster* (Hachette New Zealand Ltd, Auckland, New Zealand, 2012) at 32. Bevan Marten "The Rena and Liability" [2011] NZLJ at 341. "The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version", above n 1, at 1. Toni Dobson "The Maritime Transport Act 1994 and the MV Rena disaster - How effective is the Act in dealing with bunker oil spills?" [2013] RM Theory and Practice at 174. HFE Jones, et al "Oil dispersal modelling: reanalysis of the *Rena* oil spill using open-source modelling tools" (2016) New Zealand Journal of Marine and Freshwater Research, 50:1, at 10.

[292] Beca Carter Hollings & Ferner Ltd *APPLICATION FOR RESOURCE CONSENT (MV RENA) VOLUME ONE* (Beca 2014, 2014) at 14.

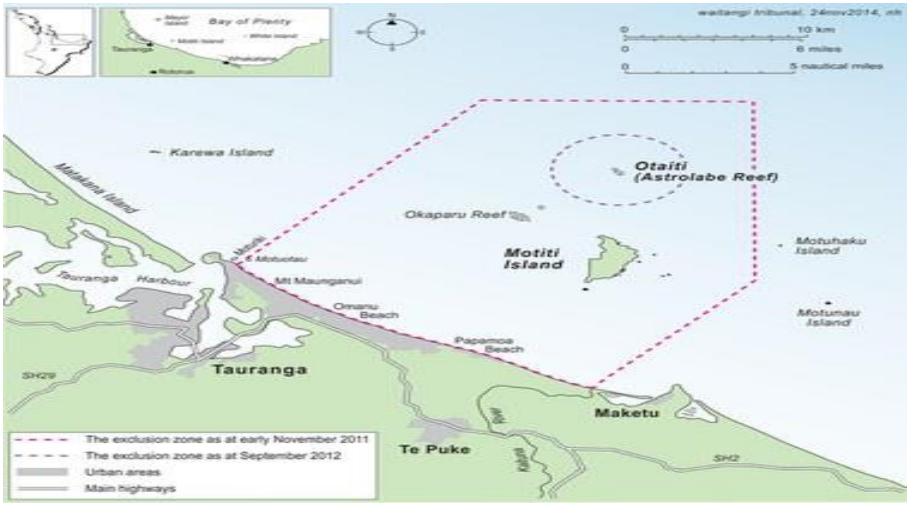

Figure 8 Otaiti (Astrolabe Reef), Motiti Island ,Tauranga Map.

Unfortunately, Simon Jude confirms the reason why the grounding occurred asserting that:[293]

> It appears that the master "became obsessed with the need to arrive at the pilot station outside Tauranga Harbour by 0300 hours[n8] and consequently sanctioned various shortcuts that departed from the vessel's passage plan. The second officer also sanctioned a short cut, which put the vessel on a collision course…The master failed to identify the problem and…the failure to plot the Rena's position accurately…and the failure to consult charts and other resources available on board that clearly and accurately showed the reef and its position.

Ian McLean supports this notion through his analysis of the grounding of the MV Rena and asserts that:[294]

[293] Simon Judd, "Compensation for Pollution from the Rena," New Zealand Journal of Public and International Law 12, no. 2 (2014) at 262.

[294] Ian G. McLean "Analysis of the grounding of the MV Rena in New Zealand, 5 October, 2011." PeerJ Preprints6 (2018) at 2.

> The ship was travelling from the south at cruising speed (17 knots) and was reported to have changed course in order to approach the harbour more directly before its pilotage window closed at 0300 hrs. The reef is well-marked on charts…the reef would not have been apparent to an alert observer if there was one on the bridge at that time.

With the master's decision to take short cuts and neglect identifying the situation correctly, considering that the reef was not visible at the time, the outcome of the grounding incident released 300-450 tonnes of heavy fuel oil and containers; with additional discharges of debris/content from the MV Rena.[295]

More importantly, on 7 January 2012, three months after the initial grounding, the MV Rena vessel was hit by severe weather conditions. During the storm, the vessel split in two pieces with the stern section sinking onto the surface of Otaiti. Subsequently, the stern section then slipped further down the slope of Otaiti (depth of 50 metres), due to Cyclone Lusi in March 2014.[296] The MV Rena rested in two parts on Otaiti with the stern section laying on the slope of Otaiti.

Once the MV Rena vessel sank and slid down the side of the reef, further environmental effects on the surrounding coastal marine area occurred.

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[295] Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014)* at 5; Bevan Marten, "Limitation of Liability in Maritime Law and Vessel-Source Pollution: A New Zealand Perspective," New Zealand Law Review 2013, no. 2 (2013) at 200.

[296] Waitangi Tribunal The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 5.

9 Environmental effects from the grounding

Figure 9 Clean-up volunteers on Motiti Island, taken by Pita Paul.

The environmental effects of the pollution to the surrounding coastal marine area extended beyond Ōtāiti and Motiti.[297] More specifically, the pollution caused an immense loss of kaimoana (seafood), which in effect largely impacts the consumption of Kaimoana (seafood) for the people of Motiti, demonstrating the gravity of the injustice on the people of Motiti.

To emphasise, David Schiel et al clarifies the extent of the environmental effects of the MV Rena shipwreck stating that:[298]

> [T]he ship's position on the reef and causing many of the 1368 containers (121 with perishable goods and 32 with 'dangerous goods') on board to break loose and cascade

[297] Simon Murdoch *Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011* (Ministry of Transport 2013) at 15.

[298] DR Schiel, PM Ross & CN Battershill, "Environmental effects of the MV *Rena* shipwreck: cross-disciplinary investigations of oil and debris impacts on a coastal ecosystem" New Zealand Journal of Marine and Freshwater Research, 50:1 (2016) at 2.

> into the sea. A combination of diesel, hydraulic oil and heavy fuel oil (HFO 380) from the recently filled bunkers began to leak from the vessel through fractures in the hull. Up to 350 tonnes of HFO were eventually released into the sea…mostly during a series of mid-October storms. With strong onshore winds, most of the oil landed on sandy beaches and rocky promontories along 70km of the western Bay of Plenty from Waihi to Maketu.

David Schiel et al further explains that:[299]

> The oil spill itself was small by comparison to the world's worst oil spill…However, the Rena oil spill was by far the worst experienced in New Zealand in terms of volume spilled…It is estimated that 4593 tonnes of debris has been brought to the surface so far and over 17,376 tonnes of ship structure has been removed from the sea…much of the broken hull, 259 broken containers, and a considerable debris field remain on and around Astrolabe Reef. An unknown quantity of material listed as 'dangerous goods' cargo also remains.

The impact of the oil spill and debris on the surrounding environment clearly encroached and further impacted local communities, tourist/fishing sectors, and associated iwi and hapū on the mainland (Bay of plenty coastline).[300] As a result, a response operation was put into place to address the initial clean up and safety issues associated with the grounding event showing the vast impact on the environment.[301]

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[299] At 2.

[300] Toni Dobson "The Maritime Transport Act 1994 and the MV Rena disaster - How effective is the Act in dealing with bunker oil spills?" [2013] RM Theory and Practice at 174. See also Murdoch, above n 6, at 15.

[301] Luke Faithful *Bay of Plenty Regional Council s 87F Report* (section 87F of the Resource Management Act 1991 Report 1370 67891, 2014) at 2. See also above n 3, at 1.

Figure 10 Clean-up volunteers on Motiti, taken by Pita Paul.

The environmental impacts from the grounding were stipulated in the environmental assessments provided by the MV Rena owners; the Crown; the Bay of Plenty Regional Council, and other participants in the MV Rena resource consent process.[302] Therefore, all relevant assessments, which encompassed information reflecting the coastal marine ecosystem in terms of how the surrounding environment was impacted. The environmental assessments also provide a baseline in which all information would provide a form of measure to place against, in order to show the actual impact from the MV Rena grounding.[303]

Many different types of environmental assessments carried out relative to the surrounding area of Ōtāiti were substantially argued by various scientists and consultants. The environmental assessments revealed the effects from the

[302] Simon Murdoch *Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011* (2013) at 1. Maritime New Zealand *Rena Response: Ministerial briefings - 5-31 October 2011* (2011) at 1.

[303] Resource Management Act 1991.

grounding on the surrounding environment of Ōtāiti. The following environmental impacts include the below list: [304]

Figure 11 Wildlife impact by marine oil pollution, taken by Pita Paul.

The following list of environmental areas were assessed in order to determine the impact of MV Rena grounding:[305]

- Ecology and Fisheries;
- Scouring, smothering and mechanical damage;
- Human health;
- Marine mammals;
- Avifauna;
- Coastal processes, oceanography and hydrodynamics;
- Natural character and landscape;
- Social impacts;
- Recreation and tourism;

[304] Simon Murdoch *Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011* (2013) at 1.

[305] Maritime New Zealand *Accident Report Recovery II Grounding, approximately 5 miles of Karamea on 17 May 2004* (Accident Report 04 3465, 2004) at pt 4.

- Recreational dive safety;
- Navigational safety;

Consequently, below is the most significant environmental effects that protruded from the MV Rena vessel. The environmental effects consist of the contamination of the coastal marine area beginning at Ōtāiti and dispersing out toward the mainland shores of the Bay of Plenty region.

The relevant broad contaminants – the contaminants consist of four categories which include:[306]

a) **Dispersed contaminants** with no apparent effect. For example, contaminants that were a low priority, because it was released and lost at sea with little environmental effect. It was found the contaminants would unlikely have any adverse effects to the environment.
b) **Broadly dispersed contaminants** with diminished effects. For example, released contaminants that impacted on the shoreline and biota subsequent to the grounding and the splitting of the ship, but have now dissipated. It was found that although the escaped oil had major impacts on the shoreline and biota immediately after the grounding event: the effect has now dissipated and any adverse effects negligible. Regarding the disbursement of the escaped beads, the consent conditions would address this. Thus, the effect on the environment from broadly dispersed contaminants will have no ongoing concerns.
c) **Locally dispersed contaminants** with ongoing effects. For example, released contaminants on Ōtāiti and surrounding biota and sediments. The effects of the contaminants are ongoing and localised on Ōtāiti, which have

[306] Bay of Plenty Regional Council *Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016* (Bay of Plenty Regional Council, 2016) at 141, 142.

now become a part of the “existing environment”. The relevant contaminants include:[307]

- Antifouling constituents (including TBT, diuron, copper, zinc);
- Oil-derived polycyclic aromatic hydrocarbons (PAHs);
- Fluoride containing cryolite;
- Copper clove; and
- Other heavy metals, including chromium, lead and nickel

It was found that, despite the fact that the water and sediment quality was close to pristine before the MV Rena struck Ōtāiti: the contaminants released significantly adversely effected the quality of Ōtāiti, its biota and surrounding sediments. However, further definition of the scale, magnitude and ecological implications of these effects require further research. These effects are an ongoing impact on the entire reef and sediments, as well as, the area at least one kilometre from and around the reef edge. The greatest impacted area is located within a few hundred meters of the MV Rena. The proposed conditions of the resource consent have been stated to not remedy the adverse effects of the contaminants in this category, because the effects will be monitored and contingency measures would be triggered if any adverse effects arise.

d) **Potentially harmful contaminants** that have not been released. For example, contaminants that remain on the MV Rena vessel, which has not released into the surrounding environment. These contaminants have potential to aggravate the effects of previously released contaminants. It was found that the remaining issues relate to the future release of copper clove and antifouling. Whereby, these effects would have the potential to increase the effects of contaminants. Relevant remedial actions would

[307] Bay of Plenty Regional Council *Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016* (Bay of Plenty Regional Council, 2016) at 141, 142.

require monitoring and recovery if future release of contaminants are detected.

Therefore, the above points indicate the environmental effects on the coastal and marine area of Bay of Plenty region, which form the actual environmental impact from the MV Rena on the environment. In addition, to the cultural and environmental aspect the following section will address economic impacts from the grounding event.

This section is focused on how the MV Rena grounding impacted on the following cultural, environmental and economic aspects of Motiti and Ōtāiti, as indicated above. Displaying the impacts from the MV Rena will convey concisely the effect the oil disaster experienced.

10 Cultural effects

The cultural impacts from the MV Rena were clearly outlined in both the Waitangi Tribunal and MV Rena resource consent processes. The relevant arguments were brought by claimants who whakapapa (genealogy connection) to Motiti and Ōtāiti. Thus, a reoccurring theme or pattern that was argued in these processes clearly demonstrated the impact targeted the cultural relationship between the people who has a cultural connection with Ōtāiti. The applicable people who have a strong connection with Ōtāiti are the people from Motiti and other surrounding hapū.[308]

[308] Waitangi Tribunal *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 Waitangi Tribunal 2014). Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015). Environment Court "Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust" (RB Enright, Barrister, Auckland, 25 October 2017) at 7-9.

Another essential point, the inclusion of affiliated hapū and iwi in the surrounding area of the Bay of Plenty region were placed in the position of arguing how the MV Rena impacted their cultural relationship through providing existing documentation, whether historical or not, to show the measure of the impact on that cultural relationship. This particular procedure, provided a forum of competing interests between each hapū to show which hapū had the greater impact. This forum of competing interests played a toll on existing hapū relationships of the Bay of Plenty region by placing each hapū in the position of arguing as individual groups, which in a cultural aspect, is the complete opposite procedure in the context of finding a solution that everyone could possibly live with. Therefore, based on the processes that Māori groups were a part of to protect their cultural relationship to Ōtāiti showed a great distortion and diminution of their culture, Te Ao Māori and mana of their people, which can be demonstrated in the following points below:[309]

1. Tāngata whenua values were compromised. For example, preventing whānau, hapū and iwi from exercising their customary practices relative to Ōtāiti. Impacting on the people of Motiti, which is also named “Te Tau o Ōtāiti” meaning the gateway or waharoa to Motiti. Also, impacting on the significance of Ōtāiti itself, because it was the place where Ngātoroirangi (is a prominent tohunga (priest) at that time) performed karakia (prayers) before travelling onto Motiti.[310] All of which were compromised.

[309] Waitangi Tribunal *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 Waitangi Tribunal 2014). See also Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015). Environment Court “Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust” (RB Enright, Barrister, Auckland, 25 October 2017) at 7-9.

[310] Environment Court “Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust” (RB Enright, Barrister, Auckland, 25 October 2017) at para [6]; Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at 2-3.

2. The specific values that were undeniably impacted by the MV Rena included the following:[311]

    a) Taonga (treasure or a highly prized possession) in relation to Ōtāiti and the relationship with Ōtāiti by the hapū of Motiti. As well as, the status as taonga in correlation with Māori values connected with Ōtāiti…

    b) Wahi Tapū (sacred place) – Ōtāiti is considered a taonga and therefore is a sacred place by Māori who have a relationship with Ōtāiti…

    c) Mauri (life force) in relation to Ōtāiti is overwhelmingly adversely affected…The Mauri of Ōtāiti is claimed to continue to suffer while the ship remains on Ōtāiti, and no amount of cultural monitoring of the area would surmount to healing the Mauri of Ōtāiti…

    d) Kaitiakitanga (guardianship responsibilities) over Ōtāiti was accepted that the hapū of Motiti kaitiakitanga outweighed other surrounding hapū…

    e) Mana (authority, prestige) relative to Ōtāiti is explained as being the most prized quality. Mana is not about how one perceives it, rather Mana is about how others perceive it or how mana is acknowledged by others in order to realise it... Thus, maintaining Mana over Ōtāiti for the surrounding area is paramount. To not have Mana over the area will reflect the impact of the Rena grounding on Ōtāiti; and

    f) Manaakitanga (obligations as hosts and helpers) relate to the ability of Tangata whenua groups to look after (manaaki) visitors (manuhiri), which is taken very seriously. To be unable to perform manaakitanga would be a detriment to the mana of Tangata whenua groups…

    g) Mahinga kai (gathering places) relates to the gathering of seafood from the surrounding marine area, due to the impact of the oil, debris and equipment from the grounding of the Rena; and

[311] Environment Court "Statement of Evidence of Nepia Ranapia on Behalf of Motiti Rohe Moana Trust" (RB Enright, Barrister, Auckland, 25 October 2017) at para [6]; Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at 2-3; Bay of Plenty Regional Council *Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016* (Bay of Plenty Regional Council, 2016) at 124.

h) Ara wairua (spiritual pathway) is the most significant value that was impacted by the Rena grounding. Ara wairua relates to the traditional stories surrounding the existence of a spiritual leaping place or pathway for the spirits of the dead to return to their ancestral home of Hawaiki. This tradition was not questioned by the decision makers of the Rena resource consent. However, the spiritual pathway was largely impacted by the Rena grounding, because the ship is perceived as blocking the spiritual pathway to Hawaiki.

The above points illustrate the impact on Māori values of affiliated hapū and iwi of the Bay of Plenty region by the grounding of the MV Rena. Therefore, indicating the impact of the MV Rena on cultural aspects. The vessel also made an impact on the environmental aspects.

11 Economic effects

According to the general understanding of economics, stated above, there is limited economic impact on Motiti and Ōtāiti. The limited impact is due to a lack of resources combined with practical and logistical issues to provide an economic threshold, which would determine an economic impact.

James Fairgray evidence sets out the key Cultural Matters from an Economic Perspective, which include the following:[312]

[312] Environment Court "Primary Statement of Evidence of James Douglas Marshall Fairgray for Iwi Appellants" (RA Makgill, Barrister, Auckland: JA Carr, Burton Partners, Auckland, 3 January 2017) at para [56]. See also Snyder, R., Williams, D., & Peterson, G. (2003). Culture loss and sense of place in resource valuation: Economics, anthropology, and indigenous cultures. In Jentoft, S., Minde, H., & Nilsen, R. (Eds.) Indigenous peoples: Resource management and global rights (Delft) (107-123).

> (a) Cultural and spiritual matters have major value for all iwi and hapū affected by the Rena wreck;(b) These cultural and spiritual links are generally founded on transgenerational (past, present, future) relationships with the sea and the land…(k) These impacts are not shared across the local and regional communities on a *per capita* basis across the population as a whole, but are heavily concentrated on the Māori community. This is not an indication of lack of concern by non-Māori, rather it reflects where understanding and responsibilities lie for those impacts…

James Fairgray goes on to say:[313]

> From an economic perspective, there is a strong nexus as to the wreck causing substantial loss of value, clear evidence as to how the impacts are distributed, and evidence that substantial impacts will continue into the future for some iwi and hapū affected by the wreck…One outcome is that there are three groupings…those prepared to negotiate a settlement based on the wreck remaining on Otaiti…those seeking through the RMA procedures to have consent declined so the wreck is not allowed to remain on the reef, and those pulling back from the RMA process itself.

Nevertheless, there would be more economic impact locally in the mainland shores of the Bay of Plenty region. For example, the following list of areas that would have economic effects were addressed by the MV Rena resource consent application proposing positive economic benefits for the people and communities of the region, such as:[314]

- Tourism – economic benefits for the local boat charter tourism industry;
- Commercial Fishing – only modest economic benefits apply, as commercial fishing is noted as a minimal component of the economy in the Western Bay of Plenty;

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[313] Environment Court "Primary Statement of Evidence of James Douglas Marshall Fairgray for Iwi Appellants" (RA Makgill, Barrister, Auckland: JA Carr, Burton Partners, Auckland, 3 January 2017) at para [116]-[118].

[314] Bay of Plenty Regional Council *Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016* (Bay of Plenty Regional Council, 2016) at 53.

- Efficient Use of Resources – low economic benefits to the local and regional community;
- Restoration and Mitigation – provides benefits to local hapū to fund certain projects.

Evidently, there would be limited economic impact on Motiti; Ōtāiti and the local community of the Bay of Plenty region, if the MV Rena vessel remains on Ōtāiti. However, as noted above, the economic limits have an opportunity of becoming economic benefits for Motiti, Ōtāiti and local communities with in the Bay of Plenty region. For example, due to the implementation of a district plan on Motiti in terms of development purposes would prove to have a more valuable resource for consumers to benefit from. Therefore, on the basis that there is not an economy that is worthy of maximising opportunities for the people of Motiti and the local communities, there is no economic effect. Only if there is potential for developing an economy on Motiti, is when there would be an economic impact from the MV Rena situation.

12 Summary

An explanation of the structural composition of the MV Rena vessel gave a reality check on the factual background of the grounding situation. This background information discloses the extent of the situation in our ocean waters within Aotearoa New Zealand.

This exploration clarifies the extent of how the vessel grounded; the location of the grounding, and how close the grounding was to Motiti. The environmental effects of the grounding justifies the extent of damage on the marine environment, at the time. The factual background depict the landscape of the oil spill disaster in Aotearoa New Zealand, and what government agencies had to face in order to deal with the clean and recovery responses.

This chapter revealed the extent of the environmental effects on the surrounding marine environment of Ōtaiti, which then extended to the marine environment

around Motiti before it drifted toward the mainland shores of the Bay of Plenty region, as well as along the coastline. The natural and physical landscape of both Ōtāiti and Motiti highlighted the community relationship, cultural setting and economic aspect of Motiti, prior to the grounding. Specifically, the longstanding spiritual connection that the people of Motiti have to the 'stepping stones' of Ōtāiti - 'Te Rerenga o nga Wairua o Ngāti Awa: the pathway between the physical world and spiritual world' that is culturally significant to the people of Motiti through their oral traditions. This cultural setting is the spiritual argument made by the people of Motiti in the legal processes, at the time, because the MV Rena grounded on the 'stepping stones' of Ōtāiti, blocking the pathway back to Hawaikinui (ancestral home).

Shedding light on how Motiti operated before the grounding will benefit the future of Motiti and its potential relationship with relevant government agencies in order to prevent further spiritual injustices relevant to the people of Motiti, in the context of the MV Rena situation.

This chapter contributes awareness of how the resource management regulatory frameworks impact small island communities within the ocean waters of Aotearoa New Zealand, such as Motiti. Those regulatory frameworks can harm the spiritual cultural of a hapū and how that cultural harm can inflict ongoing damage to the community, even after the MV Rena owner and government agencies have moved on is pertinent to mention, since the rest of this thesis depend upon the array of injustices that were subjected on the people of Motiti when the grounding occurred and the repercussion of that event.

Figure 12 Whānau helping with the clean-up on Motiti, taken by Pita Paul.

4 ŪPOKO TUAWHA: CHAPTER FOUR – REGULATING THE MARINE ENVIRONMENT

a. Introduction

Our coastal marine environment is important as an island nation. The coastal marine regulatory system in Aotearoa New Zealand has been by the response plan of the grounding of the MV Rena in 2011. Literature detailing marine regulation divulge highly complex aspects of addressing environmental issues and response strategies relative the coastal marine environment (science, planning and natural resources law).

The laws regulating resource management concern certain activities effecting the environment, such as the grounding of the MV Rena vessel on Ōtāiti.[315] The Resource Management Act 1991("RMA"), became relevant to the grounding situation because of the liability concerns discussed in chapter negotiations between the MV Rena owner and the Crown relating to a resource consent application to leave the vessel on Ōtāiti. Another essential point regarding the potential impact from the resource consent process on mainland communities and the people of Motiti living in the Bay of Plenty region. The purpose of this chapter is to demonstrate how resource management operates at the national level. The RMA deals with environmental effects of an activity, such as abandoning or dumping the MV Rena vessel on Ōtāiti. This chapter will firstly, explore relevant literature on the historical background of resource management and the relevant legal processes in Aotearoa New Zealand at the time of the grounding. This chapter will highlight how the legal processes addressing coastal

[315] Resource Management Act 1991.

marine pollution was the catalyst of the injustice carried out on the people of Motiti.

Second, the result of the split of the MV Rena vessel furthered the oil pollution in the surrounding marine environment. An explanation of the process for marine pollution regulation will specify the statutory measurement of oil pollution permitted with respect of contamination to coastal marine environments in Aotearoa New Zealand. This chapter will reveal potential gaps in resource management law nationally at the time of the MV Rena grounding.

Lastly, an analysis of the resource consent process against Te Ao Māori and Tikanga Māori to reveal whether the processes within the RMA framework fully protect Māori interests to manage and deal with marine environments from a cultural perspective. Therefore, demonstrating the injustice projected on the people of Motiti.

1 Resource management law in Aotearoa New Zealand

For an island nation surrounded by coastline, the marine environment is particularly significant to New Zealanders. Specifically, we have one of the largest marine environments in the world, extending four million square kilometres and covering an area 15 times larger than our land mass.[316] Over 65% of the

[316] Angela Foster, "New Zealand's Oceans Policy," (2003) VUWLR 34, Vol 3:469-496 at 470; Kenneth Palmer "Environmental Management of Oil and Gas Activities in the Exclusive Economic Zone and Continental Shelf of New Zealand" (2013) Journal of Energy & Natural Resources Law, 31:2, 123-146 at 126; Karen N. Scott, "Maritime Law Enforcement in New Zealand," (2018) Korean Journal of International and Comparative Law 6, no. 2:245. See also Ministry for the Environment & Stats NZ (2019) *New Zealand's Environmental Reporting Series: Out Marine Environment 2019 (Ministry for the Environment, October 2019)* https://environment.govt.nz at 9-11.

population lives within five kilometres of the coastline.[317] Within the general coastal marine environment, Greg Severinsen explains that 30 percent of Aotearoa New Zealand's biodiversity is in the sea, affirming that:[318]

> [O]ver 17,000 species identified in the EEZ. Endemic species include around 95 percent of all known sponge species, over 80 percent of bivalves and gastropods, and three quarters of sea squirts. There are 13,415 identified animal species, 702 plant species and 89 fungal species. The 412 species of marine invertebrates that have been assessed are thought to represent only five percent of the actual number. There is a lot we do not know, and there are vast areas where habitats have not been mapped…Habitats support species that pass through them…assisted by the currents…and marine mammals (like whales) travel…on incredible migrations across the Pacific Ocean into freshwater environments…

The coastal marine environment filled with different types of species living within the marine ecosystems around Ōtāiti, Motiti and the Bay of Plenty coastline, as outlined in chapter three of this thesis.[319] The marine environment has been a part of the history, the culture and the identity of this country.[320] With the mirage of inadequate statutory frameworks of over 25 pieces of legislation,[321] tasked with

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[317] Ministry for the Environment & Stats NZ (2019) *New Zealand's Environmental Reporting Series: Out Marine Environment 2019 (Ministry for the Environment, October 2019)* https://environment.govt.nz at 9-11.

[318] Greg Severinsen et al *Summary Report The Breaking Wave: Oceans reform in Aotearoa New Zealand* (Environmental Defence Society, May 2022) at 3.

[319] Daniel Hikuroa et al "Ensuring objectivity by applying the Mauri Model to assess the post-disaster affected environments of the 2011 MV Rena disaster in the Bay of Plenty, New Zealand" (2017) Ecological Indicators, Volume 79:228-246 at 233, 242; Kura Paul-Burke "Cultural Monitoring Report" The Astrolabe Community Trust (22 December 2020) at 4, 7 – 14.

[320] Karen Fisher *et al* "Broadening environmental governance ontologies to enhance ecosystem-based management in Aotearoa New Zealand" (2022) *Maritime Studies* 21, 609–629 at 613 - 615. See also Ministry for the Environment & Stats NZ (2019) *New Zealand's Environmental Reporting Series: Out Marine Environment 2019 (Ministry for the Environment, October 2019)* https://environment.govt.nz at 9-11.

[321] Derek Nolan KC (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis) at 5.93 – 5.102. The number of statutes managing the coastal marine environment include: Harbours Act 1950; Maritime Transport Act 1994; Fisheries Acts 1983 and 1996; Marine Reserves Act 1971; Crown Minerals Act 1991; Marine and Coastal Area (Takutai Moana) Act 2011; Hauraki Gulf Marine Park Act 2000.

regulating coastal marine areas, the law has unable to prevent environmental degradation to the health of the ocean, one statute relevant to the grounding incident is the RMA.[322]

2 The Resource Management Act 1991

In Aotearoa New Zealand, the basis of resource management founded on environmental planning has evolved into a decentralised network of legislation, plans, and policies guided by the RMA.[323] Historically, the RMA is the successor of the original statute named the Native Township Act 1895.[324] The Native Township Act 1895 was one of many Māori land legislation enacted to extinguish Māori Customary land title (Māori Land Title), after the signing of Te Tiriti o Waitangi ("Treaty of Waitangi") in 1840.[325] The main purpose of the Native Township Act 1895 was to promote British settlement by establishing townships in regions and districts throughout the country, without firstly acquiring the land from Māori.[326] The Native Township Act 1895 evolved over the years with the Town and Country Planning Act 1953,[327] which consolidated previous Town and Country Planning Acts to create planning provisions through District schemes implementing designated use, zoning, subdivision requirements and public

[322] Judi Hewitt et al "Proposed ecosystem-based management principles for New Zealand" [2018] RMJ at 12. See also Resource Management Act 1991.

[323] Resource Management Act 1991, pt 4; Ann Froude "Preserving coastal natural character: Court interpretations of a long-standing New Zealand policy goal." (2015) *New Zealand Geographer* 71, no. 1: 45-55 at 45-46; Andrea Sumits and Jason Morrison "Creating a Framework for Sustainability in California: Lessons Learned from the New Zealand Experience" (Pacific Institute for Studies in Development, Environment, and Security, Oakland, December 2001) at 43.

[324] Native Township Act 1895.

[325] Treaty of Waitangi, preamble; Native Township Act 1895; Woodley, Suzanne. *The Native Townships Act 1895*. Waitangi Tribunal, 1996 at 7-9.

[326] Ibid.

[327] Town and Country Planning Act 1953.

reserves.[328] At this point, Māori interests were not taken into account in the process of implementing the district schemes.

Twenty-four years later, Māori interests under Te Tiriti o Waitangi /Treaty of Waitangi were first recognised in the Town and Country Planning Act 1977. The nature of the inclusion of Māori interests primarily focused on a matter of national importance to be considered, when administering the Town and Country Planning Act 1977.[329] Unfortunately, consideration of Māori interests were not considered an overriding factor in the Planning Tribunal determinations, because the statute did not refer to Te Tiriti o Waitangi/Treaty of Waitangi.[330] These Town and Country Planning laws have evolved over time to the RMA.[331]

3 The operation of resource management under the RMA

The RMA is the main piece of legislation that sets out the regulation for managing all of New Zealand's natural and physical resources (land, water, ocean and air).[332] The RMA provides the regulatory system for a decentralised administration by local authorities (regional councils, unitary authorities, territorial authorities (city and district councils)) to manage activities by individuals and

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[328] Town and Country Planning Act 1953.

[329] Town and Country Planning Act 1977, s 3(g), 6(e), 6(3), Sch 1(9) and Sch 2(3). see also *Royal Forest and Bird Protection Society (Inc) v WA Habgood Ltd (1987) 12 NZTPA 76, Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

[330] Ibid.

[331] Derek Nolan KC (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis) at 1-5.

[332] Resource Management Act 1991; Ministry for the Environment. 2021. *Understanding the RMA and how to get involved. An everyday guide to the Resource Management Act*: 1.1. Wellington: Ministry for the Environment at 5 and 27; Robert A. Makgill and Hamish G. Rennie, "A Model for Integrated Coastal Management Legislation: A Principled Analysis of New Zealand Resource Management Act 1991," (2012) International Journal of Marine and Coastal Law 27, no. 1 at 143. See also Ministry for the Environment *Understanding national direction. An everyday guide to the Resource Management Act:1.3* (Ministry for the Environment, Wellington, 2021) at 4.

groups (inclusive of local communities, iwi communities and organisations).[333] The basis for resource management operates under the purpose principles found in section 5 centered on sustainable management of the natural and physical resources in Aotearoa New Zealand.[334] This fundamental principle recognised in the Rio Declaration purporting principle 11 that "States shall enact effective environmental regulation…" and principle 13 affirming that:[335]

> In order to achieve a more rational management of resources and thus to improve the environment, states should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their population.

The focus on the concept of sustainable management of the environment, despite adverse environmental effects from an activity and incorporated into the RMA demonstrating the connection of international obligations into domestic law, as outlined in chapter six of this thesis, through the hierarchy of the policy statements and planning instruments.[336] The hierarchy of the policy statements and plans created under the RMA gives effect to section 5, stating that:[337]

> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

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[333] Resource Management Act 1991, s 45. Martin K. Purvis and Maryam A. Purvis; George L. Benwell, "Modelling and Simulation of the New Zealand Resource Management Act," (1995) Journal of Law and Information Science 6, no. 2 at 183.

[334] Resource Management Act 1991, s 5. See also *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2012] NZRMA 123 at [33].

[335] Resource Management Act 1991, s 5; Derek Nolan KC (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis) at chp 1.2 – 1.3; Inga Carlman, "The Resource Management Act 1991 through External Eyes" (2007) 11 N.Z. J.ENVTL. L. 181 at 182.

[336] Resource Management Act 1991, pt 5; Andrea Sumits and Jason Morrison "Creating a Framework for Sustainability in California: Lessons Learned from the New Zealand Experience" (Pacific Institute for Studies in Development, Environment, and Security, Oakland, December 2001) at 4

[337] Resource Management Act 1991, s 5.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Geoffrey Palmer, the drive behind the implementation of the RMA, observed that sustainable development "comprises a matrix that binds those who believe in the need to protect the environment with those who want economic growth and development".[338] Robert Makgill and Hamish Rennie explain the founding sustainable management principle, reinforce that:[339]

> The RMA was enacted before the Rio Earth Summit and New Zealand's ratification of the LOSC. Instead, New Zealand drew on the Brundtland Report's treatment of sustainable development to shape the purpose of the RMA…The RMA was conceived as a framework for integrating and rationalising environmental management generally…it repealed or modified 59 statutes and modified 50 regulations…It focuses on the effects of activities rather than the activities themselves…

Drawn from international obligations, outlined in chapter six of this thesis, promote sustainable management to protect aspects of social, economic and cultural well-being when an activity generates an adverse effect on the environment and that adverse effect is acceptable in terms of the scale and

[338] Resource Management Act 1991; Geoffrey Palmer "The Earth Summit: What Went Wrong at Rio" (1992) 70 *Wash. U. L. Q.* 1005 at 1012 <openscholarship.wustl>.

[339] Resource Management Act, s 5. Robert A. Makgill and Hamish G. Rennie, "A Model for Integrated Coastal Management Legislation: A Principled Analysis of New Zealand Resource Management Act 1991," (2012) International Journal of Marine and Coastal Law 27, no. 1 at 144.

significance of its adverse effects on the specific area.[340] Urlich Klein clarifies the scope of sustainable management, asserting that:[341]

> Section 5 of the RMA establishes the guiding purpose of promoting ”sustainable management of natural and physical resources:. According to s2(1) the term “natural and physical resources” includes “land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures”…this definition is open, which means that the scope of the planning regime is comprehensive…”sustainable management” requires, inter alia, considerations concerning the “life-supporting capacity of air, water, soil, and ecosystems” and, more generally, concerning the “adverse effects of activities on the environment”…

Applying section 5 to the MV Rena grounding incident relates to protecting the natural and physical resources of the surrounding marine environment of Ōtāiti, Motiti and the coastline of the Bay of Plenty region found in the hierarchy of instruments under the RMA. Further, sustainable management requires assessment of environmental effects relative to the activities carried out, largely by planners, scientist and more importantly decision-makers.[342] Martin Purvis et al explain the roles of the three levels of government relating to the RMA, stipulating that:[343]

> Central Government: overview role; developing policies for managing resources, performance and quality standards…Regional Councils: Coordination; regional policy statements; regional plans…Territorial Councils: district plans; control of land-use and subdivision…

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[340] Resource Management Act 1991, ss 3, 5 and 17.

[341] Ulrich Klein, "Integrated Resource Management in New Zealand - A Juridical Analysis of Policy, Plan and Rule Making under the RMA," (2001) New Zealand Journal of Environmental Law 5 at 18.

[342] Resource Management Act 1991, ss 3, 5 and 17; Ministry for the Environment *Understanding national direction. An everyday guide to the Resource Management Act: 1.3* (Ministry for the Environment, Wellington, 2021) at 4.

[342] Sarah Kerkin “Sustainability and the Resource Management Act 1991.” (1993) *Auckland U.L.Rev* 7:290.

[343] Martin K Purvis et al "Modelling and Simulation of the New Zealand Resource Management Act," (1995) Journal of Law and Information Science 6, no. 2 at 184.

