He Tirohanga Whāiti:
Focus Area Report

Tangaroa Ararau: Te Tiriti, tikanga Māori, and the marine environment research project
Output 6 Report

National SCIENCE Challenges

SUSTAINABLE SEAS

Ko ngā moana whakauka

TANGAROA ARARAU

He Tirohanga Whāiti: Focus Area Report

Prepared and published by Awatea Consulting and Whāia Legal

Professional Disclosure Statement

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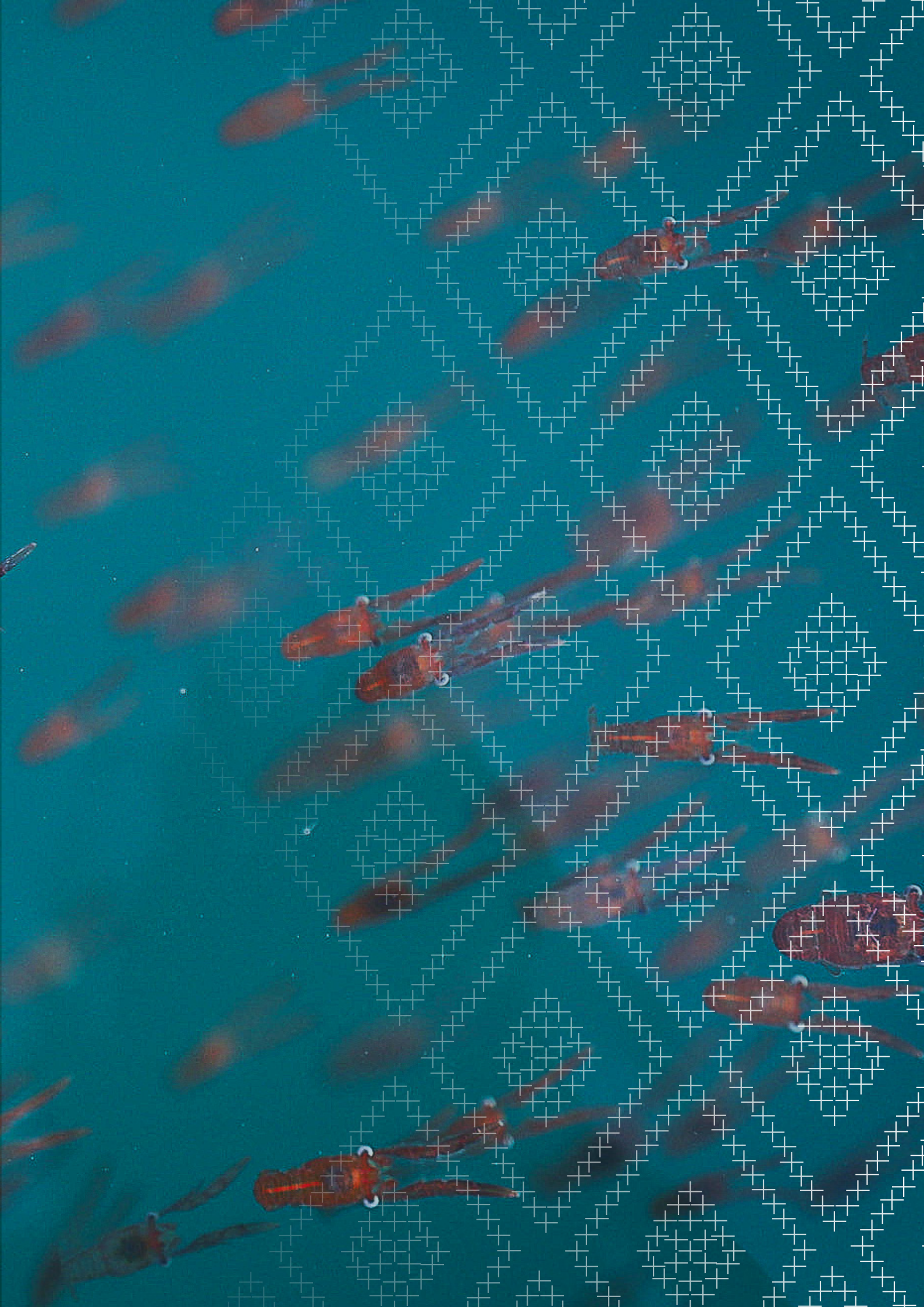

EXECUTIVE SUMMARY

The ocean holds immense significance and importance to us as Māori people: it is deeply ingrained in our heritage, traditions, and cultural identity. The ocean has played a significant role in shaping our cultural identity, mātauranga (knowledge), and tikanga (customs).

In this report we adopt a Futures Thinking approach to delve into the intricate dynamics surrounding the weight of the past and the push of the present within the context of tikanga Māori, Te Tiriti o Waitangi and marine governance.

We scrutinise its historical significance, from its utilisation in trade prior to and after the arrival of British settlers in 1840 to the ensuing power struggles following the signing of He Whakaputanga and Te Tiriti o Waitangi (the Treaty of Waitangi/Te Tiriti).

Of particular focus is the evolution of Māori fishing rights, deeply rooted in tikanga, which were recognised by British common law yet gradually eroded over time. It wasn't until the Fisheries Deed of Settlement in 1992 that the Crown formally acknowledged its duty to protect Māori rangatiratanga (chieftainship) over their fisheries. Through an examination of current customary, commercial, and takutai moana (coastal marine area) policy and legislative regimes, we aim to elucidate the necessary changes in marine governance required to uphold tikanga and honour Te Tiriti o Waitangi.

Our report culminates in a Causal Layered Analysis, a tool designed to delve beyond surface-level issues to uncover deeper systemic, worldview, and myth layers. Through this analytical lens, we endeavour to gain a comprehensive understanding of the challenges and opportunities that lie ahead in each of the focus areas, thereby paving the way to develop insights that will assist with developing marine governance arrangements that are underpinned by tikanga and Te Tiriti o Waitangi.

Image credit: Naomi Aporo-Manihera

CONTENTS

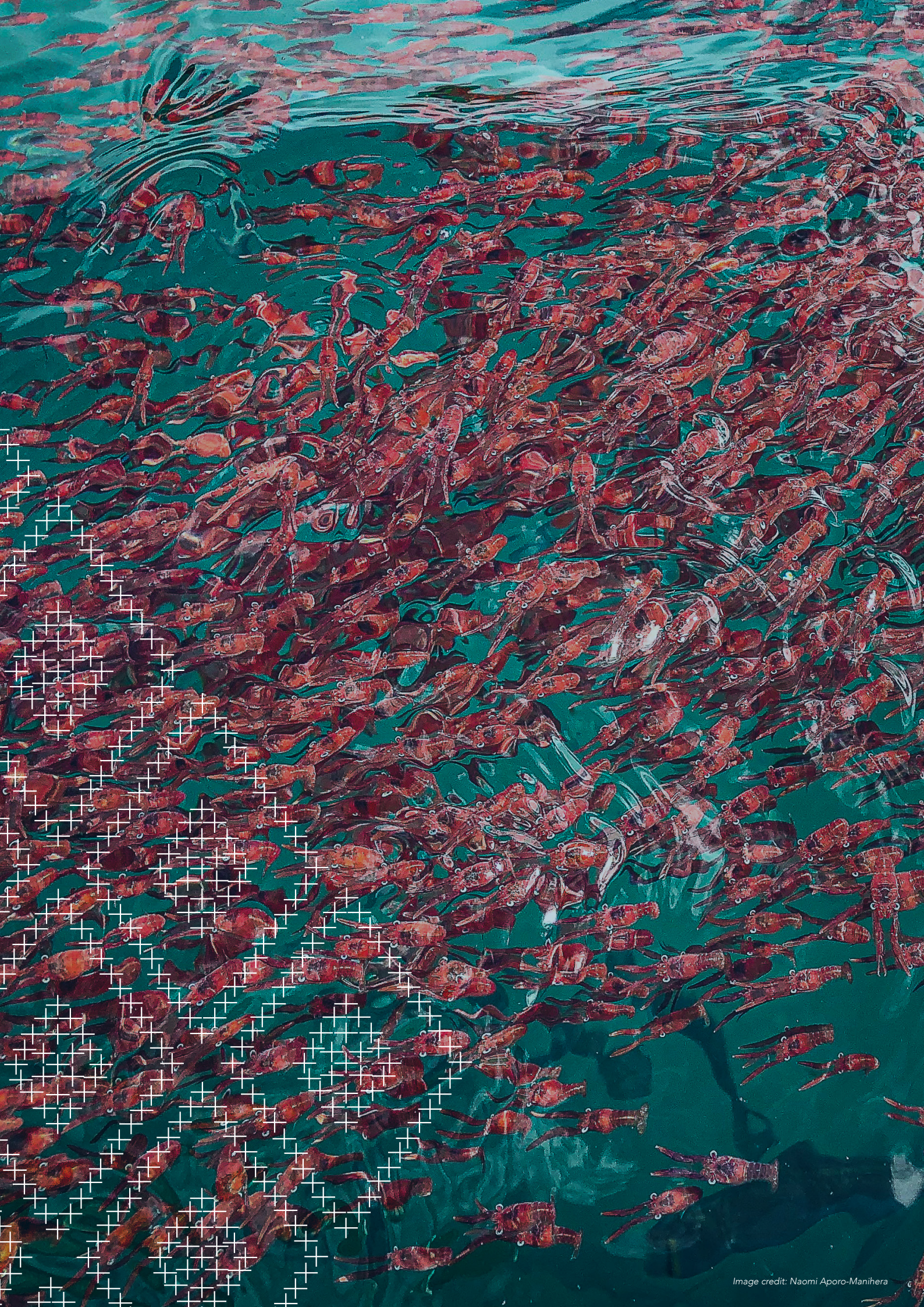

Image credit: Naomi Aporo-Manihera

INTRODUCTION

The increasing tensions and stressors affecting our marine environment in Aotearoa New Zealand have highlighted a need for transformation. In order to promote the health and wellbeing of our oceans, the concepts, values, and interests that drive human interactions, decision making, and prioritisations must be revisited.

This need has been demonstrated, both locally and internationally, in the mounting momentum towards sustainability, increasing sensitivity to non-financial factors, and the social license to operate in industries dependent on natural resources. Furthermore, the increasing public scrutiny on extractive or destructive practices in marine interactions highlights the groundswell of sentiment to reconsider the principles and practices that govern our oceans.

This context paves the way for exploring a more holistic approach to dealing with these challenges. Globally, indigenous peoples have taken such an approach to the environment for centuries. In Aotearoa, Tangaroa is the atua of the sea, the personification of the physical ocean environment and all life within it. Māori have genealogical connections to Tangaroa – Mana Atua, Mana Tāngata, Mana Moana. This connection compels within us a sense of responsibility: to utilise the bounty of Tangaroa in a manner that is sustainable and ultimately puts Tangaroa at the heart of the management and governance of the marine environment.

Marine management concepts and approaches were defined by tikanga Māori, developed over generations through sustained interaction with Aotearoa's marine environment. This incumbent system was confirmed through Article II of Te Tiriti o Waitangi, where the collective rights and responsibilities of Māori to live as Māori and to protect and develop their taonga were guaranteed. Despite these protections, this system was promptly supplanted in favour of colonial norms and a Eurocentric (and anthropocentric) approach to natural resource management, ownership, and capitalism. In essence, the tikanga-based governance and management system, bespoke to the needs of Aotearoa, was cast off to accommodate laws and concepts adopted from a foreign society.

Tikanga Māori and the intent of Te Tiriti o Waitangi remains functionally absent from the present system governing the marine environment. The hierarchy of importance within the system remains heavily weighted towards extractive property rights and the effective subjugation of the oceans to human resource requirements.

What is fascinating is that the world is now clamouring to adopt a more holistic approach to governing and managing the marine environment. Many countries do not need to venture far: this wisdom exists within their own indigenous communities, who, despite having their beliefs, values, and ways of being criticised and marginalised for generations, have continued their practices in a way that is culturally appropriate to them.

Whilst technological advances and technical developments will continue to improve our management toolkit, our unique opportunity to innovate in the marine environment lies in our whakapapa: in governance and management practices that have evolved over generations specifically for Aotearoa's oceanscape. It is important to look back and consider the learning of the past and the present to help explore what modern governance model options, based on tikanga Māori and Te Tiriti, could be developed, and applied in the modern context.

SCOPE AND METHODOLOGY

The primary aim of this research is to create marine governance models that place Tangaroa and Hinemoana at the forefront of decision-making, while honouring tikanga Māori and upholding Te Tiriti o Waitangi. As a research team, we acknowledge the needs for proactive and forward-looking approaches to address the multifaceted issues surrounding this objective. Considering this, we have chosen to adopt a futures thinking perspective to guide our investigations, with the aim of anticipating future trends, identifying emerging opportunities and effectively responding to potential disruptions.

A futures thinking approach, also known as foresight or futures studies, is a systemic and strategic way of exploring possible futures and anticipating changes in order to inform decision-making in the present. Rather than predicting the future with certainty, futures thinking involves creating a range of scenarios and considering their implications, thereby helping individuals, organisations, and societies prepare for various outcomes.

There are numerous ways in which a futures thinking approach can be incorporated into research. Specifically, for "the focus area report" we have employed two techniques: the futures triangle and the causal layered analysis. Further information on each of these methods is provided below.

Futures Triangle

The Futures Triangle was developed by Sohail Inayatullah as a foresight method used to identify the plausible future by better understanding the dynamic tensions between the past, present and future, as each has its own set of drivers and influences.

The Futures Triangle helps discern the material drivers of change, and how they interact: the **anchors** due to past histories, **forces** driving and manipulating the present, and **currents** carrying us forth to the future. The Futures Triangle allows us to assign importance to drivers of change that may originally feel out of place, or at a different level of specificity than others.

Me tiro whakamuri hei anga whakamua. It is often said that Māori are a people who, with our eyes firmly focused on our past, walk assuredly forward into the future. The comfort of legacy moderates the uncertainty of the unknown future. In te ao Māori, time is experienced as simultaneously connecting across all three points of the Futures Triangle – the legacy of our past, the push of our present, and the pull of the future.

In this report, we consider two key components of the futures triangle: the weight of the past and the push of the present. (The third component "the pull of the future," will be further developed in subsequent reports for this research project).

The 'weight of the past' segment focuses on tikanga, delving into its core principles and their relevance to marine governance. It investigates the repercussions of colonialism on our relationship as Māori with the ocean, Māori entitlements, and the recognised interests in the marine domain, as articulated in the Treaty of Waitangi Fisheries Settlements.

Transitioning to the 'present-day dynamics', the research team examined the contemporary framework of Māori customary fishing, Māori commercial fishing, and the Marine and Coastal Area (Takutai Moana). Through this analysis, of these components, our goal is to comprehend the current dynamics and frameworks within marine governance that impact Māori communities and their connection to the ocean.

While acknowledging that Māori possess substantial interests beyond these three domains, we have selected them due to their pivotal roles and considerable present and future ramifications for marine governance.

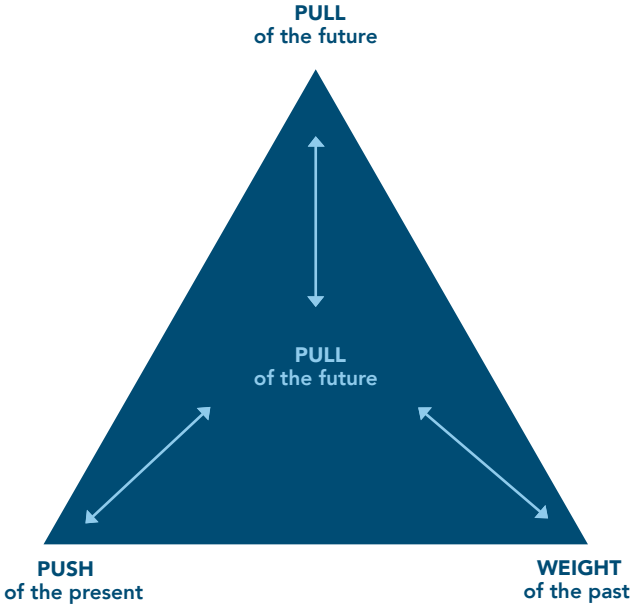

Figure 1: Futures Triangle, originally developed by Sohail Inayatullah1

1 *https://www.futuresplatform.com/blog/how-can-we-predict-plausible-futures*

Casual layered analysis

This report will end with another futures thinking method the causal layered analysis or CLA. This framework also developed by Sohail Inayatullah, provides a structured approach to understand issues at multiple levels of depth, from superficial manifestations to underlaying cultural and structural causes. This method consists of investigating the issue at four levels: the more tangible and perceivable litany of events, the social/systemic causes, the underlying embedded worldviews, and finally the entrenched myths, metaphors, and mental models that represent the root cause of the preceding layers.

By applying CLA to the domains of commercial fishing, customary fishing, and the marine and coastal area, it will assist to better understand both the immediate challenges and the deep structure, cultural and symbolic elements, that are constraining the ability to have marine governance models that are underpinned by tikanga and Te Tiriti o Waitangi.

This dual approach, integrating the holistic perspective of the Futures Triangle with the layered depth of the CLA, will provide a full examination of the intricate dynamics within and across the focus areas. Leading to a thorough comprehension of the obstacles and prospects within each focus area. This approach will facilitate the generation of insights crucial for the development of marine governance structures rooted in tikanga and Te Tiriti o Waitangi.

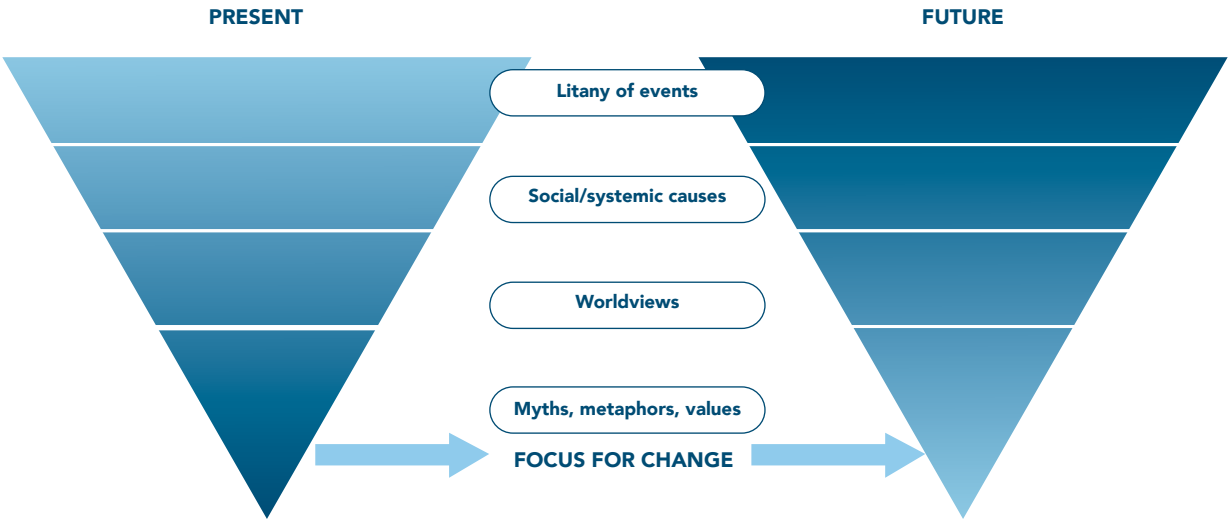

Figure 2: levels of change in Causal Layered Analysis[2]

2 *Maniam, Aaron. 2019. Leadership Across Time: Managing the future. Presentation to the Obama Foundation Leaders: Asia-Pacific convening, November 2019, Kuala Lumpur, Malaysia.*

Somewhere in my past is my destiny
- *Eva Rickard*

The signing of the Māori Fisheries Settlement 1992. Image credit: Michael Smith, Dominion Post Collection, National Library of New Zealand Te Puna Mātauranga o Aotearoa, Alexander Turnbull Library, Wellington.

WEIGHT OF THE PAST

In delving into this section, we embark on a journey into the deep connection between Māori, and the vast expanse of the moana. For Māori, the moana holds a sacred place alongside the whenua, forming an integral part of our identity. This connection deeply rooted in whakapapa, has endured through generations, representing an ancestral bond with the ocean.

However, the arrival of European settlers marked a pivotal moment, bringing forth a clash of worldviews between te ao Māori and te ao Pākehā. Colonial laws and structures emerged, disrupting Māori tino rangatiratanga and posing threats to the expression of our ancestral relationships with the moana, nurtured since time immemorial.

Within this chapter, we explore the intricate layers of the 'weight of the past' relating to our relationships with the moana. Firstly, we journey through a 'pre-colonial' narrative, shedding light on the coexistence between Māori and the moana and the tikanga that underpinned our way of living. Subsequently, we confront the arrival of Pākehā settlers and the collision of two world views, te ao Māori me te ao Pākehā. The colonial laws and structures that emerged from this collision impinge on Māori tino rangatiratanga and threaten to stifle the expression of Māori ancestral relationships with the moana and Tangaroa that have existed mai rā anō (since long ago).

This chapter is not intended to be a comprehensive analysis of all aspects of Tangaroa and the moana. Rather, this chapter provides context on tikanga and the moana, and the key points in our colonial history that have fundamentally impacted upon our ancestral connection with the moana.

Ko te ao tawhito | pre-colonial phase

Renowned land activist, Eva Rickard, once said, "somewhere in my past is my destiny." Our ancestral past is steeped in our relationship with the ocean, as vast and varied as Te Moana-nui-a-Kiwa (the Pacific Ocean). From our earliest histories as navigators and wayfarers, the ocean held primacy in the minds and hearts of Māori and our Pasifika whānaunga.

We observed our natural world and tied this mātauranga to the many elements and aspects of the ocean. We personified it to embed our whakapapa obligations of kinship and deified it to embed our responsibilities to act in a manner that is tika.

The ocean was our highway. It connected us to the world. It carried us, if we respected it, along uncertain paths to prosperous shores. It was our platform to take calculated risks, to practice our adventurous entrepreneurship, and to step into the void in search of new discoveries and horizons.

It connected us back to Hawaiiki – the constant ideal of "the paradise before," and to our whakapapa. It connected us, through the hub of Taputapuātea, to the many spokes of the Pacific. Being bound to the ocean created specialised knowledge systems and lies at the heart of our maramataka. Through necessity, the challenge of the ocean strengthened our connection to our surroundings, to the stars and moon for guidance, to the winds for propulsion, and to its denizens for sustenance and energy. Our defining concepts of rāhui and tapu found practical application in the ongoing relationship with the sea and its resources.

As it bore our tīpuna, the ocean carries our kōrero from one generation to the next. The most ubiquitous of our stories are steeped in the realm of Tangaroa, from Te Ika a Māui to Ruatepupuke discovering the art of whakairo, Kupe's pursuit of Te Wheke o Muturangi to the harrying of the greenstone fish Poutini by Hinetūāhoanga in the origins of pounamu. Our ocean-bound stories entrenched our waka and tribal identities, with defining tales such as Kahungunu courting Rongomaiwahine, of Te Arawa escaping Te Korokoro o te Parata, or Paikea riding his whale. As Māori, our connection to the moana is founded in whakapapa and is inherent in who we are as Māori.[3]

Our tikanga

Tikanga was and is very important within Māori society. Tikanga is derived from 'tika' or that which is right or just.[4] As Tā Hirini Moko-Mead explains.[5]

> *Tikanga embodies a set of beliefs and practices associated with procedures to be followed in conducting the*

3 *Anne-Marie Jackson, Ngahuia Mita and Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (Sustainable Seas National Science Challenge, 2017) at 38 and 42, referencing T. A. C. Royal (1989). Marine Disposal of Wastes: A Māori view. Royal family: Papers (Te whānau a Roera Hukiki Te Ahukaramu) p 9.*

4 *Mason Durie The Māori Politics of Māori Self-Determination (1998) and Joe Williams He Aha te Tikanga. (Unpublished paper for the Law Commission)*

5 *Hirini Moko Mead The Nature of Tikanga (paper presented at Mai i te Aata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000) 3-4, as cited in Te Aka Matua o te Ture Māori Custom and Values in New Zealand Law (NZLC SP9, 2001) at 16.*

> *affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do …*
>
> *Tikanga are tools of thought and understanding. They are packages of ideas which help to organise behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us through some huge gatherings of people and some tense moments in our ceremonial life. They help us to differentiate between right and wrong and in this sense have built-in ethical rules that must be observed. Sometimes tikanga help us survive.*
>
> *Tikanga differ in scale. Some are large, involve many participants and are very public … Other tikanga are small and are less public. Some of them might be carried out by individuals in isolation from the public, and at other times participation is limited to immediate family. There are thus great differences in the social, cultural, and economic requirements of particular tikanga.*

Further to the above description, Joe Williams provides further explanation from a law and policy perspective, stating:

> *Tikanga Māori is wider than rules or laws and the focus of tikanga is in the values of fundamental precepts of Māori systems of control not the prescriptive rules or laws with which western trained lawyers are familiar. Tikanga Māori makes no distinction between civil and criminal jurisdiction or between the spiritual and profane, Tikanga Māori is both law and religion.*[6]

Tikanga Māori encompasses the Māori approach to all aspects of human activity, ranging from everyday routines to the most sacred and significant endeavours.

Western law is prescriptive, which has the advantage of having a degree of certainty. Tikanga is not at all prescriptive, the focus being instead on the underlying values that outline the conduct or approach required in a given situation.[7]

The values provide the primary guide to the way in which someone and society should behave. In understanding tikanga, it is essential to recognise that its essence lies not in strict prescriptions but rather in the foundational values that shape the behaviour and interactions within society.

Based on the scholarly writings of Durie, Moko-Mead, and Williams, there are a set of fundamental values of tikanga that inform the body of tikanga and can be applied to marine governance; these include whakapapa/whānaungatanga, mana, utu/ea, tapu/noa, and kaitiakitanga, acknowledging that these values are interwoven.

Whakapapa/Whānaungatanga

Whakapapa establishes a contextual relationship between Māori and the environment, encompassing all living beings, plants, and natural resources. It emphasises the interconnectedness and interdependence of these elements within a complex web of relationships. Whakapapa places Māori in an environmental context with all other animals, plants, and natural resources as part of a genealogical web of interrelationships.[8]

The Waitangi Tribunal acknowledged this fundamental relationship in Ko Aotearoa Tēnei:[9]

> *This was a culture at home on land or sea. Its defining principle, and its lifeblood, was kinship – the value through which the Hawaikians expressed relationships with the elements of the physical world, the spiritual world, and each other. The sea was not an impersonal thing, but an ancestor deity. The dots of land on which the people lived were a manifestation of the constant tension between the deities, or to some, deities in their own right. Kinship was the revolving doors between the human, physical, and spiritual realms...*

Whakapapa describes the relationship and connection to Tangaroa and therefore the marine environment. Māori creation and cosmogonic narratives serve as the core system that encapsulates Māori beliefs and values, forming the foundation of a holistic worldview. These narratives not only encode cultural principles but also convey themes and myth-messages that offer guidelines, precedents, models, and social prescriptions for human behaviour.[10]

Whakapapa also extends beyond Māori and encompasses Te Moana-nui-a-Kiwa, connecting people through a shared understanding of Tangaroa and the ocean. The archival material examined by Jackson et al highlights the similarities in the stories and traditions across the Pacific pertaining to Tangaroa show the whakapapa of the ocean that connects us all.[11]

Mana

Mana is defined in the Williams dictionary of the Māori Language as authority, control, influence, prestige.[12]

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6 *Joe Williams He Aha te Tikanga. (Unpublished paper for the Law Commission)*

7 *Joe Williams He Aha te Tikanga. (Unpublished paper for the Law Commission, 1998)*

8 *GR Harmswroth and S Awatere "Indigenous Māori Knowledge and perspectives of ecosystems" in JR Dymond Ecosystem services in New Zealand – conditions and trends (Manaaki Whenua, Lincoln, 2013) 274-286 at 276.*

9 *Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (Wai 262, 2011) at 5.*

10 *Māori Marsden and T. A. Henare Kaitiakitanga: a definitive introduction to the holistic world view of the Māori (Ministry for the Environment, Wellington, 1992); Ranginui Walker Ka Whawhai Tonu Matou: Struggle Without End (Penguin, Auckland, 1990); Anne-Marie Jackson, Ngahuia Mita, Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (University of Otago, 2017).*

11 *Anne-Marie Jackson, Ngahuia Mita, Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (University of Otago, 2017).*

12 *Herbert Williams A dictionary of the Māori Language (NZ Government Printer, Wellington, 1971) at 172.*

There are different manifestations of mana, some of which are described by Reverend Māori Marsden as:[13]

1. Mana Atua – God given power;

2. Mana Tīpuna – power handed down from one's ancestors; and

3. Mana Tāngata – authority derived from personal attributes.

In a recent study paper published for Te Aka Matua o te Ture (The New Zealand Law Commission), Professor Wiremu Doherty, Tā Hirini Moko Mead and Tā Pou Temara say that the concept of mana speaks to authority that is granted to the collective.[14] They write:[15]

> *The connection to the collective is mapped through whānaungatanga and whakapapa. Through this, collective authority is granted to the order in which processes are conducted and events are to be supported, through to the elevation of people to maintain order for the collective. The individuals who are afforded the will and support of the people will be those recognised as holders of the knowledge required to maintain the integrity of the knowledge and processes of the people.*

Mana embodies political authority, which can be conferred through whakapapa or earned through individual achievements. This authority can also be imbued with a spiritual and mystical essence. The triadic nature of mana is important because it explains the dynamics of Māori status and leadership and the lines of accountability between leaders and their people.[16]

Utu

The concept of utu is commonly understood as the action for reciprocity.[17] Utu is also the action of the fulfilment of obligations and underpins all Māori social interaction and exchange. Utu can encompass both positive and negative reciprocity and is a fundamental driver of the Māori way of life.[18]