Aligning with the role of the three levels of government, the *New Zealand Rail Ltd v Marlborough District Council* was the origin for the "overall broad judgment" when applying section 5 of the RMA regarding resource consents.[344] This approach reflect "[A] deliberate openness about the language, its meanings and its connotations which…is intended to allow the application of policy in a general and broad way".[345] Additionally, it was held in *Genesis Power Ltd v Franklin District Council* that "the proper application of s 5…involved an overall broad judgment of whether or not a proposed activity…promoted the sustainable management of natural and physical resource…and the scale or degree of them, and their relative significance in the final outcome…the decision maker had to have regard to the statutory hierarchy as between ss 6, 7, 8…as part of the balancing exercise…".[346] This "overall broad judgment" approach was followed by decision makers in both the Council Panel and Environmental Court until the Supreme Court decision in the case of *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* (King Salmon case).

The *King* Salmon case is the leading authority considering the inter-relationship of planning documents. The Supreme Court dealt with the legal issue of whether the Board was correct to apply an "overall judgment" approach when deciding the matter under the New Zealand Coastal Policy Statement (NZCPS) or whether the policies created an "environmental bottom line".[347] The majority allowed the appeal and found that the Board was obliged to give effect to the NZCPS and rejected the "overall broad judgment" approach.[348] This has been the current position despite further developments; for example, in 2019 the case of *Royal*

[344] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70.

[345] At 72; *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 at 95.

[346] *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 514 at 542.

[347] *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZRMA 195.

[348] *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2019] NZRMA 1 at [47]-[51].

Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council discussed the "overall broad judgment" with regard to a proportionate response, which is an inconsistent approach affirmed in the King Salmon case stating that:[349]

> The proportionate response adopted by the Environment Court in this case is an overall judgment approach—albeit by a different name. The more restrictive regime flowing from the Supreme Court's decision in King Salmon does not permit the proportionate, or contextual, response taken by the Environment Court. Context may be relevant in considering whether an activity will have adverse effects. This could depend both on the activity itself and on the values and characteristics of the natural area in issue…in taking its proportionate response, the…Court was not referring to context in this sense. Rather it was considering context in the round. It was suggesting that the benefits and costs of regionally significant infrastructure, seeking to locate in Indigenous Biological Diversity Areas A and that could have adverse effects on such areas, should be assessed on a case by case basis, having regard to all relevant factors…

With the shift away from the King Salmon case rejecting the "overall broad judgment" approach, the current position to the approach is now much more nuanced and decision makers, while playing a large part in the operation of the RMA, shall be more attentive to implementing a full assessment of the overall effect of an environmental situation, which also include the Māori provisions of sections 6, 7 and 8. This interpretation applies to the situation of the MV Rena grounding indicating the balancing the social, economic and cultural well-being, as well as, provisions 6, 7 and 8 within the context of sustainable management to protect the natural and physical marine environment surrounding the MV Rena grounding.[350]

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[349] *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2019] NZRMA 1 at 2 and [103].

[350] *Hansen v R* [2007] NZSC 7 at [61]. The Supreme Court discusses the Bill of Rights in respect of the application of the Interpretation Act 1999. Whereby, "when new situations arise it is necessary to approach them in a way which is best suited in the circumstances to give effect to what appears to be the overall Parliamentary intention. This intention must be taken to be a compound one, involving the specific intention to be discerned from the provision in issue read in light of the general overriding directions.." applicable to the MV Rena grounding situation.

4 Sections 6, 7, and 8 of the RMA (Māori provisions)

The provisions pertaining to the Māori in Aotearoa New Zealand found in sections 6, 7, 8, 5 of the RMA (Māori provisions) entail the recognition of Te Ao Māori, Tikanga Māori and Te Tiriti of Waitangi (Treaty of Waitangi) when protecting the natural and physical marine environment of Ōtāiti, Motiti and the coastline of Bay of Plenty in Aotearoa New Zealand. *McGuire v Hastings District Council* confirm that decision-makers have obligations to take "particular sensitivity" to Māori interests relating to resource management.[351] These provisions encompass the Māori perspective of the environment entailing the oral traditions outline in chapter two.

At the early stage of RMA reforms in the 1980's, iwi Māori raised issues and concern over the "unresolved Treaty claims to the ownership of resources that would come to be regulated…These included minerals, geothermal energy, water, the foreshore and seabed, riverbeds, and so forth. All had been the subject of longstanding political or legal claims…"[352] The rational for this argument was due to the guarantees under Article 2 of the Treaty of Waitangi relating to tino rangatiratanga (sovereignty/self-determination) over taonga and the possibility of the RMA diluting those guarantees.[353] The outcome disclosed that the RMA "would only 'regulate' the use of natural resources, and would contain no declarations as to their ownership".[354] Despite, this notion, iwi Māori remained sceptical due to the historical underpinning of resource management and land

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[351] Resource Management Act 1991, ss 5, 6, 7, 8; *McGuire v Hastings District Council* [2002] 2 NZLR 577 at 594.

[352] Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi (Wai 262, 2011) at 109.

[353] Treaty of Waitangi 1975; Simmons-Donaldson, Lana. "Rangatiratanga and the crown" (2021) *Public Sector* 44, no. 2: 5-6 at 5.

[354] Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi (Wai 262, 2011) at 109.

issues in Aotearoa New Zealand, due to its experience with government agencies through Regional Council and the Department of International Affairs discussed in chapter five of this thesis. Regardless of these misgivings, aspects of Te Ao Māori, Tikanga Māori and the Treaty of Waitangi specified under the purpose of the RMA were included within sections 6, 7, and 8. Ani Mikaere explains this scepticism asserting that:[355]

> If you read Jane Keseys' writings she talks about the fact that back in the 1970's Māori were hitting the streets big time, protesting loudly, staging occupations and so on. Then they came up with the Waitangi Tribunal, which acted like a catharsis, a mechanism for allowing Māori to let off steam. We all got tied up preparing and processing Waitangi Tribunal claims and that encouraged us to forget about the bigger picture. I thing that is always the danger of working within the Pākeha legal system – that we will forget about the bigger picture. But we need to do both…

When iwi Māori deal with environmental issues relating to their land, the layered complexity of the legal system adds to those environmental issues. The MV Rena grounding gave rise to different areas of law, such as international obligations, resource management, maritime safety and Waitangi Tribunal relative to Crown breaches, outlined in chapters three, four, five and six of this thesis. With the complexity of navigating the legal system, I argue that these layered legal processes relating to environmental issues can lead to spiritual injustice when decision makers do not fully take into consideration the scope within the Māori provisions of the RMA that entail the spiritual aspects of the environment as demonstrated through chapter two relating to the spiritual approach of Māori environmental philosophy and practice, together with this chapter revealing the interruption of the legal system on iwi Māori, like the people of Motiti, when the

[355] Mikaere, Ani. "Tikanga as the first law of Aotearoa" (2007) *Yearbook of New Zealand Jurisprudence* 10: 24-31 at 29.

protective provisions for indigenous peoples at the international and national levels (RMA), are not followed.

5 Section 6 of the RMA – relationship with the environment

The Māori perspective of the environment entrenched in Te Ao Māori outlined in chapter two, is relevant to section 6 of the RMA. Specifically, under section 6 "matters of national importance" under the RMA include:

> [A]ll persons exercising functions and powers under it…shall recognise and provide for…the preservation of the natural character of the coastal environment…and the protection of outstanding natural feature…and the protection of areas of indigenous vegetation and significant habitats of indigenous fauna…the relationship of Maori and their culture and traditions with their ancestral lands, water, sites waahi tapu and other taonga.

This provision relates to the coastal environment surrounding Ōtāiti, Motiti and the coastline of the Bay of Plenty region. Specifically the natural and outstanding character of Ōtāiti, outlined in chapter three.[356] In *Ngati Hokopu Ki Hokowhitu v Whakatane District Council,* the Environment Court referred to 'relationships' under section 6(e) to mean Whanaungatanga. Also, that under section 6(e) "…the relationship of Maori and their culture and traditions…use of the word "relationship" in section 6(e) is very important.[357] In *Huakina Development Trust v Waikato Valley Authority* the High Court confirmed that:[358]

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[356] *Ngāi Te Hapu Inc v Bay of Plenty Regional Council* [2017] NZEnvC 073 at para [242].

[357] *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvC) at [39]; *Bleakley v Environmental Risk Management* Authority [2001] 3 NZLR 213

[358] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 189.

> …"the interests of the public generally" include Maori spiritual and cultural values must, in my judgment, be that they cannot be excluded from consideration if the evidence establishes the existence of spiritual, cultural and traditional relationships with natural water held by a particular and significant group of Maori people…

In *Bleakley v Environmental Risk Management Authority* the High Court affirmed that:[359]

> The provisions of s 6(d) did not mean that protection under the Act was limited to physical or tangible taonga. The reference to "other taonga" included intangible cultural and spiritual taonga as well as physical objects, without needing to compare "culture and traditions" with taonga constituted by culture and traditions. The use of the words…in 6(d) emphasised the special nature of the relationship of Maori…ensured that the relationships of Maori with taonga was not read down, dissipated or minimised by those charge with exercising functions, powers and duties under the Act.

The strong relationship that the people of Motiti have with the marine environment surrounding Ōtāiti imprinted in the oral tradition of "Te Rerenga o nga Wairua o Ngāti Awa" whereby the spiritual leaping place and pathway back to the ancestral home, argued in chapter two of this thesis, is applicable under the RMA.[360] The oral traditions of the people of Motiti view Ōtāiti as a taonga with spiritual essence linking Ōtāiti and Motiti, hold extreme importance, because of the long-standing close cultural practice and underpinning traditions of the taonga belonging to them. As a national importance, resource management decision-makers under the RMA charged with the powers to protect those oral traditions as part of the operation under the RMA.

6 Section 7 of the RMA – Kaitiakitanga (guardianship)

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[359] *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 at 215-2316.

[360] Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at 2-3. See also Bay of Plenty Regional Council Toi Moana <final-hearing-statement-pouroto-ngaropo>.

Section 7 of the RMA include “other matters” and states that:[361]

> [A]ll persons exercising functions and powers under it…shall have particular regard to…kaitiakitanga: the ethic of stewardship: the efficient use and development of natural and physical resources…intrinsic values of ecosystem…maintenance and enhancement of the quality of the environment…

Kaitiakitanga (guardianship) is tikanga Māori value creating a community responsibility to sustain the well-being of the environment and its people.[362] Further, Kaitiakitanga “is the responsibility of all and strives to regulate and sustain the well-being of people and natural resources underpinned values such as whakapapa…, mana…mauri and using tools and methods such as rāhui…resulting in mutual benefit for people and the environment”.[363]

Figure 13 An example of Kaitiaki (guardian) on Ōtāiti.

[361] Resource Management Act 1991, s7(a), (aa), (b), (c), and (d).

[362] *Tautari v Northland Regional Council PT* A55/1996, 24 June 1996 at 18 – 19; Joanne Clapcott, Jamie Ataria, Chris Hepburn, Dan Hikuroa et al "Mātauranga Māori: shaping marine and freshwater futures." (2018) *New Zealand Journal of Marine and Freshwater Research* 52, no. 4: 457-466 at 459.

[363] Clapcott, Joanne, Jamie Ataria, Chris Hepburn, Dan Hikuroa, Anne-Marie Jackson, Rauru Kirikiri, and Erica Williams. "Mātauranga Māori: shaping marine and freshwater futures." *New Zealand Journal of Marine and Freshwater Research* 52, no. 4 (2018): 457-466 at 459;

Applying Kaitiakitanga to the people of Motiti, the definition in the Motiti Island – Hapu Management Plan states that:[364]

> Kaitiakitanga is the exercise of cultural custodianship over native and physical resources in a manner that incorporates spiritual values. This is an incident of Tino Rangatiratanga reserved to Ngati Te Hapu whanau whanui under Article II of the Treaty of Waitangi…

The High Court in *Friends & Community of Ngawha Inc v Minster of Corrections* concerning an application for a resource consent for a construction of a prison in an area of cultural significance whereby "beliefs about Takauere (a taniwha of immense cultural, social and spiritual significance to Nga Puhi and Ngawha Maori)".[365] It was held that "in order to give effect to s7(a) the Court must first determine the relevant kaitiakitanga…only kaitiaki who have most recently and closely exercised stewardship over the land patently carry the greatest authority.[366] The kaitiakitanga of Ōtāiti and Motiti is the people of Motiti (Te Patuwai hapū), due to the cultural practices of fishing and carrying out karakia, as argued in chapters two and three of this thesis. This kaitiakitanga relations to the marine environment surrounding Ōtāiti is protected under s 7(a) as part of the operation of the RMA. In addition to this protection is section 8 of the RMA.

7 Section 8 of the RMA – Treaty of Waitangi

Section 8 of the RMA requires that the principles the Treaty of Waitangi be taken into account in achieving the purpose of the RMA, affirming that:[367]

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[364] Department of Internal Affairs – Te Tari Taiwhenua "Motiti Island – Hapu Management Plan: Motiti Island Native/Cultural Policy Management & Administration Plan" (2012) Vol 2:74 at 40; See also Department of Internal Affairs – Te Tari Taiwhenua "Motiti Island – Hapu Management Plan: Motiti Island Native/Cultural Policy Management & Administration Plan" <www.dia.govt.nz>.

[365] *Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 at 401, 410.

[366] At 403, [70].

[367] Resource Management Act 1991, s 8.

> [A]ll persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

The RMA "should be interpreted in a manner which best furthers the guarantee of protection affirmed by the Treaty of Waitangi".[368] Article two of the Treaty of Waitangi states that:[369]

> [T]he Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand…the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which …possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes…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…

The Treaty of Waitangi embody the principles of Māori land and the history of the Māori Land Court, which can intervene unlawful exercise of the requirements under the RMA to best further:[370]

> (a) the spirit of exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi; (b) the recognition that land is taonga tuku iho…(c) the retention of that land in the hands of its owners, their whanau and their hapu; and (d) the maintenance of a Court and the establishment of mechanisms to assist the Maori people to achieve the implementation of these principles.

The indigenous people of Aotearoa New Zealand have had strong influence on resource management principles though Article 2 of the Treaty of Waitangi.[371]

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[368] *McGuire v Hastings District Council* [2002] 2 NZLR 577 at 579.

[369] Treaty of Waitangi Act 1975, sch 1.

[370] *McGuire v Hastings District Council* [2002] 2 NZLR 577 at 579.

[371] Treaty of Waitangi Act 1975, sch 1.

The Treaty of Waitangi principles developed to include, “those of partnership, active protection, informed decision-making and rangatiratanga”.[372] Effectively, the Treaty principles were the “underlying mutual obligations and responsibilities which the Treaty places on both the Crown and Māori”.[373] The people of Motiti are captured within the structure of the Treaty principles in section 8 the RMA. The cultural practices underpinning Te Ao Māori and the exercise of Tikanga Māori by the people of Motiti protected through the operation of the RMA under sections 5, 6, 7 and particularly through section 8. Careful consideration of the RMA provisions sit with the decision-makers when determining environmental issues under the RMA.

8 Decision-making under the RMA

Effectively, section 104 of the RMA is the provision that forms the scope for guiding decision-makers at the local authority level and the relevant Courts.[374] Sustainable management requires the decision-making process to consider the future effects of resource use, development and protection over time. Environment Court Judge Jon Jackson emphasised the RMA ‘sustainable management’ process by decision-makers to consider:[375]

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[372] Paul Beverley "The mechanisms for the protection of Maori interests under Part II of the Resource Management Act 1991." *New Zealand Journal of Environmental Law* 2 (1998): 121-151 at 128; Geoffrey Palmer, "The Treaty of Waitangi - Principles for Crown Action," (1989) Victoria University of Wellington Law Review 19, no. 4: 335-346 at 338.

[373] *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawarau* [2003] 2 NZLR 349 at 350.

[374] Resource Management Act 1991, s 104.See also Martin Phillipson, "Judicial Decision Making under the Resource Management Act 1991: A Critical Assessment," (July 1994) Victoria University of Wellington Law Review 24, no. 2 at 165.

[375] Environment Judge Jon Jackson “Predictions in an uncertain world – Assessing effects under the Resource Management Act 1991” (Paper presented to NZLS CLE Ltd, Environmental Law Intensive, Wellington, November 2016) at 68.

> Avoiding, remedying and mitigating the adverse effects of activities on the environment is an essential part of what is meant by 'sustainable management' in s 5 of the RMA. The importance of managing effects is emphasised by the Act's description of the functions of local authorities…under s 31 RMA…The functions of regional councils under s 30 RMA…Section 32 of the RMA …

The Courts' and Council panels, exercise this decision-making based on the circumstances *presented* to them, in order to interpret the section through an 'overall broad judgment' approach.[376] The RMA is construed by the Court, the Council panel, and lawyers in the hearing process, such as the MV Rena grounding. The process of interpretation by the Courts' focus on sustainability in combination with managing effects through the balance of probabilities to surmise risk assessment for future generations.[377] This process was crucial for the people of Motiti regarding the removal of the MV Rena vessel under the resource consent process. Hence, the careful consideration imported through the RMA by decision-makers also require consideration of relevant policy and planning documents to provide a robust decision.

In *the King Salmon* case concerning a plan change, the Supreme Court outlined the requirements of decision-makers that "…the protection of areas of outstanding natural character from adverse effects…"[378] Thus, a shift to a bottom line approach. This decision was affirmed in *R J Davidson v Marlborough District Council,* whereby the Court of Appeal extended this ruling to resource consents applications.[379]Effectively, the environmental bottom line in the context of the

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[376] *Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZKS 38 at para [150] – [152]; *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70, 86.

[377] Resource Management Act 1991, s 3. See also, Environment Judge Jon Jackson "Predictions in an uncertain world – Assessing effects under the Resource Management Act 1991" (Paper presented to NZLS CLE Ltd, Environmental Law Intensive, Wellington, November 2016) at 68 – 77.

[378] *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38 at [175].

[379] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [80]-[83].

"broad overall" approach meant that the adverse effect on the surrounding marine environment of Ōtāiti may not have been taken into account when deciding the resource consent application. The reason being that the environmental effects from the salvaging of the MV Rena vessel was taken into account rather than the environmental effects from the initial grounding incident.[380] The operation of the RMA decision-making under section 104 of the RMA, also requires consideration of section 5 "overall broad" approach with the environmental bottom line of adverse effects on the receiving environment with respect of plans and resource consents.[381] Firstly, the underlying direction to support the RMA is given effect by the local authorities, who also work toward infusing the following hierarchy of instruments[382] through the policy and planning documents:[383]

9 RMA Policy Statements and Planning documents

The RMA establishes a hierarchy of environmental planning and policy statements under Part 5 of the RMA to give effect to the sustainable management

[380] Bay of Plenty Regional Council Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016 (Bay of Plenty Regional Council, 2016) at 38-40.

[381] *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38 at [175]; *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [80]-[83]; G, Severinsen. A model for the future (Environmental Defence Society Incorporated, Auckland October 2019) at 58.

[382] *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 at para [40]. The Court of Appeal held that the RMA 'described as a hierarchy of instruments, to the extent that regional policy statements must not be inconsistent with national policy statements and certain other instruments. District plans must not be inconsistent with national policy statements and the same other instruments, nor with regional policy statements…'

[383] Resource Management Act 1991, Part 5. See also *Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZKS 38 at para [152]; *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 at para [40] The Court of Appeal held that the RMA 'described as a hierarchy of instruments, to the extent that regional policy statements must not be inconsistent with national policy statements and certain other instruments. District plans must not be inconsistent with national policy statements and the same other instruments, nor with regional policy statements…'

principle.[384] The operation of the hierarchy creates an interlinked planning structure, whereby at the top of the hierarch sits the RMA which is decentralised through the levels of government to allow for local plan-making and implementation of those instruments at the regional and district levels (central government, regional councils, district councils and city councils) highlighted in figure 15.[385]

At the Central government level, National Policy Statements (NPS) enable central government support for local authorities (regional councils, unitary authorities, territorial authorities (city and district councils)) to implement objectives and policies, for matters of national significance. The mandatory NPS is the New Zealand Coastal Policy Statement (NCPS) prepared by the Minister of Conservation.[386]

Another key instrument at the central level include that National Environmental Standards (NES) are regulations prescribing technical standards, methods or other requirements for land use and subdivision, use of coastal marine area and beds of lakes and rivers, water take and use, discharges or noise. These regulations also provide requirements for monitoring that central government promote at the regional and district levels. The NES must be consistent with national policy statements.[387]

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[384] Resource Management Act 1991, s5, pt 5; G, Severinsen. *A model for the future* (Environmental Defence Society Incorporated, Auckland October 2019) at 58.

[385] Local Government Act 2002, pt 2; Resource Management Act 1991, s5, pt 5; *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 at para [40].

[386] Resource Management Act 1991, s 57. See also New Zealand Department of Conservation *New Zealand Coastal Policy Statement 2010* (Department of Conservation, Wellington, 4 November 2010).

[387] Local Government Act 2002, pt 2; Resource Management Act 1991, ss 43 – 44A. See also, Environment Foundation "New Zealand Environment Guide" (4 January, 2018) Environment Guide http://www.environmentguide.org.nz

National Planning Standards (NPS) reduce complexities within the planning context to provide a place for national direction. The NPS specifies matters, objectives, policies, and methods incorporated into regional policy statements or plans requiring local authorities to form regional policy statements and plans. These National Planning Standards also give effect to the National Policy Statements, such as the NZCPS.[388]

Regional Policy statements (RPS) under sections 59-62 of the RMA allow regional councils to prepare Regional Policy Statements to address resource management issues regionally. RPS provide directional structure and inform policies and methods in order to achieve managing the natural and physical resources within the regions and must give effect to NPS and the NZCPS.[389]

Regional Plans (RP) give effect to NPS (including the NZCPS) and RPS. The purpose of RP's is to assist regional councils to exercise its functions when achieving sustainable management under the RMA.[390] Regional councils prepare regional coastal plan[391] (between mean high water springs and the outer edge of the territorial sea) and optional regional plans for its region.[392] RP's cover a number of issues; for example, soil conservation, water quality and quantity, aquatic ecosystems and biodiversity, to name a few.[393] Regarding regional

[388] Local Government Act 2002, pt 2; Resource Management Act 1991, ss 45 – 55. See also, Environment Foundation "New Zealand Environment Guide" (4 January, 2018) Environment Guide http://www.environmentguide.org.nz

[389] Local Government Act 2002, pt 2.

[390] Resource Management Act 1991, s 63. See also, Environment Foundation "New Zealand Environment Guide" (4 January, 2018) Environment Guide http://www.environmentguide.org.nz

[391] Resource Management Act 1991, s 64.

[392] Resource Management Act 1991, ss 63 – 68A.

[393] Resource Management Act 1991, s 30.

coastal plans, it is primarily utilised to address activities in coastal marine areas.[394]

Next, the District plans (DP) give effect to NPS (including the NZCPS) and RPS, RP's and any conservation orders.[395] The purpose of the DP is to assist territorial authorities in exercising functions when achieving sustainable management under the RMA.[396] The territorial authority (city or district councils) prepare district plans for its district. DP cover a number of issues; for example, effects of land use, control of land use for the purpose of avoiding or mitigating natural hazards, and management of contaminated land, to name a few.[397]

The relevant instruments applicable to the MV Rena situation would include the following: NZCPS;[398] Bay of Plenty Regional Policy Statement;[399] Bay of Plenty Regional Coastal Environment Plan;[400] Statutory Acknowledgments;[401] Hapu Management Plan;[402] and the Motiti Island Environmental Management Plan.[403] These planning and policy instruments are crucial to resource management, as

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[394] Local Government Act 2002, pt 2.

[395] Resource Management Act 1991, s 75(3) and (4). See also, Environment Foundation "New Zealand Environment Guide" (4 January, 2018) Environment Guide http://www.environmentguide.org.nz

[396] Resource Management Act 1991, s 72.

[397] Local Government Act 2002, pt 2; Resource Management Act 1991, s 31.

[398] Department of Conservation *New Zealand Coastal Policy Statement 2010* (DOC, Wellington,4 November 2010) https://www.doc.govt.nz

[399] Bay of Plenty Regional Council *Bay of Plenty Regional Policy Statement* (BOPRC, Whakatane, 1 October 2014) https://www.boprc.govt.nz

[400] Bay of Plenty Regional Council *Bay of Plenty Regional Coastal Environment Plan* (BOPRC, 3 December 2019) https://www.boprc.govt.nz

[401] Ngāti Awa Claims Settlement Act 2005, s 45. See also, Bay of Plenty Regional Council *Ngāti Awa Statutory Acknowledgements* (BOPRC) https://www.boprc.govt.nz

[402] Department of Internal Affairs *Motiti Island – Hapu Management Plan* (August 2012) https://www.dia.govt.nz

[403] Department of Internal Affairs *Motiti Island Environment Management Plan* (May 2016) https://www.dia.govt.nz

well as, decision-making under the RMA.[404] All the policy statements and planning documents are utilised in a holistic filtered way, whereby local authorities exercising its powers and functions.[405] Essentially, this hierarchy of instruments used when decisions are reached in the context of resource consents or plan changes over activities in certain environments. These instruments together with the RMA provide the legal framework for regulating and managing environmental issues. Therefore, the operation of the RMA. This very framework unfortunately was a part of subjecting injustices on the people of Motiti through the resource consent process relating to the MV Rena vessel and grounding. Marine pollution operates under a different set of regulations.

b. Marine Pollution Regulation

Attached to the RMA is the Marine Pollution Regulation relative to the pollution impact of the MV Rena grounding on the surrounding coastal marine area. The RMA provision addressing marine pollution in found in both the RMA and the regulation. The relevant Marine pollution provision under the principle RMA, include sections 15A and 15B of the RMA: [406]

> (1) No person may, in the coastal marine area,—
> (a) dump any waste or other matter from any ship, aircraft, or offshore installation; or
> (b) incinerate any waste or other matter in any marine incineration facility—
> unless the dumping or incineration is expressly allowed by a resource consent.
> (2) No person may dump, in the coastal marine area, any ship, aircraft, or offshore installation unless expressly allowed to do so by a resource consent.
> (3) Nothing in this section permits the dumping of radioactive waste or radioactive matter (to which section 15C applies) or any discharge of a harmful substance that would contravene section 15B.

[404] Reform of the Resource Management System – A Pathway to Reform, Working Paper 2: G, Severinsen. A model for the future (Environmental Defence Society Incorporated, Auckland October 2019) at 65.

[405] Local Government Act 2002, pt 2.

[406] Resource Management Act 1991, ss 15A and 15B.

Section 15B asserts that no person can discharge harmful substances or contamination into the coastal marine area from a ship unless: a) the discharge is permitted or controlled by regulations under the RMA, rule, plan or resource consent and b) after reasonable mixing it is not likely to give rise to any effects in the receiving waters. This relates to the oil released from the vessel into the surrounding marine environment on Ōtāiti.[407]

Applying ss 15A and 15B demonstrates that dumping the MV Rena ship, which continues to discharge contaminants on Ōtāiti can only be carried out if the discharge of oil is permitted under the regulation, plans, rules or harmful substances/contaminants is not likely to give rise to any effects in the receiving water surrounding Ōtāiti.[408]

Next, under the RMA, there is the Resource Management (Marine Pollution) Regulations 1998 (MPR). The MPR provides how the oil discharge part of the MV Rena situation is to be managed. The MPR regulates the waste and other matter that can be dumped and discharges from ships and offshore installations of sewage, oil and garbage into the ocean and regulates where this can be carried out.[409] Section 9 states that:[410]

> (1) Any person may, in the coastal marine area, discharge oil, or mixtures containing oil, from any ship if—
> (a) the oil is not derived from the cargo of the ship; and
> (b) the ship is proceeding en route; and
> (c) the oil content of the discharge before dilution with any other substance does not exceed 15 parts per million.

[407] Resource Management Act 1991, s 15B.

[408] Resource Management Act 1991, s 15A, 15B.

[409] Resource Management (Marine Pollution) Regulations 1998.

[410] Resource Management (Marine Pollution) Regulations 1998, s 9.

(2) Any person may, in the coastal marine area, discharge oil, or mixtures containing oil, from an offshore installation, if—
(a) the oil content of the discharge before dilution with any other substance does not exceed 15 parts per million; and
(b) the discharge is platform drainage.

The three stage test for the resource consent applicant to satisfy, in order for a grant of the resource consent to discharge contaminants into the surrounding coastal marine area on Ōtāiti. Applying the three elements to the MV Rena grounding would include the below questions:[411]

1. To satisfy that the remaining oil on the MV Rena ship is not derived from the cargo of the MV Rena ship; and
2. To satisfy that the MV Rena ship is proceeding en route; and
3. To satisfy that the remaining oil content at the point of discharge, before dilution with any other substance, does not exceed 15 parts per million.

If section 9 of the MPR is contrasted with the MV Rena owners' evidence,[412] the below indicates why the resource consent may either be granted or declined.

1. The first step demonstrates that this element can be satisfied as the applicants Rena Oil Report – appendix A, Resolve Marine Group *MV Rena Entrapped Oil Removal Scope of Work*[413] affirms that: the oil was not in any cargo. The reason for this was that there were several locations of oil

[411] Resource Management (Marine Pollution) Regulations 1998, s 9.

[412] TMC (MARINE CONSULTANTS) LTD *RENA Oil Report* TMC ((MARINE CON-SULTANTS) LTD Rena Oil Report, 27 May 2015) Appendix A – Resolve Marine Group *MV Rena Entrapped Oil Removal Scope of Work* (Resolve Marine Group) at 6-10.

[413] TMC (MARINE CONSULTANTS) LTD *RENA Oil Report* TMC ((MARINE CON-SULTANTS) LTD Rena Oil Report, 27 May 2015) Appendix A – Resolve Marine Group *MV Rena Entrapped Oil Removal Scope of Work* (Resolve Marine Group) at 6-10.

pockets within the house section of the wreckage; on the main deck and two decks below in the engine room; on the port side of the vessel and three decks above the located pockets that should have been thoroughly searched for entrapped oil to confirm the quantities present.

2. The second step demonstrates that this element could not be satisfied because the MV Rena grounded while en route and came to a halt on Ōtāiti and therefore was unable to proceed en route;
3. The third step demonstrates that this element could not be satisfied due to the different measurements for oil content against the measurement required in the MPR.[414] The Rena Oil Report shows a remaining 0.5 cubic meters of Marine Fuel Oil and 650 litres of Steering Gear Oil (hydraulic oil) on the vessel.[415] The MPR asserts that the oil content, at the point of the discharge, from the MV Rena vessel should not exceed 15 parts per million. If oil content, was converted to cubic meters/litres and then into parts per million, the oil content at the discharge point (MV Rena vessel cracks) may likely exceed the 15 parts per million measurement. Therefore, the measurements provided in the evidence showed that the discharge of oil content exceeded the MPR 15 parts per million measure (remembering that this type of fuel requires heating due to its thick vis-cos nature).[416] The distortion with the measurements provided show a gap in the law and the potential opposition argument for the resource consent.

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[414] Resource Management (Marine Pollution) Regulations 1998, s 9. See also TMC (MARINE CONSULTANTS) LTD *RENA Oil Report* TMC ((MARINE CONSULTANTS) LTD Rena Oil Report, 27 May 2015) at 3-7.

[415] TMC (MARINE CONSULTANTS) LTD *RENA Oil Report* TMC ((MARINE CON-SULTANTS) LTD Rena Oil Report, 27 May 2015) Appendix A – Resolve Marine Group *MV Rena Entrapped Oil Removal Scope of Work* (Resolve Marine Group) at 17.

[416] TMC (MARINE CONSULTANTS) LTD *RENA Oil Report* TMC ((MARINE CON-SULTANTS) LTD Rena Oil Report, 27 May 2015) Appendix A – Resolve Marine Group *MV Rena Entrapped Oil Removal Scope of Work* (Resolve Marine Group) at 17.

Overall, the MPR under the RMA regime identified a distortion in the measurements of the oil content discharging from the cracks of the MV Rena ship. The elements of the MPR in the resource consent decision was found to have been adequately met. From a science perspective relative to contamination also showed that an argument in support of the people of Motiti was insufficient and therefore another injustice on the people of Motiti.

c. The RMA resource consent process

Essentially, the RMA outlines the law when dealing with environmental impacts of activities, controlled through the granting of resource consents to achieve the goal of sustainable management of resources, by controlling use, development and protection in order to enable surrounding communities.[417] The owner of the MV Rena made an application to the Bay of Plenty Regional Council for a resource consent for the MV Rena ship to remain on Ōtāiti.[418] Effectively, a resource consent allows an individual the use of a resource whereby an activity is non-existent under the RMA. Some activities may be authorised by the RMA or be a permitted activity authorised by rules and plans.[419] This is quite a procedure to work through for a successful granting of a resource consent.

Generally, the resource consent process includes three stages. The first stage requires the applicant to prepare the resource consent application, as well as, the environmental assessments to show the environmental state of the area to convey the baseline for which the effect of the activity will be measured against.

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[417] *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38 at [175]; *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [80]-[83]; Laura Fraser "Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act of 1991" (2008) 12 N.Z. J. ENVTL. L. 145 at 162.

[418] Resource Management Act 1991, Pt 6. See also, Beca Carter Hollings and Ferner (Beca) "Application for Resource Consent MV Rena" (Beca, May 2014) at ii.

[419] Resource Management Act 1991, ss 87 – 87BB.

Next, the second stage occurs when the applicant lodges their application and the Regional Council then considers the application. Lastly, the third stage is when the decision is made as to whether the resource consent application is granted or declined.[420] Thus, this leads to what the MV Rena resource consent looks like.

1 The MV Rena resource consent application

The MV Rena owner set up a Charitable Trust named the Astrolabe Community Trust that became the mechanism to administer the resource consent as the resource consent holder. Once the MV Rena owner's application was lodged in May 2014, Māori participants and the wider community had the option of entering that process, due to the findings in the Waitangi Tribunal Report purporting the inclusion of Māori involvement in the resource consent process.[421] More specifically, the resource consent sought by the MV Rena owner for the following activities include:[422]

> 1) consent to "**dump**" the remains of the MV Rena, its equipment and cargo on Astrolabe Reef as a result of the grounding of the vessel on 5 October 2011 pursuant to Section 15A of the RMA; and
> 2) consent to "**discharge**" any harmful substances or contaminants from the remains of the MV Rena, its equipment and cargo that may occur over time as a result of the degradation of the vessel pursuant to Section 15B of the RMA
>
> are granted, subject to the conditions of consent attached hereto as **Attachment One**.

[420] Resource Management Act 1991, s 104(1) and Pt 6.

[421] Bay of Plenty Regional Council *MEMORANDUM NO VII OF RENA PANEL* (Bay of Plenty Regional Council, 2015) at cl 12-13.

[422] Bay of Plenty Regional Council Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016 (Bay of Plenty Regional Council, 2016) at i.

The purpose, scope and principles of the conditions for the resource consent, include the following:[423]

> A1 The purpose of the consents, which are not retrospective consents seeking to authorise the grounding of the MV Rena…or any discharges that have occurred and abandon the remains of the MV Rena, its cargo, equipment and associated debris and any future discharges from the abandon remains…
> A2 The consents are to be exercised in accordance with the application and supporting materials…which…identify the consents as being to…the bow section including structural material, equipment and cargo…still contained…

In achieving the purpose of the resource consents:[424]

> a) A monitoring to detect adverse changes to the Otaiti/Astrolabe Reef environment resulting from the exercise of these consents and if monitoring identifies that a risk to human health…those matters will be dealt with under the conditions of these consents…
> b) The ability to ascertain whether the expected long-term natural recovery of the Otaiti/Astrolabe Reef environment is being impaired…

The organisation named Beca, was engaged by the MV Rena owner to assist with the application, which is one of the largest employee-owned professional service consultancy, located in Tauranga, New Zealand.[425] In addition, Matthew Casey Queen's Counsel, at the time, with over 30 years of experience and his legal team were engaged to proceed with the resource consent application ("the application").[426] The application was made pursuant to section 88 of the RMA,

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[423] At 173; Beca Carter Hollings and Ferner (Beca) "Application for Resource Consent MV Rena" (Beca, May 2014) at vi and 77 - 83.