Utu is concerned with the maintenance of harmony and balance. It governs societal relationships, the creation and maintenance of reciprocal obligations.[19] According to Sir Edward Taihakurei Durie, "utu underpinned the essential 'give and take' nature of the Māori social and legal order."[20]

Utu also interacts with and is dependent upon the expression of other tikanga Māori concepts, such as mana and ea. "To extract utu requires mana, both on behalf of the collective that is making the demand and similarly from those being made to make payment."[21] Those making the demand for utu need also to be capable of enforcing their demands, for example:[22]

> *When we look at Mihi-ki-te-kapua feeling aggrieved her in-laws were returning to the lands, her son had been killed before she had stopped grieving his loss and she raised a war party to seek retribution. The act of seeking retribution here is considered an example of utu, as Mihi-ki-te-kapua had the wherewithal to raise a war party. Being willing to take up arms to defend her course of action made it possible for her to seek utu. Without the will and support of the people, she would not have been able to achieve the outcomes she desired.*

A recent study paper for Te Aka Matua (the New Zealand Law Commission) published comments from Professor Jacinta Ruru and Mihiata Pirini, explaining the concepts of utu and ea. According to Ruru and Pirini, "Utu involves a process which seeks to find a way to restore equilibrium or balance. In tikanga, this process must continue until ea is reached. Ea may not result in all affected parties feeling happy with the outcome but there is an acceptance of the process and its outcome."[23]

Tapu

All things within te ao Māori have tapu.[24] It is said that while " whānaungatanga, whakapapa, and mana all speak to ensuring a connection to all elements is achieved and maintained, tapu is the regulator of the actions in maintaining the connections."[25] Tapu is described in the Williams Dictionary on the Māori Language as a type of restriction.[26] Professor Wiremu Doherty, Distinguished Professor Tā Hirini Moko Mead and Professor Tā Pou Temara frame tapu as a concept that "speaks to the action required to be conducted to maintain the intent and purpose of the functions within te ao

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13 *As noted in Herbert Williams A dictionary of the Māori Language (NZ Government Printer, Wellington, 1971) at 172.*

14 *Te Aka Matua o te Ture He Poutama – Appendix 1: Tikanga (NZLC SP24) at 53.*

15 *Te Aka Matua o te Ture He Poutama – Appendix 1: Tikanga (NZLC SP24) at 53.*

16 *Timoti Gallagher, Te Kāhui Kura Māori, Volume 1, Issue 1. Victoria University - Tikanga Māori Pre-1840 https://nzetc.victoria.ac.nz/tm/scholarly/tei-Bid001Kahu-t1-g1-t1.html*

17 *Professor Wiremu Doherty, Distinguished Professor Tā Hirini Moko Mead and Professor Tā Pou Temara He Poutama – Appendix 1: Tikanga (NZLC SP24) at 63.*

18 *Te Aka Matua o te Ture He Poutama – Appendix 2: Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tupuna (NZLC SP24) at 148, per Margaret Kawharu.*

19 *Eddie Durie Custom Law (Waitangi Tribunal, January 1994) at 6.*

20 *Eddie Durie Custom Law (Waitangi Tribunal, January 1994) at 6.*

21 *Te Aka Matua o te Ture He Poutama – Appendix 1: Tikanga (NZLC SP24) at 63.*

22 *Te Aka Matua o te Ture He Poutama – Appendix 1: Tikanga (NZLC SP24) at 63.*

23 *Te Aka Matua o te Ture He Poutama – Appendix 2: Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tupuna (NZLC SP24) at 147.*

24 *Te Aka Matua o te Ture He Poutama – Appendix 1: Tikanga (NZLC SP24) at 56.*

25 *Te Aka Matua o te Ture He Poutama – Appendix 1: Tikanga (NZLC SP24) at 56.*

26 *Herbert Williams A dictionary of the Māori Language (NZ Government Printer, Wellington, 1971) at 385.*

Māori."[27] They say:[28]

> *Tapu speaks to the sanctity that is required to be adhered to and followed in conducting the procedural elements in maintaining tikanga. To not follow the appropriate processes required by tikanga is viewed as breaking the rules. Such a breach is considered tapu, and if not addressed appropriately, consequences can befall those responsible.*

Kaitiakitanga

Whakapapa connects us. With this connection comes obligations and responsibilities to look after one another. One of the core principles underpinning the exercise or expression of the whakapapa relationship Māori have with Tangaroa and other atua (Māori deities) of te ao tūroa (natural environment) is known as kaitiakitanga, in which its meaning is profound and cannot be well described or contextualised outside te reo Māori (the Māori language) in which it originates.

Nonetheless, Māori scholars have issued various meanings across the literature. One example comes from Harmsworth and Awatere who say:[29]

> *…the principle of kaitiakitanga entails an active exercise of power in a manner beneficial to the resource. It can be illustrated by humans providing benefit to the ecosystem and natural resource, through for example guardianship and sustainability, and means that the ecosystem or resource is sustained, if cared for, and can then provide benefit back to humans.*

The way kaitiakitanga is practiced is through mātauranga and tikanga Māori, which is dynamic and location-specific, depending on the relationships between iwi, hapū, and whānau with that location.[30] However, for Māori to exercise our kaitiakitanga responsibilities, tino rangatiratanga (full authority or power) is vital.[31]

Our practices

In Aotearoa, our history as navigators, voyagers, explorers, and mariners' dates back over a thousand years, to the times of Kupe, Kuramarotini, Huiterangiora, and the Great Captains of the migration waka. Hence, an obvious starting point to explore how our tīpuna connected to the moana is to go back to the voyaging and tikanga associated with waka. Anne-Marie Jackson, Ngahuia Mita and Hauiti Hakopa explain "it is one of the activities where our ancestors were perhaps the most connected with the marine environment."[32]

Our Polynesian tīpuna embarked on incredible voyages on waka hourua (double-hulled sailing canoes) across vast expanses of Te Moana-nui-a-Kiwa, using their remarkable navigational skills, knowledge of celestial bodies, and their intricate understanding of natural signs like wave patterns, bird migration, and ocean currents.[33] These seafaring ancestors embarked on daring explorations, reaching and inhabiting the remote islands of Polynesia, including Aotearoa, New Zealand. As noted by Anne-Marie Jackson, Ngahuia Mita and Hauiti Hakopa, "Waka remains the reoccurring thread that bind the first people of Aotearoa together, link us to our greater Polynesian whakapapa and to the marine environment."[34]

The core tikanga waka identified by Anne-Marie Jackson, Ngahuia Mita and Hauiti Hakopa in their archival analysis is the performance of proper rituals to show respect and acknowledge the authority of the atua (deities) and their descendants.[35] For waka voyaging it is important to recite karakia (incantations) to seek permission and spiritual guidance before engaging in marine activities. By doing so, individuals can establish a connection with the spiritual realm and ensure their safety and protection within the marine environment.

Mita carefully decode pūrākau/kōrero of waka voyaging and more specifically Tairāwhiti waka voyaging using Taonui's model of oral traditions.[36] The model comprises four main categories: creation traditions, demigods or culture heroes, migration, and tribal oral tradition. Creation traditions encompass philosophical narratives explaining the origins of all things and their interconnectedness, with a focus on the cosmological origins of Māori. Demigods represent pivotal figures bridging the divine and human realms. Migration traditions recount the journeys from ancestral islands to new lands. Tribal oral traditions chronicle the deeds of ancestors and their descendants, focusing on specific regions. Additionally, two supplementary categories — customary lore and natural world lore — are observed alongside the main categories. The study analyses a total of 11 pūrākau, distributed across the categories,

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27 *Te Aka Matua o te Ture He Poutama – Appendix 1: Tikanga (NZLC SP24) at 56.*

28 *Te Aka Matua o te Ture He Poutama – Appendix 1: Tikanga (NZLC SP24) at 56.*

29 *GR Harmswroth and S Awatere "Indigenous Māori Knowledge and perspectives of ecosystems" in JR Dymond Ecosystem services in New Zealand – conditions and trends (Manaaki Whenua, Lincoln, 2013) 274-286 at 281.*

30 *Margaret, Mutu. Ngāti Kahu kaitiakitanga. (Māori and the Environment, 2010) at 16.*

31 *Margaret, Mutu. Mana Māori Motuhake: Māori concepts and practices of sovereignty. (In Routledge Handbook of Critical Indigenous Studies. Routledge. 2020) at 269.*

32 *Anne-Marie Jackson, Ngahuia Mita, Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (University of Otago, 2017) at 34.*

33 *Andrew, Crowe. Pathway of the birds: the voyaging achievements of Māori and their Polynesian ancestors. (David Bateman Ltd, 2018); Te Rangi, Hiroa. The coming of the Māori. (Māori Purposes Fund Board Whitcombe and Tombs LTD. 1949).*

34 *Anne-Marie Jackson, Ngahuia Mita, Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (University of Otago, 2017) at 74*

35 *Anne-Marie Jackson, Ngahuia Mita, Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (University of Otago, 2017) at 45.*

36 *Ngahuia Susannah Te Riunui, Mita. Tairāwhiti Waka, Tairāwhiti Tāngata; Examining Tairāwhiti voyaging philosophies. (PhD diss., University of Otago, 2023) at 69, referencing Rawiri, Taonui.*

and interweaves the experiential aspect of sailing Tairāwhiti Waka to illustrate the embodiment of voyaging philosophies by rangatahi.[37]

Through this exercise, Mita identifies Tairāwhiti voyaging philosophies that provide some insight into the structures of leadership established by our early tīpuna (ancestors).[38] One philosophy of leadership, known as kaihautūtanga, is demonstrated through the pūrākau/kōrero of Horouta waka, specifically through the tīpuna of Paoa and Kiwa.

Paoa and Kiwa, the kaihautū (leaders), possessed distinct but complementary skills and held different responsibilities. This is illustrated when the waka ran aground at Ohiwa, where Paoa led the search for materials to fix the canoe while Kiwa ensured the waka's operation and successful arrival at Tūranganui a Kiwa. The concept of kaihautūtanga, as demonstrated by Paoa and Kiwa, emphasises shared leadership qualities among multiple individuals. This philosophy has been embraced aboard the Tairāwhiti Waka, promoting a culture of shared leadership and empowering kaumoana (crew members) to develop skills in various roles. By embodying these ancestral voyaging philosophies, contemporary descendants and voyagers can follow a blueprint for behaviour and leadership.[39]

The moana became not just a means of transportation but an integral part of Māori cultural identity, particularly through kaimoana (seafood, coastal and marine resources) over time. Upon the arrival of early Māori ancestors to Aotearoa, there was an abundance of accessible kaimoana as well as freshwater and terrestrial resources. These early settlements were often near the sea and kaimoana was regarded as a taonga (treasure) from Tangaroa.[40]

Customary practices, such as the gathering of kaimoana, not only sustain whānau, hapū and iwi, but also preserve the enduring spiritual connection Māori have to our tūpuna, whakapapa and mana tuku iho (ancestral rights). A rich array of mātauranga and tikanga was developed regarding the gathering of kaimoana deeply rooted in whakapapa. While the mātauranga and tikanga varied across different iwi, hapū, and whānau, the integration of these customary practices into their daily lives demonstrated a commitment to sustainable resource management and the preservation of the marine environment for future generations.

Graeme Christian (Ngati Huarere) told the Waitangi Tribunal about how certain practices link whānau today with their tūpuna:[41]

> *The collection of kaimoana was and remains fundamentally something we all did and continue to do. We were taught not only where to go for kaimoana, but also when to go. Collecting kaimoana was part of our childhood, our upbringing. It is important to our wairua and to our mauri to be able to do such things. It brings us in contact with our tipuna and our surroundings when we go to the moana and collect kai.*

Iwi and hapū customary practices may differ across rohe, but this fundamental connection remains constant. For example, to the iwi Ngāi Tahu, mahinga kai is an integral part of their cultural identity and forms a key component of their Treaty settlement.[42] This is expressed in a publication from Te Rūnanga o Ngāi Tahu:[43]

> *Our natural environment – whenua, waters, coasts, oceans, flora, and fauna – and how we engage with it, is crucial to our identity, our sense of unique culture and our ongoing ability to keep our tikanga and mahinga kai practices alive. It includes our commemoration of the places our tupuna moved through in Te Waipounamu, and the particular mahinga kai resources and practices we used to maintain our ahi kā anchoring our whakapapa to the landscape. Wherever we are in the world, these things give us our tūrangawaewae. They form our home and give us a place to return to and provide use with what we need to be sustained as Ngāi Tahu.*

We can see from these testimonies that iwi and hapū have a multidimensional relationship with the moana that is both physical and spiritual. Pre-colonisation, Māori interacted with the moana as part of their whakapapa and exercise of customary rights, including through the gathering of kai.

Māori also utilised the moana and its resources in trade. Not all hapū and iwi territories abutted the sea, and therefore not all could readily access the moana and its bounty. Inter-tribal agreements were made where inland groups would trade resources with coastal iwi or hapū. In instances of dispute, the matter would be resolved in accordance with tikanga acknowledging the mana of the hapū and iwi involved.

Moana Jackson wrote, in a brief of evidence to the Waitangi Tribunal, about a common type of mahi tūhono (agreement) that allowed reciprocal access through rohe of different hapū. Jackson gave an example of a mahi

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37 Ngahuia Susannah Te Riunui, Mita. Tairāwhiti Waka, Tairāwhiti Tāngata; Examining Tairāwhiti voyaging philosophies. (PhD diss., University of Otago, 2023) at 69-72, referencing Rawiri, Taonui. Polynesian oral traditions. (Vaka moana: Voyages of the ancestors: The discovery and settlement of the Pacific, 2006) at 22-53.

38 Ngahuia Susannah Te Riunui, Mita. Tairāwhiti Waka, Tairāwhiti Tāngata; Examining Tairāwhiti voyaging philosophies. (PhD diss., University of Otago, 2023) at 113.

39 Ngahuia Susannah Te Riunui, Mita. Tairāwhiti Waka, Tairāwhiti Tāngata; Examining Tairāwhiti voyaging philosophies. (PhD diss., University of Otago, 2023) at 145-146.

40 Charles Te Ahukaramū, Royal. Māori - Pre-European society. http://www.TeAra.govt.nz/en/maori/page-2 (accessed 29 May 2023)

41 Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at 7.

42 Ngāi Tahu Settlement Act 1998.

43 Anne-Marie Jackson, Ngahuia Mita and Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (Sustainable Seas National Science Challenge, 2017) at 94, referencing Te Rūnanga o Ngāi Tahu. (no date). Ngāi Tahu 2025. Christchurch, NZ: Te Rūnanga o Ngāi Tahu.

tūhono between Ngāti Pōporo and Ngāti Hawea:[44]

> *One of the marae of Ngāti Hawea is situated near the mouth of the Tukituki River with easy access to kai in the sea and the river. Ngāti Pōporo is several kilometres inland and its main marae at Korongata is situated not far from Nga Puke o Nga Atua which was an important site for observing Matariki and thus the start of the new planting cycle. As a consequence, the Hapū had extensive gardens but no ready access to kaimoana.*
>
> *The mahi tūhono therefore allowed reciprocal access for Ngāti Pōporo to the sea and for Ngāti Hawea to Nga Puke o Nga Atua across the many trails that give the Heretaunga Plains one of its names – Heretaunga Ara Rau. The access was restricted to certain times and limited purposes but was agreed to because of the relationship between the Hapū.*
>
> *It was thus a carefully considered exercise of mana and a process which acknowledged both the independence and interdependence of Ngāti Pōporo and Ngāti Hawea. But like all agreements it was sometimes subject to dispute and on one occasion of food shortage some young people from Ngāti Pōporo were deemed to have taken too much kaimoana – in modern parlance they had exceeded the quota in a way which jeopardised not just the relationship with Ngāti Hawea but also with Tangaroa and Hinemoa.*
>
> *The breach was thus a serious disruption of whakapapa and a pokai tara of three rangatira was convened to consider the applicable tikanga as law and thereby find ways of restoring the relationship. The mediation process resulted in the performance of appropriate karakia by both Hapū at the river mouth to placate and restore the relationship with Tangaroa and Hinemoana. To restore the individual and collective relationships between the Hapū, the young people involved, along with selected whānau members, were required to attend the wānanga tōtika at Waikawa while an exchange of taonga was arranged to publicly announce the reconciliation. The hurt was assuaged "whakamahue i te mamae" and relationships were restored "whakaoranga whakapapa."*
>
> *At a Hui-ā-Hapū in 1957, the Ngāti Pōporo kaumātua Pura Cunningham explained the process as "restoring the collective not punishing the mokopuna." It "mediated the wrong" by re-positioning everyone involved within the relationships that had been disturbed and by acknowledging the mana and interdependence which the mahi tūhono represented.*

This is just one example, with many inland iwi and hapū having agreements with coastal iwi and hapū for access to resources.

Customary rights to land, of which some can be applied to the takutai moana, were established in a number of ways, including (but not limited to):[45]

(a) Take tīpuna: ancestral land right / through whakapapa;

(b) Take taunaha: naming through discovery (usually supported by other forms of tikanga);

(c) Take ōhākī: land allocated as part of the last testament of a dying chief;

(d) Take ahi kā roa: continuous occupation, keeping the home fires burning;

(e) Take raupatu: claim by conquest / through the blade of a patu; and

(f) Take tuku: a claim based on rights by way of gift.

Fundamentally, iwi and hapū have exercised their mana over the moana in accordance with tikanga Māori since their arrival to the shores of Aotearoa.[46]

He tūtakitanga | post-colonial phase

The arrival of European settlers and the collision of Pākehā systems of law and governance has created fundamental barriers to the ways in which Māori interact with Tangaroa and the moana. Writing extrajudicially, His Honour Justice Williams described this as the arrival of the 'second law' of Aotearoa New Zealand. Justice Williams identified the fundamental differences between the respective values of the 'first law' (tikanga Māori) and the 'second law', was that "one was predicated on personal connectedness (and through that group autonomy) and the other was predicated on personal autonomy (and through that group welfare)."[47]

As has been observed by the Waitangi Tribunal, there were many facets to the relationships between Māori and the British settlers that took shape after first contact in 1769. Māori and British settlers fostered trade relationships, "[shared] ideas and technologies, personal bonds or rivalries and much more."[48] Inevitably political tension would arise between rangatira Māori and British official representatives, sparked by the question of who held rights of governance and sovereignty over Aotearoa New Zealand. The Waitangi Tribunal also commented that:[49]

> *From 1769, the worlds of imperial Britain and Māori would collide. Over the following 71 years, there would be conflict and misunderstanding; there would be trade, intermarriage, and sharing of ideas and technology. Each*

44 *Moana Jackson Brief of Evidence dated 4 May 2016 in Waitangi Tribunal Tū Mai Te Rangi! Report on the crown and Disproportionate Reoffending Rates (Wai 2540, 2017).*

45 *Hirini Moko Mead, Tikanga Māori: Living by Māori Values (Revised Edition) (Huia Publishers, 2003, 2016), p. 295 – 297, 306 – 308, and 399.*

46 *Tom Bennion, Andrew Irwin, Mātānuku Mahuika, Sarah Shaw and Annette Sykes Report of Te Rōpū Tai Timu Tai Pari (June 2021) at 3, referencing Pākia ki Uta, Pākia ki Tai – Ministerial Review of the Foreshore and Seabed Act 2004 (vol 1) at 5.1.2 and Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at 20 and 38.*

47 *Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 at 6.*

48 *Waitangi Tribunal Te Paparahi o Te Raki: Report on Stage 1 of the Te Paparahi o Te Raki Inquiry (Wai 1040, 2014) Part 1, at 19.*

49 *Waitangi Tribunal Te Paparahi o Te Raki: Report on Stage 1 of the Te Paparahi o Te Raki Inquiry (Wai 1040, 2014) Part 1, at 48.*

Image credit: Naomi Aporo-Manihera

> *people, at times, would seek to impose its values on the other, and each, at times, would also bend its own rules in order to smooth its relationships with the other.*

Perhaps the most crucial consequence of this collision of cultures, was Te Tiriti o Waitangi. However, it would be remiss not to acknowledge that, with the increasing arrival of Pākehā settlers in New Zealand, the British government had begun inserting itself into the way of life in Aotearoa New Zealand years before its signing.[50]

In 1835, the northern chiefs, who were referred to as "He Whakaminenga o Ngā Hapū o Niu Tireni" (The Confederation of the United Tribes of New Zealand) adopted He Whakaputanga, a Declaration of Independence.[51] He Whakaputanga stated that "all sovereign power and authority" lay with tribal chiefs. In the Waitangi Tribunal's view, He Whakaputanga "did not radically alter Māori political organisation" but is an important context to the treaty between Māori and the British Crown that was to follow.[52]

Te Tiriti o Waitangi was signed in 1840 by representatives of the British Crown and a group of Māori rangatira. It has been described as a legal instrument, a political tool, and the most important document in New Zealand history.[53] Dr Carwyn Jones wrote that, at its heart, "the treaty provides a framework for the relationship between Māori and the New Zealand government."[54]

We do not intend to espouse in detail the numerous debates and critical theories about Te Tiriti o Waitangi that have emerged in the years since its signing. Particularly, there has been heated debate as to the "precise nature and scope of the governmental authority that was ceded and the Māori authority that was guaranteed by the Treaty of Waitangi.[55]

It will suffice for the purposes of this report to say that, since the signing of Te Tiriti o Waitangi, the British Crown has imposed its sovereignty over Aotearoa New Zealand. It is through the articles of Te Tiriti o Waitangi that Māori continue to push against the weight of colonial oppression of our rights and interests in the law. In particular, Article II of Te Tiriti o Waitangi guaranteed tino rangatiratanga to Māori over our whenua, kāinga and all our taonga. As will become clear, the regimes implemented by the Crown to regulate the moana have often failed to meet this obligation, and at times sought to extinguish Māori interests in the moana in its entirety.

The first fish law introduced in New Zealand was the Oysters Fisheries Act 1866. This Act initially barred Māori from engaging in commercial fishing activities. It facilitated the leasing of oyster beds for commercial exploitation, yet it did not grant explicit rights or considerations to Māori. Notably, it prohibited Māori from selling oysters harvested from their reserves until 1874, under the presumption that they would have developed alternative preferences by then.[56]

In 1877, the Wi Parata case revolved around a parcel of land in Porirua, initially gifted by Ngāti Toa to the Anglican church with the expectation of establishing a school on it. Despite the absence of any school construction, the church later obtained a Crown grant for the land.

Prendergast, in his ruling, asserted that the courts were not empowered to adjudicate claims rooted in aboriginal or native title. He deemed the Treaty of Waitangi "worthless" as it was perceived as a pact between an advanced nation and group considered "primitive," "incapable of treaty signing. Since the Treaty had not been formally integrated into domestic legislation, it was regarded as a mere "nullity."[57]

With this decision being made, Te Tiriti o Waitangi was swept aside, and legislation continued to be passed with provisions that purported to recognise Māori rights, if they did not encroach on the ability of the public to exploit the resource, or reduced the rights and interests of Māori to subsistence needs only.

The power struggle between iwi and hapū and the Crown to exercise tino rangatiratanga over their rohe exploded across Aotearoa New Zealand. The Crown weaponised the law, introducing legislative regimes that further expedited their colonisation of the land. We see this in the raupatu (land confiscations) that were particularly rife across regions such as the Bay of Plenty, the Waikato and Taranaki.[58]

A significant amount of land was also taken through the Native Land Court and the Native Land Act. "The primary function of the Native Land Court was to identify the customary owners of Māori land and transform the customary title to a fee simple title that could be freely bought and sold" and facilitated an immense transferal of Māori ancestral lands to Crown and private ownership.

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50 Carwyn Jones New Treaty New Tradition: Reconciling New Zealand and Māori Law (Victoria University Press, 2016) at 6.

51 Carwyn Jones New Treaty New Tradition: Reconciling New Zealand and Māori Law (Victoria University Press, 2016) at 6.

52 As summarised in Carwyn Jones New Treaty New Tradition: Reconciling New Zealand and Māori Law (Victoria University Press, 2016) at 7.

53 Carwyn Jones New Treaty New Tradition: Reconciling New Zealand and Māori Law (Victoria University Press, 2016) at 7.

54 Carwyn Jones New Treaty New Tradition: Reconciling New Zealand and Māori Law (Victoria University Press, 2016) at 7.

55 Carwyn Jones New Treaty New Tradition: Reconciling New Zealand and Māori Law (Victoria University Press, 2016) at 8.

56 Mason H, Durie. Te Mana, Te Kāwanatanga: the politics of self-determination. Auckland (Oxford University Press, 1998) at 149; Ranginui, Walker. Ka Whawhai Tonu Matou: Struggle Without End. (Auckland: Penguin, 1990) at 142

57 Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 at 7. And https://nzhistory.govt.nz/the-chief-justice-declares-that-the-treaty-of-waitangi-is-worthless-and-a-simple-nullity

58 Carwyn Jones New Treaty New Tradition: Reconciling New Zealand and Māori Law (Victoria University Press, 2016) at 12.

Māori Rights and Interest Recognised within the Marine Environment

By the 1950's, Māori began collectivising their approach to combat political marginalisation caused by colonial laws and structures. In 1962, many tribal committees were formed, including the Māori Council. This political push-back finally led to the establishment of the Waitangi Tribunal in 1975 to address the many Crown violations of Te Tiriti during the prior 135 years.[59]

The early 1980s marked a time in history when the Crown finally began to recognise Māori customary rights and authority to protect and manage taonga. This time was pivotal as it tested the extent to which Māori customary rights could be recognised under a Pākehā system and set the foundations for decision-making in the following years.

In 1983 the iwi of Te Ātiawa filed a complaint with the Waitangi Tribunal against a petrochemical facility that had been given authority to discharge untreated sewage and debris into the Motunui awa. Te Ātiawa requested compensation because their Tiriti rights had been violated. The Tribunal supported Te Ātiawa's argument and concluded that Māori were to be protected not only in their fishing grounds but also in the mana to manage them.[60]

This decision was followed by the famous High Court case of Te Weehi v Regional Fisheries Officer. Tom Te Weehi went to North Canterbury's Motunau Beach to collect pāua for his whānau. While there, he was stopped by two fisheries officers, who inspected his catch and decided that Mr Te Weehi was in breach of the Fisheries (Amateur Fishing) Regulations 1983 because some of the pāua he had collected were undersized.

The Court found that Mr Te Weehi was exercising a Māori fishing right covered by the exemption provision of section 88(2) of the Fisheries Act 1983, which provided that "Nothing in this Act shall affect any Māori fishing rights." The Court found that he had fished in accordance with customary practices by obtaining permission from the kaitiaki of the tāngata whenua. Furthermore, the Court ruled that customary fishing rights retained by iwi under Te Tiriti remain enforceable unless specifically extinguished, either by sale or by legislation with the consent of the indigenous owner. As a result, he could not be convicted of an offence under the old Fisheries (Amateur Fishing) Regulations 1983.

The nature and extent of Māori fishing rights was further enhanced by the findings of the Waitangi Tribunal in the Muriwhenua Fishing Report and the Ngāi Tahu Sea Fisheries Report. Māori fishing rights were found to have both a commercial and non-commercial component, based on evidence that Māori were trading seafood widely prior to the signing of the Te Tiriti o Waitangi.[61] Although it had been identified in the Muriwhenua Fisheries Claim in 1988, it wasn't until the Tribunal's Ngāi Tahu Fisheries Claim report that it ascribed a developmental right, which means that Māori have rights to fish species that have been discovered and technology that has been developed since the signing of the Treaty in 1840.[62]

In 1986, the Government introduced the Quota Management System (QMS) based on the use of Individual Transferrable Quota – an economic fisheries tool that allows individuals to catch a certain amount of fish, providing fishers with exclusive and transferrable rights to catch a percentage of the total catch allowed for a certain fish stock.[63] This was confronted with several applications to the High Court by Māori leaders seeking a halt to the implementation of the QMS until Māori fishing rights were properly recognised and provided for in the allocation of commercial fishing quota.

In 1989 the Crown and Māori, represented by Ngāi Tahu, Muriwhenua, Tainui, and the New Zealand Māori Council, reached an interim agreement. This agreement facilitated the implementation of the Quota Management System (QMS) and ensured that Māori received compensation totalling $10 million in cash along with 10% of all fish quotas introduced into the QMS. This compensation was progressively provided at a rate of 2.5% per annum for four years, or alternatively, as a cash equivalent in cases where the Crown was unable to provide quota. Concurrently, the Māori Fisheries Commission was established under the Māori Fisheries Act 1989 with the aim of integrating Māori into the fishing industry.

The Fisheries Treaty Settlement

The above ultimately lead to a significant Treaty Settlement between Māori and the Crown, the Fisheries Deed of Settlement 1992 and subsequently the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. In both the Deed of Settlement and the Act, the Crown recognised the full extent of Māori customary (commercial and non-commercial) rights to fishing and fisheries. According to the Deed of Settlement:

> *The Crown recognises that traditional fisheries are of importance to Māori and that the Crown's Treaty duty is to develop policies to help recognise the use and management practices and provide protection for and*

59 *Te Kāhui o Te Ohu Kaimoana. The evolution of our customary rights. (Te Korowai o Tangaroa | Hōtoke 2021) at 12-15*

60 *Te Kāhui o Te Ohu Kaimoana. The evolution of our customary rights. (Te Korowai o Tangaroa | Hōtoke 2021) at 12-15*

61 *Option 4. Obligations to Māori.(https://www.option4.co.nz/Your_Rights/occasional1.htm, Retrieved 12 March 2024)*

62 *Fisheries New Zealand. Indigenous Rights. (https://efaidnbmnnnibpcajpcglclefindmkaj/https://fs.fish.govt.nz/NR/rdonlyres/89283C43-533D-42DC-AD59-90B9126B037B/0/qms_chapter_04_indigenous_rights.pdf, retrieved 12 March 2024) at 6.*

63 *Rashid, Sumalia. How to make Individual Transferable Quotas Work Economically, Socially and Environmentally. (https://doi.org/10.1093/acrefore/9780199389414.013.475, 2003)*

scope for the exercise of rangatiratanga in respect of traditional fisheries.[64]

The Settlement was full and final, extinguishing any further claims Māori had to commercial fishing rights.[65] Among other things, the Deed provided for:[66]

- $150m to be paid to the Māori Fisheries Commission to be used for the development and involvement of Māori in the New Zealand Fishing Industry
- The reconstitution of the Māori Fisheries Commission as the Treaty of Waitangi Fisheries Commission under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992
- The participation in a joint venture to acquire 50% shareholding in Sealord Products Limited
- Provision for the allocation to the Commission of 20% of all commercial fisheries brought into the QMS subsequently.
- The promulgation of regulations for customary fishing.