[424] Bay of Plenty Regional Council Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016 (Bay of Plenty Regional Council, 2016) at 25.

[425] Beca Carter Hollings and Ferner (BECA) "BECA" (2014) BECA. <http://www.beca.co.nz/careers/working_in_our_offices/nz_offices/tauranga.aspx>.

[426] Matthew (Matt) Casey "Mathew Casey Queen's Counsel" (2015) <http://casey.co.nz/>.

which entail a vast amount of information enclosed within three volumes, which include:[427]

- **Volume One** – the Application for Resource Consent (MV Rena)
- **Volume Two** (Parts A and B) – Technical Reports
- **Volume Three** – Background and Alternatives Considered.

The public was notified of the resource consent under section 95A (2) (b) of the RMA. An extension to the timeframe by 20 to 40 working days was made to accommodate individuals to make a submission under section 37A(4)(b)(ii) of the RMA. The application was lodged under sections 15A and 15B to "dump" (i.e abandon) the wreck on the seabed and to authorise any potential future discharges of contaminants form the wreck. The introduction of these RMA sections were captured under international conventions relative to shipping casualties, as outlined in chapter six of this thesis. Therefore, the focus of the application was to abandon the wreck and provide for any potential future discharges on and around the marine environment of Ōtāiti.

2 The MV Rena owner sets up a Trust to bring the resource consent proceedings

The Astrolabe Community Trust (the Trust) lodged the resource consent application (consent holder). The Trust was established by the owner of the MV Rena, tasked with the responsibility of: exercising the resource consent and administering the conditions. The way the Trust was set up to provide a fund for the impacted communities and to administer the consent conditions.[428]

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[427] above n 3, at 3. See also Formal letter from Beca Carter Hollings and Ferner (BECA) "Bay of Plenty Regional Council - Application for Resource Consent (MV Rena)" (30 May 2014) at 1.

[428] Lowndes Associates Barristers & Solicitors *DEED OF TRUST Relating to The Astrolabe Community Trust* (Lowndes Associates Barrister & Solicitors, 2014) at 4.

The resource consent application lodged by the Trust proposed to leave the remaining parts of the MV Rena on Ōtāiti for a 10 year duration, which include the following propositions:[429]

- To leave the wreck and its debris on Ōtāiti in a state as is practicable (determined by technical assessments) subject to the proposed conditions;

- To seek retrospective consent for the grounding event or its aftermath inclusive of any discharges that have already occurred. For the reason being, that the grounding event and subsequent discharges have been dealt with under the RMA by the prosecution and conviction of the officers responsible and the owner;

- There is a range of alternatives that have been refined, due to technical investigations and consultation to arrive at the option now proposed in this application.

Based on the collated information to support the application, mitigation suggestions that potential adverse social and cultural effects, included the following four groups: the people of Motiti, Te Arawa ki Maketu, Tauranga Moana Iwi and the wider Bay of Plenty community. The proposed application shows the assessment of effects on the environment, outlined in chapter three, in order to leave the remains of the wreck and equipment, cargo and debris on Ōtāiti. This indicated that the actual or potential adverse effects are no more than minor. In terms of fisheries of the Reef, there is potential for a minor positive effect due to the complexity of habitat. Further, the assessment also recognised that the main

[429] At 3.

area of potential adverse effects relative to cultural and social values. The restoration projects proposed, as a consent condition, are provided to benefit communities of Motiti, Maketu, Tauranga Moana and the wider Bay of Plenty.[430] The proposed application is subject to proposed conditions, such as:[431]

1. **A Monitoring Plan** – to monitor cultural values, environmental effects, the condition of the wreck and to provide for review of monitoring frequency and scope, and for contingencies;
2. **A Wreck Access Plan** – to educate and inform visitors to Otaiti, inclusive of recreational divers;
3. **A Shoreline Debris Management Plan** – to recover debris from the MV Rena washing up on the shoreline; and
4. **Restoration and Mitigation** – to address any potential adverse effects of leaving the wreck.

Essentially, the resource consent application was lodged 30 May 2014 to allow the abandonment of the MV Rena wreck, with its equipment, cargo and debris field on Ōtāiti, and to provide for potential future discharge, with the attached monitoring conditions, for a 10 year duration.[432] Thus, the applicant originally indicated that it intended to seek a direct referral to the Environment Court; however, following the release of the Bay of Plenty Regional Council ("the Council") Report, the applicant decided to proceed with a Council hearing. The relevant parties to oppose or partially oppose the application were the Crown and the Bay of Plenty Regional Council.

Effectively, the resource consent was granted subject to conditions, on 26 February 2016.[433] Unfortunately, the granting of the resource consent posed a

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[430] Beca Carter Hollings & Ferner Ltd *APPLICATION FOR RESOURCE CONSENT (MV RENA) VOLUME ONE* (Beca 2014, 2014) at 7.

[431] At 7.

[432] At 7.

[433] Astrolabe Reef "Astrolabe Community Trust" (2017) Astrolabe Reef/Otaiti Guidelines for safe & responsible boating & diving < http://www.astrolabereef.co.nz/astrolabe-community-trust>

significant injustice on the people of the Motiti, as well as, provide a framework for local authorities to address the MV Rena grounding at the council hearing.

d. The Council Hearing – Hearing Panel

As an historical recount of the MV Rena grounding at the time it occurred and up until the Council Hearing, it is important to disclose that there were common law developments that occurred after the Hearing Panel decision was issued. Those developments are appropriate for further research. In particular, the Environment Court case *Ngai Te Hapu Inc v Bay of Plenty Regional Council*[434] placed more weight on the te Ao Māori perspective than the decision provided by the Hearing Panel. Unfortunately, the Hearing Panel decision had impacted the people of Motiti despite the Environment Court decision, because the harm caused by the Panel Hearing decision had been done and the Environment Court decision could not alleviate that harm on the people of Motiti. The harm on the people of Motiti was one of a spiritual nature, spiritual injustice.

The purpose of emphasising the Hearing Panel process is to make clear the argument of spiritual injustice for the people of Motiti, because of the impact it had on the local community on Motiti. The regulatory system in place had interfered with the practise of tikanga for the people of Motiti by limiting their voice and ability implement their ways of culture on Motiti through the Panel Hearing decision. In addition, certain surrounding hapū in the Bay of Plenty region had entered into agreements with the owner of the MV Rena, which signalled a decision to acknowledge the MV Rena grounding and its impact on Tauranga marine area heralding a signal to move on after from pushing for the wreck to be removed since the grounding. Once the surrounding hapū started to break away

[434] *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73.

from the collaborative push to remove the wreck, soon impacted cultural relationships in the area, including within the hapū belonging to Motiti. Therefore, the focus for this section is to detail the Council Hearing process and decision as the reason and starting point signalling the cultural impact and spiritual injustice on the people of Motiti.

The composition of the Council panel of Hearing Commissioners, such as: Judge G Whiting, Dr S Kelly and Messers R Kirikiri and J Lumsden.[435] The process in which the Hearing proceeds is that the Panel will listen to all of the evidence and submissions brought before the Panel for consideration and then make a decision under the RMA provision previously discussed in this chapter.[436] The legal arguments from the applicant; the Crown and the Regional Council and certain Hapū groups within the Bay of Plenty region are provided to demonstrate the issues before the at the Council hearing.

1 The Hearing Panel Decision

The decision of the Panel on the MV Rena Resource Consent Applications was released on 26 February 2016. The Determination of the Panel granted the following resource consents, subject to conditions:[437]

1) Consent to "dump" the remains of the MV Rena, its equipment and cargo on Astrolabe as a result of the grounding of the vessel on 5 October 2011 pursuant to section 15A of the RMA; and
2) Consent to "discharge" any harmful substances or contaminants form the remains of the MV Rena, its equipment and cargo that may occur over time because of the degradation of the vessel pursuant to section 15B of the RMA.

[435] Bay of Plenty Regional Council Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016 (Bay of Plenty Regional Council, 2016).

[436] Environment Court of New Zealand Practice Note 2014 2014, pp 3–12.

[437] Bay of Plenty Regional Council *Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016* (Bay of Plenty Regional Council, 2016) at 1.

The Hearing Panel decision gave their reasons for granting the resource consent by setting out a summary of the factual findings on the situation in relation to the potential effects of granting the proposal. The Panel was mindful of Part 2 of the RMA together with considering sustainable management in alignment with the hierarchy of policy and planning documents that assisted with their decision.[438] Thus, an outline of the effects on the environment from leaving the MV Rena vessel on Ōtāiti indicate the precautionary principle or risk assessment process.

2 The Hearing Panels version of the resource consent

The first point addressed by the Panel relate to the positive effects in terms of Certainty of control. Certainty of control is about the consequence of the decision possibly declining the resource consent application, because there was an uncertainty of not having a statutory authority to order the ship to be removed. Declining the resource consent would mean the ship would remain on Otaiti, which would not be subject to any conditions to monitor any adverse effects of the ship without any remedial action. If in the event the application would be declined, it would fall on:[439]

a) The applicant to propose an alternative; or
b) The Council to take enforcement action; or
c) Both parties allowing the status quo to continue; or
d) Action being taken by the Director of Maritime New Zealand under the Maritime Transport Act ("MTA").

Set out above, the uncertainty lay with the fact that if the owner does not seek an alternative proposal: any position taken by the Council or the Director of Maritime

[438] At 139.
[439] At 139.

New Zealand would be subject to a measure of uncertainty, due to the application of the limitation provisions of the MTA.

The limitation provisions of the MTA applies to every ship (whether registered or not or a New Zealand ship or not) in which the High Court has jurisdiction in regards to the limitation of liability for maritime claims. Therefore, the Panel found that granting the resource consent meant that the uncertainty would be avoided and certainty of having the owners responsible for monitoring Otaiti and the surrounding area for ten years would be a positive outcome. For the reason being, that it would guarantee Council controlled surveillance and ongoing management of the wreck and Ōtāiti, at the cost of the MV Rena owner.[440]

3 The Panels version of 'other effects'

The other effects that the Panel considered relate to the following:

1. Recreation and tourism - that the proposed consent will unlikely have any adverse effect on recreational activities such as fishing and boating, because in terms of the Bow section, it would provide a diving attraction to other experienced divers in the community, and safety issues were covered in the conditions;
2. Social impacts – that the proposal range from minor negative to minor positive effect, because the majority of submitters clearly referred to potentially positive effects from an experiential value;
3. Potential adverse effects – in terms of the contaminants showed that the effects of individual contaminants on water and sediment quality

[440] At 40.

varied due to differences in the physical and chemical characteristics, as well as, the quantities released. For example:[441]

a) Dispersed contaminants with no apparent effects;

b) Broadly dispersed contaminants with diminished effects – found that the potential risk of the remaining oil adversely affecting the area is negligible;

c) Locally dispersed contaminants with ongoing effects – found that contaminants release from the ship had adverse effect on the quality of Otaiti, and that those effects are still significant and that the proposed monitoring conditions should control the adverse effects; and

d) Potentially harmful contaminants that have not been released – found that the copper clove and antifouling have potential effects of contaminants released, and that it would continue to be released as the ship breaks apart or corrodes (this could take years, decades or centuries). The conditions provide adequate management of the effects, but there are concerns over the management of the copper clove after the proposed ten-year consent duration.

The Panels' findings were set on (b), (c) and (d) above.

[441] At 141, 142.

4. Ecology and fisheries – found that there would be minor effects on ecology from the Bow section. The existing contaminants showed adverse effects and further contaminants showed potential effects. There were concerns of potential effects (copper) released after the consent term.
5. Human health – found that there is potential health effects on Māori.
6. Marine mammals and birds – found that the proposal would have little impact on marine mammals or birds.
7. Coastal processes – found that the effects of wave patterns would be negligible.
8. Heritage – the removal either partial or in whole would not lessen the historical significance.
9. Natural character and landscape – found that the wreck is a prominent unnatural object accepted as a high value natural landscape and habitat, and that the adverse effects would be significant.
10. Sections 6, 7 and 8 of the RMA (exclusive of Māori values) – found that:
    a) Under section 6 the ongoing effects of leaving the ship would be significant and inappropriate in terms of s 6(a). In relation to section 6(e) there are still contaminants, copper clove and antifouling which could have potential adverse effects. In section 6(d) provides for safe access. Section 6(f) the grounding of the MV Rena was a high historical event and will remain so.
    b) Under section 7 the proposal would be inconsistent with sections 7(c) and 7(f) as the adverse effects would not maintain or enhance amenity values and the quality of the environment.

11. Māori values – found that the complexity of the Māori landscape was large. The views on whether the consent conditions were sufficient, were split. However, there was a common agreement that Otaiti was a Taonga and the wreck was an adverse effect. The Panel found that, despite the proposed conditions of consent, the continued presence of

the MV Rena and its contaminants on Otaiti would consequentially affect a number of the Māori values associated with Otaiti.

12. Māori values under section 6, 7 and 8 of the RMA were addressed separately, the Panel found that:[442]
    a) Under section 6(e) recognise and provide for the relationship of Māori, their culture, traditions, and ancestral lands, water, sites, waahi tapu and other taonga; 7(a) regards the kaitiakitanga and section 8 takes into account the principles of the Treaty of Waitangi (Tiriti o Waitangi). All three sections, to an extent, overlap and interrelate with each other;
    b) The strong belief that the continuous presence of the ship would be a significant adverse effect, which could only be mitigated by complete removal rather than the conditions proposed;
    c) The inevitable conclusion that the proposal would not be consistent with the strong directions relating to Māori under Part 2 of the RMA.

The Panel confirmed that the proposed resource consent conditions were inconsistent with the Maori provisions of the RMA and inadequately met To emphasise, there was a strong indication that due to the inconsistency with the legal provision in protecting Māori interests under the RMA, despite the case law reinforcing that the spiritual relationship that Māori have with the environment and their kaitiakitanga obligations were protected by law the rights of indigenous

[442] Bay of Plenty Regional Council Decision of Panel on MV Rena Resource Consent Applicants Volume One Date of Decision: 26 February 2016 (Bay of Plenty Regional Council, 2016) at [474], [655].

peoples in Aotearoa New Zealand endured spiritual injustice and their voice was silenced.[443]

e. The resource consent conditions

This key aspect developed in this section will show the Panels' findings in terms of the conditions that would likely be sufficient for the consent holder to execute in order to mitigate the effects found on Otaiti and the surrounding environment.

The purpose of establishing resource consents subject to conditions was to allow the abandonment of the ship on Otaiti with a monitoring system in place to cater to the maintenance of environmental sustainability in the environment, and if applicable, address any remedial action, in a situation where it is necessary.[444]

The Panel clearly stated that granting the resource consent subject to the consent conditions may place an enforceable regime for at least 20 years after the granting of any consent. The proposed condition would place a framework under the control of the Council that would ensure that Ōtāiti would be managed in a sustainable way.[445]

That particular management set up would also be at the cost of the consent holder. In order to protect the Council and the community a *form of security* during the consent timeframe and ten year after the expiry of the resource consent will remain active. It is this certainty that of management that will prevent further damage to Ōtāiti.[446] Leaving the ship on Ōtāiti would reflect uncertainty and

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[443] At 57, 68.

[444] Bay of Plenty Regional Council *Decision of Panel on MV Rena Resource Consent Applications: Volume One Appendix* (Bay of Plenty Regional Council, 2016) at 2.

[445] above n 143, at 153.

[446] At 153.

defeat the purpose of section 5 of the RMA, in terms of sustainable management. Providing a *form of certainty* through the resource consent conditions maintains compliance by the owner to monitor Ōtāiti and the surrounding environment, at their cost, to benefit the Bay of Plenty community.

The applicant has placed a robust and effective *form of security* to ensure that the cost of monitoring, as well as, the remediation, where practicable, for any unacceptable adverse effects on the environment are met by the consent holder. This *form of security* has therefore been set to safeguard the community by financially protecting the management of Ōtāiti and the surrounding area.[447]

The proposed conditions subject to the resource consents covered the following:[448]

1. A monitoring plan to monitor the environmental effects and cultural values for the purpose of reviewing the frequency and scope of the monitoring, as well as, the contingencies;

2. A wreck access plan for education and providing information to visitors of the reef, which include recreational divers;

3. A shoreline debris management plan for the purpose of recovering debris from the MV Rena washing up on the shoreline; and

4. Restoration and Mitigation for addressing any potential adverse effects of leaving the ship.

[447] At 140.
[448] At 26.

More specifically, the conditions relative to providing security were found that:[449]

1. The appropriate security is to provide a twenty year cash bond relative to conditions 20.1 and 20.2;

2. The quantum for the twenty-year timeframe should be six million, three hundred and fifty thousand dollars ($6.35m). This amount will be reduced to two million, nine hundred thousand dollars ($2.9m) for years 11-20; and

3. In addition to the bond, the consent holder will provide a surety by way of an Irrevocable *Letter of Undertaking* relative to condition 20.3, from the Swedish Club in the sum of five million dollars ($5m) in favour of the Council to provide for the undertaking of any contingency measures relating to the bow pieces of the ship.

It is evident that for the above reasons, laying out the environmental effects and then providing the conditions that would mitigate possible or potential adverse effects from the activity of leaving the remaining MV Rena vessel on Ōtāiti, argued by the MV Rena owners legal team illustrated the reasons why the Hearing Panel decision went in their favour. That decision being, to grant both resource consents to 1) abandon the MV Rena ship on Ōtāiti; and 2) to allow for the discharge of the contaminants from the Rena ship into the surrounding coastal environment of Otaiti in the Bay of Plenty region.

1 The Applicants legal argument

The opening submission ("the submission") outlines the start of a predicted lengthy process to resolve the question of what should be done with the

[449] At 53.

shipwreck of the MV Rena. Primarily, maritime casualties are dealt with under the Maritime Transport Act 1994 ("MTA"). The MTA regime purports the Director of Maritime New Zealand to take action where a ship is either a) a hazard to navigation and/or b) a hazardous ship. In this instance, two notices were issued that required the owner to render the ship to be no longer a hazard to navigation or being a hazard. It was noted that the vessel maintain that it is no longer a hazard.[450]

However, due to international maritime law obligations incorporated into the MTA, there a limitations on what can be required of the ship owner relative to protecting the environment from the significant risk of marine pollution and hazards. The limits relate to excluding any claim of removing a ship that has either sunk, wrecked, stranded or abandoned under section 86 of the MTA, but liability under the RMA does not apply. The legal argument turns to the application of the RMA as the better option to address the current MV Rena grounding liability.[451]

The legal submission states that the application for consent and this hearing was not in relation to the actual grounding of the MV Rena or the following matters. Rather, it discussed the previous events to justify why the applicant is present at the hearing and to understand what is to be considered from what remains in the environment.[452] The applicant placed emphasis on the future with the exclusion of any emotional attachment to the grounding and environmental harm subsequent to the grounding.

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[450] Lowndes Associates Barristers & Solicitors *Opening Submissions of Counsel for the Applicant Dated 7th September 2015* (2015) at 5.

[451] At 5.

[452] At 1.

At the time of the hearing, the state of the MV Rena wreck in terms of potential damage to the surrounding environment or human health, was minimal and the remaining risk factors would be addressed by the consent conditions. Essentially, the outcome of this situation may provide a beneficial result for the environment and the community, with the remaining issue of dealing with a partial wreck and its contents. This resetting of the applicants legal argument meant that the people of Motiti could not focus their arguments on the cultural impact from the initial grounding incident. As a result, the people of Motiti were unable to meaningfully participate in the council hearing process, because their voice would effectively land on deaf ears and ultimately under the RMA, the decision-makers could be justified in stating that the cultural arguments has be taken into consideration. In other words, the Panel only needed to listen to the concerns of the people of Motiti at the council hearing and not give full effect to an outcome that would align with the cultural arguments to oppose the granting of the resource consent. Reinforcing the injustice to the people of Motiti, as an indigenous peoples with a voice that had no weight in the resource consent decision.

2 A legal analysis of the applicants legal argument for a resource consent

The following relevant provisions of the RMA relating to the legal argument for the proposed resource consent include the following:

- Section 5 – purpose of the RMA;
- Section 6 – Matters of National Importance;
- Section 7 – Other Matters;
- Section 8 – Treaty of Waitangi;
- Section 15A – abandoning/dumping the ship;
- Section 15B – discharges into the environment;
- Section 12 – requires a consent to remove the ship, but doesn't apply to anything in relation to sections 15A or 15B of the RMA;
- Section 3 – effects on the environment;
- Section 2 - Environment;

- Section 104 – provides the framework of which the hearing panel is to assess the matter.

Essentially, the applicant's legal argument was reframed by proposing that the environmental effects from the activity of leaving the MV Rena vessel on Ōtāiti, from 2014 onwards could be challenged and not the environmental effects that occurred on the initial grounding incident in 2011. This reframing caused some concerns because iwi Māori were unable to make their full arguments to oppose the resource consent since the response strategy and marine pollution plans has been executed to deal with the marine pollution in the surrounding costal area, as discussed in chapter three.

Furthermore, an additional argument made referred to the ships containers and cargo scattered over Ōtāiti, as not falling within the definition of a ship and therefore the resource consent application could be declined.[453] However, the applicants position refer to the ships' containers and cargo, as being a part of the ship when it ran aground and; therefore, part of the ex-ship. Applying this logic does not make sense if the applicant is referring to the resource consent as applying to the current time that the application was lodged in 2014. If the granting of the resource consent is based on the ships' containers and cargo as being a part of the ship when it grounded on Ōtāiti in 2011, then logically the environment effects that occurred in 2011 should be included in the decision-makers decision on the resource consent. Despite this clear gap in interpreting the definition of ship and environmental effects, this logic was not taken into account in the decision and the resource consent was granted. Demonstrating the injustice on the people of Motiti due to the framing of the legal argument posed.

[453] Resource Management Act 1991, ss 15A, 15B.

Equally important, in reference to section 15B provided that no person may, in the common marine area (CMA), discharge a harmful substance or contaminant from a ship into water or land unless permitted or controlled by regulations, regional rule or resource consent. The issue relates to the contaminants still contained within the MV Rena wreck. For example, the copper; some TBT, and residual which could be discharged in future if the ship remained on Ōtāiti as an activity of abandoning the ship.[454] The discharge argument refers to the question of whether contaminants had already been emitted, deposited or escaped are still being discharged. The reason being, that once a discharge of contaminant had occurred there is no longer an ongoing discharge present because the contaminant is in the environment or would break down and disperse in the environment.[455] Hence, the point of discharge is the point at which the contaminant leaves the contained area. The subsequent course of that discharge relates only to the effects on the environment. In other words, a discharge of a contaminant is when that contaminant leaves the contained area only. Once that contaminant enters the environment it then becomes an effect on the environment rather than a discharge on the environment.[456] The conditions proposed relate to the monitoring of contaminants that have already been discharged into the environment. This monitoring has been proposed to last for the timeframe of 10 years.

Uncertainty around the timeframe of the consent conditions is a key point in this decision, as the uncertainty provide for an ongoing injustice to the people of Motiti because they are still exposed to the potential adverse effects that may occur. These environmental effects include: any positive, adverse, temporary, permanent, past, present, future, cumulative effect which arises over time or in

[454] At 12.
[455] At 22.
[456] At 22, 23.

combination with other effects regardless of the scale, intensity, duration or frequency of the effect, as well as, any potential effect of high probability and potential effect of low probability which has a high potential impact.[457] The legal argument is focused not on the type of effect occurring from leaving the ship on Ōtāiti, but on the issue of assessing the probability, and if a low probability, then the potential influence, of that potentiality.[458] To prove the probability, such an effect is unable to be based on a hypothesis because there must be evidence to support it.[459] For example, fears and anxieties in relation to the possible effects should be treated as an effect on the environment, and although the fears and anxiety can be genuinely held, that fear and anxiety could only be given weight if it was 'reasonably based on real risk'.[460] Therefore, emotional responses to an activity can be treated as an effect, as long as, it can be proven that it is a real risk. The proof of real risk would be the evidence to support the assessment of probability and the potential impact. This would be an effect of the people of Motiti to also show their injustice.

Effectively, the applicant relies on the 'environment' definition based on prepared assessments. The hearing Panel directed that the assessed environment would be assessed *'from its pre-collision state through to its state at the time of the hearing'.*[461] The defined environment was based on the pre-collision state of the surrounding area of Otaiti. If this is the case, and the pre-collision state to the time of the hearing is considered then logically the environment effects that occurred

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[457] Resource Management Act 1991, s 3.

[458] Environment Judge Jon Jackson "Predictions in an uncertain world – Assessing effects under the Resource Management Act 1991" (Paper presented to NZLS CLE Ltd, Environmental Law Intensive, Wellington, November 2016) at 24.

[459] Environment Judge Jon Jackson "Predictions in an uncertain world – Assessing effects under the Resource Management Act 1991" (Paper presented to NZLS CLE Ltd, Environmental Law Intensive, Wellington, November 2016) at 68.

[460] *Shirley Primary School v Telecom [1999] NZRMA 66* Environment Court at 66.

[461] At 26.

in 2011 should be included in the decision-makers decision on the resource consent. Despite this clear gap in definition of the environment and interpretation of its application to the resource consent application, this logic was not taken into account in the decision and the resource consent was granted. Demonstrating the injustice on the people of Motiti due to the framing of the legal argument posed.

Another essential point, an issue raised by the Crown was whether section 12 of the RMA also applied in this circumstance. The relevant provisions provided that section 12(1) (b) requires a consent to remove or demolish any "structure or any part of a structure" that is fixed on the seabed or foreshore; section 12(2) requires a consent to occupy any part of the common marine and coastal area, and section 12(1) (d) requires a consent to deposit in the seabed any substance that might have an adverse effect on it. However, according to section 12(6) states that it "shall not apply to anything to which section 15A or 15B applies, as well as, the ship did not come within the meaning of a structure being fixed to Ōtāiti.[462] The applicant argued section 12 of the RMA as irrelevant and not applicable. Thus, once again an injustice to the people of Motiti to make an opposition argument using section 12.

3 Iwi Māori involvement in the resource consent process

As outlined in the previous chapter relating to the role of the Waitangi Tribunal when considering the breaches of the Crown when they entered into negotiations with the MV Rena with respect of the three Deeds of Settlement (Wreck Removal Deed).[463] The Wreck Removal Deed disclosed an alternative avenue that the MV

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[462] Resource Management Act 1991, s 12(1)(b). See also above n 115, at 20.

[463] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre=Publication version (Wai 2391, Wai 2393, 2014) at 8; Waitangi Tribunal The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version (Wai 2391 Waitangi Tribunal 2014) at 1; Marian Ang, "The

Rena owner triggered in order to leave the MV Rena vessel on Ōtāiti. Additionally, the finding of the Waitangi Tribunal Report recommended iwi Māori the opportunity to engage the resource consent application process by providing a resourcing package proposed by the Crown which included the following:[464]

1. The Crown funding an RMA (Resource Management Act) expert law practitioner to provide legal advice/advocacy for Māori in opposing the resource consent application;

2. The RMA practitioner is to be chosen by the participating Māori submitter from a set of three counsel with appropriate experience nominated by the Crown. The legal practitioners are: Derek Nolan, Morgan Slyfield and Paul Beverley;

3. The use and instruction of the RMA practitioner is for the Māori submitter to decide. The Crown has no say or input in how Māori are to choose their legal representation. The Crowns role is to pay for legal representation;

4. The RMA practitioner could also decide in consultation with Māori to utilise the funding from the Crown to engage expert evidence if that is required;

Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 179.

[464] Bay of Plenty Regional Council *MEMORANDUM NO VII OF RENA PANEL* (Bay of Plenty Regional Council, 2015) at cl 12-13. See also Ken Stephen and Jeremy Prebble *MEMORANDUM OF THE CROWN* (Crown Law Te Tari Ture o Te Karauna, 2015) at 1–3. See also New Zealand Government "The Crown's Funding Proposals for the Rena Resource Consent Process" (17 December 2015) The Crown's Funding Proposals for the Rena Resource Consent Process <http://www.transport.govt.nz/sea/rena-resource-consent/>.

5. The RMA practitioner is not intended to displace any representation that might already be in place with other groups, which Māori are able to decide;

6. The purpose of the proposal is to actively assist Māori to participate in the resource consent process;

The above proposal was applied through the facilitation of the Ministry of Transport. However, the following Māori participants in the resource consent process were unable to obtain the Crowns funding, because they chose to engage a different legal representative to the proposed legal representative:[465]

1. Ngai Te Hapū– presented by Tom Bennion

2. Ngati Makino Heritage Trust on behalf of Te Arawa – presented by Jason Pou and Alex Hope.

3. Nga Potiki – presented by Tama Hovell.

4. Motiti Rohe Moana Trust and Mataatua District Māori Council (represented by the Trustee/Project Manager Hugh Sayers). Both bodies have sought to re-litigate the Crown's implementation of the relevant Tribunal recommendation and pursued further legal challenge against the Crown before the Waitangi Tribunal, as below:[466]

    a) Further claims initially filed to revive the Tribunal's inquiry relative to the Crown breaching the Treaty through the way it was implementing

[465] Stephen and Prebble, above n 93, at 2. See also Marlene Oliver *Rena Panel - Preparation for Expert Conferencing Minutes of 4 March 2015* (2015) at 4.

[466] Stephen and Prebble, above n 93, at 2.

one of the recommendations provided. Unfortunately, this revival was unobtainable because that Tribunal process was complete.

b) Both the Motiti Rohe Moana Trust and Mataatua District Māori Council (who were also parties in the Waitangi Tribunal's Rena inquiry) then filed with the Waitangi Tribunal a fresh claim in respect of the Crown's response to recommendations in the Tribunal's Final Report. Therefore, the Tribunal has issued timetabling directions on 13 April 2015. The Tribunal has directed the Crown and interested parties to respond to this application by 22 April 2015. At present no record of this process has been noted.

These compounding injustices for the people of Motiti (above number 1 and 4) were outlined. The implications of the above proposal process provides that:[467]

1. The Crown considers that to be fair to the groups who may benefit from the above proposal would be that more time in the process is required. The Crown suggested to the Panel to adopt the Crowns proposed timetable, which also included caucusing proceeding after evidence;
2. The Crown cannot predict the outcome of the new claim before the Tribunal or whether urgency will be granted, and notes that the Hearing Panel's processes are independent from the Tribunal's and the fact a further claim has been lodged is not of itself a ground to delay the hearing;

3. Despite the difficult time constraints, given the circumstance, the Crown again requests the Panel provide sufficient time for their counsel to come up to speed on the matter. This would include determining whether further

[467] At 3.

expertise is required. Furthermore, holding caucusing and resolving legal issues ahead of having the Crowns proposal in place is potentially prejudicial to Māori interests (and indeed the Crown's proposal);

4. In addition, the Crown raises other concerns to provide rationale for extending the timeframes due to the following: the Crown has resourced NIWA to obtain footage of the wreck site to provide submitters for their information; new information has come to light that indicate oil pockets remaining on the Rena; further information is sought with regard to copper clove post Cyclone Pam. These concerns were only raised for information purposes for the Panel to understand the reasons why the extension of the timetable should be considered for the benefit of evidence exchange of the knowledge over the wreck site between the applicant and submitters. Additionally the Crown may seek further direction from the Tribunal in terms of information provided by the applicant.

The resource consent then proceeded on the Waitangi Tribunal's recommendations.[468] The proposed resourcing package for Māori submitters to fund Māori involvement in the process: reflects the Crowns action to alleviate its breach of the Treaty obligations to protect Māori interests and demonstrate the Crowns active duty to inform the Panel of its concerns in support of Māori participation. It can be seen that the Crown had in fact complied with the Waitangi Tribunals recommendation. Despite Māori participation there were still some form of limitation that iwi Māori were exposed to under the RMA.

[468] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre=Publication version (Wai 2391, Wai 2393, 2014) at 8; Waitangi Tribunal The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version (Wai 2391 Waitangi Tribunal 2014) at 1.

4 Implications of the RMA on Te Ao Māori/Tikanga Māori

Iwi Māori participation, in particular, the people of Motiti were able to engage the resource consent process but in very limiting circumstances. This section will demonstrate those implications endured under the RMA by explaining the relevant provisions concerning Te Ao Māori (tikanga Māori).

The RMA provisions relating to Te Ao Māori include a range of 434 provisions, 12 schedules, 5 Amendment Acts and a hierarchy of instruments that are informed or prepared by local authorities and then the local authorities execute the content of the hierarchy of instruments in combination with the RMA.[469]

Additionally, there are a number of decision-making processes involved in relation to sustainable management: at the local authority level, as well as, the Environment Court, High Court, Court of Appeal and Supreme Court hierarchy that make decisions in respect of RMA disputes. Within this framework, there can be a number of provisions that reflect Te Ao Māori (tikanga Māori), as mentioned in the above sections of this chapter and in chapter two of this thesis.[470] The people of Motiti and the associated hapū in the area have a distinct and strong connection to Ōtāiti, in respect of the interpretation the Māori provisions and perspective under the RMA.[471] Thus, (Māori customary law/Tikanga Māori) clearly meet the interpretation of the terms under the RMA and its protection mechanism.[472]

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[469] Resource Management Act 1991, pt 4, pt5.

[470] Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" Vol 21 Waikato Law Review 2013 at Chp 1.

[470] Resource Management Act 1991, ss 2, 5, 6, 7 and 8.

[471] Resource Management Act 1991, ss 2, 5, 6, 7, 8.

[472] Catherine Magallanes "Access to Environmental Justice" Vol 15 NZYJ (2017) at 172.

To reiterate the Māori provisions under the RMA relative to the resource consent application, include the following provisions:[473]

> [T]he purpose of this Act is to promote the sustainable management of natural and physical resource…managing the use, development, and protection of natural and physical resources…which enables people and communities to provide for their…social…cultural well-being…to meet the foreseeable needs of future generations…safeguarding the life-supporting…ecosystems and …avoiding, remedying…adverse effects of activities on the environment.

The section applies to (Māori customary law/Tikanga Māori) because it assists with exercising Tikanga Māori through the words "managing the use, development and protection…resources" and "which enables people and communities to provide for their…cultural well-being…to meet…the needs of future generations".[474] These terms relate to the tikanga Māori values explained in the chapter two of this thesis. Next, section 6 (c) and (e) of the RMA in matters of national importance.[475] This provision relate to (Māori customary law/Tikanga Māori) due to the extremely strong connection and relationship that the people of Motiti and other associated hapū in the region hold with Ōtāiti through their oral traditions and customary practices.[476]Section 7 of the RMA is strongly relate to (Māori customary law/Tikanga Māori) because of the strongly held customary practices and belief system and culture in connection to Ōtāiti that the people of

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[473] Resource Management Act 1991, ss 2, 5, 6, 7 and 8.

[474] Resource Management Act 1991, s5. See also Retired Environment Court Judge Gordon Whiting – Chairman ent al "Decision of Panel on MV Rena Resource Consent Applications" Vol One (26 February 2016), Part 5 at para [557], [559].

[475] Resource Management Act 1991, s 6. See also, Catherine Magallanes "Access to Environmental Justice" Vol 15 NZYJ (2017) at 153 – 154, 172.

[476] Resource Management Act 1991, s5. See also Retired Environment Court Judge Gordon Whiting – Chairman ent al "Decision of Panel on MV Rena Resource Consent Applications" Vol One (26 February 2016), Part 5; "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (14 July 2015) Bay of Plenty Regional Council Toi Moana <http://www.renaresourceconsent.org.nz/wp-content/uploads/2015/07/67891-Brief-of-evidence-Pouroto-Ngaropo-Ngati-Awa2.pdf> at 10–24.

Motiti and associated hapū in the region hold.[477] This provision applies through the wording "managing the use, development and protection of natural and physical resources, shall have particular regard to…kaitiakitanga; the ethic of stewardship…"[478] These terms relate to the people of Motiti when taking care of the coastal marine are around the island. Section 8 of the RMA enable a balancing between Māori and Western values to occur when considering resource development.[479] The Treaty of Waitangi is a supporting constitutional document in place to protect Māori interests in respect of the people of Motiti.