In the Deed of Settlement all commercial fishing rights and interests of Māori is ultimately for the benefit of all Māori. The Treaty of Waitangi Fisheries Commission (predecessor to Te Ohu Kaimoana) was tasked with developing proposals for allocating the various assets and benefits deriving from the Settlement regarding commercial fisheries.

The Crown was tasked with consulting with Māori in the process of policy development to help recognise the use and management practices of Māori, exercising their extant non-commercial fishing rights. Following this, it would promulgate regulations. In practice, these agreements began the formation of two distinct regimes for regulating customary Māori fishing rights (Figure 3).[67]

The Commission began to devise a framework for distributing the Fisheries Settlement assets among iwi in 1992. This endeavour spanned roughly 12 years, characterised by divergent perspectives from iwi groups and the broader Māori community regarding the allocation methodology. Some iwi argued for distributing the settlement primarily according to the length of an iwi's coastline, while others advocated for a population-based approach. The process was additionally complicated by legal challenges from specific groups seeking to allocate the settlement to

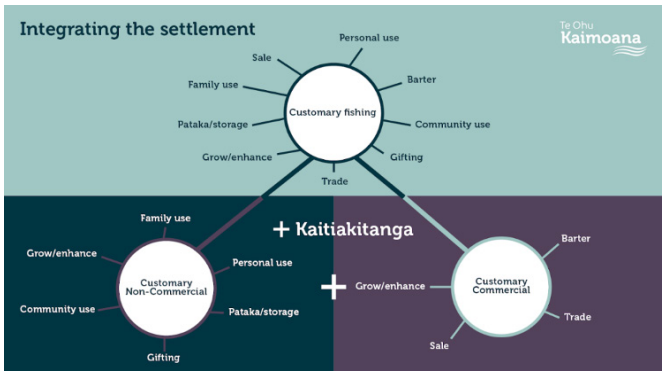

Figure 3: The commercial and non-commercial elements of the Māori Fishing Rights[68]

In August 2002, a single model for allocation was produced. This model balanced a broad range of competing interests designed to ensure that Māori would be able to participate and prosper in the business and activity of fishing. This model achieved the support of 93.1% of iwi, representing 96.7% of iwi-affiliated Māori to proceed, as well as indications of support from urban Māori organisations.[69]

This was followed by the introduction of the Māori Fisheries Act 2004. This Act set out the methodology for allocating settlement assets to iwi. Under this methodology, iwi had to meet strict criteria to be recognised to receive assets under sections 14, 15 and 21(1) under the Māori Fisheries Act 2004. These bodies are now known as Mandated Iwi Organisations (MIOs). It also established Te Ohu Kaimoana and its subsidiaries, specifically Aotearoa Fisheries Limited (now known as Moana), Te Wai Māori Trust and Te Pūtea Whakatupu (now known as Tapuwae Roa).

The Māori Commercial Aquaculture Claims Settlement Act

The Māori Commercial Aquaculture Claims Settlement Act provided a full and final settlement of all Māori claims to commercial aquaculture space since 21 September 1992. This settlement was unfinished business of the Fisheries Settlement.

Through this Settlement, the Crown provide settlement assets to Te Ohu Kaimoana Trustee Limited for distribution to Iwi Aquaculture Organisations (IAOs). An IAO is a mandated organisation authorised to act on behalf of its iwi in relation to aquaculture claims and settlement assets.

64 *Fisheries Deed of Settlement 23 September 1992, Preamble at 3.*

65 *Te Ohu Kaimoana. Māori Fisheries Strategy – Ka ora ki Tai – Ka Hua ki Uta: A Bountiful Ocean will Sustain Us 2017. (https://teohu.maori.nz/wp-content/uploads/2018/12/Maori-Fisheries-Strategy-27-February-2017.pdf, retrieved 12 March 2024)*

66 *Te Ohu Kaimoana. Weaving together our common interests in fishing: Discussion Paper – 2011. (https://www.yumpu.com/en/document/view/51751904/weaving-together-our-common-interests-in-fishing-te-ohu-kaimoana, retrieved 12 March 2024) at 9*

67 *Te Ohu Kaimoana. Weaving together our common interests in fishing: Discussion Paper – 2011. (https://www.yumpu.com/en/document/view/51751904/weaving-together-our-common-interests-in-fishing-te-ohu-kaimoana, retrieved 12 March 2024) at 10*

68 *Te Ohu Kaimoana. Weaving together our common interests in fishing: Discussion Paper – 2011. (https://www.yumpu.com/en/document/view/51751904/weaving-together-our-common-interests-in-fishing-te-ohu-kaimoana, retrieved 12 March 2024).*

69 *Te Ohu Kaimoana. Settlement History. (https://teohu.maori.nz/settlement-history/allocation-method/, 2011, retrieved 12 March 2024)*

Assets provided under this settlement must be equivalent to 20% of aquaculture space. The settlement has been delivered in 3 parts:[70]

1. The pre-commencement space settlement related to marine farming space applied for between 21 September 1992 and 31 December 2004, and involved the Crown paying cash settlement for growth that had occurred before the Settlement was decided.

2. Under an interim settlement phase from 2004 to 2011, iwi received a share of new aquaculture space within "aquaculture management areas" established by councils.

3. Under the current "new space" settlement regime, the Crown must provide iwi with settlement assets equivalent to 20% of the value of all new marine farming space created after 1 October 2011. This phase requires the Crown to deliver assets on an ongoing basis, ahead of growth occurring. It uses a forecast of anticipated growth so that iwi receive assets up front as a more usable package, rather than incrementally as growth occurs over time.

Despite what looks to be a success of the treaty of Waitangi Fisheries Settlement, Māori participation in national fisheries is confined to colonial legal structures that has created division in the way in which collective iwi, hapū govern and manage our fisheries. In her paper, Te Taiawatea Moko-Mead notes:[71]

> *The structures set up under the Deed of Settlement are essentially an invention of the Crown. As Māori, we are working with what we have within a system that is void of tino rangatiratanga, which makes it difficult, if not impossible, to achieve kaitiakitanga. It has been nearly 30 years since the Settlement, and as each year passes, Māori and Te Ohu Kaimoana continue to unravel and separate the ties of coloniality. This means that we actively work to show the inseparability of kaitiakitanga and tino rangatiratanga.*

This history of colonisation and forced subjugation of Māori tino rangatiratanga over our land and oceans has embedded hard barriers that we intend to challenge in the later chapters of this report.

Conclusion

The journey of Māori rights relating to the Ocean has been a complex and evolving process since the signing of the Treaty of Waitangi in 1840. Pre-colonisation, Māori relied heavily on the ocean for sustenance, with deep knowledge of our oceans, fisheries, and ownership systems in place to prevent exploitation – Māori had their own tikanga.

As Joe Williams states, "the focus of tikanga is in the values or fundamental precepts of Māori systems of control not the prescriptive rules or laws with which western trained lawyers are familiar."[72] The control lies in its core values and fundamental principles rather than rigid, prescriptive rules of laws commonly familiar to us within a Westminster System. Unlike legal systems that prioritise codified statues and regulations, tikanga emphasises overarching values such as whānaungatanga (kinship), mana (authority), utu/ea (reciprocity and balance), tapu/noa (sanctity and maintenance) and kaitiakitanga (obligations and responsibilities). These values guide behaviour and decision-making within Māori communities, fostering relationships, responsibility, and sustainability. The fluid nature of tikanga allows for adaptation to diverse situations while remaining rooted in its cultural context, reflecting a holistic approach to governance and societal organisation. Thus, understanding tikanga requires an appreciation for its philosophical underpinnings and relational dynamics rather than merely adhering to fixed legal statues.

The Treaty of Waitangi recognised and guaranteed these rights, but the specific nature of these rights was left undefined. Over time these rights were eroded by successive governments and legislation, and it was not until the 1980s that the government began to listen to Māori and implement measures to protect and reinstate our rights.

Despite the losses and challenges suffered by Māori since 1840, there have also been gains and changes to the status quo in favour of Māori rights. Legal cases like Te Weehi v Regional Fisheries Officer (1986) that clarified and upheld these rights, the findings of the Waitangi Tribunal in the Muriwhenua Fishing Report and the Ngāi Tahu Sea Fisheries Report further expanded the scope of Māori fishing rights, recognising both commercial and non-commercial interests.

The Fisheries Settlement stands as a landmark moment, heralding a paradigm shift in acknowledging and enshrining Māori rights within legislation, particularly in the realm of fisheries. This pivotal agreement marked the dawn of contemporary governance structures for Māori.

Overall, the journey of Māori fishing rights in New Zealand has been one of struggle, resilience, and adaptation. Through legal battles, negotiations, and a commitment to upholding our rights under tikanga, Māori have achieved significant recognition and protection for their fishing rights. However, the battles continue to ensure that these rights, which were so hard fought for, are not further eroded, or forgotten about.

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70 Ministry for Primary Industries. Māori commercial aquaculture claims settlement. (https://www.mpi.govt.nz/fishing-aquaculture/fishing-aquaculture-funding-support/maori-commercial-aquaculture-claims-settlement/, retrieved 12 March 2024)

71 Te Taiawatea Moko-Mead. Policy Analysis of Māori Customary Fishing in Aotearoa. (Unpublished manuscript, University of Melbourne, 2021)

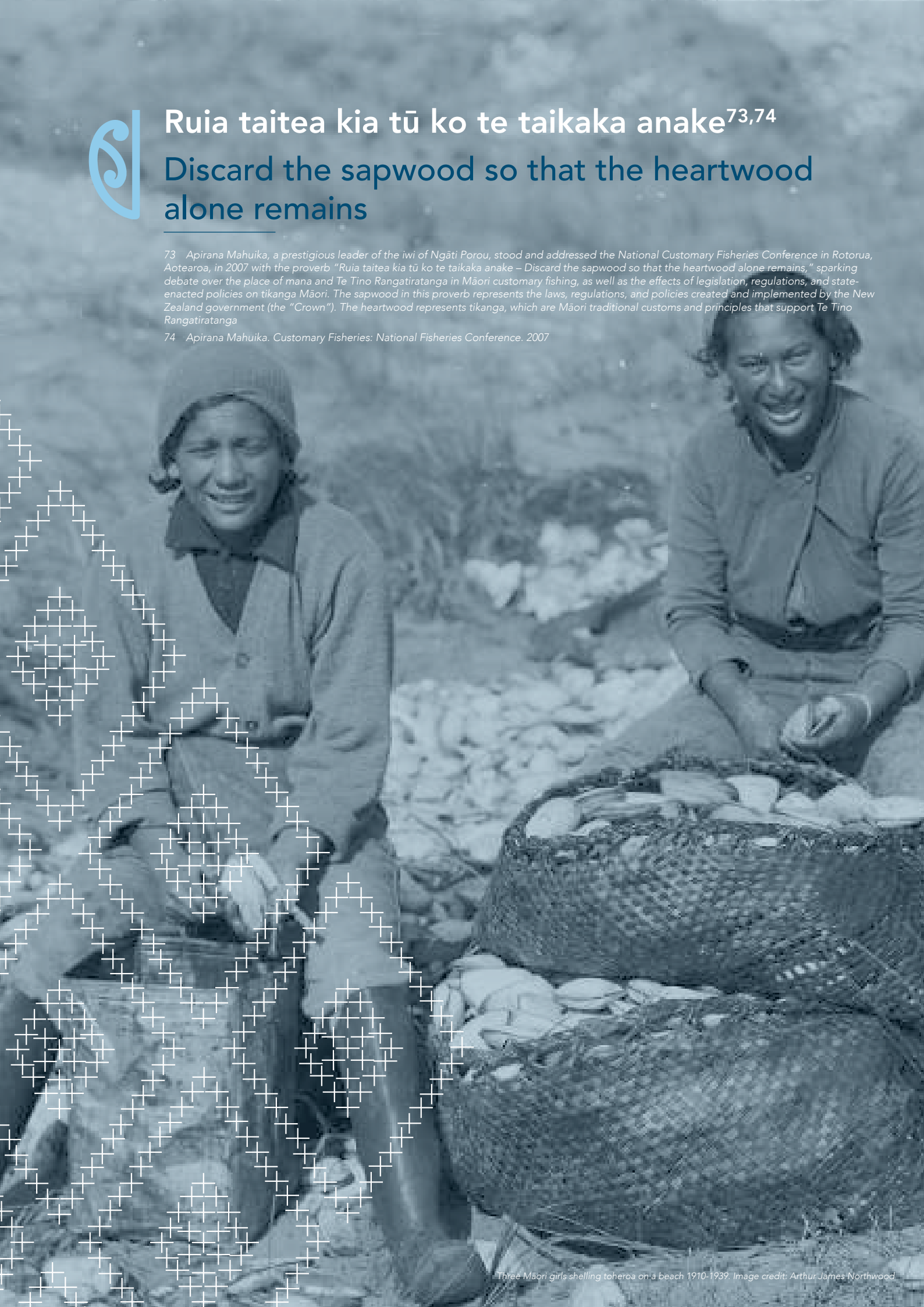
72 https://www.lawcom.govt.nz/assets/Publications/Supplementary/NZLC-SP9-unpublished-revised-draft-paper-David-Williams-1998.pdf

Ruia taitea kia tū ko te taikaka anake[73,74]

Discard the sapwood so that the heartwood alone remains

73 Apirana Mahuika, a prestigious leader of the iwi of Ngāti Porou, stood and addressed the National Customary Fisheries Conference in Rotorua, Aotearoa, in 2007 with the proverb "Ruia taitea kia tū ko te taikaka anake – Discard the sapwood so that the heartwood alone remains," sparking debate over the place of mana and Te Tino Rangatiratanga in Māori customary fishing, as well as the effects of legislation, regulations, and state-enacted policies on tikanga Māori. The sapwood in this proverb represents the laws, regulations, and policies created and implemented by the New Zealand government (the "Crown"). The heartwood represents tikanga, which are Māori traditional customs and principles that support Te Tino Rangatiratanga

74 Apirana Mahuika. Customary Fisheries: National Fisheries Conference. 2007



Three Māori girls shelling toheroa on a beach 1910-1939. Image credit: Arthur James Northwood

PUSH OF THE PRESENT - MĀORI CUSTOMARY FISHING

The non-commercial fishing regime

The 1992 Fisheries Deed of Settlement laid the groundwork for New Zealand's customary fishing regime. In the Deed it states that:[75]

> *The Crown and Māori agree that in respect of all fishing rights and interests of Māori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Māori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in criminal, regulatory or other proceedings). Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of requests by Māori to the Government or initiatives by Government in consultation with Māori to develop policies to help recognise use and management practices of Māori in the exercise of their traditional rights.*

The aforementioned is implemented in accordance with section 10(d) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. This section of the Act specifies the Crown's responsibilities to Māori, including the enactment of regulations acknowledging and facilitating customary food gathering practices, as well as the unique connection between tāngata whenua and significant sites for such gatherings. Furthermore, it dictates that such food gathering activities must not have any commercial aspect or involve profit-making or trade.