Strong cultural arguments were proposed, such as Ngati Awa iwi on behalf of Te Patuwai hapū (people of Motiti) rejecting the resource consent on the grounds that:[480]

a) The mauri of the reef had suffered irreparable damage;
b) The gateway between the physical and spiritual worlds, that is such a key part of the Māori way of life, would remain impaired;
c) The Applicant's contention that removal of the wreck would not only be costly but a danger to human life and to further damage the reef was unacceptable;
d) The strong kaitiaki obligations of Ngāti Awa, with respect to Otaiti would continue to be marginalised;
e) The health and cultural well-being of Ngāti Awa would continue to suffer; and
f) Only full removal of the wreck would rectify the negative impact the grounding has had on Ngāti Awa cultural and spiritual values, and the relationship of Ngāti Awa with Otaiti and Motiti.

[477] Resource Management Act 1991, s 7. See also Retired Environment Court Judge Gordon Whiting – Chairman ent al "Decision of Panel on MV Rena Resource Consent Applications" Vol One (26 February 2016), Part 5 at para [557].

[478] Resource Management Act 1991, s 7.

[479] Robert Joseph and Tom Bennion "Challenges of Incorporating Māori Values and Tikanga under the Resource Management Act 1991 and Local Government Bill – possible ways forward" Vol 6 Issue 1 (2002-2003) (Ed) YNZJ at 13.

[480] Retired Environment Court Judge Gordon Whiting – Chairman ent al "Decision of Panel on MV Rena Resource Consent Applications" Vol One (26 February 2016), Part 5 at para [574] – [576].

Applying the above factors to the RMA provisions and the cultural argument put forward from the perspective of the people of Motiti through the support of its iwi, Ngāti Awa. The cultural arguments have been taken into regard with respect to the decision makers aligning with section 104 of the RMA. The decision of the MV Rena resource consent emphasised a regard to the cultural arguments. The panel came to its finding that:[481]

> We are mindful of the adverse effects of the wreck and its debris on the physical and ecological characteristics of Otaiti. We are particularly mindful of the effect on Māori values. This was evident by the vivid, and at times colourful and emotionally charged, presentation by the Māori submitters. Their genuineness was unquestionable.

The panel continues with the focal point for the decision:

> However, the fact is the wreck and its contaminants are there as a result of the collision…More importantly, granting the consent would provide certainty that a management regime…would promote the…purpose described in Section 5…For the reasons set out in this decision, the applications by the Applicant…are granted, subject to the conditions of consent attached…

The granting of the MV Rena resource consent means that the MV Rena vessel is able to remain on Ōtāiti, as a permitted activity. This decision was not in favour of the cultural arguments of the people of Motiti and its iwi Ngāti Awa, which outlines an implication of the RMA on (Māori customary law/Tikanga Māori) at the domestic level and; therefore, the injustice on the people of Motiti.

The RMA framework and all attached instruments, statutes and case law reflects sufficient terminology, meanings and provisions that can be utilised for decision makers to consider, take into account and have regard to. However, the

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[481] Retired Environment Court Judge Gordon Whiting – Chairman ent al "Decision of Panel on MV Rena Resource Consent Applications" Vol One (26 February 2016), Part 5 at 158.

implication may lay with how the cultural arguments are presented and whether those arguments are given its full consideration when weighed up against the other social, economic, and cultural aspects in section 5 of the RMA. This may indicate that cultural arguments may be lost within all the material that decision makers have to filter through in order to give effect to their decision-making obligations under the RMA. Therefore, perhaps the RMA may fall short of providing any protective mechanisms for (Māori customary law/Tikanga Māori) due to being saturated with all other environmental aspects as it did with the decision on the MV Rena resource consent decision.[482]

Additionally, the marine pollution regulation outlines specifications regarding the measures of pollution on the environment, which indicate a sufficient framework of legal processes relating to contamination on the surrounding marine environment. This regulation relates to the resource consent application in respect of the adverse effects on the surrounding marine environment of Ōtāiti.

5 Summary

The purpose of this chapter was to show how the RMA operates and to show any gaps in domestic law that gave rise to any injustice to the people of Motiti. This chapter outlined relevant literature on the historical background of the RMA and its operation, as well as, the regulatory system under the MTA in Aotearoa New Zealand regarding the protecting the marine environment and the response to MV Rena grounding. This chapter highlighted how the legal processes addressing coastal marine pollution was the catalyst of the injustice carried out on the people of Motiti.

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[482] Retired Environment Court Judge Gordon Whiting – Chairman ent al "Decision of Panel on MV Rena Resource Consent Applications" Vol One (26 February 2016), Part 5.

An analysis of the RMA regime with respect of the marine pollution detailed to illustrate how the oil discharged from the MV Rena vessel aligned with the law at the time. This chapter revealed potential gaps in resource management law nationally at the time of the MV Rena grounding.

An analysis of the resource consent process against Te Ao Māori and Tikanga Māori revealed that the processes within the RMA framework did not fully protect Māori interests in managing and dealing with marine environment surrounding Ōtāiti from a cultural perspective. This chapter demonstrated the injustice projected on the people of Motiti.

5 ŪPOKO TUARIMA: CHAPTER FIVE –THE KEY PLAYERS

a. Introduction

The issue of the MV Rena oil disaster and how the environmental effects, marked an impression on the Bay of Plenty region. The ordeal has been quite a loaded area of debate. These debates in literature, from a range of disciplines (science, natural resources law), contributes to an understanding of the grounding and the effects on the environment, as well as, possible solutions to these issues.

Part of this issue was not only identifying the processes and laws available at the time to respond to the grounding: it placed pressure on the Maritime New Zealand ("MNZ") three tier response process. The pressure on the MNZ system revealed how those processes set up and communicated to local communities in the Bay of Plenty region.[483] This chapter explores the particular organisations (Players) that were involved in the response to the MV Rena grounding, and what their respective roles and responsibilities were in this context.

Second, the legal processes existing pre-MV Rena signify how certain Players executed those legal processes when the MV Rena ran aground on Ōtāiti. Unfortunately, some of the Players decision making strongly affected the people of Motiti and the surrounding local communities in the Bay of Plenty region. This chapter will provide the legal analysis of the existing legal framework, at the time of the grounding to present the rational of particular decisions carried out.

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[483] Sonya Hunt et al "An Incident Control Centre in Action: Response in Action: Response to the Rena Oil Spill in New Zealand" (2014) Journal of Contingencies and Crisis Management, Volume 22, 63-66 at 63.

Lastly, relevant literature on the response operation (clean up ad safety issues) to the grounding are marked to highlight not only the environmental impacts; but, also the cultural impact causing injustice to the people of Motiti.[484] The response to the release of oil and debris from the MV Rena carried out by Maritime New Zealand, also included a cross-sector approach by other individual organisations and government agencies.

b. Player One - Maritime New Zealand

With Aotearoa New Zealand as an island nation consisting of "Te Ika-a-Maui (North Island) and Te Waipounamu/Te Waka-o-Maui (South Island)" divided by the Cook Strait, and having one of the world's largest exclusive economic zone consisting of 4,000,000 square kilometres. This vast ocean area is 20 times the size of the Aotearoa New Zealand's land mass, as mentioned in Chapter Two of this thesis.[485] Marten Bevan notes that most of the maritime historic events that have occurred in Aotearoa New Zealand have been connected with ships and the sea.[486] Such events included "the stories of Māui in his great waka, fishing up Te Ika-a-Māui, the exploration undertaken by Kupe the legendary navigator, and the voyages of ancestral waka through which these islands were first settled, which are distilled in Māori oral traditions explored in Chapter Four of this thesis.[487]

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[484] C, N. Battershill, et al. "The MV *Rena* shipwreck: time-critical scientific response and environmental legacies" (2016) New Zealand Journal of Marine and Freshwater Research, 50:1, 173-182 at 174; Hunt, S., Smith, K., Hamerton, H. and Sargisson, R.J. "An ICC in Action. J Contingencies & Crisis Man" (2014), 22: 63-66 at 65; Luke Faithful *Bay of Plenty Regional Council s 87F Report* (section 87F of the Resource Management Act 1991 Report 1370 67891, 2014) at 2.

[485] Marten, Bevan. *Maritime law in New Zealand* (Thomson Reuters New Zealand Ltd, 2016) at 3.

[486] At 5.

[487] At 5.

Our ocean continues to face indirect and direct impacts of human activities, which change the marine environment ecosystem.[488] These human activities also relate to the way people respond to groundings in our coastal marine areas around Aotearoa New Zealand. Maritime New Zealand ("MNZ") is responsible for administering their response strategy; and therefore, was responsible in leading the strategy with respect of the MV Rena grounding.[489]

1 The composition of MNZ

MNZ was initially named Maritime Safety Authority, established in 1993 and then renamed MNZ in 2005. MNZ is regulated by legislation, relevant regulations and rules[490] for implementing maritime regulatory, compliance and response for safe secure and environmental protection of coastal marine and inland waterways.[491]

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[488] C, N. Battershill, et al. "The MV *Rena* shipwreck: time-critical scientific response and environmental legacies" (2016) New Zealand Journal of Marine and Freshwater Research, 50:1, 173-182 at 174; Heike K. Lotze, Haley Guest, Jennifer O'Leary, Arthur Tuda, Douglas Wallace "Public perceptions of marine threats and protection from around the world" Ocean & Coastal Management, Volume 152 (2018) 14-22 at 14.

[489] Maritime Transport Act 1994, pt 23 and pt 25; C, N. Battershill, et al. "The MV *Rena* shipwreck: time-critical scientific response and environmental legacies" (2016) New Zealand Journal of Marine and Freshwater Research, 50:1, 173-182 at 174; Tianyu Xu, Xiaojing Liu & Shuang Hu "Maritime accidents in New Zealand from 2015 to 2018: revealing recommendations from statistical review" Journal of the Royal Society of New Zealand (2020), 50:4, 509-522 at 509.

[490] Maritime Transport Act 1994; Maritime Security Act 2004; Ship Registration 1992; Health and Safety at Work Act 2015; Hazardous Substances and New Organisms Act 1996; Civil Aviation Act 1990; Submarine Cables and Pipelines Protection Act 1996.

[491] Maritime Transport Act 1994; Maritime Security Act 2004; Ship Registration 1992; Health and Safety at Work Act 2015; Hazardous Substances and New Organisms Act 1996; Civil Aviation Act 1990; Submarine Cables and Pipelines Protection Act 1996. Each legislation has their specified regulation and rules. Tianyu Xu, Xiaojing Liu & Shuang Hu "Maritime accidents in New Zealand from 2015 to 2018: revealing recommendations from statistical review" Journal of the Royal Society of New Zealand (2020), 50:4, 509-522 at 509; Maritime New Zealand *Briefing to the Incoming Minister* (November 2020) at 4.

Effectively, MNZ is an institutional structure, set up as a Crown entity owned by the Crown, and effectively functioning as a Crown agent "which must give effect to government policy when directed by the responsible Minister".[492] The responsible Minister, falls under the government transport portfolio (Minister of Transport). The Minister of Transport, as the governments' principal advisor, then appoints a Board for MNZ to determine MNZ's strategy and the ability to appoint the MNZ Director, who is the Chief Executive of the Board, responsible for managing the day-to-day operations.[493]

With MNZ having an oversight by the Minister of Transport, this means that MNZ is a component of five Crown entities and part of the wider transport sector 'family' of agencies monitored by the Ministry of Transport. The Minister of Transport and Associate Minister of Transport oversees the Ministry of Transport is responsible for MNZ.[494] MNZ is one of the four transport sectors within the Ministry of Transport.[495] For example, the Ministry of Transport branches include Civil Aviation Authority and MNZ, NZ Transport Agency and the Transport Accident Investigation Commission.[496] MNZ oversights the maritime 'domain' (which extends further than transport matters) through the objectives and purposes of the MNZ Board, and the responsible Minister.

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[492] Maritime Transport Act 1994, s 429; Crown Entities Act 2004, s 7.

[493] Maritime Transport Act 1994, ss 2, 5, 5A, 429-444A.

[494] Maritime New Zealand *Annual Report Pūrono ā-Tau 2020/21* (2020-2021) at 12. See also, Maritime New Zealand *Annual Report Pūrono ā-Tau 2011/12* (2011-2012) at 4. New Zealand Government "Maritime New Zealand No te rere moana Aotearoa" Maritime New Zealand No te rere moana Aotearoa <www.maritimenz.govt.nz>.

[495] Maritime New Zealand *Annual Report Pūrono ā-Tau 2011/12* (2011-2012) at 4. See also, New Zealand Government "Maritime New Zealand No te rere moana Aotearoa" Maritime New Zealand No te rere moana Aotearoa <www.maritimenz.govt.nz>.

[496] Maritime New Zealand *Annual Report Pūrono ā-Tau 2011/12* (2011-2012) at 5; Maritime New Zealand *Annual Report Pūrono ā-Tau 2020/21* (2020-2021) at 12. See also, New Zealand Government "Maritime New Zealand No te rere moana Aotearoa" Maritime New Zealand No te rere moana Aotearoa <www.maritimenz.govt.nz>.

With respect to the MNZ Board, it's composition includes a membership of "5, but no more than 7"[497] members, appointed to the MNZ Board with the general purpose, stating that:[498]

> …consistent framework for the establishment, governance, and operation of Crown entities and to clarify accountability relationships between Crown entities, their board members, their responsible Ministers on behalf of the Crown, and the House of Representatives…to provide for different categories of Crown Entities…to have its own framework for governance…to set out reporting and accountability requirements.

In addition to its general purpose, is the specific maritime objective of the Board "to undertake its safety, security, marine protect, and other functions in a way that contributes to the aim of achieving and integrated, safe, responsive, and sustainable transport system".[499] The function of the Board has an extensive list under section 431 of the Maritime Transport Act 1994 (MTA), namely that it has the following functions:[500]

> (a) to promote maritime safety and security, and protection of the marine environment in New Zealand:
> (b) to promote maritime safety and security, and protection of the marine environment beyond New Zealand in accordance with New Zealand's international obligations:
> (e) to ensure the provision of appropriate distress and safety radio communication systems and navigational aids for shipping:
> (f) to ensure New Zealand's preparedness for, and ability to respond to, marine oil pollution spills…
> (i) to co-operate with, or to provide advice and assistance to, any government agency or local government agency when requested to do so by the Minister…
> (ia) to provide information and advice with respect to maritime transport and marine protection, and to foster appropriate information education programmes…
> (j) to investigate and review maritime transport accidents and incidents and maritime security breaches and incidents…
> (m) to advise the Minister on technical maritime safety policy…

[497] Maritime Transport Act 1994, s 429A(1).

[498] Maritime Transport Act 1994, s 429A (2); Crown Entities Act 2004, ss 3 and 7.

[499] Maritime Transport Act 1994, s 430.

[500] Maritime Transport Act 1994, s 431.

There are further functions that the MNZ must act on if the Minister directs it, held under section 14C of the Aviation Act 1990, which relate to aviation activities in terms of search and rescue co-ordination, participation, and performance of the operation. In addition, to the MNZ Boards responsibilities also include the Directors duties relative to the day-to-day operations of MNZ, which assert:[501]

> …[A]ppoint a chief executive of the Authority, who shall be known as the Director of Maritime New Zealand.
> (2) The Director shall have and may exercise such functions and powers as may be conferred or imposed on the Director by this Act or any other Act, or regulations or rules made under this Act or any other Act, and such functions and powers as may be delegated to the Director by the Authority under section 73 of the Crown Entities Act 2004 or any other Act.
> (3) Without limiting subsection (2), the Director shall—
> (a) exercise control over entry into the maritime transport system through the granting of maritime documents and marine protection documents under this Act or any other Act…
> (4) In performing or exercising any functions or powers in relation to—
> (a) the granting of maritime or marine protection documents; or
> (b) the suspension of maritime or marine protection documents; or
> (c) the revocation of maritime or marine protection documents; or
> (d) the granting of exemptions; or
> (e) the enforcement of the provisions of this Act or any other Act, or of rules or regulations made under any such Act…

Under the statutory regime of the MTA, MNZ is a main player in New Zealand's response strategy for addressing environmental disasters and marine casualties, such as the MV Rena disaster.[502]

2 The role of MNZ - National Maritime regulations

[501] Maritime Transport Act 1994, s 439.

[502] Tianyu Xu, Xiaojing Liu & Shuang Hu "Maritime accidents in New Zealand from 2015 to 2018: revealing recommendations from statistical review" Journal of the Royal Society of New Zealand (2020) 50:4, 509-522 at 509. Maritime New Zealand *Annual Report Pūrono ā-Tau 2011/12* (2011-2012) at 4; Maritime New Zealand *Briefing to the Incoming Minister* (November 2020) at 4.

In more detail, the MNZ's objective as the national maritime regulatory, compliance and response agency is to work toward providing safe and secure clean water.[503] The importance of the role is to ensure that all maritime activities are executed safely with minimal impact on the environment and on the Nations security. Three main roles are carried out by MNZ which include:[504]

1. **Regulation and Compliance** – to develop and maintain the national safety, security and environmental protection regulations governing ships, ports and offshore installation;

2. **Provision of maritime safety infrastructure** – to maintain coastal navigation aides to shipping; national maritime distress and safety radio service; and an emergency locator beacon detection network.

3. **Response to incidents** – to provide a national search and rescue coordination service and develop national maritime incident and oil spill response capability and emergencies.

With the MNZ board appointed by the Governor General on the recommendation of the Minister of Transport and providing direction for the overall maritime strategy, MNZ had a major role in responding to the MV Rena grounding clean-up operation. A large part of that response relates to cross-sectorial

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[503] Maritime New Zealand *Annual Report Pūrono ā-Tau 2020/21* (2020-2021) at 12. See also, New Zealand Government "Maritime New Zealand No te rere moana Aotearoa" Maritime New Zealand No te rere moana Aotearoa <www.maritimenz.govt.nz>.

[504] Maritime New Zealand *Maritime New Zealand Statement of Intent 2015-2021* (Statement of Intent 2015) at 4. Maritime New Zealand *Annual Report Pūrono ā-Tau 2020/21* (2020-2021) at 12. See also, New Zealand Government "Maritime New Zealand No te rere moana Aotearoa" Maritime New Zealand No te rere moana Aotearoa <www.maritimenz.govt.nz>.

communication and collaboration with certain groups and bodies working together in achieving the goal of keeping the marine environment clean.[505]

Communicating the delivery of outputs to local communities affected by the grounding in the Bay of Plenty was prevalent relative to the oil clean up co-ordination.[506] MNZ's commercial shipping sector carries out its task through: international cargo and cruise operators; coastal traders and tankers recognised under international regulations, categories of vessel such as interisland ferries; and domestic operators of fishing or commuter/passenger services.[507] MNZ not only responds to oil spill disasters, they also comply and work with international shipping industries akin to the MV Rena, in order to keep New Zealand's environment safe. With this important role and knowledge base, MNZ was equipped to respond appropriately to the oil spill disaster at Ōtāiti and also to communicate those processes to the local communities involved.[508]

3 The MNZ response to marine pollution?

MNZ maintain the coordination service leading Aotearoa New Zealand's activities and responses.[509] MNZ has two main objective for meeting their responsibilities

[505] Maritime Transport Act 1994, s 429; Maritime New Zealand *Annual Report Pūrono ā-Tau 2020/21* (2020-2021) at 12; Sonya Hunt et al "An Incident Control Centre in Action: Response in Action: Response to the Rena Oil Spill in New Zealand" (2014) Journal of Contingencies and Crisis Management, Volume 22, 63-66 at 63. See also, New Zealand Government "Maritime New Zealand No te rere moana Aotearoa" Maritime New Zealand No te rere moana Aotearoa <www.maritimenz.govt.nz>.

[506] Sonya Hunt et al "An Incident Control Centre in Action: Response in Action: Response to the Rena Oil Spill in New Zealand" (2014) Journal of Contingencies and Crisis Management, Volume 22, 63-66 at 63; Simon Murdoch, Reviewer Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (March 2013) at 52.

[507] Maritime Transport Act 1994, s 429. Maritime New Zealand *Annual Report Pūrono ā-Tau 2020/21* (2020-2021) at 12.

[508] Sonya Hunt et al "An Incident Control Centre in Action: Response in Action: Response to the Rena Oil Spill in New Zealand" (2014) Journal of Contingencies and Crisis Management, Volume 22, 63-66 at 63.

[509] Maritime New Zealand *Briefing to the Incoming Minister* (November 2020) at 6.

responding to oil spills. First, MNZ is required to the international treaty obligations that is attached to New Zealand's membership to the "International Maritime Organisation and the International Convention for Oil Pollution Preparedness, Response and Cooperation" and other instruments, which are further explored in Chapter six.[510] Second, MNZ is required to: 1) prepared the New Zealand Marine Oil Spill Response Strategy and National Marine Oil Spill Contingency Plan; 2) ensure that regional, shipboard and site marine oil spill contingency plans are prepared and regularly reviewed; 3) ensure the training for implementing the national strategy and 4) appointing a National On-Scene Commander to lead response operations.[511] Effectively, MNZ manages the response to oil spills (from the MV Rena) and the oversight of the salvage operation container removal and wreck removal.[512]

To carry out the response task, MNZ establish and administer a fund named New Zealand Oil Pollution Fund ("the Fund") managed by the Oil Pollution Advisory Committee ("OPAC"). OPAC, amongst other responsibilities, collect money intended to assist with implementing any marine oil spill response, meeting international obligations for international assistance for "Oil Pollution Preparedness, Response and Cooperation".[513] The New Zealand Marine Oil Spill Response strategy support and align with these requirements and addresses the

[510] Simon Murdoch Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (Ministry of Transport 2013) at 15.

[511] Maritime Transport Act 1994, pt 23; Simon Murdoch Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (Ministry of Transport 2013) at 15.

[512] Ministry for the Environment Manatū mo Te Taiao *Rena Long-Term Environmental Recovery Plan* (December 2011) at 2.

[513] Maritime Transport Act 1994, ss 282, 331; Simon Murdoch Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (Ministry of Transport 2013) at 23.

roles, responsibilities, guidelines and financial accountabilities for the cost of the response that:[514]

> The original Strategy was developed in 1992…The last revision was completed in 2006. The planned review in 2011 was delayed because of the ***Rena*** incident…The Strategy also meets requirements under part 23 of the Act, which sets out the domestic obligations for plans and responses to protect the marine environment from marine oil spills. Obligations apply across government (Maritime NZ), regional councils and various industry sectors…Marine Protection Rules…implement international conventions and standards and form part of New Zealand's maritime law. These rules regulate…the development of marine oil spill contingency plans…key requirement for planning a response to oil spills by industry operators, regional councils and Maritime NZ.

The Oil Response Strategy set out the three-tier marine pollution response system, framework and policy for partnership within that system.[515] It also stipulated that in "the event of an oil spill, the polluter is liable for all reasonably incurred costs associated with the response within specified limits".[516] Noting that in this oil spill incident, the owner of the MV Rena was involved with the response in accordance with the international obligations.[517]

Emphasising the Oil Response Strategy, under the Fund, an Oil Pollution Levy ("OPL") which imposed levies applied to commercial vessels over 100 gross tons and more than 24 metres in length, akin to the MV Rena.[518] For instance our marine community involves over "450,000 pleasure craft, nearly 4,000 commercial vessels, and a small number of New Zealand flagged vessels

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[514] Maritime Transport Act 1994, s 284; Maritime New Zealand *New Zealand Marine Oil Spill Response Strategy 2015-2019* at 10.

[515] Maritime New Zealand New Zealand Marine Oil Spill Response Strategy 2015-2019 at 5.

[516] Maritime Transport Act, s 345, pt 25; Maritime New Zealand New Zealand Marine Oil Spill Response Strategy 2015-2019 at 7; Simon Murdoch Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (Ministry of Transport 2013) at 16.

[517] *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2017 NZEnvC 073. This case confirmed the granting of the resource consent to abandon the MV Rena ship on Ōtāiti.

[518] Maritime Transport (Oil pollution Levies) amendment Order 2019; Maritime Transport (Oil Pollution Levies) Order 2016.

(including interisland ferries), as well as a range of smaller ferries carrying millions of passengers each year".[519] The collection of the levies assist with operating New Zealand's maritime oil pollution preparedness and response system.[520] The imposed levies are for the following purpose under the MTA:[521]

> (a) to meet the costs of the Oil Pollution Advisory Committee:
> (b) to purchase plant, equipment.or assist in implementing, any responses to marine oil spills:
> (c) to meet the reasonable costs of the Authority…in controlling, dispersing, and cleaning up any marine oil spill:
> (ca) to meet the costs of services associated with planning and responses…
> (d) to meet the costs of the Authority in—
> (i) the performance of the…Authority, the Director, and the National On-Scene Commander…
> (ii) taking measures to avoid marine oil spills:
> (e) to meet the reasonable costs of a regional council…marine oil spill and in controlling, dispersing, and cleaning up any marine oil spill:
> (f) to meet the reasonable costs of any regional council in—
> (i) the performance of the other functions…of the regional council and its regional on-scene commander…
> (ii) taking steps to avoid marine oil spills:
> (g) to meet the reasonable costs incurred…in assisting any animal or plant life affected by any marine oil spill…
> (h) to meet any other expenditure for…reimbursement…from the Fund:
> (i) such other expenditure…related to marine oil spills…approved by the Governor-General by Order in Council…

The other key advice that OPAC provides MNZ involves any other matters set out by MNZ, and the New Zealand Oil Spill Response Strategy ("Oil Response Strategy").[522] Oil Response Strategy, shaped by lessons of the past, and mindful of the future, prevent environmental oil risks.[523] The Oil Response Strategy aligns

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[519] Jim Lilley et al "Government (Maritime New Zealand's) Rohe in Oiled Wildlife Response" (paper presented to Effects of Oil on Wildlife 10th International Conference, Tallinn, Estonia, October 2009) at 3.

[520] Maritime Transport (Oil Pollution Levies) Order 2016.

[521] Maritime Transport Act 1994, ss 330, 331 and 333.

[522] Maritime Transport Act 1994, s 282.

[523] Maritime Transport Act 1994, s 283; Maritime New Zealand *New Zealand Marine Oil Spill Response Strategy 2015-2019* at 5.

with international best practice and convention guidance, specified in chapter six of this thesis, and implements the three tiered readiness and response approach.[524]

The three-tiered marine oil spill response system entail the framework and policies for cooperation and partnership. Further, the three tier oil spill response system was executed through the Marine Pollution Response Service. The Maritime Response Service was the operational unit of MNZ, tasked with the response operation and coordination, stationed in Auckland with, at the time, nine staff and a manager who reports to the Wellington manager (at the time of the MV Rena grounding both the general manager and the manager were relatively new in their roles).[525] The Marine Response Service takes command role and leadership duties for the response or it can provide support and standby services to the relevant responders for tier one and two situations.[526] The National Response Team ("NRT") engages a response if the situation renders a three-tier response and the 50-person NTR, which consist of both Marine Pollution Response Service and MNZ staff (all qualified and experienced with responding to maritime incident response) come together to address the oil spill in territorial waters.[527] Regional Council are involved and responsible for their part of the territorial sea. Effectively, the MV Rena grounding triggered the collaborative approach for MNZ and the Regional Council in the Bay of Plenty area to carry out

[524] Maritime New Zealand New Zealand Marine Oil Spill Response Strategy 2015-2019 at 10.

[525] Maritime Transport Act 1994, pt 23; Simon Murdoch Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (Ministry of Transport 2013) at 17.

[526] Maritime Transport Act 1994, pt 23; At 17.

[527] Maritime Transport Act 1994, pt 23; At 17.

the policies, processes and guidelines with the Three Tier Marine Oil Spill Response Strategy in Figure 11.[528]

The MV Rena owner was obligated to respect these rules, due to the vessel location within Aotearoa New Zealand waters.[529] The key values for the Oil Response Strategy set the platform for cross-sector collaboration for the maritime community at the local level and iwi Māori to keep the waters clean, secure and safe, while acting with integrity, commitment and respect.[530] Highlighting the experience of oil response from the initial responders at the site, technical editor for Casualty Management Guidelines (2012) endorsed that:[531]

> …many people caught up in a major casualty response…will never have experienced anything like [it] in their careers before…Even ashore, parties with responsibility for dealing with the casualty response until it occurs. While all the training that does take place is invaluable, nothing quite prepares a responder for a first-time reaction.

This experience faced by all government agencies; Regional Council; local businesses, iwi Māori in the Bay of Plenty carried out their roles in response to the grounding with substantial shock, knowing that their roles were of importance, because the health of the ocean was, and still continues, to be an important goal

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[528] Maritime Transport Act 1994, s 283; Maritime New Zealand New Zealand Marine Oil Spill Response Strategy 2015-2019 at 5; Simon Murdoch Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (Ministry of Transport 2013) at 3.

[529] Maritime New Zealand New Zealand Marine Oil Spill Response Strategy 2015-2019 at 6.

[530] Maritime New Zealand New Zealand Marine Oil Spill Response Strategy 2015-2019 at 8.

[531] Simon Murdoch Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (Ministry of Transport 2013) at 3.

to achieve. Simon Murdoch placed emphasis on the reverberation of the grounding effects on the legal processes that:[532]

> Later phases may be equally or more problematic in substance…The pressures of the Rena incident caused Maritime New Zealand (MNZ), across its systems and response machinery, to buckle initially. Some of its planned and exercised response functions had limited resilience to begin with and were impaired in ways that might have damaged the response as a whole…

Unfortunately, the response was criticised by the community and iwi Māori.[533] As an example from an iwi on the mainland, Te Kipa Kepa Morgan and Tumanaki Ngawhika Fa'aui affirm the view of the tribal grouping named Te Arawa ki Tai stating that:[534]

> In December 2011, one of the affected indigenous tribal groups, Te Arawa ki Tai, made submissions on the draft recovery plan, stating that the goal of the plan did not recognise and provide for a Māori (indigenous peoples of New Zealand) cultural perspective to environmental restoration. They suggested that the word "mauri" (life force or life supporting capacity) be inserted, or a new goal added to properly encompass a Māori worldview or environmental restoration.

As a result, the Ministry for the Environment delivered the Rena Long-Term Environmental Recovery Plan on 26 January 2011, with the stated goal to

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[532] Simon Murdoch Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (Ministry of Transport 2013) at 3.

[533] Simon Murdoch, Reviewer Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (March 2013) at 29.

[534] Te Kipa Kepa Brian Morgan, Tumanako Ngawhika Fa`aui, "Empowering indigenous voices in disaster response: Applying the Mauri Model to New Zealand's worst environmental maritime disaster" European Journal of Operational Research, Volume 268 (2018), Issue 3, 984-995 at 984.

"restore the mauri of the affected environment to its "pre-Rena" state".[535] An extremely significant turn for the indigenous people of Aotearoa New Zealand.

Subsequently, the MNZ response involved a vast amount of information and cross-sectorial communication between certain organisations, community groups and hapū and iwi, which the Rena Long-term Environmental Recovery Plan ("Recovery Plan") was set up to address the grounding effects.[536] The oil spill response continued as a large-scale coordinated approach by particular government agencies and individuals throughout New Zealand to work together in a short amount of time to deal with the grounding event, which cost the Crown $47 million to execute.[537] Therefore, the response put a communicative strain on existing government structures and procedures when addressing international obligations.[538] This meant that government agencies had to regroup in their approach to the grounding incident.

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[535] Te Kipa Kepa Brian Morgan, Tumanako Ngawhika Fa`aui, "Empowering indigenous voices in disaster response: Applying the Mauri Model to New Zealand's worst environmental maritime disaster" European Journal of Operational Research, Volume 268 (2018), Issue 3, 984-995 at 984.

[536] Tianyu Xu, Xiaojing Liu & Shuang Hu "Maritime accidents in New Zealand from 2015 to 2018: revealing recommendations from statistical review" Journal of the Royal Society of New Zealand (2020) 50:4, 509-522 at 509; Sonya Hunt et al "An Incident Control Centre in Action: Response in Action: Response to the Rena Oil Spill in New Zealand" (2014) Journal of Contingencies and Crisis Management, Volume 22, 63-66 at 63; Simon Murdoch *Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011* (Ministry of Transport 2013) at 16.

[537] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 1.

[538] Sonya Hunt et al "An Incident Control Centre in Action: Response in Action: Response to the Rena Oil Spill in New Zealand" (2014) Journal of Contingencies and Crisis Management, Volume 22, 63-66 at 63. See also Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 1. See also Simon Murdoch *Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011* (Ministry of Transport 2013) at 3.

4 The MTA alternative legal process

The alternative option to removing the vessel under sections 248 and 100A of the MTA was the opportunity to negotiate another pathway.[539] As part of international relations outlined in chapter six, the MV Rena owner entered into negotiations with the Crown to settle the Crowns' claims (inclusive of the Crowns' agencies) resulting from the grounding of the MV Rena. The following three deeds of settlement included: a Claims Deed, an Indemnity Deed and the Wreck Removal Deed.[540]

The purpose of entering the Claims Deed was to settle the Crowns' Claims against the owners for $27.6 million. The Indemnity Deed affirmed that the Crown agreed to indemnify the owners against 'certain claims by New Zealand public and local government claimants' to an extent of $38 million (maximum). Lastly, the Wreck Removal Deed asserted that the Crown would decide whether or not to support the MV Rena resource consent application to leave part of the wreck on Ōtāiti by considering environmental, cultural and economic interests of New Zealand and the costs of complete removal of the wreck. If the Crown supported the application in succeeding, then the MV Rena owners will pay the Crown $10.4 million for 'public purposes'. In addition, the Waitangi Tribunal also acknowledged that a similar Deed obliges the Bay of Plenty Regional Council to consider submitting in support of any resource consent application (this deed was not however placed before the Tribunal). The most pivotal deed of settlement is the Wreck Removal Deed, because there was a legal requirement on the MV Rena

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[539] Maritime Transport Act 1994, s 248 and 100A.

[540] Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims: Pre=Publication version (Wai 2391, Wai 2393, 2014)* at 7; Waitangi Tribunal *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 Waitangi Tribunal 2014) at 1; Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 179.

owners by two MTA notices to either remove the ship or find another lawful means of dealing with the ship.[541] Therefore, the Wreck Removal Deed to enter into a resource consent process to deal with the remaining ship on Ōtāiti demonstrates the alternative lawful means of dealing with the ship to avoid full wreck removal under the MTA notices issued.[542] With the Crowns support of this alternative legal process for the granting of a resource consent under the Resource Management Act 1991 ("RMA") would mean that the MV Rena owner would make substantial 'cost savings'.[543] This alternative RMA process and the Crowns support of the granting of the resource consent, without iwi consultation prior to the entering of the Wreck Removal Deed, had compounding impacts on iwi Māori in the Bay of Plenty region, as well as, the people of Motiti.[544]

The support of the Crown became a significant issue to certain people within the Bay of Plenty community, because the deeds of settlement was carried out, without the involvement of those who had an interest in the outcome.[545] Accordingly, an outline of the following Waitangi Tribunal process will be summarised to illustrate the development and outcome that occurred after the Deeds were signed between the Crown and the MV Rena Owners. The impact of the signing of the Deeds validate how Māori were disadvantaged and driven

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[541] Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims: Pre=Publication version (Wai 2391, Wai 2393, 2014)*at 8; Waitangi Tribunal *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 Waitangi Tribunal 2014) at 1; Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 179.

[542] Maritime Transport Act 1994, s 248 and 100A.

[543] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 1.

[544] Resource Management Act 1991 pt 6. See also "The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version", above n 1, at 1.

[545] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre=Publication version (Wai 2391, Wai 2393, 2014) at 8; Waitangi Tribunal The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version (Wai 2391 Waitangi Tribunal 2014) at 1; Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 179.

toward aligning with legal processes that intercept the boundaries of te Ao Māori and the Māori perspective of the environment, as explored in chapter four of this thesis. This interception is a disadvantage because the law limits the voice of iwi Māori to protect their tino rangatiratanga (self-determination/chieftainship) over their taonga (gifts, property, and possession). One of those limits can appear through the historical Crown and Māori partnership under Te Tiriti o Waitangi (Treaty of Waitangi).[546]

c. Players Two, Three and Four - Collaborative approach for Marine pollution response

Alongside MNZ, the Ministry for the Environment and the Department of Internal Affairs ("DIA") and the Minister of Local Government all played a part in responding to the MV Rena grounding and impacting environmental effects. This section sets out the roles of each player. The Ministry for the Environment set course the Rena Long-term Environmental Recovery Plan ("Recovery Plan"), the purpose states that:[547]

> The Rena Long-term Environmental Recovery Plan sets the goal and objectives for the long-term environmental recovery following the grounding of the *Rena* on Otaiti (Astrolabe Reef). It describes the environmental issues and outlines the actions that will be undertaken to address them…Where the Plan sits in the wider response and recovery effort…The Ministry for the Environment is taking a lead for the environmental cluster. This Long-term Environment Recovery Plan will be overseen by a Recovery Manager with support from a project team based in Tauranga.

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[546] *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC at para [151]; Cabinet Office *Cabinet Manual* 2017 at [7.25]; Ruru, Jacinta "Legislative provision for Tino Rangatiratanga: A National park case study" [2005] NZYbkNZJur 24.

[547] Ministry for the Environment Manatū mo Te Taiao *Rena Long-Term Environmental Recovery Plan* (December 2011) at 2.

The Recovery Plan provides the cross-sectorial collaboration of government agencies and iwi Māori to work together in response to the grounding.[548] The main goal of the Recovery Plan was to "Restore the mauri of the affected environment to a pre-Rena state, ensuring that all involved parties would have a clear understanding of what will be achieved.[549] The Recovery Plan stipulate the meaning of Mauri:[550]

> Mauri includes: lifeforce, the integrity, form, functioning and resilience of the coastal environment, including its ecosystems, all Kaimoana, marine and inter-tidal areas, rocks, estuaries, rivers and streams, islands, dunes and land, and customary fishing areas…this goal recognises the environmental state that is desired by the people of New Zealand…the activities in this Plan are therefore focused on addressing the environmental consequences as far as it is practical to do so.

The Recovery Plan was implemented to achieve the goal and objectives affirming that:[551]

> …The mauri of the takutai (coast) recovers from the effects of the Rena grounding. Our…food source and a…ecosystem…of species including plants, fish, shellfish, birds, marine mammals, and other wildlife. We need to ensure that it recovers from the effects of the Rena grounding…Enable and engage with affected iwi and hapü and wider communities in the environmental recovery effort…For the long-term recovery to be effective…to mobilise this network of people and draw on their local knowledge, skills and expertise…about progress towards the environmental recovery goal…from this incident so any future such event can be well informed of the environmental impacts, the actions taken, and progress made towards recovery and restoration…

The outcome of the Recovery Plan sought that the owner of the owner of the MV Rena engaging the salvage company named Svitzer Salvage for salvage operations, which removed over "1350 tonnes of oil from the MV Rena, as at 1

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[548] At 3.

[549] At 3.

[550] At 3.

[551] At 5.

December 2011".[552] Salvors reduced the amount of oil in the marine environment. Regarding the 1368 containers on the vessel, 86 went into the marine environment at the time of the grounding, 33 containers were retrieved and 53 containers remained in the environment.[553] By 12 December 2011 195 containers were removed from the vessel and 110 tonnes of hazardous goods with 21 containers holding hazardous material were taken off the ship. The release of the oil and containers (with their content) into the surrounding marine environment caused the environmental effects.[554] The below figures show examples of the environmental effects.

As part of the Recovery Plan, different iwi surrounding the Bay of Plenty region, all of the district and regional councils, tertiary institutes and iwi within Te Moana a Toi (Bay of Plenty) worked together in developing a partnership to look at how to return the surrounding marine environment back to a 'pre-Rena' state.[555] This was a large-scale consultation and collaboration within the Bay of Plenty iwi to establish a comprehensive review of environmental responses to situations like the MV Rena grounding.[556]

[552] At 5.

[553] At 5.

[554] At 6-7.

[555] CN Battershill, PR Ross & DR Schiel, "The MV Rena shipwreck: time-critical scientific response and environmental legacies" New Zealand Journal of Marine and Freshwater Research (2016) 50:1, 173-182 at 174; Bay of Plenty Regional Council "Bay of Plenty/Te Moana-a-Toi" www.growregions.govt.nz.

[556] CN Battershill, PR Ross & DR Schiel, "The MV Rena shipwreck: time-critical scientific response and environmental legacies" New Zealand Journal of Marine and Freshwater Research (2016) 50:1, 173-182 at 174; Bay of Plenty Regional Council "Bay of Plenty/Te Moana-a-Toi" www.growregions.govt.nz.

Iwi Māori were a large part of the discussion and communication that occurred during the response to the grounding.[557] The Recovery Governance Group consisting of the following organisations pulled together to assist:[558]

- The Ministry of Transport
- Department of Conservation
- Maritime New Zealand
- Toi Te Ora Public Health Service
- Te Moana a Toi
- Motiti maketū (Te Arawa)
- East Coast Iwi
- Hauraki District Council
- Bay of Plenty Regional Council
- Western Bay of Plenty District Council
- Ōpotiki District Council.

With cross-sector logistics of the local community, communication of real-time information about the MV Rena grounding and the response was a challenging prospect at the time. With these logistics occurring on the mainland, Motiti had other challenges that needed addressing from the Local Government.

With respect to Motiti, the relevant Local Government involved was the DIA. Under section 22 of the Local Government Act 2002, the DIA has jurisdiction of managing offshore islands around Aotearoa New Zealand, as the territorial authority.[559] The DIA supports the Local Government Minister in fulfilling the role and responsibility of territorial authority for offshore islands, including Motiti

[557] Sonya Hunt et al "An Incident Control Centre in Action: Response in Action: Response to the Rena Oil Spill in New Zealand" (2014) Journal of Contingencies and Crisis Management, Volume 22, 63-66 at 63.

[558] Bay of Plenty Regional Council "Bay of Plenty/Te Moana-a-Toi" www.growregions.govt.nz.

[559] Local Government Act 2002, s 22; Te Tari Taiwhenua – Department of Internal Affairs "Administration of Motiti Island" www.dia.govt.nz.

Island.[560] Thus, the reason why the Local Government was involved in the oil spill response.

Historically, the relationship between the people of Motiti and the DIA has been terse with trust issues and miscommunication as far back as the 1960s. The Waitangi Tribunal Report noted that the people of Motiti objected to Tauranga County Council in administering Motiti, for the local government purposes:[561]

> Te Patuwai Tribal Committee called meetings of the Maori owners and an objection was lodged with the county. They complained that the county had not outlined its intentions for the island and that they were satisfied with the existing position.

Although, Tauranga County Council was exercising its role under the statutory regime, despite the reluctances of the people of Motiti which was the unfortunate start of their relationship.[562] Attempts to rectify past issues by DIA with the attempt of building and maintaining the relationship, resulted in further mistrust in DIA and legal processes.[563] Marian Ang elaborates the nature of the mistrust:[564]

> …the Crown approached its task with 'minimal effort…the Minister of Local Government, in her capacity as the territorial authority for Motiti, wrote on a single occasion to encourage participation in the consultation process…The 'clear message' from all communications…was that the consultation process was not designed to adequately inform Māori…

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[560] Local Government Act 2002, s 22; Te Tari Taiwhenua – Department of Internal Affairs "Administration of Motiti Island" www.dia.govt.nz; Waitangi Tribunal, Final *Report on the MV Rena and Motiti Island Claims* (WAI2391, WAI2393, 28 November 2014) at 55.

[561] Waitangi Tribunal, Report of the Waitangi Tribunal on a Motiti Claim (WAI12, 21 May 1985) at 1.

[562] Waitangi Tribunal, Report of the Waitangi Tribunal on a Motiti Claim (WAI12, 21 May 1985) at 1.

[563] Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015): 177-188 at 18.

[564] At 18.

The relationship with DIA and the Minister of Local Government unfortunately has been challenging for the people of Motiti.[565] For example, generally the "overwhelming" pressure… was progressively reduced, although only in relative terms, because the response was a major news item nationally for an extended period and the dominant public issue, regionally and locally to the end of the response phase and beyond".[566] The people of Motiti also experienced pressure through providing hospitality to government agencies and local government, arriving on the island, during the Oil Response Strategy and Recovery Plan: burdening the Marae (meeting house) and Wharekai (dining room) of resources to accommodate visitors.[567] The Minister of Local Government and DIA had an unwarming effect with the arrival of government agencies and local authorities on Motiti compounding the injustices of the people of Motiti.

1 *The international obligations and domestic interface of the MV Rena owners responsibilities*

The general position for international law and policy on shipwrecks is the removal of the vessel. When a shipwreck concerning oil pollution arise, the solution becomes a complicated one with particular criteria.[568] This criteria proposes whether the vessel is at the end of its life, because in that situation it should be recycled. Second, whether the vessel should be dumped (as waste) into the ocean, on the basis that dumping the vessel may provide 'distinctive advantages', such as tourism (diving). Making sure the vessel is stripped of potential pollutants,

[565] At 18.

[566] Simon Murdoch Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011 (Ministry of Transport 2013) at 83.

[567] Bruce Fraser et al *The Rena Volunteer Programme* (May 2012) at 13.

[568] Waitangi Tribunal Hearing "Brief of Evidence of Alexander Mathew Gillespie" (Pacific Law Limited, Wellington, 23 June 2014) at 4.

as well as, the selection of the site for dumping are factors of consideration.[569] This criteria requires careful consideration.

Professor Alexander Gillespie further explains international legal regimes dealing with the recycling and dumping of vessels that:[570]

> A further regime that is relevant to the current circumstances is that of the international law dealing with the vessels which have become wrecked…the Wreck Removal Convention seeks to…remove…shipwrecks that may have potential to affect adversely the safety of lives, goods and property at sea…I understand that the MV Rena insurers…are involved so I have presumed that insurance is available for the removal of the Rena wreck…

The New Zealand government addressed the MV Rena grounding with the owners of the MV Rena to maintain international relations. MNZ issued notices pursuant to the MTA, as the legal default position.[571] The notices determined the MV Rena wreck as a "hazardous ship", due to the leaking oil and other pollution, as well as, a "hazard to navigation".[572] Essentially, it was a legal requirement to complete the removal of the wreck, which remain in force until either the ship was removed or other lawful means of dealing with the ship were carried out.[573] This criteria, put strain on existing government structures and procedures to issues of the MV Rena owner's position and how they would deal with the vessel once the oil spill removal was complete. This concern relates to chapter six on International Law in terms of sustaining the relationships between nation states holding certain

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569 At 4.

570 At 6.

571 Maritime Transport Act 1994, s 248 and 100A. see also Simon Murdoch *Independent Review of Maritime New Zealand's Response to the MV Rena Incident on 5 October 2011* (Ministry of Transport 2013) at 26.

572 Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre=Publication version (Wai 2391, Wai 2393, 2014) at 1; See also Maritime Transport Act 1994, ss 248, 100A.

573 Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 1.

environmental international obligations.[574] In particular, upholding international obligations in the context of the shipping industry for addressing maritime casualties in Aotearoa New Zealand.

d. Players Five and Six – the Crown and the Waitangi Tribunal

Regarding the deed settlements, the Crown did not consult with Māori prior to entering negotiations with the MV Rena owner. The reason why the Crown should have consulted with Māori is purely based on the Treaty jurisprudence surrounding Te Tiriti o Waitangi (Treaty of Waitangi) locking the Crown in an equal partnership with iwi Māori, in particular the people of Motiti.[575]

Literature and common law on the evolution of Treaty of Waitangi jurisprudence strongly affirms the legal status of the Treaty of Waitangi and Crown obligations under the Treaty of Waitangi, to protect the interests of Māori.[576] Chilwell J in *Huakina Development Trust v Waikato Valley Authority* stated that cases "show

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[574] James Crawford *Principles of Public International Law* (8th ed, Oxford University Press, United Kingdom, 2012) at 4. See also John O'Brien *International Law* (Cavendish Pub, Portland; London, 2001) at 1.

[575] Treaty of Waitangi Act 1975, preamble; Ani Mikaere "Tikanga as the First Law of Aotearoa" (2007) Yearbook of New Zealand Jurisprudence: 24-31 at 25; Janine Hayward, "The Treaty of Waitangi, Maori and the Evolving Crown" (1998) Political Science, 49:2, 153-172 at 158; Janine Hayward, "Local Government and Maori: Talking Treaty?" (1999) Political Science, 50:2, 182-194 at 184.

[576] Treaty of Waitangi Act 1975; *R v Symonds* (1847) NZPCC 387 (SC); *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC); *Nireaha Tamaki v Baker* (1901) NZPCC 371 (PC); *Wallis v Solicitor-General* (1903) NZPCC 23 (PC); *Hoani Te Heuheu Tukino v Aotea District Māori Land Board (1941); New Zealand Māori Council v Attorney-General* [1987]**.** *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC at para [151]; *Takamore v Clarke* [2012] NZSC at para [94]; United Nations United Nations Declaration on the Rights of Indigenous Rights https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf; Margaret Mutu (Ngāti Kahu, Te Rarawa and Ngāti Whātua nations) "To honour the treaty, we must first settle colonisation' (Moana Jackson 2015): the long road from colonial devastation to balance, peace and harmony" (2019) Journal of the Royal Society of New Zealand, 49:sup1, 4-18 at 4. Margaret Mutu emphasises He Whakaputanga o te Rangatira o nu Tireni 1835 as part of New Zealand history, as a declaration of sovereignty of the rangatira of the many hapū throughout the country, declaring that they would never give law-making power to anyone.

that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute" of the Crowns obligations. The Supreme Court in *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* also acknowledged that, "there has been a move towards precise consideration of how Parliament "wants particular legislative schemes to provide for and protect Māori interests in the light of the Crown's responsibility under the Treaty".[577] Emphasis on Māori interests, as it relates to chapter four regarding the philosophical underpinning of Te Ao Māori and chapter five regarding the Māori provisions under the RMA.

In the same vein, the Treaty of Waitangi Act 1975 established the Waitangi Tribunal, which is a permanent commission set up to investigate Māori claims relation to the Crown breaches of the Treaty of Waitangi, which also has retrospective powers to investigate back to the signing of the Treaty of Waitangi.[578] Once a claim is lodged and a hearing is set down and executed by the Waitangi Tribunal, the outcome is a Waitangi Tribunal report with findings that state whether or not the claim is well founded: and recommendations to the government on how the claim should be settled. These recommendations are not binding on the government unless the claims relate to the return on land to Māori ownership.[579] These recommendations set the platform for negotiation between Crown and Māori to settle breaches of the Crowns obligation.[580] Thus, the

[577] Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188 (HC) at 210; Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board [2021] NZSC 127 at [150].

[578] Margaret Mutu (Ngāti Kahu, Te Rarawa and Ngāti Whātua nations) "To honour the treaty, we must first settle colonisation' (Moana Jackson 2015): the long road from colonial devastation to balance, peace and harmony" (2019) Journal of the Royal Society of New Zealand, 49:sup1, 4-18 at 4; Hayward, Janine, and Nicola Wheen, *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi*. (Bridget Williams Books, 2016) at vi, vii, 3.

[579] Geoffrey Melvin The Claims Process of the Waitangi Tribunal: Information for Claimants (Waitangi Tribunal, 2000) at 8.

[580] Treaty of Waitangi Act 1975; Geoffrey Melvin *The Claims Process of the Waitangi Tribunal: Information for Claimants* (Waitangi Tribunal, 2000) at 1-10.

Waitangi Tribunal known as the “second most important Tribunal in the country, ranking only behind parliament itself”.[581] The Waitangi Tribunal has an extensive archived knowledge base open to public while it “has published more than ninety reports in response to the hundreds of contemporary and historical claims lodged before it. But the published work only represents a fraction of the tribunals work”.[582] The work of the Waitangi Tribunal is long and voluminous: generating seeds of satisfying and challenging stories about New Zealand’s history (past and present) rich with layered politics of history-making reports.[583] The legal process in the Waitangi Tribunal relates to the MV Rena grounding situation because of the deeds of settlement entered into between the Crown and the MV Rena owner, without Māori included in the decision for the deeds of settlement.

1 The Tribunal process relative to the deed settlements

In May 2013, two claims were lodged in the Waitangi Tribunal (The Tribunal). One claim by the Ngai Te Hapū Incorporated Society (Wai 2293), and the other joint claim by Motiti Rohe Moana Trust and the Mataatua District Māori Council (Wai 2291).[584] Both claims relate to the conduct of the Crown in respect of removing the MV Rena vessel from Ōtāiti with the understanding that the MV Rena owner would seek a resource consent to leave the wreck on the reef. Both claims stipulate that complete removal of the MV Rena vessel would be crucial to restoring the mauri (spiritual essence) of Ōtāiti, because a strong concern was whether the Crown would guarantee the removal of the MV Rena vessel and

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[581] Richard. Boast, “The Waitangi Tribunal : “conscience of the nation”, or just another court?” (1993) The University of New South Wales Law Journal, 16(1), 223–244 at 224.

[582] Buchanan, Rachel. "Decolonizing the archives: The work of New Zealand's Waitangi tribunal." *Public History Review* 14 (2007): 44-63 at 45.

[583] Buchanan, Rachel. "Decolonizing the archives: The work of New Zealand's Waitangi tribunal." *Public History Review* 14 (2007): 44-63 at 45.

[584] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 2.

genuine consultation with Māori. Therefore, the Tribunal granted an urgent process for the claims to be heard in Tauranga from the 30 June to 2 July 2014.

Consequently, on 30 May 2014 the MV Rena owners lodged the resource consent application to abandon part of the MV Rena on Ōtāiti.[585] The closing date for submissions on the MV Rena owners' resource consent application were due on the 8th August 2014. At this stage, while the Tribunal heard the breaches of the Crowns conduct relative to the Deeds negotiation and resource consent process: the Tribunal was informed on the 28th July 2014 that Cabinet would decide on whether the Crown would make a submission on the MV Rena owner's resource consent application. This meant that the Tribunals Interim Report had to be released to inform the Crown's decision on whether to support or oppose the MV Rena resource consent application. The timeframes and influence were tight despite its significance.

2 The Tribunal Interim Report

The Interim Report investigated two matters: 1) the consultation process that took place following the signing of the Wreck Removal Deed ("WRD"); 2) issues relative to the Resource Management Act 1991 that the Crown would take into account when making its decision whether to submit in support, opposition or to accept the decision in the resource consent application ("the application").[586] Therefore, the following summaries of the claimant and the Crown submissions form the context of the Tribunals findings.[587]

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[585] Waitangi Tribunal, The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version (Wai 2391 2014) at 2.

[586] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 2. See also Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 181.

[587] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 3.

3 The Claimants submissions

The Claimants submit that: [588]

1. Subsequent to the signing of the WRD the Crowns consultation process was a “hollow”, “tick-box” and mere “window-dressing” process that was unduly ‘rushed’;

2. The claimants were under-resourced to formulate an informed position on the application;

3. The Crown failed to act honourably and in good faith together with the duty of active protection breaching the Treaty of Waitangi; and

4. In order to fulfil its Treaty obligations the Crown ought to take a more substantial stance in pursuing those obligations.

The claimants requested a recommendation of the Crown, to not submit in favour of the MV Rena owner’s application. In response, the Crown’s submission is outlined.

4 The Crowns’ submissions

[588] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 3. See also Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 182.

The Crown submits that:[589]

1. The Treaty principles were actioned consistently by the Crown; and

2. Early consultation engagement with Māori was carried out because the Crown accumulated the necessary views to affirm that the process was in accord with its duty.

The Crown's view of the outcome of the MV Rena clean-up process; consultation process, and Tribunal hearings were well-informed of local Māori communities' perspective on the application. However, the real issue at the heart of the claims was whether the Crown had competently protected Māori and their relationship to their taonga. In this case, that taonga being Otaiti, in accordance with the Treaty of Waitangi. Thus, the task of the Tribunal was to determine whether the Crown had fulfilled its obligations under the Treaty, during the consultation process with Māori before the signing of the WRD and whether or not the Crown would support the MV Rena owner's resource consent application.[590]

5 The Crown's duty in this circumstance

For the Crown to exercise its duty of active protection due to the significant damage caused to the taonga (Ōtāiti) by a third party, in the context of protecting

[589] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 3. See also Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 182.

[590] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 3. See also Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 182

rangatiratanga (chieftainship or right to exercise authority, ownership or leadership of a group), the Crown must:[591]

- Recognise which hapū and iwi have interests in the taonga;

- Recognise the nature of their (Māori) relationship to their taonga and how the Rena grounding has affected that relationship;

- Ensure robust consultation, through providing information on the complex resource consent application process, for Māori to "make intelligent and useful responses";

- Ensure meaningful engagement with Māori through support that will allow them to articulate the nature of their relationship with Otaiti. In particular, how the grounding of the MV Rena has affected their relationship to fully express the impact of the MV Rena on their interests to show the reasons why Māori wish a full wreck removal.

In relation to the Crown protecting the taonga itself and the impact of the resource consent application on affected Māori, the Crown must:

- Do as much as reasonable to test the evidence on the feasibility of the removal of the MV Rena wreck, cargo and debris in order to form a view on whether to make a submission on the application;

[591] At 7.

- Seek the process of imposing monitoring and mitigation conditions to protect the environment surrounding Ōtāiti and Motiti Island from the effects of the MV Rena, on an ongoing basis;

- If the application is granted, seek some positive and reasonable mitigation offset is provided by the consent holder to affect Māori.

In this situation, the Crown's duty of active protection was triggered directly within this context, after the damage had occurred, relevant to both the taonga (Ōtāiti) and Māori exercising rangatiratanga. Hence, the reason why the Tribunal was to consider whether the Crown had fulfilled these duties in consulting Māori before the signing of the WRD.

6 The Tribunal analysis

For the Tribunal to consider whether the Crown had taken steps to fulfil its duties in consulting with Māori the Tribunal had to assess if the Crown had considered the below factors:[592]

1. That Motiti Island is an isolated and under-resourced island community. For example, a lack of road network or footpaths, water supply, sewerage system, power or wired phone system. The only public infrastructure on the island is a telephone installation. Hence, the logistical and practical obstacles were a challenge for the consultation process;

[592] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 9. See also Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 185.

2. That the Crown knew of the extent of Māori concerns about the Rena making plans to leave the wreck on Ōtāiti, and the fact that the Crown was potentially a part of the MV Rena application process success;

3. Finally, the fact that once the application was lodged, there were time constraints for a lengthy and complex process, which would impact on the consultation process with Māori and the lodging of submissions. The Crown knew by 31 January 2014 about the potential lodging of the application, which had long been signalled. This set of circumstances presented the Crown with a challenging and overwhelming task.

Despite the above obstacles, the Tribunal considered the Crown's approach taken and was considered of little effort, because it showed the Crowns involvement with regard to consultation that:[593]

1. The Ministry for the Environment sending letters of invitation for consultation to 20 Māori groups on three occasions:

    a) The 29th of November 2013; and

    b) The 29th of April 2014 (three months after the Crown knew about the resource consent application to be fast approaching); and

    c) The 6th of June 2014 (a week after the resource consent application was lodged).

[593] At 9 See also Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 185.

2. In May, the Minister of Local Government, in the capacity as the Territorial Authority for Motiti Island, wrote to iwi and hapū to encourage participation in the consultation process in March 2013, which was the total sum of the Ministers involvement.

3. Throughout this period, the Crown approached the consultation process only as a means to ascertain the views from Māori to inform the Crown's influence relative to the Rena's application.

4. After the lodging of the application, the process focused on the Crown's consultation on May 2014 setting the purpose of ensuring the Crown obtained an understanding on how the interest of iwi and hapū, as well as, the Treaty of Waitangi Interests could be maintained. The Crown's 6 June 2014 letter sought 'further consultation with iwi on the resource consent application' on both general and specific matters: with a two-week timeframe to assess information on the application. The message conveyed through the Crown, was that the consultation process was not designed to inform Māori to enable them to assist the Crown's decision.

5. In late June 2014 the Crown met with five groups which included:

    a) Ngāti Awa and Ngāi Te Rangi met with the Crown in early February 2014;
    b) The Tapuika Iwi Authority;
    c) The Mataatua District Māori Council; and
    d) The Motiti Rohe Moana Trust. This meeting was three days prior to the present Tribunal process;
    e) The other groups approach had refused to meet the Crown based on their understanding that the Crown knew their views.
    f) The Crown submitted that it would have preferred to have had a wider range of engagement with Māori groups within the Bay of Plenty.

Essentially, the Crowns view was that the consultation process was carried out accordingly; and any deficiencies arising were actually the responsibility of iwi Māori, for failing to engage. The Tribunal considered this view an unfair assessment.[594] Therefore, an acknowledgement of the reason why Māori were reluctant to engage with the Crown, due to the unimaginable sense of mistrust arising before the Crown started its consultation, developed a position on the proposed application demonstrated through the Crown negotiation with the MV Rena owner on the WRD.[595] Clearly, demonstrating an added and unfortunate mistrust of the Crown, which gave effect to the injustice of the people of Motiti.

Dr Matthew Palmer led the Crown and MV Rena owner's negotiation of the Deeds, and he acknowledged that the Crown's ability to "act in good faith" was of a standard that fell lower than desired. Such a situation for Māori required active efforts by the Crown to rebuild its relationship with iwi and hapū, due to Māori reluctance to engage, as the nature within the meetings held were brief, rushed and not taken seriously in respect of the Māori perspective.[596]

With regard to the Crowns consultation process for Māori feedback on the MV Rena resource consent application, out of the 20 or so groups that had not responded to the Crowns initial invitation, only two groups received a reply from the Crown that the resource consent application would be lodged. When the resource consent application was lodged, the Crown sent out another letter to consult to advise their interest in meeting with iwi Māori. However, by that stage restrictive timeframes were placed on iwi Māori, which meant that meaningful consultation with the Crown required proper groundwork for an informed

[594] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 10.

[595] At 11.

[596] At 12.

outcome, which unfortunately did not occur.[597] Additionally, the claimants point out another disadvantage that there was no funding made available from the Environmental Legal Assistance Fund at the consultation stage when "detailed feedback" was requested by the Crown, which impacts on Māori capacity to engage the RMA process.

To summarise, the Tribunal looked at the consultation process by the Crown prior to the WRD, in which the Crown had failed. This matter then extended to the consultation process with the Crown prior to the resource consent process, because both processes (Waitangi Tribunal and resource consent application) were running simultaneously. Hence the timeframe situation which left room for potential breaches by the Crown.

7 The Tribunal perspective on Māori ability to engage the RMA resource consent process

The Tribunal explained the following concerns about the capacity of Motiti groups in engaging with meaning in the RMA resource consent application process, which included that:[598]

1. The proposed application was advanced as an alternative avenue for claimants to express their views;

2. Māori encountered difficulties in engaging with the RMA application process because it was a "costly and ineffective way to try and shape planning processes" and Māori were frequently unsuccessful in their

[597] At 14.

[598] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 14. See also Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 185.

efforts to do so. The Tribunal made recommendations for better resourcing for Māori to participate in the resource consent application process;

3. Awareness of resourcing challenges that an Environment Court hearing would entail for Māori participants, if they did not have sufficient resources.

4. Inadequate support by Local Government for Motiti Māori to engage in the resource consent process. The Tribunal acknowledges that the relationship between the Department of Internal Affairs and Motiti Island "isn't good".

5. The poor relationship between the Department of Internal Affairs and Motiti Island, because the Minister of Local Government placed the local planning officer with the role of protecting the environment of Motiti Island who was holding a conflict of interest position. This conflict of interest was due to the local planning office being employed by Beca who formed the Motiti Island District Plan who was also contracted by the MV Rena owner to advance the resource consent application. This clear conflict impacted Motiti Māori, because the community would be required to utilise the very same planning officer for advice on how to response to an application of this nature. A contradicting predicament.

6. The Minister of local Government to make a potential submission on the application on behalf of Motiti Māori residents in the capacity of the territorial authority. The Tribunal noted that it would be unusual for a territorial authority not to submit on an issue relevant to a local community strongly suggesting opposition to the application. Motiti Island and Ōtāiti stand exposed to the adverse effects of a MV Rena wreck and officials advised the Minister of Local Government that the grounding event had a strong impact on the environment and people of Motiti.

The distinction that Motiti groups faced challenges to obtain meaningful engagement with the Crown, well before the resource consent application proceeded. This coloured the pathway forward for Motiti groups participating in the resource consent process. The capacity for Motiti Māori entering the RMA resource consent process on a back foot suggested problems before starting an opposition argument.[599]

More importantly, Motiti groups were entering the resource consent process without the full support of the Crown and Minister of Local Government to assist in protecting Māori interests (Motiti Māori).[600] Hence, the Tribunal accepting that Motiti groups would find engagement in the resource consent process challenging, as well as, being aware of a potential Environment Court hearing.

The situation of arising issues show that Motiti Māori were left in an extremely vulnerable position. The challenges faced during both the consultation process with the Crown and the subsequent resource consent process placed Motiti groups with the lack of resources to properly engage with the MV Rena owner's application.[601] The available funding would only commence at the Environment Court phase. Thus, an added injustice to the people of Motiti, because the Tribunal accepted that the resource consent was a pre-process to the Environment Court and that the resource consent process only allow the submitters a small window of opportunity to make a submission on the

[599] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 14. See also Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 185.

[600] At 74.

[601] At 74.

application. This window of opportunity left time pressures placed on Motiti groups and other Māori groups wanting to participate.[602]

8 The Tribunal Findings and Recommendations

In short, the Crown owed a duty of active protection of both the taonga and kaitiaki (guardian) obligations.[603] The Tribunal found the Crown failed its task to perform meaningful engagement consultation with Māori relative to the resource consent application. Therefore, the consultation process did not adequately: 1) inform the Crown of Māori views on the resource consent application nor; 2) equip Māori to participate usefully or with informed insight in the resource consent process.[604] The Tribunal clearly states that leaving the wreck on Ōtāiti would undoubtedly harm the people of Motiti and compound the injustice that occurred at the time.

Consequently, the Crowns conduct in the process to determining whether the wreck should remain on Ōtāiti was in breach of the Treaty principles. The prejudice suffered by the claimants affirmed that:[605]

1. The Crown was not fully informed of Māori views and values in respect of their taonga and;

2. Māori were not adequately equipped to meaningfully engage in the resource consent process;

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[602] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 14. See also Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 185.

[603] Waitangi Tribunal, *The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version* (Wai 2391 2014) at 14. See also Marian Ang, "The Waitangi Treaty, the Rena Wreck and Indigenous Culture in New Zealand," Art Antiquity and Law 20, no. 2 (July 2015) at 185.

[604] At 78.

[605] At 78.

3. Whatever action the Crown took in respect of the resource consent process was necessary for the Crown to actively protect Māori and their taonga, due to the inadequate consultation process to date, the Crown must ensure that it visibly protects Motiti Māori interests in the anticipated resource consent application.

The arising prejudice upholds the current reality for the people of Motiti, because they were fully aware that the Crown had bound itself to consider "in good faith" in supporting the MV Rena owner's application to leave the MV Rena wreck on the reef. As a result, If the resource consent was granted, with the powerful support of the Crown through its submission: it would leave the people of Motiti empty, disheartened and betrayed by the Crown and the Minister for Local Government acting as Motiti Islands territorial authority. Therefore, the Tribunal views Motiti Māori, as being left alone to suffer the consequences of a decision which they had no meaningful part in, and through which they were rendered powerless to protect their taonga, adding to the injustices subjected on the people of Motiti.[606]

Regarding the Crowns duty in actively protecting Māori and their taonga, the Tribunal recommended that, in considering whether to make a submission on the MV Rena owner's resource consent application, the Crown should take into account the following matters that: [607]

a) The adverse effects of the continued presence of the MV Rena vessel in its degrading form; large debris field on and around the reef; and the potential discharge of contaminants, as the structures break down further;

[606] At 78.
[607] At 78.

b) The physical resource effects subject to potential discharges, as well as, knowing the existence of the vast debris tonnage lying in, on and around the Ōtāiti. If the resource consent is granted, these circumstances, impose adverse effects on the environment inclusive of the community on Motiti.

c) That feasibility of removal or mitigation of adverse effects may be different depending on which part or parts of the wreck or its former contents, which include: the bow section; the balance of the hull and superstructure; or the large debris field on and around the reef.

If the Crown decides to make a submission on the MV Rena owners' application, whether in support, opposition, or neutral, the Tribunal recommends that:[608]

a) The Crown should submit that Ōtāiti Reef is a taonga;

b) As a consequence of Ōtāiti being a taonga, the status actually elevates its protection to be a matter of national importance in terms of section 6(e) of the Resource Management Act 1991.

c) The Crown would ensure that its submission sought that monitoring and mitigating conditions were imposed to reduce the effects on the taonga (Ōtāiti) and on the coastal environment of Motiti Island and its community to a sustainable level as far as is possible.

In summary, the Tribunal Interim Report strongly indicate the failure from the Crown and the suggested recommendations to balance the Crowns breach of the Treaty of Waitangi. Subsequently, the Final Report is provided and deals largely

[608] At 78.

with the Interim Report recommendations in detail to provide further recommendations.

9 The Waitangi Tribunal Final Report

The Final Report relates to the Crown's response to the wreck of the MV Rena on Ōtāiti, which followed the Interim Report release 18 July 2014. For the purpose of not repeating the same material provided from the Interim Report, this section will cover part of the background in this report; the additional recommendations and the Tribunals findings on this matter.

10 Background

The Interim Report found that the Crown's consultation process with Māori while in preparation to decide its position regarding the MV Rena owners' application to leave the wreck on Ōtāiti, and whether if coming to that position breached the Treaty of Waitangi principles of "good faith" and partnership.[609]

The combination of both the Interim and Final Report findings provide the total complete findings in this inquiry. This Final Report focuses on the Crowns conduct when it entered into the WRD, which obligated the Crown to consider, in good faith, to support the Rena owners application to leave the ship on Ōtāiti.[610]

The central theme of the Interim Report was the urgent inquiry by the Waitangi Tribunal into the Crowns conduct following the grounding event near Motiti Island on 5 October 2011. The Crowns conduct relates to when it entered into three deeds with the MV Rena owners in October 2012. The Final Report focuses on

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[609] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 13.

[610] At 1–11.

the WRD, because it provided the Crown with an opportunity for an additional payment of $10.4 million for public purposes, if the Crown decided to support the resource consent application.[611]

Emphasised, are two claims discussed in the Final Report filed by individuals for and on behalf of themselves: Graham Hoete, Umuhuri Matehaere and Jacqueline Taro Haimona (Wai 2391); and the Motiti Rohe Moana Trust, as well as, one other individual for and on behalf of himself, Cletus Maanu Paul and the Mataatua District Māori Council. Additionally, Wai 2393 was filed by Elaine Rangi Butler for and on behalf of Ngāi Te Hapū Incorporated Society.[612] Also, the Crown is the other main party to this inquiry, as well as, interested parties which include: MV Rena owners, the Bay of Plenty Regional Council, Te Whānau a Tauwhao, Ngāi Te Rangi, Ngāti Makino and Ngati Whakahemo.[613]

The allegations the claimants made relate to the Crown's actions in entering the WRD with the MV Rena owners, which constituted a breach of the principles of the Treaty of Waitangi. The claimants submit that the Crown had failed in the following ways:[614]

1. To act honourably and in good faith; and

2. To fulfil its duty of active protection to consult with Māori prior to signing the WRD; and

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[611] Ibid.

[612] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 1-13.

[613] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 1-13.

[614] At1.

3. Whatever the decision the Crown makes on whether or not to support the resource consent application, will prejudice Māori because the Crown's process was not Treaty compliant.

However, the Crown submits that:[615]

1. The WRD does not amount to a Treaty breach or incentivises it to breach the Treaty obligations; and

2. The deed preserves the Crowns' ability to meet those obligations and;

3. The Crown is aware of the Treaty issues that arise for tangata whenua, and acted in a Treaty-compliant manner when seeking Māori views on the resource consent application.

More importantly, the Tribunal hearing was conducted in an urgent manner because on May 30th 2014 the Astrolabe Community Trust, on behalf of the MV Rena owners, lodged a resource consent application to leave the wreck on Ōtāiti. The closing date for submissions was set for 8th August 2014.

11 The MV Rena owners legal position and salvage activities

Despite the fact that the Crown had failed their duty to actively protect Māori interest, an outline of the MV Rena owners legal position demonstrate the reasons for the Crown to enter negotiations of the settlements with the MV Rena owners to address the grounding.

[615] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 3.