In 1992 the Crown agreed to work with Māori on developing regulations for customary non-commercial fishing as per section 10 of the Settlement Act. Iwi and hapū leaders met in 1994 to agree on how Māori and the Crown would co-design customary national regulations, with the minimum requirement that the regulations should give expression to tino rangatiratanga over customary fisheries. In addition, iwi and hapū leaders at the meeting resolved that following the development of the regulations, any alteration or amendment would not proceed without the prior consent of iwi.[76]

During this time, the Treaty of Waitangi Fisheries Commission (the predecessor to Te Ohu Kaimoana) assisted iwi and hapū leaders in the development of the regulations by organising and facilitating national and regional hui. It also provided draft regulations and recommendations for further negotiation between the parties in the Crown-Māori working group that was established to co-design the regulations. One of the core recommendations of the Treaty of Waitangi Fisheries Commission at the time was that the regulations must "provide for greater environmental management by Māori" due to the Crown's failure to protect fisheries resources and fishes' aquatic environments, as guaranteed by Te Tiriti.[77]

However, the Crown-Māori working group's negotiations collapsed, and the Crown enacted the Fisheries (Kaimoana Customary Fishing) Regulations 1998 (Kaimoana Regulations) and other customary regulations under Section 186 of the Fisheries Act 1996. Additionally, given the timing of the negotiation collapse, this triggered the Ngāi Tahu Deed of Settlement to establish separate regulations for the management of customary fisheries in the South Island.[78]

Excluding customary fisheries arrangements ratified under individual Treaty settlements, the management of customary fishing in New Zealand is governed by the following regulations:

- Fisheries Act 1996 – sections 174, 186, 186A and 186B.
- Fishing (Amateur Fishing) Regulations 2013 – sections 50, 51 and 52.
- Fisheries (Kaimoana Customary Fishing) Regulations 1998.
- Fisheries (South Island Customary Fishing) Regulations 1999.

More information related to each of these mechanisms is outlined below.

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75 Fisheries Deed of Settlement 23 September 1992 at 21.

76 Te Taiawatea, Moko-Mead. Policy Analysis of Māori Customary Fishing in Aotearoa. (Unpublished manuscript, University of Melbourne, 2021)

77 Caren, Wickliffe. The Co-Management of Living Resources and Māori Customary Fishing Rights. (Indigenous Land Use Agreements Conference, 1995) at 68-91, at 88.

78 e Rūnanga o Ngāi Tahu. Māhinga Kai. (https://ngaitahu.iwi.nz/ngai-tahu/the-settlement/settlement-offer/cultural-redress/ownership-and-control/mahinga-kai/#Customary, 2022, retrieved 12 March 2024).

Fisheries Act 1996 – section 174 – Taiapure Local Fisheries and Customary Fishing

Introduced in the Māori Fisheries Act 1989 a taiāpure is a local management tool that was created to ensure "better provision of the recognition of rangatiratanga and the right secured to fisheries by Article II of the Treaty of Waitangi."[79] Taiāpure can be formed over estuary or littoral coastal waters of New Zealand fisheries that have been important to any iwi or hapū for dietary, spiritual, or cultural reasons.

All types of fishing can occur within a Taiāpure: commercial, recreational, and customary. The management committee decides who can stipulate the rules, but it is the responsible Minister of Fisheries that must approve them.

Following a rigorous application and objection process, the Minister may recommend to the Governor-General the declaration and establishment of a taiāpure. Once declared, the Minister, in consultation with the Minister of Māori Affairs, appoints a management committee for the taiāpure. This committee represents the broader community and not solely tangata whenua.

It is this limited ability for tāngata whenua to assert rangatiratanga that creates dissatisfaction with the taiāpure mechanism. Wickliffe describes that within the legislation, taiāpure were "not a special fishing regime for iwi, hence must not discriminate against people on the grounds of "colour, race, ethnic or national origins."[80] However, some consider that taiāpure are indeed crafted as special settlement tools specifically addressing iwi rights and interests, while simultaneously being obligated to uphold non-discriminatory principles. Tāngata whenua also can provide recommendations to the Minister underscoring the significant involvement of iwi in the decision-making process, as the Minister typically adheres to the committee's recommendations in most cases.

Fisheries Act 1996: Temporary closures - sections 186A and 186B

The 1996 Fisheries Act has two provisions for temporary closures. Section 186A governs all other New Zealand fisheries waters, whereas Section 186B governs South Island fisheries waters (as defined in section 297 of the Ngāi Tahu Claims Settlement Act 1998).

Section 186A gives the responsible Minister the authority to temporarily close any area of New Zealand fisheries waters (other than South Island fisheries waters) to protect any species of fish, aquatic life, or seaweed, or to restrict or prohibit the use of any fishing method in that same area and for any species of fish, aquatic life, or seaweed. The Minister may only impose such closures, limits, or prohibitions if they can recognise and make provisions for tāngata whenua use and management practices to exercise their non-commercial fishing rights. The Minister may provide for these rights by increasing the availability or size (or both) of a species of fish, aquatic life, or seaweed in the area subject to the closure, restriction, or prohibition or by recognising customary fishing practices in that area.[81]

If instated, temporary closures last for two years. If resources have not recovered within that time, a request can be made for the closure to be reinstated. The provisions do not specify how often a temporary closure can be 'rolled over'. The effectiveness of reinstating temporary closures depends on the commitment of the relevant applicant group/authority to submit requests when necessary, highlighting the conditional nature of the reinstatement process. If a temporary closure is reapplied for, an assessment is carried out by the responsible Ministry at the conclusion of each two-year period against the necessary criteria. As of January 2023, three temporary closures were gazetted in the South Island, and eight in the North Island.[82]

Fishing (Amateur Fishing) Regulations 2013 – sections 50, 51, 52 and 66

For areas where neither the Kaimoana nor the South Island regulations are in effect, Regulation 50 of the Fisheries (Amateur Fishing) Regulations 2013 (Amateur Fishing Regulations) enables the customary gathering of fish, aquatic life or seaweed for hui or tangi. Regulation 50 provides that a person wanting to gather seafood must be issued with a customary authorisation under Regulation 51 by a person or organisation approved as an authorised representative by the responsible chief executive. The persons and organisations able to issue authorisations under Regulation 50 are:

- a marae committee, whether incorporated or not, that is established to manage or operate a marae;
- Māori Committee constituted by or under the Māori Community Development Act 1962;
- rūnanga, whether incorporated or not;
- Māori Trust Board within the meaning of the Māori Trust Boards Act 1955.

These authorised representative groups must represent the tāngata whenua of the area to which the authorisation relates.

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79 Fisheries Act 1996, s 174

80 Caren, Wickliffe. The Co-Management of Living Resources and Māori Customary Fishing Rights. (Indigenous Land Use Agreements Conference, 1995) at 68-91, at 76

81 Fisheries Act 1996, s 186A.

82 Ministry of Primary Industries. NABIS - National Aquatic Biodiversity System. Retrieved from NABIS - National Aquatic Biodiversity System. (https://maps.mpi.govt.nz/templates/MPIViewer/?appid=96f54e1918554ebbaf17f965f0d961e1, retrieved on January 24 2023).

Regulation 52 enables the taking of fish, aquatic life, or seaweed for a specific traditional non-commercial fishing use approved by the responsible chief executive, and following any conditions considered necessary by the responsible chief executive for the overall conservation and management of the fishery concerned. The chief executive may, in writing, delegate the power to approve a traditional non-commercial fishing use to 1 or more of the following:

- Māori Committee constituted by or under the Māori Community Development Act 1962;
- a marae committee that is an incorporated society under the Incorporated Societies Act 1908;
- any kaitiaki of the tāngata whenua

Fisheries (Kaimoana Customary Fishing) Regulations 1998 and the Fisheries (South Island Customary Fishing) Regulations 1999

The Fisheries (Kaimoana Customary Fishing) Regulations 1998 and the Fisheries (South Island Customary Fishing) Regulations 1999 (South Island Regulations) enable tāngata whenua to exercise customary management of all marine and freshwater fisheries resources in their rohe. The South Island Regulations apply to South Island fisheries waters, and the Kaimoana Regulations apply to all other New Zealand fisheries waters (North Island and the Chatham Islands).

While it had been the intention of the government at the time to promulgate one set of customary fishing regulations for the entire country following the Fisheries Settlement, those regulations were unable to be finalised due to differences of opinion between the Crown and the Māori Working Party that was appointed by iwi.[83]

During the Ngāi Tahu Deed of Settlement, Ngāi Tahu and the Crown negotiated the inclusion of regulations for the management of customary fisheries in the South Island, to be put in place within three months of their settlement legislation being enacted if national regulations were not in place at that time. National regulations were not implemented in time, meaning different regulations were introduced for the customary management of the South Island fisheries waters.[84]

Both sets of regulations provide for the following:

- The appointment of persons as Tangata Kaitiaki/Tiaki. In the case of the South Island, ngā rūnanga now appoint Tangata Tiaki in their respective takiwā, and the Minister approves the rohe moana.
- A system for appointed Kaitiaki (or, in the South Island Regulations, Tangata Tiaki) to authorise individuals to take fisheries resources within their rohe for customary food gathering purposes.
- The establishment of mātaitai reserves, which in the instance of the North Island, are areas over which commercial fishing is prohibited. In the South Island there are options for nominating bodies to develop conditions to exempt certain fishing and fishing activities (processing, landing) upfront and these are 'baked in' to the mātaitai through the gazette notice. The Kaitiaki/Iwi (North Island) or nominating bodies (South Island) have management control to recommend bylaws to the Minister.
- The participation of Kaitiaki in fisheries management.

Within these provisions are several mechanisms in which the Minister must play a role in the notification (i.e. for rohe moana, mātaitai, and for the North Island the appointment of Kaitiaki), public consultation, confirmation and declaration process outlined in the regulations. In addition, two provisions within the regulations enable Kaitiaki to provide input into and participate in setting or varying sustainability measures, or developing management measures concerning the whole or any part of the customary gathering area/rohe moana for which they have been appointed. This is done:

a) by requiring that Kaitiaki provide the Ministry for Primary Industries with summaries of all authorisations (a summary of fish authorised and taken at a QMA scale) they have issued, and all fisheries resources taken according to those authorisations. Under the Kaimoana Regulations these reports are required quarterly, while under the South Island Regulations, the reporting period can be negotiated, and

b) by preparing a management plan or strategy for the customary gathering area/rohe moana for which they have authority, that the Minister must consider.

The implementation of these regulations has taken time. 20 years after the introduction of these regulations, 62% of New Zealand's coastline was under customary regulations. 644 kaitiaki/tangata tiaki had been appointed, and 44 mātaitai had been established (please note that these figures may vary in 2024). Six regional forums had been established to enable the input and participation of tāngata whenua in sustainability measures.[85] Additionally, notifying bodies, iwi and Tangata Kaitiaki/Tiaki engage directly with the responsible government department when needed.

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83 Caren, Wickliffe. The Co-Management of Living Resources and Māori Customary Fishing Rights. (Indigenous Land Use Agreements Conference, 1995) at 68-91, at 91

84 Te Rūnanga o Ngāi Tahu. Māhinga Kai. (https://ngaitahu.iwi.nz/ngai-tahu/the-settlement/settlement-offer/cultural-redress/ownership-and-control/mahinga-kai/#Customary, 2022, retrieved 12 March 2024).

85 Fisheries New Zealand. Hi Ika: Customary Fisheries still thriving. (Fisheries New Zealand publication, Spring 2019).

Significant challenges have arisen in the application of these regulations, notably stemming from instances of overlapping interests, a deficit in practical dispute resolution mechanisms within the framework, and notable opposition from commercial interests, including the objection from Te Ohu Kaimoana in past instances, regarding the establishment of mātaitai reserves. These hurdles underscore the importance of fostering collaboration and dialogue to address and mitigate conflicts, ensuring effective implementation and sustainable management of customary fishing resources.

The non-commercial fishing regime - observations

It has been over thirty years since the signing of the Settlement. Moko-Mead describes that while there has been some progress to better recognise and provide for Māori customary fishing rights (i.e. through the United Nations Declaration on the Rights of Indigenous People and the Waitangi Tribunal's landmark report 'Ko Aotearoa Tēnei'), the ability for Māori to fully exercise their customary fishing rights continues to be suppressed by settler-colonial policies introduced by the Crown to retain power and control.[86] Moko-Mead's position is supported by Bennett-Jones and others, who states:

> *Although New Zealand has created a legal framework that recognises Māori fishing rights, the extent to which rangatiratanga is provided remains a challenge for the Crown in truly providing for local management by iwi and hapū at a local level.*[87]

This reality highlights the need for continued effort and investment from Māori communities, recognising that the rewards may not always be immediate but are contingent upon proactive engagement. Some consider it crucial to acknowledge that post-settlement life entails a shift towards more practical approaches rather than reverting to pre-settlement theoretical discussions or legal uncertainties. This is particularly pertinent amidst environmental changes, such as the impact of unaddressed sedimentation, underscoring the importance of navigating these challenges within the framework of settlement agreements.

Power and Authority regarding the customary fishing rights

There are diverse viewpoints regarding the implementation of customary fishing rights in Aotearoa. The Taiāpure and Fisheries (Kaimoana Customary Fishing) Regulations 1998 exemplify a complex interplay of power and authority. Notably, the process for establishing taiāpure and introducing regulations stipulates those decisions "may only be made by the Minister."[88] However, it is important to acknowledge that the Settlement mandates independent third-party assessment based on specific criteria, ensuring a balanced decision-making process.