The legal position by default is that the wreck must be completely removed. A resource consent under the Resource Management Act 1991 ("RMA") is required to leave any part of the wreck on Ōtāiti. Moreover, following the grounding the Director of Maritime New Zealand issued notices under the MTA that defined the wreck as a hazardous ship (due to the leaking of the oil and other pollution) and as a hazard to navigation. These notices require complete removal of the wreck.[616] These legal obligations permitted the MV Rena owners responsibility for the salvaging operations (process to remove the vessel).[617]

The salvage activities included the operations to remove the remaining oil left on the MV Rena wreck, followed by removal of the cargo, focusing on hazardous or damaging cargo.[618]

In addition, the MV Rena owners and crew were subject to criminal charges resulting from the Maritime New Zealand investigation into the grounding. The Master and Navigational Officer of the MV Rena were convicted in May 2012 of offences under:[619]

- The Maritime Transport Act 1994 for operating the Rena vessel in a manner likely to cause danger; and

[616] Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014)* at 7.

[617] At 7; Waitangi Tribunal Hearing "Brief of Evidence of Alexander Mathew Gillespie" (Pacific Law Limited, Wellington, 23 June 2014) at 4.

[618] Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014)* at 7; Waitangi Tribunal Hearing "Brief of Evidence of Alexander Mathew Gillespie" (Pacific Law Limited, Wellington, 23 June 2014) at 4.

[619] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 7; Maritime Transport Act 1994; Resource Management Act 1991.

- The Resource Management Act 1991 ("RMA") for discharging a contaminant; and

- Crimes Act 1961 for altering ship documents.

As a result, Daina Shipping Company, as the registered owner of the ship, was convicted in October 2012 of an offence under the RMA for the discharge of harmful substances from ships in the coastal marine area and fined $300,000 of a maximum $6000,000.[620] Therefore, the environmental recovery stage in late 2011 prepared the shift from the initial response to the grounding into the recovery phase where the Crown initiated two parallel processes consisting of:[621]

1. The Crown and Maritime New Zealand entering into negotiations with the owners and insurers (Swedish Club) of the MV Rena to settle the Crown's claims arising from the grounding. In particular, the $47 million of Crown expenditure that largely resulted from clean-up activities. These negotiations were conducted on a confidential basis over the period of about a year; and
2. The Ministry for the Environment developed the MV Rena Long-Term Environmental Recovery Plan ("Recovery Plan"). The Recovery Plan released in December 2011 after input from government agencies, such as: the Department of Conservation, the Ministry of Transport, councils from the Bay of Plenty and neighbouring regions and the Moana a Toi Iwi Leaders Forum. The goal of the Recovery Plan was to 'restore the mauri of the affected environment to its pre-Rena state' and to address 'the environmental consequences as far as it is practical to do so'. To

[620] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 7.

[621] At7; Maritime Transport Act 1994; Resource Management Act 1991.

accomplish this goal the Recovery Plan established work-streams relating to beaches and shorelines, seabed, water quality and the water column, kaimoana and wildlife. The Crown attributed $1.88 million for the first two years and then later provided $542, 000 to complete the implementation of the four-year plan.

In summary, the salvage activity of producing the Recovery Plan benefited the relationship between Māori and the affected environment in terms of the 'strong holistic connection' iwi and hapū shared with the environment, specifically the relationship to Ōtāiti. Certain role for Māori were established in governance structures, which included representatives from Motiti and other affected groups. Subsequently, the Recovery Plan was reviewed in April 2013, which was then disestablished, due to the purpose being met and the responsibility for the Recovery Plan and its implementation was transferred to the Bay of Plenty Regional Council.

12 The Deeds of Settlement

As mentioned in the Interim report, the negotiations the Crown entered into with the MV Rena owners, in October 2012, related to three deeds of settlement: the Claims Deed, the Indemnity Deed, and the WRD.[622] The Crown did not consult with Māori prior to entering these deeds with the MV Rena owners.

Both previously and throughout the Tribunal's inquiry the Crown strongly relied on commercial confidentiality to limit the information about the settlement with the MV Rena owners. The fact that clause 13(e) of the WRD provides that any of the parties could "disclose the Deed in legal proceedings as evidence of its response"

[622] Waitangi Tribunal, The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014) at 9.

to the MV Rena grounding. The Crown refused to provide the deed until it was compelled by the Tribunal to do so. Hence, another significant reason why the Tribunal did not consider the Crowns conduct, as aligning with its duty as a Treaty partner to act reasonably, honourably, and in good faith. While this was the case, the disclosure of the information within the WRD demonstrates the obligations the Crown exposed itself to.

Consequently, the WRD required the Crown to decide whether or not to support the owners' application by 'taking into account the environmental, cultural and economic interests of New Zealand and the likely costs and feasibility of compete removal of the wreck. In the event that the Crown does not oppose the resource consent application (direct or indirect) and the application succeeds, the MV Rena owners will pay the Crown an additional $10.4 million for 'public purposes'.

More specifically, the WRD stipulates the relevant parties to the deed to include the following: Daina Shipping Company ("the MV Rena owner"); Her Majesty the Queen in Right of New Zealand (but in the case of the Minister of Conservation, subject to clause 11 of this Deed) and Maritime New Zealand and the Director of MNZ.[623] To elaborate, the WRD expressed that the Rena owner, within a 12 month period, will execute the following: advise the Crown and MNZ their intention to remove the Rena wreck; apply for a resource consent and the Rena owner may apply for further consents, withdraw or amend the application with notice to the Crown.

As an exchange, the Crown and MNZ provided assistance to prepare lodging and progressing the application, but will not involve itself in the independent decision to be made and give notice to the MV Rena owner of all claims made relevant to

[623] At 85.

the customary marine title and protected customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011, as well as, “in good faith” make a submission in support of the application. For the reason being, that the Rena owners would be impacted by these claims; and lastly to not seek recovery of the lodged resource consent application or other compensation.[624]

With regard to the payment, in the event that the Crown follows through with the terms of the WRD: payment by the Rena owner to the Crown will be the amount of $10.4 million on the condition that the Crown does not oppose the granting of the application (directly or indirectly), as well as, the payment will be made 14 days after all the consents have been satisfied, and if payment was made prior to any appeals to the consent, then payment is to be returned. Once the WRD has completed its process, the Crown and MNZ the Rena owner has carried out their requirements under New Zealand law and will have no further obligation or liability to the Crown or MNZ[625] Therefore, the above is the basis of the WRD between the Crown and the MV Rena owners with respect of the next process of applying for the resource consent to leave the Rena vessel on Ōtāiti.

The rational of why the Crown entered into the negotiation for the WRD is crucial. It is obvious that the Crowns conduct was not in alignment with the Treaty principles at the time of entering the WRD. The entry caused a major impact on the Crowns relationship with Motiti Māori; specifically, with the claimants.[626] While at the same time, the Crown was in pursuit of creating and maintain a relationship with the Rena owners, which involved a commitment to consider supporting the resource consent “in good faith”. Unfortunately, the Crowns conduct was causing

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[624] At 85.

[625] At 86.

[626] Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014)* at 54.

immense and tragic pressure to its relationship with its Treaty partner (Māori). Then again, the utmost purpose of entering the WRD, from the Crown perspective, was to ensure some degree of trust to ensure that the MV Rena owners would comply with their legal obligations to remove the MV Rena wreck. It was a misfortune that this therefore occurred at the expense of the Crowns Treaty relationship with Māori.[627] From here, the Crowns submission to the resource consent is outlined below.

13 The Crowns' submission on the MV Rena owners' resource consent application

At this stage, the Governor-General announced that the Crown was to make a partial opposition submission on the resource consent application to leave the wreck on the Ōtāiti.[628] For example, the Crown sought to remove the bow section of the MV Rena and other associated parts and debris to a depth of 30 metres. Further, for the parts of the wreck remaining below that level: the Crown proposed enhanced monitoring and consent conditions. To assist further, the submission sought to seek out more information in connection with Tangata Whenua values, as well as, technical assessments.[629] Therefore, it can be seen that the Crown had 'carefully considered through this process the principles of the Treaty of Waitangi' providing a balanced approach that conveniently aligned with the terms of the WRD and also the concerns of protecting Māori interests. This guides the notion of the Crowns response to the Interim Report findings and recommendations.

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[627] At 55.
[628] At 46.
[629] At 46.

14 The Findings

The Tribunal was required to consider whether the Crown breached Treaty principles by means that were prejudicial to Māori and/or Māori in future. As known in the Interim Report, the Tribunal found that the Crown breached the Treaty by failing to properly consult with Māori in relation to whether it would make a supportive submission for the Rena owner's application.[630]

Equally important, in this Final Report, the pivotal point was whether the Crown's conduct in entering the WRD was a breach of the Treaty principles and also prejudice to the claimants.[631] Thus, the Tribunal found the claimants had suffered because the Crown was not sufficiently informed of the Māori perspective of their values in relation to Ōtāiti (taonga), as well as, not being equipped for meaningful engagement in the resource consent process.

Adding to the wound, people of Motiti were now aware of the Crown placing itself in a position to be bound "in good faith" to support the resource consent application, due to the WRD. The Crowns position left Motiti Māori to fend for themselves, absent of support from the Crown and the Minister of Local Government.[632] Hence, the Tribunal considered that the Crown needed to be seen to take active steps to protect Māori and their taonga in the time leading up to and inclusive of the resource consent process.[633]

As a means of addressing the breaches in the Interim Report, the Crown decided to partially oppose the MV Rena owner's application in order to avoid the situation of the claimants suffering any prejudice from the Crown entering into the WRD.

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[630] At 51.
[631] At 52.
[632] At 52.
[633] At 51–56.

Additionally, the Crown is still open to addressing the potential meaningful steps to demonstrate its active protection of Māori and their taonga, because the Crown stipulated the fact that entering the WRD "upset people" which gave rise to the appearance of the Crown not acting in good faith incurring its obligations to the MV Rena owners.[634] This was a further injustice to the people of Motiti.[635] Therefore, the Tribunal stated that the Crown was required to first consult with Māori on the nature and extent of their interest in Ōtāiti, combined with their views on the general resource management related issue before making a decision of how to approach the submission in the resource consent process or any resource management related issue.

With the lack of consultation with Māori by the Crown previous to entering negotiations with the MV Rena owner, compounded the existing trust issues between the Crown and Māori.[636] For the people of Motiti this impaired their trust in the legal system relating to protecting the marine environment.

12 The Conclusion of the Crowns breaches arising from entering the WRD

In summary of the Crown breaches showed that the conduct both before and after the negotiation of the WRD, and the lead up to the decision of supporting the MV Rena resource consent application was a clear failure on the Crowns part because the Crown chose to support the resource consent application and oblige itself to the MV Rena owners rather than to protect Māori interests as its Treaty

[634] At 53.
[635] At 53.
[636] At 52.

partner. The Tribunal had no doubt that this circumstance would have resulted as prejudicial for Māori.[637]

The Crown inflamed this failure by not providing parts of the WRD to Māori as soon as possible and by conducting an inadequate consultation process covering whether to make a submission in the resource consent application placing extensive pressure on its relationship with Māori. Therefore the Crown's conduct has significantly diminished the Treaty partnership to the detriment of Māori affecting the claimants by entering the WRD without a consultation process. The Crown breached the principle of partnership and mutual benefit and the Tribunal found that the claims are well-founded.[638] Hence the injustice subjected on the people of Motiti.

13 The Recommendations of the Tribunal

The Tribunal largely considered that the best way forward for the Crown to address the prejudice and begin to rebuild its relationship with the claimants in order to fulfil its Treaty duty. The Tribunal suggests the Crown to now play an active role in the resource consent process, because the Crown has a more extensive ability to call evidence on the wide range of the issues that may arise before the Environment Court and continuing to press for monitoring conditions in the event the resource consent is granted.[639] Hence, the Tribunal considers the Crown needs to make clear to the Environment Court its acceptance of the significance of Otaiti to Māori and indicate that Ōtāiti should have status, because these key points are missing from the Crowns submission.

[637] At 55.
[638] At 56.
[639] At 56.

Further the Crown needs to make clear to the Environment Court, its admission of the connection Māori have with Ōtāiti. Therefore, it is crucial that the Crown is to provide Motiti Māori with adequate support to participate in the resource consent process themselves, because Māori will bring a unique voice and set of concerns to the resource consent process because Motiti Māori community has had the most direct effect by the grounding of the Rena on Otaiti.

The Tribunal recommends that in order to mitigate the prejudice suffered by claimants the Crown should:[640]

1. Actively participate in the resource consent. In particular, how it can protect Māori interests in that process, which may include calling its experts for questioning and testing of evidence produced by the owners in support of their submission, and seeking enhanced monitoring conditions in the event the application is approved;

2. In the resource consent hearing, submit that the Environment Court accept that Ōtāiti is a taonga and the protection of Ōtāiti is a matter of national importance in relation to 6(e) of the Resource Management Act 1991;

3. Consider the unique and vulnerable position of the claimants. The Crown should consider actively assisting Māori participation in the resource consent process beyond the limited contestable legal aid fund administered by the Ministry for the Environment.

From here, the resource consent process proceeded, addressed in chapter five.

[640] At 58.

14 Summary

Outlined in this chapter were the relevant actors involved in the MV Rena grounding incident regarding marine pollution response and other legal processes, such as the Waitangi Tribunal and the RMA resource consent process. This chapter showed the legal implications and responsibilities of each player in this situation in order to show the scope of how complex the multi-layered collaborative approach to addressing the grounding.

This chapter also explored the legal processes and existing legal frameworks triggered once the MV Rena grounded on Ōtāiti and how those legal processes impact local communities and iwi Māori, such as the communication complexities across sectorial collaborative approaches to the Recovery Plan. Additionally, the response operation was outlined to understand how it was implemented and by whom, demonstrating the flaws in the logistical complexity that occurred at the time and the lack of an indigenous voice in the maritime sector.

6 ŪPOKO TUAONO: CHAPTER SIX – THE MV RENA AND INTERNATIONAL LAW

a. Introduction

The four cornerstones of globalisation include "communications, international standardisation…trade liberalisation" and transportation that contributes to oil demand.[641] International shipping liners navigate global coastal marine areas' inclusive of Aotearoa New Zealand. Owners of international shipping liners to adhere to applicable international obligations. The New Zealand government must ensure that Aotearoa New Zealand has the regulatory framework in place to achieve those international obligations, as a "protection jurisdiction" against any danger that may arise in these circumstances.[642]

The MV Rena vessel qualifies as an international shipping liner that entered Aotearoa New Zealand coastal waters, as outlined in chapter three.[643] Literature on international law involves political and ethical commitments under the principle of participation by three or more parties (multilateralism), institutionalism and humanitarianism relative to many different issues.[644] This chapter will firstly describe the international law landscape relative to the marine environment and oil pollution. The purpose of this will illustrate the international principles to protect

[641] Mohammad Mazraati "Challenges and prospects of international marine bunker fuels demand" (2011) OPEC Energy Review, 35: 1-26 at 2.

[642] *Helu v Immigration and Protection Tribunal* [2015] NZSC 28 at [143]. See also, Claude C Emanuelli "The Right of Intervention of Coastal States on the High Seas in Cases of Pollution Casualties," (1976) University of New Brunswick Law Journal 25:79 at 79.

[643] The MV Rena was registered in Liberia. The owner is a Greek company, a subsidiary company of the Costamare Shipping Company; *Daina Shipping Company v Te Runanga o Ngati Awa (No 2)* [2013] NZHC 500 at [13].

[644] David Kennedy "International Symposium on the International Legal Order" (2003) Leiden Journal of International Law, 16, 839-847.

marine environments from oil pollution, and the way those principles are reflected through domestic regulations, in Aotearoa New Zealand.

Second, international instruments form part of international law that independent countries (nation states) adhere to by signing up to those obligations.[645] This chapter will explore the international principles pertaining to human rights' treaties relative to indigenous peoples. The rationale for this investigation is to illustrate that when indigenous peoples' submit spiritual or cultural arguments in legal processes, they are listened to. The emphasis in this chapter is that decision-makers have to listen to indigenous communities and that indigenous people matter.

The aim of this chapter is to show that Aotearoa New Zealand is committed internationally to protecting our coastal marine environment and our country is committed internationally to protect the voice of indigenous peoples and to listen to that voice. This international commitment sets the tone as to how our domestic law regulates these international obligations.

1 Setting the ocean scene: International Law

International law has been an evolving topic of debate, recorded as far back as the fall of the Western Roman Empire in 476,[646] with a plethora of legal

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[645] *Minister of Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353; see also New Zealand *Maori Council v Attorney General* [1996] 3 NZLR 140, 184; Keith Kenneth "Roles of the Courts in New Zealand in Giving Effect to International Human Rights with Some History" (1999) 29 VUWLR 27 at para [47], [41]; Melissa Poole "International Instruments in Administrative decisions: Mainstreaming International Law" (1999) 30 VUWLR 91. See also Law Commission The Treaty Making Process: Reform and the Role of Parliament (NZLC R45 1997) at 11.

[646] Stéphane Beaulac "The Westphalian model in defining international law: Challenging the myth" (2004) *Australian Journal of Legal History* 8, no. 2:181-213 at 189; Arthur MacDonald "Suggestions of the Peace Treaty of Westphalia for the Peace Conference in France" 88 CENT. L.J. 302 (1919) at 194-195.

scholarship analysing and navigating international frameworks, institutions and legal processes.[647] The concept of International law created in 1789 by Jeremy Bentham as “the law which relates to “the mutual transactions between sovereigns as such”.[648] The developed definition refers to “the body of binding norms governing the relations between states (countries)”.[649] Aotearoa New Zealand is a state that has its unique rights and privileges in its domestic laws at the national level, while at the same time, participating at the international level.[650]

International law literature also reveal that each individual state hold particular characteristics that include terms such as: autonomy,[651] sovereignty[652] and state sovereignty.[653] Although this chapter does not delve into the details of these terms, it is worth mentioning, the relevance of these terms to the exploration of indigenous rights in this chapter: that relevance is sovereignty in respect of self-determination for Māori under international obligations. Such state characteristics

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[647] Kiss Alexandre and Dinah Shelton *Guide to International Environmental Law* (BRILL, 2007) at 1 and 31; Beaulac, Stéphane. "The Westphalian model in defining international law: Challenging the myth." *Australian Journal of Legal History* 8, no. 2 (2004): 181-213 at 182.

[648] Janis M W "Individuals as subjects of international law" (1984) *Cornell Int'l LJ* 17:61 at 62.

[649] Kiss Alexandre and Dinah Shelton *Guide to International Environmental Law* (BRILL, 2007) at 8.

[650] Kiss Alexandre and Dinah Shelton *Guide to International Environmental Law* (BRILL, 2007) at 8; Mitchell J Taylor "Westphalia to Westminster: British Autonomy in the 'Postmodern' Era," Manchester Review of Law, Crime and Ethics 9 (2020): 12-31 at 12; Duncan French "Finding Autonomy in International Environmental Law and Governance," Journal of Environmental Law 21, no. 2 (2009): 255-290 at 256; Skurbaty Z *Beyond a One-Dimensional State : An Emerging Right to Autonomy?* (Ed, BRILL, 2004) at 47. See also Dennis Jacobs "What Is an International Rule of Law," Harvard Journal of Law & Public Policy 30, no. 1 (Fall 2006): 3-6 at 5.

[651] Skurbaty Z *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (Ed, BRILL, 2004) at 47; Alexander Osipov "Non-Territorial Autonomy and International Law," International Community Law Review 13, no. 4 (2011) 393-412 at 394; Duncan French "Finding Autonomy in International Environmental Law and Governance," Journal of Environmental Law 21, no. 2 (2009): 255-290 at 256.

[652] Thomas S Hornbuckle "A Definition and Explanation of Sovereignty in the Polity of the United States" Houston Law Review 3, no. 3 (Winter 1966) at 370; Hathaway A Oona “International Delegation and State Sovereignty” Law and Contemporary Problems, Vol 71:115 (Winter 2008) at 115.

[653] Wilson A E ““People Power” and the problem of Sovereignty in International Law” Duke Journal of Comparative & International Law, Vol 26 (2016) at 551; Stacy H “Relational Sovereignty” Standford Law Review, Vol 55:2090 (2003) at 2030; Kiss Alexandre and Dinah Shelton *Guide to International Environmental Law* (BRILL, 2007) at 11-12.

extend to Aotearoa New Zealand in protecting marine environment through state autonomy and identity, independent of other states. As a whole, global states comprise the international community committing to obligations arising from international treaties and other sources of international law. At the national level in respect of state sovereignty and autonomy, setting out the marine boundary is applicable.

2 Relevant Marine boundaries in Aotearoa New Zealand

As a nation state, marine boundaries reflect the jurisdiction for sovereignty, and the maintenance of a resource management regulatory system, as mentioned in chapter three and four.[654]

Aotearoa New Zealand boundary from the baseline out to edge of the Exclusive Economic Zone (EEZ) is 200 nautical miles. Beyond the EEZ is the continental shelf, which covers an area of 1.7 million square kilometres.[655] This particular area was confirmed by the UN Commission (2008) implemented under domestic law by way of an Order in Council.[656] Consequently, sovereignty rights for

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[654] United Nations Convention on the Law of the Sea I-31363 (open for signature 23 May 1997, entered into force 30 December 2001), art 2 and part 4 ('Continental Shelf'…provides that the coastal state may exercise 'over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources'). Oceans & Law of the Sea United Nations – Division for Ocean Affairs and the Law of the Sea "United Nations Convention on the Law of the Sea of 10 December 1982 Overview and full text" (10 December 1982) Oceans & Law of the Sea United Nations www.un.org. Scott, Karen N. "Does Aotearoa New Zealand Need an Oceans Policy for Modern Ocean Governance?" *Ocean Yearbook Online* 35, 1 (2021) at 245.

[655] Angela Foster, "New Zealand's Oceans Policy," Victoria University of Wellington Law Review 34, no. 3 (August 2003) at 470; Kenneth Palmer, "Environmental Management of Oil and Gas Activities in the Exclusive Economic Zone and Continental Shelf of New Zealand," Journal of Energy & Natural Resources Law 31, no. 2 (May 2013) at 126; Karen N. Scott, "Maritime Law Enforcement in New Zealand," Korean Journal of International and Comparative Law 6, no. 2 (October 2018) 245.

[656] Karen N Scott "Does Aotearoa New Zealand Need an Oceans Policy for Modern Ocean Governance?" (2021) *Ocean Yearbook Online* 35, 1 at 281. Continental Shelf Order 2018/135. Continental Shelf Order 2018.

Aotearoa New Zealand extends beyond the 200 nautical miles, which can extend to 350 nautical miles.[657]

The purpose of identifying these boundaries is to demonstrate the sovereign boundary of Aotearoa New Zealand in connection with the ocean, and illustrate the different boundary zones and reflected jurisdictions. [658]

The above figure[659] of the marine boundaries clearly indicates Aotearoa New Zealand's marine boundaries, including the extended continental shelf. Aotearoa New Zealand has rights to the area of the continental shelf goes beyond the Exclusive Economic Zone (200 nautical miles). Essentially, the continental shelf is the part of an area that surrounds the landmass of Aotearoa New Zealand, where the sea is shallow compared to the open sea.[660]

Additionally, below is a diagram showing the marine boundaries from a side-view but within the EEZ up to the baseline (shoreline), which also aligns with the United Nations Convention on the Law of the Sea.[661]

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[657] Karen N Scott "Evolving MPA Management in New Zealand: Between Principle and Pragmatism, Ocean Development & International Law" (2016) 47:3, 289-307 at 290.

[658] New Zealand Foreign Affairs & Trade – Manatū Aorere "Our marine zones and boundaries" (2022) www.mfat.govt.nz; Oceans & Law of the Sea United Nations – Division for Ocean Affairs and the Law of the Sea "United Nations Convention on the Law of the Sea of 10 December 1982 Overview and full text" (10 December 1982) Oceans & Law of the Sea United Nations www.un.org.

[659] Continental Shelf Act 1964, s 2 (continental shelf means the seabed and subsoil of those submarine areas that extend beyond the territorial limits of New Zealand, to the seaward-side boundaries). Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2021, s 4. New Zealand Foreign Affairs & Trade – Manatū Aorere "Our marine zones and boundaries" (2022) www.mfat.govt.nz.

[660] Continental Shelf Act 1964, s 2 (continental shelf means the seabed and subsoil of those submarine areas that extend beyond the territorial limits of New Zealand, to the seaward-side boundaries). Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2021, s 4. New Zealand Foreign Affairs & Trade – Manatū Aorere "Our marine zones and boundaries" (2022) www.mfat.govt.nz.

[661] New Zealand Foreign Affairs & Trade – Manatū Aorere "Our marine zones and boundaries" (2022) www.mfat.govt.nz; Oceans & Law of the Sea United Nations – Division for Ocean Affairs and the Law

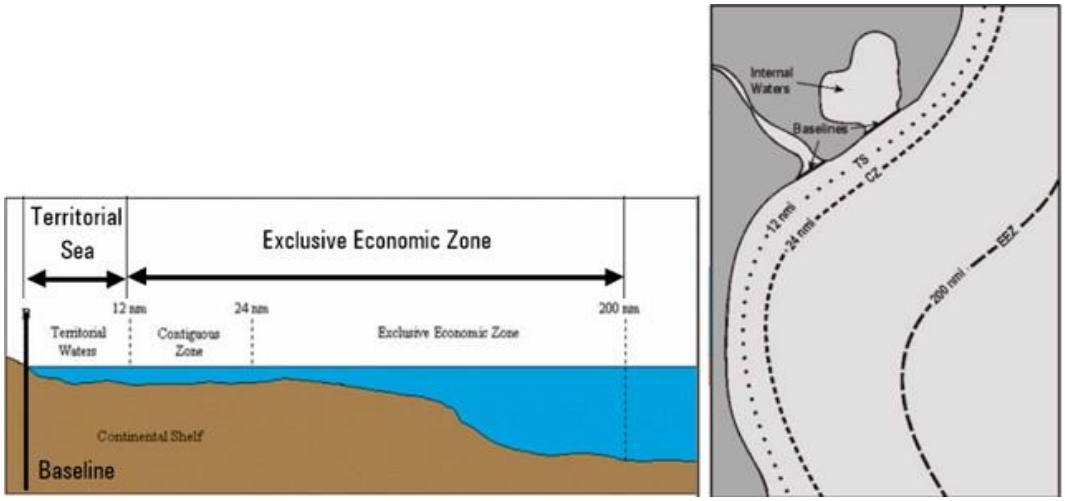

Figure 14 Marine boundary – territorial zone

Furthermore, from the baseline (shoreline) there is a territorial sea zone that reaches out into the ocean to 12 nautical miles.[662] From the 12 nautical mile zone toward the sea, another 12 nautical miles is added. The name of this zone is the contiguous zone.[663] The next zone at the outer limits of the territorial seas, reaching out to 200 nautical miles is the EEZ.[664] The ocean beyond the EEZ, as mentioned before is the continental shelf.[665] Certainly, these marine boundaries come with obligations through domestic law, such as, the Resource Management Act 1991, which covers the activities occurring on the environment from inland out to 12 nautical miles and potential out further depending on the environmental

of the Sea "United Nations Convention on the Law of the Sea of 10 December 1982 Overview and full text" (10 December 1982) Oceans & Law of the Sea United Nations www.un.org.

662 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, ss 3, 5, 6 and 6A.

663 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 8A.

664 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 9.

665 Continental Shelf Act 1964, s 2

issues, to name one statute of many existing legislation in Aotearoa New Zealand.[666]

Historical principles of 'autonomy' and 'sovereignty' for each state to maintain its own societal authority at the national level, separately to other nation states, demonstrate marine boundary zoning that reflect each nation states sovereignty.[667] These marine boundaries encompass regulatory systems that chose to accept or agree to the content of the United Nations Charter.

Under the United Nations Charter ("UN Charter"), the founding principles "reaffirm faith in human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small…to respect…obligations arising from treaties and other sources of international law…to promote social progress and better standards of life…" [668]

The United Nations ("UN") established itself as an organisation based on sovereign equality of all its members, to respect other members under the principles in the UN Charter.[669] Such as "all members shall refrain …from the treat or use of force against the territorial integrity or political independence of any state…in any manner…inconsistent with the Purposes of the United Nations.[670] The members of the UN accept the UN Charter obligations, rights and principles outlined in the content of the UN Charter.[671] Aotearoa New Zealand, as a small island nation, is a member of the UN and participates in activities such

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[666] Resource Management Act 1991;

[667] Hathaway A. Oona, "International Delegation and State Sovereignty" Law and Contemporary Problems, Vol 71:115 (Winter 2008) at 115.

[668] United Nations Charter, preamble.

[669] Ibid.

[670] United Nations Charter, art 2(4).

[671] At, art 1 - 4.

as “UN-led or sanctioned peace and security operations to demonstrate its willingness - as a responsible global citizen - to contribute to the maintenance of a stable world order”.[672]

3 Protecting our coastal marine environment

General aspects such as, diplomacy, trade treaties, and interactions between states are amongst the dynamic of international law, which also consist of different branches.[673] International Environmental law is the branch that deals with questions concerning the role of science and risk management of environmental issues, with no single treaty outlining its principles and rules.[674] But, these principles of international environment law are found in an array of “clearly accepted “hard law”…”emerging” or “in progressive development” (accepted by many but still lacking thorough consensus), to…”aspirational” or futuristic values”.[675] These layered principles assist with protecting the environment.

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[672] Graham Hassall and Negar Partow *A Seat at the Table: New Zealand and the United Nations Security Council 2015–2016* (ed, Massey University Press, 2020) at 103. See also New Zealand Foreign Affairs & Trade Manatū Aorere “Our work in the UN” New Zealand Foreign Affairs & Trade Manatū Aorere www.mfat.govt.nz.

[673] Mégret F, “Are there “Inherently Sovereign Functions” in International Law?” The American Journal of International Law, Vol 115:3 (Cambridge University Press, 2021) at 453-454; Hathaway A. Oona, “International Delegation and State Sovereignty” Law and Contemporary Problems, Vol 71:115 (Winter 2008) at 115; Bevan Marten Maritime Law in New Zealand (Thomson Reuters New Zealand Limited, 2016) at 1 – 2. See also, Kiss, Alexandre, and Dinah Shelton Guide to International Environmental Law, (BRILL, 2007) at 1 and 31.

[674] Annecoos Wiersema, “What Can the WTO Learn from International Environmental Law”. Soc'y INT'l L. PROC. 23 (2010) 104 at 23.

[675] Ved Nanda and George Pricing International Environmental Law: International Environmental Law and Policy for the 21st Century (BRILL, 2012) at 19.

Environmental issues require a starting point of defining the "environment" which can reflect any system from wetland up to the outer space region.[676] Addressing environmental issues through the *precautionary principle* to manage "science, risk and uncertainty" aspects, as well as, *sustainability* and *integrated environmental management practice* to find solutions.[677] Nation states find solutions through collaborative discussions that may result in international agreements (both multilateral and bilateral), "declarations, resolutions, judicial decisions, and other legal authorities" since 1970.[678] This branch of international law is strongly applicable to the MV Rena grounding situation in Aotearoa New Zealand. Alexander Gillespie extends that application and explains that:[679]

> International law, and public concern, has traditionally focused on oil related damage from vessels, as opposed to the fact of the wrecks themselves. In this regard, a large amount of international and domestic law has been developed covering everything from the design of oil tankers through to elaborate compensation regimes. Consequently, when accidents occur, financial compensation and response mechanisms ought to already be in place…

In the context of Removal of the MV Rena vessel, the presumption affirms that:[680]

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[676] Ved Nanda and George Pricing International Environmental Law: International Environmental Law and Policy for the 21st Century (BRILL, 2012) at 6.

[677] McNicol J B, *Sustainable Planet: Issues and Solutions for Our Environment's Future [2 Volumes]* (Edited ABC-CLIO, LLC, 2021) at xii; Resource Management Act 1991, s 5; Annecoos Wiersema, "What Can the WTO Learn from International Environmental Law". Soc'y INT'l L. PROC. 23 (2010) 104 at 23. See also Nanda, Ved, and George (Rock) Pring. *International Environmental Law: International Environmental Law and Policy for the 21st Century* (BRILL, 2012) at 5-6; Bosselmann, K; Grinlinton, D "Environmental law for a sustainable society: environmental law for a sustainable society" (Ed) NZLFRR [p2002] at 23.

[678] United Nations Charter, art 1; Ved Nanda and George Pricing International Environmental Law: International Environmental Law and Policy for the 21st Century (BRILL, 2012) at 6.

[679] Waitangi Tribunal Hearing "Brief of Evidence of Alexander Mathew Gillespie" (Pacific Law Limited, Wellington, 23 June 2014) at 2.

[680] At 2.

> There is a strong presumption through the development of international law and policy on wrecks, that the Rena Wreck should be removed from its current location. This is because, in addition to it possibly not being adequately stripped of pollutants, it may also be on a culturally significant site…the Rena Wreck is sitting on Astrolabe Reef and the Rena owner is applying for a resource consent to leave it there. In this context, international law relating to the rules around how to deal with old vessels is relevant and should have a persuasive value about how this issue is considered…

With the wide application and presumption of international law relating to the marine environment and international shipping, is significant, as it will show the potential implications to the environmental issues in Aotearoa New Zealand and to the people of Motiti indicating gaps in the law and the lack of incorporating the indigenous voice in solutions for environmental issues. This sets the scene for the rest of this chapter, as each section will be an explanation of the relevant conventions applicable to the MV Rena incident in Aotearoa New Zealand.

4 United Nations Convention on the Law of the Sea 1994

Given the nature of the shipping industry the applicable principles derive from the United Nations Convention on the Law of the Sea ("UNCLOS"), which deals directly with shipping matters such as, ocean resources, ocean usage and maritime boundaries relative to coastal state jurisdiction over foreign vessels (also includes flag state's obligations).[681] UNCLOS has a presumption of marine protection that all states are to undertake, which are set out in principles contained in UNCLOS covering all maritime matters.[682] The preamble of the UNCLOS states that:[683]

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[681] United Nations Convention on the Law of the Sea Marten B, Maritime Law in New Zealand (Thomson Reuters New Zealand Limited, 2016) at 26.

[682] Maritime Transport Act 1994. John Warren Kindt, "Vessel-Source Pollution and the Law of the Sea," Vanderbilt Journal of Transnational Law 17, no. 2 (Spring 1984): 287-328.

[683] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996), preamble; Rosemary Rayfuse *Research Handbook on International Marine Environmental Law*, edited by, Edward Elgar Publishing Limited,

> The States Parties to this Convention,
> … in the spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance…conscious that the problems of ocean space are closely interrelated and need to be considered as a whole…and friendly relations among all nations in conformity with the principles of justice and equal rights…in accordance with the Purposes and Principles of the United Nations…

New Zealand government ratified UNCLOS on 18 August 1996 affirming that our island nation, as small as it is, in comparison to other nation states.[684] To contrast, Greece government ratified UNCLOS on 20 August 1995 (location of the MV Rena owners).[685] Accordingly, both countries are committed to aligning with the international obligations for protecting the marine environment. This is a positive position for both countries in the context of the MV Rena grounding reflecting the collaborative approach in working together across sectors and the goodwill of the MV Rena owners in their attempt with addressing the oil pollution to the coastal marine area, as outlined in chapters three and five of this thesis.[686] UNCLOS outlines the principles of protection for the marine environment.

The protection of the marine environment under Part 12 of the UNCLOS to protect and preserve the marine environment, with the specific general obligation affirming that:[687]

2015; Jensen, Øystein. "General introduction". In *The Development of the Law of the Sea Convention*, (Cheltenham, UK: Edward Elgar Publishing, 2020) at 1; Kenneth Palmer, "Environmental Management of Oil and Gas Activities in the Exclusive Economic Zone and Continental Shelf of New Zealand," Journal of Energy & Natural Resources Law 31, no. 2 (May 2013) at 126.

[684] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996); Angela Foster, "New Zealand's Oceans Policy," Victoria University of Wellington Law Review 34, no. 3 (August 2003) at 470.

[685] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 20 August, 1996).

[686] Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] 1 NZLR at 841-842.

[687] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996), art 192.

> States have the obligation to protect and preserve the marine environment.