Taiāpure Management committees are typically perceived to have limited authority, primarily serving in an advisory capacity.[89] Moreover, the public hearing process during taiāpure establishment may expose Māori fishing rights under Article II to objections from other community members, suggesting a degree of constraint on te tino rangatiratanga of iwi and hapū.[90] However, recent developments indicate a shifting dynamic where Customary Protection Area managers in the South Island, empowered by Fisheries New Zealand (the current Ministry responsible for fisheries), are increasingly entrusted with decision-making responsibilities. Ministers have yet to decline fishing regulation recommendations, attributing success to proactive efforts and growing autonomy within Māori communities.[91]

The benefits from the fisheries settlement have cultivated grassroots capabilities and self-confidence among communities in some areas, particularly in the South Island, and have proven instrumental in stimulating productive outcomes.[92]

Unlike the South Island Regulations, which to this day has allowed South Island iwi to co-develop and update the regulations, the Kaimoana Regulations included concessions and compromises that excluded iwi and hapū from endorsing the final 1998 regulations. These compromises included the Minister appointing tāngata kaitiaki/tiaki, confirming customary areas of interest, and determining whether customary tools could be implemented through public consultation.[93] While some might find these compromises offensive, some consider that having the Minister act as a third-party arbitrator between applicants and the opposing submitters is critical, given the potential

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86 Te Taiawatea, Moko-Mead. Fishing as an expression of kaitiakitanga and tino rangatiratanga. (Unpublished manuscript, University of Melbourne, 2021)

87 Louise, Bennett-Jones; Gaya, Gnanalingam; Bredan, Flack; Nigel J,Scott; Paul, Chambers; Chris, Hepburn. Constraints to effective co management of New Zealand's customary fisheries: experiences of the East Otago Taiāpure. (Ecology and Society, 2022) at 27(4):38

88 Fisheries Act 1996, s176(1).

89 Louise, Bennett-Jones,; Gaya, Gnanalingam; Bredan, Flack; Nigel J,Scott; Paul, Chambers; Chris, Hepburn. Constraints to effective co-management of New Zealand's customary fisheries: experiences of the East Otago Taiāpure. (Ecology and Society, 2022) at 27(4):38; Caren, Wickliffe. The Co-Management of Living Resources and Māori Customary Fishing Rights. (Indigenous Land Use Agreements Conference, 1995) at 68-91

90 Caren, Wickliffe. The Co-Management of Living Resources and Māori Customary Fishing Rights. (Indigenous Land Use Agreements Conference, 1995) at 68-91; Anne Marie, Jackson. Erosion of Māori fishing rights in customary fisheries management. (Waikato L. Rev, 2013), 21-59; Te Kāhui o Te Ohu Kaimoana. The evolution of our customary rights. (Te Korowai o Tangaroa | Hōtoke 2021) at 12-15

91 Anonymous 1. Tangaroa Ararau: Phase II Focus Area Report Review. (Reviewer, October 2023).

92 Anonymous 1. Tangaroa Ararau: Phase II Focus Area Report Review. (Reviewer, October 2023).

93 Te Taiawatea, Moko-Mead. Policy Analysis of Māori Customary Fishing in Aotearoa. (Unpublished manuscript, University of Melbourne, 2021); Te Kāhui o Te Ohu Kaimoana. The evolution of our customary rights. (Te Korowai o Tangaroa | Hōtoke 2021) at 12-15

for significant judicial reviews in the High Court.

In assessing the efficacy of the current customary fishing regime in upholding rangatiratanga under Article II of Te Tiriti and tikanga Māori, Anonymous expresses reservations, noting a perceived disparity between intent and delivery:[94]

> *Probably not - Whilst the intent is there, delivery can be a lot more..and it's going back to the way that we view customary fishing. We understand what happens on that coastline, we understand the need to stop pollution, we understand the taiao. And yet to have the Minister make decisions, you know the position that he has is sits in Wellington and.. [inaudible]..obviously he's got a bank of advisors, and yet we don't often see those advisors talking to our own people. So, the priorities obviously, are commercial fishing, recreational fishing. When it comes to customary, there's very little interaction at that level. A clear example would be all of a sudden, MPI have taken a hands off in terms of support for our forum and we are sitting there going 'Hey, we are still here!*

Nganeko Minhinnick expresses that "Only tāngata whenua can be kaitiaki, can identify kaitiaki, can determine the form and structure of kaitiaki."[95] However, within the context of the Kaimoana Regulations, the term tangata kaitiaki has seen dilution, with the Crown assuming the authority to appoint kaitiaki. This centralised control over regulations has led some iwi and hapū to reject their management under the Kaimoana Regulations, citing concerns over the constriction of tino rangatiratanga and the inability to manage fisheries according to tikanga.

In response to these complexities, South Island perspectives acknowledge the challenges inherent in navigating settlement legislation and emphasise the need to adapt and make the best of the situation. Despite the inherent messiness and all the complications, there is recognition of progress, and evolving influence on both central and local government spheres.

Furthermore, the suppression of recreational fishing advocacy groups in the south, as noted by Anonymous[96], has helped to mitigate damage to local stocks. This suppression, although controversial, has arguably helped to preserve fisheries in the southern region, compared to the significant depletion observed in North Island stocks due to unchecked growth in recreational fishing.

Acknowledgement of Indigenous Knowledge

Parsons and others conduct a systematic review of the literature on Indigenous peoples' involvement in marine governance and management.[97] Of the six papers (out of thirty-three selected for the study) that investigated Indigenous knowledge, only three demonstrated Indigenous knowledge in the context of Indigenous environmental management practices. Additionally, these papers perceived Indigenous knowledge as a source of ecological information that could be extracted and used to 'fill the gap' for western scientific knowledge about biophysical phenomena, rather than as a knowledge system that weaves "Indigenous worldviews, values, norms, governance structures and environmental management approaches." The authors conclude that this lack of recognition and understanding of Indigenous knowledge and worldviews by governments, academics, resource planners and others within the marine governance and management regimes contributes to "environmental injustices for Indigenous communities through misrecognition."[98]

These perceptions of indigenous knowledge by governments and other players in marine governance and management arrangements remain prominent today in Aotearoa, as exemplified by Bennett-Jones and others. The authors discuss some of the difficulties that the East Otago Taiāpure Committee faced when applying for additional fisheries management measures for pāua that aligned with the mātauranga and tikanga of the tāngata whenua and customary fishers of the area. These additional measures were proposed as the regulatory mechanisms offered in the statute were insufficient to address the area's serial depletion of pāua stocks.[99]

Customarily, inshore shellfish were targeted and harvested by tāngata whenua through wading, while the deeper populations that were out of reach were left alone. Bennett-Jones and others interviewed several customary fishers who emphasised the success of this method and proved it through the historical abundance of pāua and recent concerns about the sustainability risk of the stock (despite several management measures and research/monitoring programmes in place).

Accordingly, the East Otago Taiāpure Committee proposed a wade-only regulation as a "simple-to-understand way" to return to customary methods of gathering seafood, conserving pāua in deeper areas while maintaining some access and associated tikanga.

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94 Anonymous 2. Tangaroa Ararau: Phase II Focus Area Report. (Interviewed, August 2023).

95 Nganeko Minhinnick. Establishing kaitiaki: A Report prepared for the Resource Management Law Reform. (Auckland, 1989)

96 Anonymous 1. Tangaroa Ararau: Phase II Focus Area Report Review. (Reviewer, October 2023).

97 Meg, Parsons; Lara, Taylor; Roa, Crease. Indigenous environmental justice within marine ecosystems: A systematic review of the literature on indigenous peoples' involvement in marine governance and management. (Sustainability, 2021) 13(4), 4217.

98 Meg, Parsons; Lara, Taylor; Roa, Crease. Indigenous environmental justice within marine ecosystems: A systematic review of the literature on indigenous peoples' involvement in marine governance and management. (Sustainability, 2021) 13(4), 4217.

99 Louise, Bennett-Jones,; Gaya, Gnanalingam; Bredan, Flack; Nigel J,Scott; Paul, Chambers; Chris, Hepburn. Constraints to effective co management of New Zealand's customary fisheries: experiences of the East Otago Taiāpure. (Ecology and Society, 2022) at 27(4):38

Ultimately, this proposal was opposed by the Ministry of Primary Industries (MPI) because "a closure would be far easier to enforce than the proposed wading fishery regulations."

Unable to proceed with the wading proposal, the committee proposed to close the fishery entirely, which was readily accepted by MPI.[100] The hastiness in accepting a full closure to all fishing, instead of constraining access through customary practices, highlights how colonial mechanisms continue to be favoured over realigning with tikanga Māori in Aotearoa. This is also worrying given the findings from the Waitangi Tribunal's "Ko Aotearoa Tēnei" report note that it is the responsibility of the Government to work with Māori "to protect taonga species[101], taonga works[102] and mātauranga Māori." Despite having a legal mechanism designed to recognise and provide for customary values and practices, and clear responsibility to work with Māori to protect taonga species and mātauranga, MPI's readiness to accept a colonial fisheries mechanism over a tikanga mechanism demonstrates a continued unwillingness to accept te ao Māori and honour Te Tiriti.

On the contrary, some view that such decisions often stem from practical considerations, such as ease of enforcement, rather than a deliberate disregard for Māori values.[103] Nevertheless, the implementation of a rāhui or 'closure' through taiāpure regulations offers an alternative approach, albeit one born out of necessity due to lack of support for the initial proposal. The trial of a permitting system for community fishing of pāua under Tangata Tiaki authorisations is seen as valuable, potentially paving the way for the introduction of licensing for recreational fishing in the long-term. This adaptive approach reflects an ongoing journey towards empowering kaitiakitanga at the appropriate spatial scale, acknowledging that the concept of autonomy and cultural preservation evolves with each generation's expectations and experiences.

Moko-Mead, and Bennett-Jones and others have deliberated on the Crown's rationale for the dilution or refusal to adopt proposals that centre kaitiakitanga, tikanga Māori and mātauranga from customary fisheries management and advisory organisations.[104] Both authors find that dilution or refusal is due to political unacceptability of the regulations with the general public and other sector interest groups, and fear of precedence setting within other sectors. However, underpinning this rationale is the deep-rooted issue of the Crown's discomfort with devolving power to regulate and manage customary fishing to Māori.

Nevertheless, it is important to recognise differing perspectives on this matter. Some argue that the Crown's reticence stems from a deeply ingrained reluctance to relinquish regulatory power, fearing precedent-setting implications. Others, however, contend that these concerns are overblown and that accommodating Māori customary practices could enrich New Zealand's fisheries management approach. Despite these tensions, the work persists, driven by a steadfast commitment to progress.

Pātaka

One of the developments that complements the existing customary fisheries framework has been the establishment of Pātaka, which is one of the many purposes Tangata Kaitiaki/Tiaki authorise for. When requested by authorised tāngata whenua groups, a pātaka system uses commercial boats for customary catch, transferring the catch to a large food store or freezer to preserve the kaimoana to supply for hui (meetings), tangi (funerals) and other customary purposes. The value of Pātaka, both big and small, came to light during the COVID-19 lockdown in 2020. A no-fishing regulation was enforced nationwide and applied to all individuals during the lockdown. In this instance, iwi all around the country partnered with seafood companies to supply kaimoana to whānau in need as commercial food providers were considered essential services; hence, the pātaka system was also able to operate.[105]

Although the pātaka concept has been around for a long time (with the initiative developed by tāngata whenua), the benefits are highlighted when fishing is prohibited, i.e. during a pandemic, poor weather conditions, and marine and fisheries closures. It also provides an opportunity for iwi to reinstate their customary fishing right in the deep sea, as evidenced through the establishment of the Deepwater Pātaka, governed and managed by Te Taihauāuru iwi and Sealord Group Limited.[106] Pātaka provides a mechanism for Māori to exercise customary commercial and non-commercial fishing rights in a balanced and integrated way and within a tribal framework that meets our collective needs

100 Louise, Bennett-Jones,; Gaya, Gnanalingam; Bredan, Flack; Nigel J,Scott; Paul, Chambers; Chris, Hepburn. Constraints to effective co management of New Zealand's customary fisheries: experiences of the East Otago Taiāpure. (Ecology and Society, 2022) at 27(4):38

101 Taonga species: the species of flora and fauna for which an iwi, hapū, or whānau says it has kaitiaki responsibilities (Tribunal, 2011)

102 Taonga works: the unique artistic and intellectual expressions of te ao Māori that include the work of weavers, carvers, tohunga tā moko, writers, musicians, and others – and their associated mātauranga Māori (Tribunal, 2011)

103 Anonymous 2. Tangaroa Ararau: Phase II Focus Area Report. (Interviewed, August 2023).

104 Te Taiawatea, Moko-Mead. Policy Analysis of Māori Customary Fishing in Aotearoa. (Unpublished manuscript, University of Melbourne, 2021); Louise, Bennett-Jones,; Gaya, Gnanalingam; Bredan, Flack; Nigel J,Scott; Paul, Chambers; Chris, Hepburn. Constraints to effective co management of New Zealand's customary fisheries: experiences of the East Otago Taiāpure. (Ecology and Society, 2022) at 27(4):38

105 Te Kāhui o Te Ohu Kaimoana. Deepwater Pātaka: Providing kaimoana for when we can't fish. (Te Korowai o Tangaroa | Hōtoke 2021) at 18-19

106 Te Kāhui o Te Ohu Kaimoana. Deepwater Pātaka: Providing kaimoana for when we can't fish. (Te Korowai o Tangaroa | Hōtoke 2021) at 18-19

in a modern context.[107] As quoted by Anonymous when asked if Pātaka has been beneficial in providing for customary purposes:[108]

> *You definitely can sense the benefits that come from it... So recently we had 100 kilos of fish in the pataka and that came in time for a couple of tangi and more soon. So, it has some real good benefits, so that's Pataka.*

In the face of the current climate crisis and significant decline in the biodiversity of ecological systems, returning resource management to people and places offers an opportunity to preserve and restore biological and cultural diversity simultaneously.[109] As written, the existing customary governance and management framework serves the Crown. A fundamental and transformative shift in process is urgently needed, to better support Te Tiriti compliance, the restoration of tikanga Māori and our taonga tuku iho (i.e. customary fisheries). It is only fitting that this shift is led by Māori, for Māori, as this will benefit all. This has arguably already been happening with the South Island Regulations, underpinned by the Ngāi Tahu Settlement.

Conclusion

The issue of customary fishing rights in Aotearoa New Zealand represents a complex interplay of historical injustices, legal frameworks, cultural values, and contemporary politics. As we delve into the nuances of this topic, it becomes evident that the journey towards empowering Māori communities and upholding Te Tiriti o Waitangi is far from straightforward.

One prominent challenge is the dilution of key tikanga like tino rangatiratanga and kaitiakitanga. Despite over three decades since the signing of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, settler-colonial policies continue to constrain the full exercise of Māori customary fishing rights, albeit to different extents under the various customary regimes. For the Kaimoana Regulations, the Crown's reluctance to devolve power and authority, exemplified by the centralisation of decision-making in the hands of the Minister, restricts iwi and hapū from managing their fisheries according to their own tikanga. Nonetheless, this is slowly changing for the South Island given recent review of the Regulations, which devolve power back to notifying authorities. This situation reflects the complexity and ongoing struggle for the recognition and equitable expression of Indigenous rights and self-determination for Māori across Aotearoa.

Additionally, the acknowledgement of Indigenous knowledge remains a significant issue. Indigenous knowledge is often perceived as a mere source of ecological information to supplement Western scientific knowledge, rather than a holistic system that integrates Indigenous worldviews, values, norms, governance structures, and environmental management approaches. This misrecognition perpetuates environmental injustices for Indigenous communities and hinders the incorporation of traditional practices into modern fisheries management.