Adding to the general obligation include articles 192 – 237.[688] Article 193 and 194 asserts that, "States have the sovereign right…pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment" and that:[689]

> States shall take…all measures…with this Convention…to prevent, reduce and control pollution of the marine environment…to harmonize their policies…to ensure that activities…are so conducted as not to cause damage by pollution to other states...The measures taken…shall deal with all sources of pollution…include…release of toxic, harmful or noxious substances…by dumping...from vessels…to prevent, reduce or control pollution of the marine environment…

With respect to a foreign vessel such as the MV Rena, Article 211(4) states that:[690]

> …in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage…

As long as the New Zealand government has implemented laws to support the protection and preservation of the marine environment from pollution, then the UNCLOS international obligations are satisfied. Specifically, the "Coastal state shall adopt laws and regulations to prevent, reduce and control pollution of the

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[688] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996), pt XII.

[689] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996), art 193, 194.

[690] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996), art 211(4).

marine environment arising from or in connection with sea-bed activities…"[691] and "from vessels…to minimize the treat of accidents which might cause pollution damage to… coastal states…".[692] The Supreme Court in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* refers to the UNCLOS stating that:[693]

> Under art 194(1), states parties are required to take…all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

The owners of the MV Rena were responsible for all measures taken to respond to marine pollution. Further, the Supreme Court emphasised the term and meaning of "Pollution of the marine environment" as:[694]

> …the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for sue of sea water and reduction of amenities…

In chapters three and five of this thesis, the oil pollution that migrated throughout the ocean from the MV Rena vessel is applicable to the meaning of "pollution of

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[691] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996), art 208.

[692] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996), art 211(1).

[693] United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994) [LOSC], art 194; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR at 841-842.

[694] Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] 1 NZLR 842.

the marine environment", because the environmental effect of the grounding spread cargo equipment, and debris. With respect to the regulating pollution control, the Supreme Court asserts that:[695]

> …[A]rt 208(1) provides for coastal states to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction" Under art 208(3), the national legislation and regulations in this respect are to be "no less effective" than international rules…

The Court continues stating that:[696]

> [T]he case law and commentary of arts 192-194 of the LOSC suggest that what is envisaged is a balance between environmental protection and preservation (art 192) and the economic development of resources (art 193), but the balance is tilted towards environmental protection. That environmental protection has priority over economic development is apparent…

The MV Rena situation captured within the international obligations demonstrates that the grounding incident itself did not satisfy the UNCLOS obligations despite having domestic laws supporting preventative measures. However, the MV Rena owners attempt at preventing further pollution did satisfy those obligations, because they prioritised environmental protection of the marine environment over economic development of resources.

With respect to pollution by "dumping within the territorial sea…shall not be carried out without…approval of the coastal State, which has the right to permit, regulate and control such dumping"[697] and that "National laws, regulations and

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[695] At [92].

[696] At [93].

[697] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996), art 1, 194.

measures shall be no less effective in preventing…such pollution than the global rules and standards".[698] New Zealand's regulation on 'dumping' the MV Rena on Ōtāiti, after all assessments and recovery plans were carried out, indicate the complexity of navigating the existing legislative frameworks. Such as, the MTA stating that vessels that cause marine pollution are to be removed, while in comparison, the RMA affirming that vessels can be abandoned or dumped, as highlighted in chapter four. With two different provisions within two different statutes, referring to two different legal avenues in addressing the MV Rena situation. These silo statutes and provisions can seem either confusing to the layperson or a clever way of drafting statutes for legal practitioners to take advantage of interpreting the law to make arguments that limit the opportunity for the indigenous voice to have any weight in legal processes, such as the MTA and the RMA.

To surmise, UNCLOS set the regulatory system for environmental problems in the ocean, at the international level. These international obligations filter through legislation, regulations, policies, rules, plans and strategies, like the MTA and RMA, at the domestic level. The New Zealand government ratified UNCLOS to include this regulatory system, founded on strong notions of protection and preservation of the ocean. The grounding incident shows that both the New Zealand government and the owner of the MV Rena are subject to UNCLOS by cooperating on a regional basis directly, through contingency plans and environmental assessments, to protect and preserve the marine environment, as argued in chapters three and five of this thesis.[699] Therefore, the purpose of UNCLOS creates the strong presumption of protection that all states have to

[698] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996), art 210(4), (5).

[699] United Nations Convention on the Law of the Sea 31363 UNTS 1833 (opened for signature 16 November 1994, entered into force 18 August, 1996), art 197-210.

undertake to prevent oil pollution in marine environments. UNCLOS is the framework of principles to prevent oil pollution, dealt with through specific conventions through the International Maritime Organisation.

5 International Maritime Organisation and marine oil pollution conventions

The Convention on the International Maritime Organisation ("IMO") originally established the organisation to encourage cooperation among nation state shipping owners before evolving into an organisation that facilitates the forming of regulations for safe shipping and marine pollution.[700] IMO also facilitates resolution forums for member states to discuss and agree on standards or conventions (mandatory), guidelines and codes (mandatory or non-mandatory) recommending minimum standards. For instance, aspect of construction, ship design and ship operations. The process of how the instruments operate with indicate that:[701]

> Conventions are mandatory. Codes can be mandatory or non-mandatory, depending on the resolution. If a code is mandatory it becomes…part of any convention to which it relates. Guidelines are non-mandatory but are generally considered "best practice", states elect which IMO instruments they will adopt. Once a state signs up to a mandatory IMO instrument, it is responsible for adopting the standards in the instrument into its domestic legislation and checking that ships under it registry comply with them.

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[700] Convention on the International Maritime Organization 4214 UNTS 289 (opened for signature 6 March 1948, entered into force 9 November 1960); Mark Szepes, "MARPOL 73/78: The Challenges of Regulating Vessel-Source Oil Pollution," Manchester Review of Law, Crime and Ethics 2 (2013) at 82; Rebecca Becker, "MARPOL 73/78: An Overview in International Environmental Enforcement," Georgetown International Environmental Law Review 10, no. 2 (1998) at 626, 627; Convention on the Intergovernmental Maritime Consultative Organization, Mar. 17, 1958, 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 48 [hereinafter Convention]. This organisation was then changed to the International Maritime Organisation in 1982.

[701] Transport Accident Investigation Commission Te Kōmihana Tirotiro Aituā Waka Final Report Marine Inquiry 11-204 Container Ship MV Rena grounding on Astrolabe Reef, 5 October 2011 (November 2014) at 17.

Internal IMO instrument operations have distinct roles relating to marine pollution under the UNCLOS that:[702]

> One role is as a forum for international co-operation, sharing of information, and negotiation of international standards (forum role). A second role relations to the legal effect under the Convention of rules promulgated by or through the IMO or in IMO-related treaties (standard-setting role). A third role is to review is to review and, if it agrees, approve specific regulatory proposals of individual states (approval role).

Oil pollution conventions are applicable to the MV Rena vessel and the grounding, which constitute the International Convention for the Prevention of Pollution from Ships 1973 and 1978;[703] the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990[704] and the International Fund for Compensation for Oil Pollution Damage 1992.[705] These conventions set a clear framework for oil pollution prevention, preparedness, response and cooperation.

6 *International Convention for the Prevention of Pollution from Ships 1973 and 1978*

With UNCLOS as the umbrella regime for the ocean generally, the first relevant convention facilitated through the IMO is the International Convention for the

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[702] Bernard Oxman "Environmental Protection in Archipelagic Waters and International Straits - The Role of the International Maritime Organisation" (1995) International Journal of Marine and Coastal Law 10, no. 4: 467-482 at 468. See also International Maritime Organisation "United Nations Convention on the Law of the Sea" (2019) International Maritime Organisation www.imo.org.

[703] Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 1340 UNTS 22484 (opened for signature 17 February 1978, entered into force 2 October 1983).

[704] International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 1891 UNTS 32194 (opened for signature 30 November 1990, 2 October 1999).

[705] International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage, 1110 UNTS 17146 (opened for signature 18 December 1971, entered into for 20 February 1992).

Prevention of Pollution from Ships 1973 and 1978 ("MARPOL"),[706] specifically created to regulate the prevention and reduction of oceanic oil pollution discharges.[707] MARPOL is a remarkable global legal instrument for the prevention of vessel-source marine pollution covering all relevant issues. Ultimately, MARPOL provides a system for design, construction and equipment necessary for the prevention of marine pollution, which outlines the regulatory regime through its articles.[708] The general obligations of MARPOL states that:[709]

> The Parties…undertake to give effect to…the Annex…The International Convention for the Prevention of Pollution from Ships…provisions of the Convention and the present Protocol shall be read and interpreted together as one single instrument…Every reference to the present Protocol constitutes…a reference to the Annex hereto.

MARPOL affirms the coastal States ability to take such preventative measures in addressing the danger of marine pollution on the surrounding marine environment from ships or following a maritime casualty.[710] Literature debating

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[706] Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 1340 UNTS 22484 (opened for signature 17 February 1978, entered into force 2 October 1983).

[707] Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 1340 UNTS 22484 (opened for signature 17 February 1978, entered into force 2 October 1983), annex I.

[708] Gerard Peet "The MARPOL Convention: Implementation and Effectiveness" (1992) International Journal of Estuarine and Coastal Law 7, no. 4: 277-295 at 277; Rebecca Becker "MARPOL 73/78: An Overview in International Environmental Enforcement" (1998) Georgetown International Environmental Law Review 10, no. 2: 625-642 at 628; Mark Szepes, "MARPOL 73/78: The Challenges of Regulating Vessel-Source Oil Pollution," Manchester Review of Law, Crime and Ethics 2 (2013) at 80 – 81; Saiful Karim, "Implementation of the MARPOL Convention in Developing Countries," Nordic Journal of International Law 79, no. 2 (2010) at 312; Gerard Peet, "The MARPOL Convention: Implementation and Effectiveness," International Journal of Estuarine and Coastal Law 7, no. 4 (November 1992) at 277.

[709] Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 1340 UNTS 22484 (opened for signature 17 February 1978, entered into force 2 October 1983), art 1, 2(3)(a); International Maritime Organisation "International Convention for the Prevention of Air Pollution from ships (MARPOL)" (17 February, 1978) www.imo.org.

[710] Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 1340 UNTS 22484 (opened for signature 17 February 1978, entered into force 2 October 1983), preamble.

the rationale for implementing the MARPOL relate to the operational and navigational practices of vessels carrying oil or liquid noxious substances, resulting in intentional discharges.[711] Andrew Griffin suggests with regard to vessel pollution purports that:[712]

> This treaty is the international community's answer to the problem of vessel pollution. Since international commerce is vitally dependent upon sea transport, MARPOL 73/78 attempts to strike a balance between the need to protect and preserve the marine environment and the desire not to impose laws which make shipping prohibitively expensive. Additionally, MARPOL 73/78 had to create an environmental enforcement regime which balanced conflicting jurisdictional claims…to enforce MARPOL 73/78 against the ships of other nations.

MARPOL has received praised for the decreased amount of oil entering the sea from maritime transportation activities. For the purpose of providing another way of polluting the ocean by contrast, can be explained by Jeff Curtis referring to ocean pollution, cleaning and discharge procedures for oil from ships, which include:[713]

> The first tanker operation that contributes to the pollution of the seas is ballasting. After a tanker has discharged its cargo at a port…Seawater is taken into a bunker or cargo tank as ballast to correct this situation…The seawater mixes with both the settled oil residues and the oil that adheres to the cargo tank walls…This oil is not recoverable since it mixes with seawater…during the cargo tank cleaning process…

International shipping is a serious method of transporting goods, which also include container ships holding bunker oil, similar to the MV Rena vessel. However, MARPOL definitions only refer to tanker oil instead of also referring to

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[711] Jeff B. Curtis, "Vessel-Source Oil Pollution and Marpol 73/78: An International Success Story," Environmental Law 15, no. 4 (Summer 1985) at 682.

[712] Andrew Griffin, "MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty," Indiana Journal of Global Legal Studies 1, no. 2 (Spring 1994) at 490.

[713] Jeff B. Curtis, "Vessel-Source Oil Pollution and Marpol 73/78: An International Success Story," Environmental Law 15, no. 4 (Summer 1985) at 682-683.

bunker oil. Although there is, a great deal of literature referring to tanker oil and the ballasting processes relative to oil pollution.[714] This gap in MARPOL by excluding articles conveying the process of addressing marine oil pollution situations from ships accidentally discharging bunker oil from container ships could be seen as not satisfying the UNCLOS regime.[715] Highlighting this gap means that if international obligations do not stipulate the bunker oil aspect, this would mean that our domestic law in Aotearoa New Zealand would effectively not stipulate the bunker oil aspect either, complicating marine environment regulations.

The government of the day had ratified the MARPOL, which is considered an important convention. The fact that the grounding of the MV Rena is captured within the MARPOL regime, meant that the MV Rena owner had complied with the principles held within MARPOL. However, due to the gap in the MARPOL regime regarding the lack of bunker oil regulations suggest a lack of fully addressing the MV Rena grounding situation in implementing provisions for removing the vessel without opposition. Had the MARPOL regime included bunker oil regulations at the international level, Aotearoa New Zealand would have reflected those regulations at the domestic level in order to remove the MV Rena vessel. The result of such regulations would have not carried out the following Waitangi Tribunal, MTA or RMA resource consent processes and the injustices to the indigenous voice of the people of Motiti would not have occurred. Therefore, despite the bunker oil concern, the UNCLOS obligations incorporated

[714] Jeff B. Curtis, "Vessel-Source Oil Pollution and Marpol 73/78: An International Success Story," Environmental Law 15, no. 4 (Summer 1985) at 682; Mark Szepes, "MARPOL 73/78: The Challenges of Regulating Vessel-Source Oil Pollution" (2013) Manchester Review of Law, Crime and Ethics 2:73.

[715] Mark Szepes, "MARPOL 73/78: The Challenges of Regulating Vessel-Source Oil Pollution" (2013) Manchester Review of Law, Crime and Ethics 2:73.

into domestic law in Aotearoa New Zealand reflect protection measures for the marine environment to prevent marine pollution.

The MV Rena grounding has been the best example to demonstrate that the resource management legal system is incapable of addressing marine pollution incidents regarding vessels that accidentally discharging bunker oil. At the time, bunker oil was deal with in the best way possible but the legal system will need to reset these regulations to fully prepare and prevent a potential repeat of this situation. There are international obligations regarding bunker oil, but in the context of civil liability rather than preventing marine pollution from ships.

7 *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001*

There is a separate convention relating to bunker oil named the International Convention on Civil Liability for Bunker Oil Pollution Damage ("Bunker Convention") adopted on 23 November 2001, at a conference at IMO in London, England. The Bunker Convention addresses the liability aspect for oil spills' caused by a vessel, which damaged the coastal area around Aotearoa New Zealand. The very convention that should have been implemented and ratified in Aotearoa New Zealand pre-MV Rena grounding.[716] This Bunker Convention entered into force on the 21 November 2008 and at 31 March 2012, sixty-four states became parties to the Bunker Convention.[717] For Aotearoa New Zealand, the Bunker Convention came into force on 4 July 2014, three years after the grounding incident. If this Bunker Convention was in place prior to the grounding

[716] International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 M2014-02 (opened for signature 23 March 2001, entered into force 4 July 2014); Ministry of Foreign Affairs & Trade "New Zealand Treaties Online" www.treaties.mfat.govt.nz.

[717] Tanya Lambert *Civil Liability For Bunker Oil Pollution Damage Act 2012* International Maritime Law Institute (2011/2012) at 6.

the New Zealand government and the MV Rena owner would have be obligated to remove the vessel from our coastal waters. This thesis is a historic account of the laws at the time of the MV Rena grounding; thus, unable to argue that the laws at the time were fully protective and preventative of oil pollution in the marine environment. Therefore, the Bunker Convention obligations, if implemented in Aotearoa New Zealand at the time of the grounding, would fully protect the marine environment by providing a complete ship removal process, to protect against marine pollution.

8 *International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990*

The most important factor in a successful response to marine pollution is the measure of preparedness the state has in its regulatory system and having best practice cooperation processes in place.[718] The relevant convention facilitated by IMO in connection with the UNCLOS regime is the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 ("Preparedness Convention") that all parties to the Preparedness Convention adhere to.[719] The Preparedness Convention deals with oil pollution situations, outlined in the preamble:[720]

> …the need to preserve the human environment in general and the marine environment…RECONIZING the serious threat posed to the marine environment by oil pollution incidents involving ships…MINDFUL of the importance of precautionary measures and prevention in avoiding oil pollution in the first instance…the need for strict

[718] Karen Purnell and Ann Zhang "What makes a good response? In *International Oil Spill Conference Proceedings*" (American Petroleum Institute, 2014) vol. 2014 no. 1, pp. 1408-1419 at 1.

[719] International Convention on oil pollution preparedness, response and cooperation, 1990 1891 UNTS 32194 (opened for signature 30 November 1990, entered into force 2 October 1999). See also New Zealand Government "New Zealand Treaties online" New Zealand Treaties online www.treaties.mfat.govt.nz.

[720] International Convention on oil pollution preparedness, response and cooperation, 1990 1891 UNTS 32194 (opened for signature 30 November 1990, entered into force 2 October 1999), preamble.

> application of existing international instruments dealing with maritime safety and marine pollution prevention…to minimize the damage…for combating oil pollution incidents and the…role which the oil and shipping industries have in…international co-operation…to respond to oil pollution incidents, the preparation of oil pollution contingency plans, the exchange of reports of incidents…

The general obligation found in article 1 of the Preparedness Convention "to take all appropriate measures…to prepare for and respond to an oil pollution incident".[721] This principle extends to article two for adopting pollution emergency plans located on their ships, as demonstrated by the approach to the MV Rena grounding.[722] Article 3 of the Preparedness convention[723] relative to emergency plans are projected through the national and regional systems for preparedness and response coordination, as explored in chapters three and five. Specifically, through the MNZ and Regional Council setting out the maritime safety and response coordination (Oil Response Strategy) and the Ministry for the Environment implementing the Recovery Plan. Thus, New Zealand government and the MV Rena both met the international obligations with preparing for and responding to marine oil pollution.[724]

Another essential point is the cost of preparing for and responding to oil spills, inclusive of coordinating groups, organisations and local communities to address the marine oil pollution. The Preparedness Convention allow "Parties to deal with oil pollution incidents…bear the costs of their respective actions in dealing with pollution".[725] The Annex part of the Preparedness Convention states that:[726]

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[721] International Convention on oil pollution preparedness, response and cooperation, 1990 1891 UNTS 32194 (opened for signature 30 November 1990, entered into force 2 October 1999), art 1.

[722] At, art 1(a) - 12.

[723] At, art 3 – 6.

[724] At, art 6, 7.

[725] At, annex (1).

[726] At, Annex (1)(b), (2), (3).

> The Principles laid down…shall apply unless the Parties concerned otherwise agree…the costs of action taken by a Party at the request of another Party shall be fairly calculated…concerning the reimbursement of such costs…where appropriate, co-operate…in response to a compensation claim…

To illustrate the international obligation under the Preparedness Convention through the MTA align with Article 6 stating that:[727]

> This system shall include as a minimum…the competent national authority…with responsibility for oil pollution preparedness and response…the national operational contact point…which shall be responsible for the receipt and transmission of oil pollution reports…and an authority which is entitled to act on behalf of the State to request assistance...a national contingency plan for preparedness and response which includes the organizational relationship of the various bodies involved…

The national regulations in Aotearoa New Zealand aligning with these international obligations found in the MNZ, as the national authority responsible for oil pollution preparedness and response, national operation, and coordination.[728] The MNZ also administer a fund to carry out the cost of the response task outlined in the New Zealand Oil Pollution Fund managed by the Oil Pollution Advisory Committee.[729] Therefore, the Preparedness Convention

[727] International Convention on oil pollution preparedness, response and cooperation, 1990 1891 UNTS 32194 (opened for signature 30 November 1990, entered into force 2 October 1999), art 6.

[728] Maritime Transport Act 1994, s 431; Sonya Hunt et al "An Incident Control Centre in Action: Response in Action: Response to the Rena Oil Spill in New Zealand" (2014) Journal of Contingencies and Crisis Management, Volume 22, 63-66 at 63; Maritime Transport Act 1994, pt 23 and pt 25; C N Battershill et al. "The MV *Rena* shipwreck: time-critical scientific response and environmental legacies" (2016) New Zealand Journal of Marine and Freshwater Research, 50:1, 173-182 at 174; Tianyu Xu, Xiaojing Liu and Shuang Hu "Maritime accidents in New Zealand from 2015 to 2018: revealing recommendations from statistical review" (2020) Journal of the Royal Society of New Zealand 50:4, 509-522 at 509.

[729] Maritime Transport Act 1994, s 284; Maritime New Zealand *New Zealand Marine Oil Spill Response Strategy 2015-2019* at 10.

obligations implemented into domestic law in Aotearoa New Zealand protect the marine environment by preventing marine pollution.

9 *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*

Another convention under the IMO and administered through the International Oil Pollution Compensation Fund (IOPC) is the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage ("Fund Convention").[730] The IOCP provides a compensation regime for oil pollution damage caused by pollution incidents with the main "purpose of which is to mitigate the economic consequences of damage caused to the environment" generally by tankers, as well as, bunker oil spills from takers.[731] The preamble of the Fund Convention states that:

> The States Parties to the present Convention…Conscious of the dangers of pollution posed by the world-wide maritime carriage of oil in bulk…to ensure that adequate compensation is available to persons who suffer damaged caused by pollution resulting from the escape or discharge of oil from ships..

[730] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1110 UNTS 17146 (opened for signature 18 December 1971, entered into force 21 February 1997, withdrawal 25 June 1999); R H Ganten "The International Oil Pollution Compensation Fund," (1984) Environmental Policy and Law 12, no. 1-2: 5-9 at 5.

[731] R H Ganten "The International Oil Pollution Compensation Fund," (1984) Environmental Policy and Law 12, no. 1-2: 5-9 at 5; Beth Hanswyk "The 1984 protocols to the international convention on civil liability for oil pollution damages and the international fund for compensation for oil pollution damages: An option for needed reform in United States law." (1988) *The International Lawyer*: 319-343 at 320.

A compensation regime is an "International Fund for compensation for pollution damage…with the following aims:[732]

> (a) To provide compensation for pollution damage to the extent that the protection afforded by the Liability Convention is inadequate;
> (b) To give relief to shipowners in respect of the additional financial burden imposed on them…such relief being subject to conditions designed to ensure compliance with safety at sea and other conventions;
> (c) To give effect to…The Fund…in each…State…as a legal person capable under the laws of that State…

The Fund Convention was generally set up as a "worldwide intergovernmental organisation established for the purpose of administering the regime of compensation".[733] The IOPC Funds financed by contributions levy coastal state members receiving in one calendar year more than 150, 000 tonnes of crude oil/heavy fuel oil (contributing oil) in a state party.[734] The reasoning for levying the contributions are based on a reporting system of oil receipts of individual contributors, which means that each coastal state is to report the contact details of the liable state and to record the oil tankage or storage (oil contribution). The payment of the contributions are levied by the IOPC to meet the "anticipated

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[732] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1110 UNTS 17146 (opened for signature 18 December 1971, entered into force 21 February 1997, withdrawal 25 June 1999), art 2.

[733] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1110 UNTS 17146 (opened for signature 18 December 1971, entered into force 21 February 1997, withdrawal 25 June 1999) art 5; Lawson Hunter "The Proposed International Compensation Fund for Oil Pollution Damage" (1972) Journal of Maritime Law and Commerce 4, no. 1: 117-140 at 118; International Oil Pollution Compensation Funds "Explanatory Note" (2022) 10 at 4; International Oil Pollution Compensation Funds "Funds Overview" (2022) International Oil Pollution Funds https://iopcfunds.org/about-us/.

[734] International Oil Pollution Compensation Funds "Explanatory Note" (2022) 10 at 1; International Oil Pollution Compensation Funds "Funds Overview" (2022) International Oil Pollution Funds https://iopcfunds.org/about-us/.

payments of compensation and administrative expenses".[735] The IOPC explanatory note explains what the fund covers, stating that:

> [C]ompensation payments and claims-related expenditure, to the extent that the aggregate amount payable by the Fund does not exceed a given amount per incident (SDR 4 million). If an incident gives rise to substantial payments of compensation and claims-related expenditure by the 1992 Fund, a Major Claims Fund is established to cover established to cover payments in excess of the amount payable from the General Fund for that incident…The Director issues an invoice to each contributor, following the decision…to levy annual contributions. Each contributor pays a specified amount per tonne of contributing oil received…A State is not responsible for the payment of contributions levied on contributors in that State, unless it has voluntarily accepted such responsibility…

With an effective system under the Fund Convention and facilitation by the ICOP demonstrate that this mechanism is set up to protect the marine environment from oil pollution since resources are needed to address oil spills akin to the MV Rena grounding. The costs relating to the salvage operations show the extensive impact on the funding system. An example of the extent of the costs for the MV Rena situation is found in the case of *Ngāi Te Hapu Inc v Bay of Plenty Regional Council* whereby the Environment Court affirmed that:[736]

> [S]ubstantial work was done from this time to February 2016…Although the estimates vary and there seems to be issues between the translation from New Zealand US dollars, the total costs of salvage works to the time of this hearing is estimated in the region of USS650m (around NZ$900m). Behind the Costa Concordia, this would make this the most significant marine salvage event in the world.

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[735] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1110 UNTS 17146 (opened for signature 18 December 1971, entered into force 21 February 1997, withdrawal 25 June 1999); International Oil Pollution Compensation Funds "Explanatory Note" (2022) 10 at 1; International Oil Pollution Compensation Funds "Funds Overview" (2022) International Oil Pollution Funds https://iopcfunds.org/about-us/.

[736] *Ngāi Te Hapu Inc v Bay of Plenty Regional Council* [2017] NZEnC 073 at para [14], [15].

These accumulated costs in addressing marine pollution: recovery of material from the MV Rena vessel, and the cost of removal, is extreme under international obligations and national regulations. Therefore, the Fund Convention obligations implemented in domestic law protect and prevent marine pollution, in Aotearoa New Zealand. An added international obligation for removing wrecks exist. This obligation relates to the Nairobi International Convention on Removal of Wrecks, which strongly relates to the grounding incident.

10 Nairobi International Convention on the removal of Wrecks 2007

With regret, Aotearoa New Zealand is not a party to the Nairobi International Convention on the Removal of Wrecks 2007 ("Wreck Removal Convention").[737] On the 14th April 2015, the Wreck Removal Convention came into force to deal with wreck removals and to address certain marine issues, such as "Who is responsible? What measures can and are to be taken based on such a responsibility? And lastly; how can the responsibility be enforced?[738] The purpose of the Wreck Removal Convention "is about the removal of wrecks, and it is a matter of the utmost common sense that the Nairobi Convention creates a strong presumption that if New Zealand was a signatory, the Rena Wreck should be removed".[739] The Wreck Removal Convention exercises 'international best practice' in relation to and based on the following, that:[740]

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[737] Nairobi International Convention on the Removal of Wrecks, 2007 3283 UNTS 55565 (opened for signature 18 May 2007, not entered into); Maritime New Zealand "Safety update" (October 2015) Maritime New Zealand www.maritimenz.govt.nz.

[738] Jhonnie Kern "Wreck Removal and the Nairobi Convention—a Movement Toward a Unified Framework?" (2016) *Frontiers in Marine Science* 3:11 at 1.

[739] Waitangi Tribunal Hearing "Brief of Evidence of Alexander Mathew Gillespie" (Pacific Law Limited, Wellington, 23 June 2014) at 2; Nairobi International Convention on the Removal of Wrecks, 2007 3283 UNTS 55565 (opened for signature 18 May 2007, not entered into), preamble.

[740] Nairobi International Convention on the Removal of Wrecks, 2007 3283 UNTS 55565 (opened for signature 18 May 2007, not entered into); Maritime New Zealand "Safety update" (October 2015) Maritime New Zealand www.maritimenz.govt.nz.

a. The countries that are signing up to the Nairobi Convention are very influential, including such heavy-weights as the United Kingdom, Germany and India; and
b. The Nairobi Convention is widely supported by the international insurance sector that oversees this area, such as Lloyds…

As part of the 'international best practice' an explanation of the context of ships in connection to maritime casualties are asserted by William Irving that:[741]

> When a ship is wrecked, the shipowner will not only have lost a high value asset, but may also incur considerable additional costs through removing the resulting wreck…when faced with a valueless shipwreck, the key question which is likely to occur to the shipowner is '[c]an I merely abandon this wreck to the Government and walk away without further liability?'…

The MV Rena owner would have carefully considered pattern mindset that led to the outcome of abandoning the vessel on Ōtāiti through the RMA resource consent process. Further, Jhonnie Kern emphasised the process within the Wreck Removal Convention that:[742]

> The registered owner of a ship bears strict liability according to the convention but can be exonerated by certain limited defences…The onus to remove the wreck is on the registered owner, but there are also options available for the State affected by the wreck strives to ensure enforceability by compulsory insurance for ships, wherever registered…

Additionally, the Wreck Removal Convention stipulates that:[743]

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[741] William Irving, William. "Nairobi Convention: Reforming Wreck Removal in New Zealand." (2010) *Austl. & NZ Mar. LJ* 24:76 at 76.

[742] Jhonnie Kern "Wreck Removal and the Nairobi Convention—a Movement Toward a Unified Framework?" (2016) *Frontiers in Marine Science* 3:11 at 1.

[743] Nairobi International Convention on the Removal of Wrecks, 2007 3283 UNTS 55565 (opened for signature 18 May 2007, not entered into), preamble.

> The States parties…
> CONSCIOUS of the fact that wrecks, if not removed, may pose a hazard to navigation or the marine environment…to adopt uniform international rules and procedures to ensure…removal of wrecks and payment of compensation for the costs…that many wrecks may…BEARING IN MIND the importance of the United Nations Convention on the Law of the Sea…

The general principles and objectives of the Wreck Removal Conventions assert that:[744]

> A State Party may take measures in accordance with this Convention…measures shall not go beyond what is reasonably necessary to remove a wreck…The application of this Convention…shall not entitle...or exercise sovereignty…to co-operate when the effects of a maritime casualty resulting in a wreck involve a State other than the Affected State.

A part of the decision for wreck removal is confirmed by Alexander Gillespie in the Waitangi Tribunal hearing process that:[745]

> …the Nairobi Convention has a significantly greater understanding of the work "hazard" than it is currently understood to have in New Zealand and there does affect the current situation, in that the Nairobi Convention would require a far wider group of interests to be taken into account when determining whether or not the wreck of the MV Rena ("the Rena Wreck") constitutes a "hazard".

The assessment of removing a vessel include the assessment of "the potential effects, cross-checked against the potential dump site…the importance of location cannot be underestimated. It is often for this reason that wrecks are

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[744] Nairobi International Convention on the Removal of Wrecks, 2007 3283 UNTS 55565 (opened for signature 18 May 2007, not entered into), art 2.

[745] Waitangi Tribunal Hearing "Brief of Evidence of Alexander Mathew Gillespie" (Pacific Law Limited, Wellington, 23 June 2014) at 2.

removed from high value locations".[746] In the case of *Motiti Rohe Moana Trust v Bay of Plenty Regional Council,* Ōtāiti is classed as an Outstanding Natural Character, as outlined in chapter three, emphasising that the wreck removal would hold a strong cultural argument. Despite that fact, the MV Rena owner did bear the liability through their 'international best practice' under the Wreck Removal Convention and approached the people of Motiti personally when discussing and sharing information as a part of the response strategy and plan. The MV Rena owner also engaged their insurance policy process to assist, "their insurer, the Swedish Club, is regarded as 'one of the world's leading marine liability insurers', and it committed in October 2011 to meet the owners' obligations in relation to the Rena "in full"...".[747] Thus, the MV Rena owner exercised their international obligations and followed protocols relevant to the Wreck Removal Convention, despite the fact that the Wreck Removal Convention not applying to Aotearoa New Zealand, because the New Zealand government had not ratified or became a party to this convention.

Equally important, the MV Rena owner had carried out their obligations with good faith in cooperating with the New Zealand government agencies in dealing with the marine environment. If the Wreck Removal Convention was ratified or New Zealand as a signatory then the ship removal process would have been cemented in domestic law and the protocols would have mad the MV Rena owner remove the vessel without objection. A full wreck removal under the Wreck Removal Convention would have benefited the marine environment from marine pollution,

[746] Waitangi Tribunal Hearing "Brief of Evidence of Alexander Mathew Gillespie" (Pacific Law Limited, Wellington, 23 June 2014) at 6.

[747] Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims: Pre-Publication version (Wai 2391, Wai 2393, 2014)* at 31. See also, Bay of Plenty Regional Council Toi Moana "Rena recovery" Bay of Plenty Regional Council Toi Moana (3 January 2017) www.boprc.govt.nz.

as it illustrates that all involved parties would have been utilised. An added Convention on Biological Diversity is applicable to the MV Rena situation

11 Convention on Biological Diversity

The Convention of Biological Diversity (CBD) objectives are the conservation of biological diversity due to earth's vital biological resources to human's economic and social development. Resulting, in recognition that biological diversity is a global asset of significant value to future generations.[748] The CBD articulates that the threats to species and ecosystems is an important activity to commit to due to species extinction caused by human activities and if those activities continue the harm could be alarming.[749] Robin Warner articulates the meaning of biological diversity affirming that:[750]

> Biological diversity is an all-encompassing term defined in Article 2 of the CBD as "the variability among living organisms from all sources include, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part" and including "diversity within species, between species and of ecosystems".

The CBD was established as an international law framework to assist States in addressing the significant alarming rate of extinction of species and the eradication of their habitats.[751] Regarding the marine environment, conservation of marine biodiversity involve protection of the components of biodiversity

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[748] Convention of Biological Diversity, 1992 1760 UNTS 30619 (opened for signature 12/06/1992, entered into force 16 September 1993) at 1.

[749] At 1.

[750] Warner, Robin. *Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework* (BRILL, 2009) at 91.

[751] At 91.

referring to species, habitats, ecosystems and generic material for accountability purposes.[752]

The CBD objectives relate to the MV Rena situation and the landscape of Motiti, outlined in Chapter One and Two. The Taonga species that existed in the surrounding marine area of Ōtaiti and Motiti at the time of the grounding is deserving of protection under the CBD. The CBD is relevant in the domestic context because the government of Aotearoa New Zealand had ratified the convention in 1993. Therefore, compliant with international law that the conservation of biological diversity is "a common concern of humankind".[753]

In Aotearoa New Zealand the CBD is centered on three objectives which include: the conservation of biological diversity; the sustainable use of the components of biological diversity and the fair and equitable sharing in relative to utilising genetic resources.[754] Similar to the vision set out in the "Rio Declaration and Agenda 21 of integrated and ecosystem based management of the environment including marine areas beyond national jurisdiction".[755] These objectives are informed by a CBD framework aligning with the international process in developing a global framework on CBD and for Aotearoa New Zealand, the CBD Plan for Biodiversity 2011-202 has been implemented in support of protecting biological diversity in the marine environment in the Bay of Plenty region; and therefore, Ōtaiti and Motiti marine areas.[756]

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[752] At 92.

[753] Ibid. See also Department of Conservation "Convention on Biological Diversity (CBD)" www.doc.govt.nz.

[754] Department of Conservation "Convention on Biological Diversity (CBD)" www.doc.govt.nz.

[755] Warner, Robin. *Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework* (BRILL, 2009) at 91.

[756] Convention of Biological Diversity, 1992 1760 UNTS 30619 (opened for signature 12/06/1992, entered into force 16 September 1993) at 1; Convention of Biological Diversity "Strategic Plan for Biodiversity

The CBD therefore relates to cultural concerns of the surrounding marine environment of Ōtaiti and Motiti to protect the biological diversity in the marine area from the environmental impacts of the MV Rena grounding. An added international cultural inclusion at the international level would also be relevant to mention.

12 Indigenous Rights at the international level

Customary international law in an array of consistent practices if the state believes that the practice is legally required.[757] This is evident in Aotearoa New Zealand through Te Tiriti o Waitangi (Treaty of Waitangi) and Tikanga Māori (asserted in legislation and case law).[758] Customary international law is a primary source of international law that sits beside international treaties, requiring confirmation of general practice, such as the freedom of the high seas and sovereign immunity.[759] This branch of international law is relevant to the MV Rena grounding, because the grounding affected both the hapū and iwi of Bay of Plenty region. In particular, the people of Motiti, as the indigenous peoples of Aotearoa New Zealand. The indigenous voice in Aotearoa New Zealand is protected and supported under the Treaty of Waitangi, outlined in chapter two.

2011-2020, including Aichi Biodiversity Targets" www.cbd.int; Convention of Biological Diversity "Preparations for the Post-2020 Biodiversity Framework" www.cbd.int.

[757] Kiss, Alexandre, and Dinah Shelton *Guide to International Environmental Law*, (BRILL, 2007) at 8.

[758] Treaty of Waitangi Act 1975; Anne-Marie Jackson "Erosion of Māori Fishing Rights in Customary Fisheries Management" (2013) 21 Waikato L.Rev. at 61; *R v Symonds* (1847) NZPCC 387 (SC); *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC); *Nireaha Tamaki v Baker* (1901) NZPCC 371 (PC); *Wallis v Solicitor-General* (1903) NZPCC 23 (PC); *Hoani Te Heuheu Tukino v Aotea District Māori Land Board (1941); New Zealand Māori Council v Attorney-General* [1987].

[759] *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) at 48; Kiri Toki "Ko Ngā Take Ture Māori, Māori Rights and Customary International Law" [2012] AukULawRw 13 at 250; Kiss, Alexandre, and Dinah Shelton *Guide to International Environmental Law*, (BRILL, 2007) at 8.

13 United Nations Declaration on the Rights of Indigenous Peoples

Globally, there are over 300 million Indigenous people worldwide, with representatives of particular groups present at the United Nations to heighten the awareness of Indigenous peoples' issues. This context falls within the "United Nations human rights framework that Indigenous peoples have made the strongest impact upon international law".[760] The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") is a comprehensive international instrument that deal with issues relating to rights of indigenous peoples'.[761]

UNDRIP was the result of extensive negotiations over time, between states and between the indigenous peoples in states to progress through the United Nations system to affirm their right to their identity and survival.[762] UNDRIP is an international declaration adopted by way of a statement made to the 61st session of the United Nations General assembly on the 13 September 2007.[763] The Chair of the Global Indigenous Peoples' Caucus, Les Malezer, at the time asserted that:[764]

> The Declaration does not represent solely the viewpoint of the United Nations, nor does it represent solely the viewpoint of the Indigenous Peoples. It is a Declaration which combines our views and interests and which sets the framework for the future. It is the tool for peace and justice, based upon mutual recognition and mutual respect.

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[760] *Resolution on the United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, (2007); Megan Davis "The United Nations Declaration on the Rights of Indigenous Peoples" (2007) Other Journal Article, Jour. Australian Indigenous Law Review 11, no. 3: 55–63 at 55.

[761] Claire Charters and Stavenhagen Rodolfo "Making the declaration work" (2009) *The United Nations Declaration on the Rights of Indigenous Peoples, Copenhagen: IWGIA* at 10.

[762] Claire Charters "The rights of indigenous peoples." (2006) *New Zealand Law Journal*, 335-337 at 335.

[763] *Resolution on the United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, (2007); Oldham, Paul, and Miriam Anne Frank. "'We the Peoples...' the United Nations Declaration on the Rights of Indigenous Peoples." *Anthropology Today* 24, no. 2 (2008) 5–9 at 1.

[764] Oldham, Paul, and Miriam Anne Frank. "'We the Peoples...' the United Nations Declaration on the Rights of Indigenous Peoples." *Anthropology Today* 24, no. 2 (2008) 5–9 at 1.

Historically, the 13th of September 2007 will be remembered by the world's Indigenous peoples, because it marked an event signifying a vision manifesting in reality, bringing forth the aspirations and rights of Indigenous peoples all over the world.[765] The rational for such celebration is due to problems of recognition of the needs of Indigenous peoples, which paved a path before 1969.[766] UNDRIP manifested through the United Nations, human rights framework by Indigenous representative leadership, making a strong impact on international law.[767]

UNDRIP was acclaimed as a significant international Indigenous peoples' rights document for the purpose of articulating the human rights position of Indigenous peoples at the International level.[768] Moreover, UNDRIP recognises evolving standards of human rights and international norms relative to Indigenous peoples around the world.[769] However, literature has scrutinised the strategy and motives for its purpose and its validation of authenticity, which covered all factors pertaining to UNDRIP.[770] In contrast, literature also inspired awareness providing growth and support to UNDRIP, as an international instrument dealing with a full range of "civil, political, economic, social, cultural and environmental rights"

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[765] Allen, Stephen, and Xanthaki, Alexandra, eds. 2011. *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. London (Bloomsbury Publishing Plc, May 30, 2022) at 11.

[766] Allen, Stephen, and Xanthaki, Alexandra, eds. 2011. *Reflections on the un Declaration on the Rights of Indigenous Peoples*. London (Bloomsbury Publishing Plc, May 30, 2022) at 11.

[767] Davis, Megan. "The United Nations Declaration on the Rights of Indigenous Peoples." *Australian Indigenous Law Review* 11, no. 3 (2007) at 55.

[768] Toki, Valmaine, and Centre for International Governance Innovation. "Comparative Perspectives on Implementing the UN Declaration on the Rights of Indigenous Peoples." *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS*. Centre for International Governance Innovation, 2020 at 101.

[769] Davis, Megan. "The United Nations Declaration on the Rights of Indigenous Peoples." *Australian Indigenous Law Review* 11, no. 3 (2007) at 55.

[770] Megan Davis "To Bind or Not to Bind : The United Nations Declaration on the Rights of Indigenous People Five Years On" (2012) Other Journal Article, Jour. Australian Indigenous Law Review, no. 19: 17–48 at 17.

recognising that indigenous rights as inherent.[771] UNDRIP is an extensive document filled with rights in international law.[772] In 1971, the United Nations Sub-commission on the Prevention of Discrimination and Protection of Minorities endorsed a comprehensive study of discrimination against Indigenous peoples to be carried out, which provided the first definition of Indigenous peoples as:[773]

> Those people having an historical continuity with pre-invasion and pre-colonial societies who consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations, their ancestral territories, and their ethnic identity, as the basis of their continues existence as peoples in accordance with their own cultural patterns, social institutions, and legal systems.

This definition has unfortunately drawn resistance from some nation states; whereby, the focus of the resistance reflect the notion that no Indigenous people existed in their particular region because these types of peoples were classed as 'minority groups'.[774] By contrast, the demographic aspect of Indigenous peoples, asserts that:[775]

> Indigenous peoples matter. Numbering 350 to 500 million people in up to 90 countries, they are most often the descendants of the first arrivals in their territory, land or

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[771] Claire Charters and Stavenhagen Rodolfo "Making the declaration work." (2009) *The United Nations Declaration on the Rights of Indigenous Peoples. Copenhagen: IWGIA* at 1, 13; Jeremie Gilbert, "Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples," (2007) International Journal on Minority and Group Rights 14, no. Issues 2 and 3: 207-230 at 207.

[772] Resolution on the United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, (2007);

[773] Davis, Megan. "The United Nations Declaration on the Rights of Indigenous Peoples." *Australian Indigenous Law Review* 11, no. 3 (2007) at 55.

[774] Davis, Megan. "The United Nations Declaration on the Rights of Indigenous Peoples." *Australian Indigenous Law Review* 11, no. 3 (2007) at 55.

[775] Selwyn Katene, and Rawiri Taonui *Conversations About Indigenous Rights: The UN Declaration of the Rights of Indigenous People and Aotearoa New Zealand* (Chicago: Massey University Press, May 30, 2022) at 16.

> region...Comprising 5000 distinct cultural groups speaking 4000 of the world's 7000 languages, Indigenous nations encompass up to 90 per cent of the world's cultural diversity. As the oldest cultural autochthonies in world societies, they have unique cultural characteristics and epistemologies connected to ancestors, oral tradition and land.

Applying this demographic to the indigenous peoples of Aotearoa New Zealand, relevant to hapū and iwi, which include the people of Motiti who are of Māori descent residing unique to their cultural characteristics and epistemologies connected to ancestors, oral traditions and the land, as outlined in chapter three (connection to Motiti) and chapter two (philosophical underpinnings through oral traditions). The disruption of the MV Rena grounding and the environmental effects, not only in the environment, but to the community of Motiti has left them at further disadvantage. Rawiri Taoni emphasises on the treatment of Indigenous peoples that:[776]

> Indigenous peoples are vulnerable. Most live under the yoke of the cumulative transgenerational impacts of colonisation. They suffer ongoing political, economic, social and cultural marginalisation. The artificial geographical borders arbitrarily imposed by nation states divide many Indigenous peoples. First peoples face extreme forms of historically embedded racism and prejudice, often because they are Indigenous. Prejudice and violence confront Indigenous people in all aspects of life, employment, health, educations, housing, justice, identity and culture.

The grounding effects, as well as, the implementation and approach of the response strategy and oil pollution plans by MNZ, left the people of Motiti at a disadvantage on top of the existing cumulative transgenerational impacts of colonisation of Motiti. Hence, the description of the historical position of Indigenous peoples to demonstrate their place in general and specific to Aotearoa New Zealand with the reasoning for the constant push by Indigenous people in this world to acquire legal recognition strongly emphasise the layered

[776] At 16.

disadvantage on the people of Motiti.[777] This disadvantage relates firstly to the impact of colonisation and secondly the lack of involvement in the approach to the protective, preparedness and preventative measures for the marine environment and the grounding effects. The reason why UNDRIP is extremely important for the indigenous peoples in Aotearoa New Zealand is that it provides protective rights for indigenous peoples to exercise and to prevent further mistreatment, particularly for the people of Motiti. UNDRIP provides support for the indigenous voice; and therefore, the voice of the people of Motiti matter.

The perspective in Aotearoa New Zealand of UNDRIP has full support of the Indigenous peoples in Aotearoa New Zealand. Jacinta Ruru and James Morris affirm Māori as the Indigenous peoples of Aotearoa New Zealand, in the context of environmental law relating to water:[778]

> For instance, Māori – the Indigenous peoples of Aotearoa New Zealand – view many rivers as tupuna (ancestors) and invoke the name of a river to assert their identity. There is a deep belief that humans and water are intertwined as is encapsulated in common tribal sayings such as 'I am the river and the river is me' and 'the river belongs to us just as we belong to the river. Indigenous peoples, including Māori, wish to achieve particular cultural aspirations in regard to the management of water as a consequence of these relationships.

The people of Motiti, from the hapū of Te Patuwai and their deep belief of their spiritual, emotional, mental and physical connection to both Motiti and Ōtāiti illustrate their deep connection and relationship to their surrounding marine

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[777] Andrew Eruiti and Centre for International Governance Innovation. "The UN Declaration on the Rights of Indigenous Peoples: A Mixed Model of Interpretation." *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS*. Centre for International Governance Innovation, 2020 at 17.

[778] Morris, James D K, and Jacinta Ruru. "GIVING VOICE TO RIVERS: LEGAL PERSONALITY AS A VEHICLE FOR RECOGNISING INDIGENOUS PEOPLES' RELATIONSHIPS TO WATER?" *Australian Indigenous Law Review* 14, no. 2 (2010) at 49.

environment, as indigenous peoples of Aotearoa New Zealand, as outlined in chapter three of this thesis. UNDRIP states that:[779]

> Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different…Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures which constitute the common heritage of human kind…Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racists, scientifically false, legally invalid, morally condemnable and socially unjust…

The purpose of UNDRIP is to illustrate the wide scope of which UNDRIP extends to, relative to the rights of indigenous peoples. Hence, the comprehensive instrument. Subsequently, in the 1980's, the former Chair of the Waitangi Tribunal, Sir Edward Taihakurei Durie asserts the UNDRIP perspective in the context of the Waitangi Tribunal:[780]

> So what does the Declaration intend? It asserts:
> - The individual and collective rights of Indigenous peoples, as well as their rights to culture, identify, language, employment, health and education
> - … to self-determination, and the free, prior and informed consent over their heritage and culture, and the development of their territories and natural resources
> - … to maintain and strengthen their owner institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations
> - Discrimination against Indigenous peoples is prohibited, and promotes their full and effective participation in all matters that concern them…

Contrasting, Paul Oldham and Miriam Frank reinforces that UNDRIP is not a legally binding international instrument, because in some respects it is a

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[779] Resolution on the United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, (2007), preamble.

[780] Selwyn Katene, and Rawiri Taonui *Conversations About Indigenous Rights: The UN Declaration of the Rights of Indigenous People and Aotearoa New Zealand* (Chicago: Massey University Press, May 30, 2022) at 10.

declaration of customary international law, manifested in national or domestic legal cases, developed as a forerunner to a binding Convention. Valmaine Toki describes the legal effect and the use of Tikanga Māori in respect of the implementation of the UNDRIP in domestic law in Aotearoa New Zealand:[781]

> The orthodox view is that the UN Declaration is soft law and, similar to the Treaty of Waitangi, will not be legally binding upon the state unless it is incorporated into domestic legislation. The doctrine of state sovereignty provides a restriction on international instruments, such as the declaration, to regulate matters within the realm of the state.

The declaratory position is clear that UNDRIP has a somewhat diluted influence for that reason at the domestic level in Aotearoa New Zealand, despite supportive arguments to implement such an international instrument, affirming that:[782]

> In the absence of direct incorporation by statute, there are different methods of recognising international human rights instruments, including recourse. First, the (outdated) concept of legitimate expectation in Australia, and mandatory relevant consideration in New Zealand, have been utilised to treat unincorporated international obligations as considerations for the decision maker…

There has been judicial reference to the UNDRIP to better comply with Indigenous peoples' rights in Aotearoa New Zealand, whereby Claire Charters assert the position that:[783]

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[781] Toki, Valmaine, and Centre for International Governance Innovation. "Comparative Perspectives on Implementing the UN Declaration on the Rights of Indigenous Peoples." *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS*. Centre for International Governance Innovation, 2020 at 102.

[782] Ibid.

[783] Charters, Claire, and Centre for International Governance Innovation. "The UN Declaration on the Rights of Indigenous Peoples in New Zealand Courts: A Case for Cautious Optimism." *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS*. Centre for International Governance Innovation, 2020 at 45.

> The New Zealand Supreme Court references to the UN Declaration are unique in that there are few references to the declaration in courts internationally…the declaration has been embraced relatively more by the political arms of government in some states…[I]t is the courts and not the political institutions supporting the UN Declaration in New Zealand…

Moreover, Chief Justice Elias provided obiter comments in the case of Paki No 2, stating that:[784]

> …potential duties owned in equity by the Crown to Māori…she referred to the UN Declaration's provisions with respect to redress for lands, territories and resources taken from Indigenous peoples without their free, prior and informed consent.…Further she cited the support provided by the declaration for restitutionary remedies where possible.

Considering, the scope of support for the UNDRIP at common law, the clear position is that there is an influence of inclusion despite opposition for incorporation into domestic legislation to enhance indigenous capability for the protection of the indigenous peoples of Aotearoa New Zealand from further implications of the current legal system.

Although the rights under UNDRIP is not codified in legislation the government of the day provide some level of support. The Office of Te Minita Whanaketanga Māori - Minister for Māori Development minute, affirms that:[785]

> In 2010, New Zealand expressed its support for the Declaration. In moving to support the Declaration, New Zealand both affirmed the rights and principles contained in the Declaration and reaffirmed the legal and constitutional frameworks that underpin New Zealand's legal system. In 2014, as a result of New Zealand's acceptance of a Universal

[784] At 46.

[785] Charters, Claire ent al "He Puapua Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand" (1 Whiringa-ā-Rangi 2019) at i-iv. Ministry of Māori Development, Hon Willie Jackson "United Nations Declaration on the Rights of Indigenous Peoples: Next Steps for a Declaration Plan" Office of Te Minita Whanaketanga Māori - Chair Cabinet Social Wellbeing Committee (2021) at 1.

> Periodic Review recommendation on the Declaration, New Zealand committed to "take concrete measures to ensure the implementation and promotion" of the Declaration…

The position for the implementation of the UNDRIP, as the support from New Zealand government stands strong. Support of the Indigenous Peoples of Aotearoa New Zealand's rights and interests to be recognised in principle a valued-based approach. Therefore, the indigenous voice is important.

UNDRIP is applicable to the grounding of the MV Rena, due to an international shipping vessel impacting Ōtāiti resulting in various measures of marine pollution. In connection with the Wreck Removal Convention the MV Rena owner had aligned with UNDRIP to a particular measure, through their relationship building with the people of Motiti during the implementation of the response strategy and marine oil pollution plans, due to the current legal system in place at the time. Acknowledgement should be given to the owner of the MV Rena for their approach in building a relationship with the people of Motiti. However, partial responsibility lay with the New Zealand government, since they did not involve the people of Motiti in the negotiation process leading up to the settlement deeds,[786] as well as, communication issues for coordinating the oil response strategy and plans addressing the marine environment approach to the grounding, as explored in chapter three and five of this thesis.[787]

In effect, it is a positive notion that the government of the day has expressed support for UNDRIP and carrying out steps for implementation at the domestic level.[788] The relevance of UNDRIP in providing a protective measure

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[786] The Interim Report on the MV Rena and Motiti Island Claims: Pre-Publication Version (Wai 2391 Waitangi Tribunal 2014) at 17.

[787] At 17.

[788] Charters, Claire ent al "He Puapua Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand" (1 Whiringa-ā-Rangi 2019) at i-iv. Ministry of Māori Development, Hon Willie Jackson "United Nations Declaration on the Rights of

unfortunately does not exist. However, if it did exist it would have been a strong influence in supporting a positive Crown and Māori relationship. As a result, a potential regulatory framework could have been put in place, at the time, to protect and preserve the marine coastal area from oil pollution, while at the same time, supporting and maintaining iwi, hapū and whānau when dealing with the grounding situation. UNDRIP, if incorporated, could provide the support of the indigenous voice in matter concerning the marine environment, which would provide a more robust legal process to include the indigenous voice.

International instruments, such as the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, Cultural Rights ("ICESCR") and the Convention on Biological Diversity ("CBD") support indigenous rights and interests.[789] Firstly, the ICCPR relate to the human rights branch of international law, whereby indigenous leaders utilised it when submitting arguments for the UNDRIP.[790] The purpose of utilising the ICCPR to support UNDRIP was if human rights were permitted, then this would logically extend to indigenous peoples like the people of Motiti.[791] Secondly, the

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Indigenous Peoples: Next Steps for a Declaration Plan" Office of Te Minita Whanaketanga Māori - Chair Cabinet Social Wellbeing Committee (2021) at 1.

[789] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 12 December 1966, entered into 228 March 1979), preamble; United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007), annex; Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into 29 December 1993), preamble; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (opened for signature 16 December 1966, entered into 28 March 1979), preamble; United Nations Declaration on the Rights of Indigenous New Zealand Government "Constitutional Issues and Human Rights" Ministry of Justice (19 May 2020) www.justice.govt.nz.

[790] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 12 December 1966, entered into 228 March 1979), preamble; United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007), annex.

[791] United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007), annex; New Zealand Government "Constitutional Issues and Human Rights" Ministry of Justice (19 May 2020) <www.justice.govt.nz>. See also, Charters, Claire ent al "He Puapua Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand" (1 Whiringa-ā-Rangi 2019) at i-iv. Ministry of Māori Development, Hon Willie Jackson "United Nations

ICESCR[792] whereby, "recognition of the inherent dignity and of the equal and inalienable rights of all members the human family is the foundation of freedom, justice and peace in the world".[793] This relates to indigenous peoples rights and interests to instil and recognise the inherent dignity and equal rights as members of the human family subject to freedoms that indigenous peoples have not had the pleasure of receiving. This also include the land and ocean through the right to self-determination of tangata whenua through, such as Te Patuwai hapū of Motiti (tangata whenua).[794] Third, the CBD refer to the "…intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components".[795] The CBD relates to indigenous peoples affirming that:[796]

> Recognising the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

Declaration on the Rights of Indigenous Peoples: Next Steps for a Declaration Plan" Office of Te Minita Whanaketanga Māori - Chair Cabinet Social Wellbeing Committee (2021) at 1.

[792] New Zealand Government "Constitutional Issues and Human Rights" Ministry of Justice (19 May 2020) <www.justice.govt.n>

[793] International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (opened for signature 16 December 1966, entered into 28 March 1979), preamble.

[794] New Zealand Government "Constitutional Issues and Human Rights" Ministry of Justice (19 May 2020) <www.justice.govt.nz>. See also, Charters, Claire ent al "He Puapua Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand" (1 Whiringa-ā-Rangi 2019) at i-iv. Ministry of Māori Development, Hon Willie Jackson "United Nations Declaration on the Rights of Indigenous Peoples: Next Steps for a Declaration Plan" Office of Te Minita Whanaketanga Māori - Chair Cabinet Social Wellbeing Committee (2021) at 1.

[795] Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into 29 December 1993), preamble.

[796] At preamble.

Further article 8 of the CBD refers to the implementation of the international obligations in domestic law, asserting that:[797]

> Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity…

The CBD captures indigenous peoples, which include Te Patuwai hapū of Motiti due to their oral traditions, innovations, knowledge and cultural practices, as a local community on Motiti dependent on their spiritual connection to Ōtāiti through "*Te Rerenga o nga Wairua o Ngāti Awa",* the spiritual pathway back to Hawaikinui (ancestral home).[798] From the- perspective of the MV Rena grounding, the CBD has the potential for setting up a legal framework for ecological restoration, reinforced by Professor An Cliquet that:[799]

> CBD parties could develop a set of specific harmonized measures applicable to ecological restoration. Notably under the IPPC, broadly applicable regional standards can be used as the basis for international standards. Something similar might allow for certain ecosystem-specific standards …

Although the ecosystem restoration was not establish specifically for indigenous peoples, noting that it is an opportunity for States to advance the development of substantive and qualitative international law obligations for conducting restoration activities to assist countries with target-driven approach for international

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[797] At art 8.

[798] Final Hearing Statement "Statement of Evidence of Pouroto Ngaropo on Behalf of Te Rūnanga O Ngāti Awa" (Buddle Finlay Barristers and Solicitors Wellington, 14 July 2015) at 2-3. See also Bay of Plenty Regional Council Toi Moana <final-hearing-statement-pouroto-ngaropo>.

[799] An Cliquet and others "Upscaling Ecological Restoration: towards a new legal principle and protocol on ecological restoration in international law" (2021) 30(4) Restoration Ecology 1 at 4.

commitments of particular areas.[800] This approach can resonate with the people of Motiti, as they understand their environmental surroundings on Motiti to be able to align with such restoration activities because these activities align with their tikanga values and practises with managing the surrounding environmental area.

All of these conventions are relevant to the people of Motiti as the deal with the human rights and biological aspects referring to the environment. Unfortunately, some of these conventions were not applicable or they were not ratified at the time by the New Zealand government. To emphasise, Alexander Gillespie highlight treaties that the New Zealand government has not ratified, asserting that:[801]

> International law has created a number of mechanisms to promote the protection of heritage with regard to the protection of both intangible and under water heritage…it has not yet availed itself of all of the opportunities to protect cultural heritage…the second…which New Zealand is not a signatory to…is the 2001 Convention on the Protection of the Underwater Cultural Heritage…The third…which New Zealand is not a signatory to…is the 2003 Convention for the Safeguarding of Intangible Cultural Heritage…intangible cultural heritage provide communities with a sense of practices, knowledge and practices "concerning nature and the universe"…

Aotearoa New Zealand is far behind the rest of the world by not ratifying the Conventions stated. This will continue to cause a gap in the protective measures for cultural practices and the inclusion of the indigenous voice when submitting spiritual or cultural arguments in legal processes against the resource consent application to dump the MV Rena vessel on Ōtāiti.

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[800] An Cliquet and others "Upscaling Ecological Restoration: towards a new legal principle and protocol on ecological restoration in international law" (2021) 30(4) Restoration Ecology 1.

[801] Waitangi Tribunal Hearing "Brief of Evidence of Alexander Mathew Gillespie" (Pacific Law Limited, Wellington, 23 June 2014) at 6.

In summary, UNDRIP is applicable to the MV Rena situation, due to the extensive marine environmental effects on the surrounding coastal marine area and the impact on Motiti and Ōtāiti: together with the cultural and spiritual connection that the people of Motiti has with both Motiti and Ōtāiti. UNDRIP is the protective mechanism at the international level for the rights of indigenous peoples which would then filter through to domestic law to further protect the rights of the people of Motiti, particularly under the Treaty of Waitangi. Again, because UNDRIP was not codified in the law at the time of the grounding, the indigenous voice was lost within all the decision-making processes and not given full acknowledgment. The point of this section of the chapter is that decision-makers and resource management practitioners have to listen to indigenous communities in respect of environmental issues, because indigenous people matter, and to avoid invisibility of indigenous peoples.

Further, the complication for the New Zealand government as a state, and the environmental laws are fragmented and implemented in a silo approach, affecting involved parties. The impact from silo environmental legislation means that not only are the legal processes complicated but it also complicates the New Zealand government ("Crown") obligations of the Te Tiriti o Waitangi partnership under the Treaty of Waitangi Act 1975 to Māori, as we clearly see from the MV Rena incident in chapters three and five. As argued in chapter four, the indigenous voice on environmental issues does not have strength, due to this legal complication.

The Crowns Treaty partnership obligation should strongly involve the indigenous voice on environmental issues like the MV Rena incident. Specifically, the voice of the people of Motiti, due to their physical, cultural, spiritual, social wellbeing connection to the marine environment, as mentioned in chapters two and three of this thesis. When the Crown went into negotiations with the MV Rena owner about a Wreck Removal Deed, emphasised in chapter three of this thesis, illustrates the link from the MTA under section 248(2)(d) that led to the Waitangi Tribunal negotiation process, which then led to the RMA resource consent

process. All of these legal processes outlined in legislation and environmental policies drew out the imperfections in the law. These legal processes also highlighted the injustice on the people of Motiti. Better legislative and policy regimes require a cohesive approach that is inclusive of the indigenous voice for iwi Māori under the Treaty of Waitangi.

14 Summary

This chapter provided a description of the international law landscape relative to the marine environment and oil pollution. The purpose of this chapter is to highlight commitment to the international principles protecting marine environments from oil pollution, and how those international obligations are filtered through domestic law in Aotearoa New Zealand.

The exploration in this chapter demonstrated certain gaps at the international level, such as MARPOL only referring to tanker oil situation and excluding bunker oil situations, as well as, the Fund Convention not applicable to bunker oil situation akin to the MV Rena grounding situation. These gaps in the international obligations are unable to provide the same regulatory system at the national level (domestic law) causing implications in the legal processes. In addition, it was shown that some conventions were not ratified, such as the Bunker Convention and the Wreck Removal Convention.

Had the government of the day ratified the Bunker Convention prior to the MV Rena grounding incident, then the outcome of the location of the MV Rena ship may have been a completely different result, such as a full wreck removal. Capturing these highlighted points show that had the international obligations reflected in the domestic law in Aotearoa New Zealand, then our country may have had a better approach at both the approach to responding to marine pollution generally and a legal mechanism for a full wreck removal without opposition. This would have prevented the engagement of legal processes in the MTA, Waitangi Tribunal and the RMA resource consent process that has been,

and continues to be, an ongoing process for the people of Motiti, which layered the received injustice.

From the perspective of New Zealand government at the national level. This chapter identified that because there are gaps in the international conventions; whereby, the inclusion of particular parts of the convention would highly benefit the national level in its regulatory systems to include an indigenous voice, such as an indigenous voice in the MNZ, regarding the response to marine pollution with our coastal waters would benefit the MNZ institution. Ultimately, the point is that indigenous peoples matter and their voice must be heard in situations relating to environmental issues.

This chapter then explored international instruments holding international principles pertaining to human rights' treaties relative to indigenous peoples.[802] The purpose was to make aware that indigenous people are not invisible when submitting spiritual or cultural arguments in legal processes. The emphasis is that decision-makers have to listen to indigenous communities and that indigenous people matter with respect of environmental issues on marine pollution situations. It was discovered that although at the international level UNDRIP provides the supportive rights to allow iwi Māori generally inclusive of the people of Motiti. UNDRIP is a declaratory instrument, that had not been implemented at the National level at the time, which meant that the cultural and spiritual arguments made in legal processes were not fully supported, as it should have been, if UNDRIP had supportive standing in Aotearoa New Zealand. Additionally, it was

[802] *Minister of Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353; see also New Zealand *Maori Council v Attorney General* [1996] 3 NZLR 140, 184; Keith Kenneth "Roles of the Courts in New Zealand in Giving Effect to International Human Rights with Some History" (1999) 29 VUWLR 27 at para [47], [41]; Melissa Poole "International Instruments in Administrative decisions: Mainstreaming International Law" (1999) 30 VUWLR 91. See also Law Commission The Treaty Making Process : Reform and the Role of Parliament (NZLC R45 1997) at 11.

found that the MV Rena, through its relationship building in the response strategy coordination, may have aligned with respecting the principles set out in UNDRIP.

From the perspective of New Zealand government, this chapter identified that iwi Māori particularly the people of Motiti are considered indigenous peoples with the rights emulating from UNDRIP. However, at the time of the MV Rena grounding, UNDRIP was not incorporated in the legal system to support iwi Māori, inclusive of the people of Motiti. Had the legal system incorporated the rights within the UNDRIP international obligations, the cultural and spiritual arguments carried out in the Waitangi Tribunal and the resource consent process would have been strongly supported and their voice would be had more strength by decision makers. The inclusion of UNDRIP would be highly beneficial in the national regulatory system to balance out the Treaty of Waitangi partnership between Crown and Māori. This would provide the positive inclusion of an indigenous voice, in the MNZ relating to responding to marine pollution with our coastal waters would benefit the MNZ institution and in the resource management area.

Aotearoa New Zealand and the MV Rena owner (as a group from another nation state) are a part of the international community under good faith. Both Aotearoa New Zealand and the MV Rena are committed internationally to protecting the coastal marine environment and our country is committed internationally to protecting the voice of indigenous peoples and to listen to that voice and this will set the tone of domestic law on how Aotearoa New Zealand regulate these international obligations nationally.

Investigating these international obligations identified the injustice on iwi Māori, specifically to the people of Motiti. International law has principles that should have been taken into account from the start. These principles include the following key points, that controls are in place to address the pollution on the oceans. There should be policies around preparedness for responding to marine pollution in a coordinated way that include relevant groups and local and iwi communities, which requires sufficient funding available for addressing a bunker problem, as well as, having wreck removal conventions in place. International law

does deal with these factors and both Aotearoa New Zealand and the MV Rena are committed to these international obligations. Equally, the inclusion of the indigenous peoples' voice is an important factor to take into account, these are international principles that should filter into the domestic regulatory system in Aotearoa New Zealand.

7 HE KŌRERO WHAKAMUTUNGA – CONCLUSION

The MV Rena oil spill disaster occurred in 2011. The MV Rena grounding on Astrolabe Reef, Ōtāiti called for a cross sector collaboration of relevant government agencies and local iwi Māori. The collaborative purpose was to work toward responding to marine pollution, as a result of the grounding incident. The response strategy carried out was to restore the surrounding marine environment of Ōtāiti, Motiti Island and the Bay of Plenty region to its pre-MV Rena state and to reduce further environmental effects guided by maritime and resource management regulations at both the international and national levels, at the time of the MV Rena grounding.

This thesis has proved that at its heart the debate was a historic conceptual approach to explain the reasons for the injustices to the people Motiti. From an environmental philosophy perspective, this thesis reveal that anthropocentrism drives environmental ethics and ideals based on the human-centric view. Whereby the Māori environmental philosophy approach consisting of Te Ao Māori derived from mātauranga Māori and infused with Tikanga Māori values and practices would better address environmental problems, if given full recognition equal to anthropocentrism. Without such recognition, creates substantial spiritual injustice to the people of Motiti.

At the international level relative to marine environment and oil pollution Aotearoa New Zealand is committed to international obligations protecting marine environments from oil pollution, which then require domestic support through legislation. This thesis unveiled certain gaps at the international level, such as MARPOL only referring to tanker oil situations, which excluded bunker oil situations that also excluded the Fund Convention because the MV Rena was a bunker oil incident. These gaps in the international obligations impact the regulatory system at the national level causing implications in legal process, due to a lack of marine protection. Additionally, it was proved that the Bunker Convention was not ratified. Had the government of the day ratified the Bunker

Convention and Wreck Removal Convention prior to the MV Rena grounding incident, the country would have seen a completely different result, such as a full wreck removal without opposition. This would have prevented the people of Motiti from having to engage the legal processes in the MTA, Waitangi Tribunal and the RMA resource consent process. The alternative result would have meant that the people of Motiti would not have receive the substantial injustice.

This thesis does more than highlight the response to coastal marine oil disasters. It provides a positive contribution to identifying and arguing that indigenous peoples matter and the indigenous voice is crucial to providing a robust environmental philosophy and approach to the marine environment, reflecting in international obligations at the national level. This chapter has proved that at the national level there are legislations that protect and support Māori interest pertaining to Te Ao Māori, mātauranga Māori and Tikanga Māori (Māori customary law) to uphold spiritual justice.

However, this thesis reveals that Aotearoa New Zealand have laws to protect particular places like the marine environment. However, the way the law is interpreted suggests that improvements could be made. Those improvements could possible look at educative training for decision-makers or more involved or collaborative processes could be created to prevent repeat of the spiritual injustice whereby the law overrode Māori customary law, when it was mean to protect it. The resource management legal framework can improve, to accommodate sustainable cultural approaches that prevent environmental issues and protect the spiritual relationship that Māori have with the environment, such as the people of Motiti. The result of implementing this approach would improve the understanding of spiritual justice for indigenous peoples, and their voice for better environmental outcomes.

a. Thesis Recommendations: Maritime and Resource Management regulation

This thesis proved that the environmental effects from the MV Rena grounding on the surrounding marine environment justified the extreme extent of environmental damage. This impact highlighted the effect on the longstanding spiritual connection that the people of Motiti have to Ōtāiti, which explained how the resource management system failed the local community of Motiti in Aotearoa New Zealand.

This thesis further revealed problems with the resource management system, at the national level and unravelled the legal processes addressing coastal marine pollution to consider how whether the resource management system was equipped to deal with marine pollution of this scale. Moreover, it has highlighted potential gaps in resource management law at the time of the grounding. Particularly, the analysis of the resource management law did not fully protect Māori interests in managing and dealing with the marine environment surrounding Ōtāiti, Motiti and the Bay of Plenty region.

Alongside the legal system, dealing with marine environments included the actors involved with addressing the marine oil pollution from the MV Rena grounding at Ōtāiti. This thesis demonstrated the complex marine pollution response by different actors involved in the collaborative response. This in turn showed the level of multi-layered coordination required to address a marine disaster like the MV Rena grounding. It revealed a gap in the maritime sector lacking an indigenous voice. The indigenous voice in the maritime sector would have provided a supportive approach to coordination with local communities in Aotearoa New Zealand.

The existing regulations did not support the spiritual injustices that occurred. However, the lessons learned from the past indicate that Aotearoa New Zealand have the laws in place but interpretation can lead to ambiguous results that are not supportive of Māori interests under the RMA. Further, there are no regulations involving Māori in the maritime system. This maritime and resource management situation should never happen again.

An alternative pathway forward may include the following recommendations:

- Inclusion of Crown and Māori relationship aligning with the Treaty principles through implementing a Maritime Strategy Policy document to include iwi Māori leadership directives to share the domestic and international obligations in the Maritime industry;

- Establishment of a permanent forum of Tikanga experts in the Maritime industry to assist with guiding Crown and iwi Māori leadership directives for approaching certain resource management and maritime issues;

- Establishment of alternative dispute resolution processes in the Maritime industry, which will outline ADR/mediation processes to address potential disputes of a similar nature that impact local communities;

- Establishment of a permanent forum of Tikanga experts in the Resource Management industry to assist with guiding Crown and iwi Māori leadership directives for approaching certain resource management and maritime issues;

- Education/training for all staff in the Maritime and Resource Management industry for implementing

The above recommendations may assist with better Crown Māori relationships within the Resource Management and Maritime industries to provide a preparedness and recovery approach to disasters. Aotearoa New Zealand can learn from the experience of the MV Rena oil disaster in a number of perspectives such as: legal, cultural, scientific, management communication, strategic and leadership.

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