Despite these challenges, there are positive components within the existing customary fisheries regime. Initiatives like the Pātaka system have provided opportunities for Māori to exercise our customary fishing rights in a balanced and integrated way, particularly during times when fishing is prohibited. Pātaka not only helps preserve cultural practices but also contributes to meeting community needs.

In the face of the current climate crisis and the declining biodiversity of ecological systems, there is an urgent need for a more equitable customary governance and management framework to better align with Te Tiriti and restore tikanga Māori. Much can be learned from the establishment and evolution of the South Island Regulations, in order to reframe the customary fishing regime for the North Island.

The issue of customary fishing rights in Aotearoa New Zealand is characteristic of broader challenges surrounding indigenous rights, sovereignty, and reconciliation. By centering Māori perspectives and values, and embracing a collaborative approach grounded in the Te Tiriti o Waitangi, there is an opportunity to forge a more just and equitable future where Māori can exercise our customary fishing rights in accordance with tikanga Māori, and where the Crown honours its obligations as a Treaty partner. This journey towards empowerment and reconciliation will require courage, humility, and a genuine commitment to justice and partnership.

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107 Although it must be noted that under the Fisheries Act 1996, under s192, approval from Fisheries New Zealand is required to hold customary fish at a Licenced Fish Receiver, if that is the pātaka facility. However, this is not the case with marae or whānau freezers.

108 Anonymous 2. Tangaroa Ararau: Phase II Focus Area Report. (Interviewed, August 2023).

109 IPBES. Media Release: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating'. (Retrieved from Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES): https://www.ipbes.net/news/Media-Release-Global-Assessment#2-Indigenous, 2019); United Nations. (2007). United Nations Declaration on the Rights of Indigenous Peoples. (Retrieved from United Nations 12 March 2024: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html)

Ka pū te rūhā, ka hao te rangatahi
When the old net is exhausted, the new net goes fishing

PUSH OF THE PRESENT – MĀORI COMMERCIAL FISHING

The current state

The Fisheries Act 1996 is the statutory basis for Aotearoa New Zealand's fisheries management, in which its purpose is "to provide utilisation of fisheries resources while ensuring sustainability."[110] In addition, there are several environmental and information principles that fisheries decision-makers must consider. There are also obligations to act in a manner consistent with New Zealand's international fishing commitments and the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (Fisheries Claims Settlement Act), which recognises and provides for Māori customary (commercial and non-commercial) fishing rights.[111]

The critical mechanism within the Fisheries Act 1996 for fisheries management is the Quota Management System (QMS). Each species managed under the QMS splits into stock areas, for which a "total allowable catch" (TAC) is set by the Minister for Oceans and Fisheries.[112] The legislation requires TACs to be set at or above a level that can produce maximum sustainable yield.[113] In addition, the TAC provides allowances for customary Māori fishing, recreational fishing, and other fishing-related mortality sources before allocating the remaining portion to the total allowable commercial catch (TACC).[114]

Separate management regimes exist for each fisheries sector. The commercial sector is managed through Individual Transferable Quota (ITQ), which gives exclusive rights and is carefully regulated with routine reporting. The customary Māori (non-commercial) fishery devolves management to Māori groups or communities over defined customary fishing areas. Customary Māori fisheries have exclusive rights provided for under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and, through the regulations, must provide routine reports to the responsible fisheries Ministry. The recreational fishery is open access and is managed through regulations which determine daily bag limits, size limits, closed areas, closed seasons, etc. Rights are held in common, and the sector is not obligated to routinely report.[115]

The Fisheries Act 1996 is enacted through a framework of legislation, regulation, and Gazette notices, and sets the TAC as the central sustainability measure.

Decision-making in the QMS

Under the QMS, the decision-making rests primarily with the responsible Minister for Oceans and Fisheries. The Minister sets a Total Allowable Catch (TAC) which provides allowances for customary Māori fishing, recreational fishing, and other fishing-related mortality sources (including illegal fishing) before allocating the remaining portion to the total allowable commercial catch (TACC).

These decisions are, for the most part, guided under the requirements of section 13 of the Act, which seeks to ensure that the biomass of a fish stock is large enough to support catch levels at (or less than) the maximum sustainable yield (MSY). The MSY is the largest catch that can be safely sustained over time while maintaining the stock's productive capacity.

In practice, there is a myriad of complicating factors (including difficulties in estimating fish populations, lack of robust data, and competing sector interests) that impact the effectiveness of this regime.

Determining MSY is an information-intensive process. Robust research is required to set meaningful targets and limits each fishing year. If these resources are to be managed using TACs based on MSY (or some other index for sustainability), the supporting research must be sound and subject to rigorous peer review.

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110 Fisheries Act 1996, s 8

111 Fisheries Act 1996, s 5 (a)(b)

112 Ministry of Primary Industries. Quota Management System. (Retrieved on 17 March 2024 from https://www.mpi.govt.nz/fishing-aquaculture/fisheries-management/quota-management-system/, 2020)

113 Ministry of Primary Industries. Quota Management System. (Retrieved on 17 March 2024 from https://www.mpi.govt.nz/fishing-aquaculture/fisheries-management/quota-management-system/, 2020)

114 Ministry of Primary Industries. Quota Management System. (Retrieved on 17 March 2024 from https://www.mpi.govt.nz/fishing-aquaculture/fisheries-management/quota-management-system/, 2020)

115 Lynne Zeitlin, Hale & Jeremy, Rude. Learning from New Zealand's 30 Years of Experience Managing Fisheries Under a Quota Management System (Arlington, Virginia, USA: The Nature Conservancy, 2017) at 22; Michael, Harte. Assessing the road towards self. Case studies in fisheries self-governance at (504) 323. (2008).

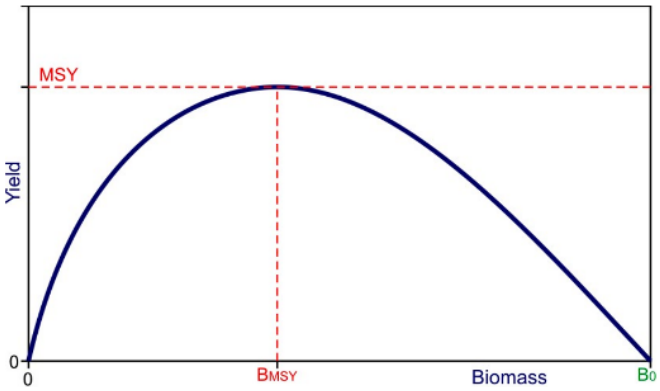

Figure 4: Bmsy: long-term average biomass of a fishstock that can maintain the maximum sustainable yield[116]

Individual transferrable quota (ITQ) gives the owner a proportionate share of a fishery. When the Minister for Oceans and Fisheries sets a TACC for a fishery, a quota owner is entitled to an allocation for the fishing year's Annual Catch Entitlement (ACE). The ACE amount is generated annually for each quota holder based on their percentage holding of a fish stock.[117] Both quota and ACE are tradable assets; quota is held in perpetuity (or until alienation), whereas ACE is by and large solely for the corresponding fishing year.[118]

Quota owners have a decision-making role in the determination of who fishes the ACE. Through their ACE contracts, quota owners can determine the basis of fishing, such as timing, method, camera use, area, and protected species mitigation. The QMS is predicated on creating an ownership incentive for commercial fishers to ensure the sustainable utilisation of the fisheries, as these are rights in perpetuity.

Quota holders can also exert their decision-making authority through the concept of "shelving" – a deliberate decision not to catch their ACE allotment under the Total Allowable Commercial Catch (TACC) set by the Minister for Oceans and Fisheries. For instance, iwi control or hold approximately 50% of North Island longfin eel quota, but whereas the national TACC for the species is set at 137,000kg, just under 22,000kg was caught in the 2023 fishing year.[119] Iwi may choose to make similarly motivated catch decisions for customary allocations to which they are entitled.

Māori decision-making in this process is largely limited to their status as owners of fishing quota and participants in consultation processes under section 12 of the Fisheries Act. This is despite requirements under the Fisheries Act 1996 to act in a manner consistent with the provisions of the Fisheries Claims Settlement Act.[120] This hierarchy, which gives the Minister for Oceans and Fisheries primacy in decision-making, diminishes the ability of iwi and hapū to exercise rangatiratanga over their fisheries.

Māori Participation in the Commercial Fishing Sector

There are 58 Mandated or Recognised Iwi Organisations (MIOs/RIOs) identified in the Māori Fisheries Act 2004 that own the fisheries settlement commercial assets (Individual Transferable Quota and shares in Aotearoa Fisheries Limited).

These settlement derived fisheries interests for inshore species (caught in depths of up to 200m) are largely held in Aotearoa Fisheries Limited, trading as Moana New Zealand (Moana). It contracts out fish harvesting to third-party fishers and processes the catch in its main facility in Auckland, or its smaller Wellington and Chatham Islands facilities. In 2023, Moana entered a ten-year lease to acquire Sanford's fishing rights in the North Island inshore area for the next decade, making it the largest inshore fishing company in the country.[121]

Māori rights in the deep-sea fishery are predominantly recognised through their part-ownership of fishing company Sealord, 50% of which is owned by Japanese seafood company NISSUI, and 50% by iwi, allocated proportionally across the 58 MIOs on the basis of population. New Zealand's deep-sea fisheries are largely consolidated into three key companies: Sealord, Talleys and Sanford. A fourth large deepwater company, Independent Fisheries, was acquired by Sealord in February 2024.[122] Iwi also hold quota shares in their own right (independently of Sealord or Moana) and are able to lease their annually derived ACE directly to fishing companies.

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116 Ministry of Fisheries. Operational Guidelines for New Zealand's Harvest Strategy Standard, at 2. (Revision 1 Ministry of Fisheries, June 2011)

117 Fishserve Commercial Fishing Limited. The Quota Management System and underfishing rights. (Retrieved 17 March 2024 from https://www.fishserve.co.nz/Media/Default/documents/ACE%20Information.pdf)

118 ACE holders are eligible to apply for underfishing allocation, to carry forward 10% of any uncaught ACE into the following fishing year.

119 Fisheries New Zealand. Catch, 2023. (Retrieved on 17 March 2024 from https://fs.fish.govt.nz/Page.aspx?pk=7&tk=100&ey=2023)

120 Fisheries Act 1996, s 5(b)

121 Stuff. Commerce Commission clears Moana to buy Sanford's North Island inshore fishing business. (Retrieved 17 March 2024, https://www.stuff.co.nz/business/farming/aquaculture/132930969/commerce-commission-clears-moana-to-buy-sanfords-north-island-inshore-fishing-business)

122 Sealord. Sealord confirms the purchase of Independent Fisheries. (Retrieved 17 March 2024, https://www.sealord.com/newsroom/posts/sealord-confirms-purchase-of-independent-fisheries/)

Company	Quota 000's MT		
	Inshore	Deepwater	Total
Sealord	4,112,235	106,113,551	110,225,786
Sanford	16,426,163	88,107,861	104,534,024
Talleys	15,249,802	56,224,839	71,474,641
Independent	2,442,486	42,394,313	44,836,799
Vela	1,120,546	21,781,624	22,902,170
Moana	4,952,946	1,287,363	6,240,309

Figure 5: Quota ownership in 2023, major fishing companies in Aotearoa, including Moana and Sealord123

Māori interests in the governance of Moana and Sealords are represented through Te Ohu Kaimoana[124], which has a range of statutory responsibilities under the Settlement, including for the appointment of the Board of Aotearoa Fisheries Limited. MIOs appoint directors of Te Ohu Kaimoana through an electoral college structure; however, amendments to this method of appointment are being progressed as a result of the 2015 Independent Review of the Fisheries Settlement as required under section 114(2) of the Fisheries Claims Settlement Act.

The overall worth of NZ quota is estimated to be around USD $2.35 billion, with Māori-owned quota valued at USD $670 million in 2016/17.[125] These estimates rely on Sealord quota being recorded as 100% Māori controlled (Sealord is 50% owned by Māori through Aotearoa Fisheries Ltd and holds 25% of NZ quota by volume through a holding company). North Island eels (50 percent), pāua (30 percent), and rock lobster (40 percent) have the highest percentage of Māori ownership.[126] This estimate will likely be higher today, given both five years of capital growth and recent acquisitions by Māori fishing entities, such as Sealord's recent acquisition of Independent Fisheries, including c.44,000 tonnes of quota.[127]

The proportion of quota value represented by financial gains from owning quota has decreased since 2004, mirroring the overall decline in interest rates across New Zealand during that time. Currently, the annual yields from quota stand at approximately 6%, with Māori fishing assets generating approximately $60 million annually (equivalent to around $100 per Māori individual). Total seafood exports have continued to grow year on year.[128]

Roughly half of profits is reinvested, while the other half supports MIOs and the distribution initiatives they create and manage, ultimately aiming to benefit all registered iwi members.[129] For Moana, about half of the profit from quota assets is reinvested into the company, with the remaining balance distributed as dividends to MIOs. Distributions to date total $132.4 million,[130] an average of $7.6 million per year (2018-2023), or 42% of net profits.[131]

Due to several factors (including prohibitive capital requirements, lack of localised infrastructure, increased regulation, and climate-related financial risk), iwi predominantly participate as quota owners and shareholders of fishing companies rather than as active fishers. Iwi asset holding companies, subsidiaries to MIOs, are driven, with some exceptions, to ensure maximum return on iwi assets, which are then distributed through services to iwi members. This has created difficulty in promoting localised and iwi-led fishing operations due to the nature of the industry and the benefits in utilising economies of scale to ensure a return on investment of iwi assets.

Some Māori groups are further utilising their position as major quota owners to improve Māori participation. Two primary examples of this are Port Nicholson Fisheries (PNF) and the Iwi Collective Partnership (ICP), which aims to address the fractionalised nature of iwi quota assets through collectivisation. PNF collectivises the interests of iwi and Māori businesses to specialise in the export of live lobster, while ICP collectivises the fishing interests of 19 iwi, increasing bargaining strength to improve economic returns, create cost savings and provide greater benefit for participating iwi and the communities they serve.[132]

123 As reported by the Commerce Commission, retrieved on 17 March 2024 from https://comcom.govt.nz/__data/assets/pdf_file/0024/329073/09-Appendix-9-Para-10.12-Quota-Volume-for-Five-Largest-Owners-and-Moana.pdf

124 Te Ohu Kaimoana is a pan-iwi entity established under the 2004 Māori Fisheries Act to advocate, advance, and protect iwi rights and interests relating to fisheries, fishing, and fisheries-related activities.

125 Williams, J., Stokes, F., Dixon, H., & Hurren, K. The economic contribution of commercial fishing to New Zealand's economy. (Business and Economic Research Limited (BERL), 2017); Te Ohu Kaimoana. Building on the Fisheries Settlement (2018). (Retrieved 17 March 2024, https://teohu.maori.nz/wpcontent/uploads/2018/06/Building_on_the_Settlement_TOKM.pdf).

126 e Ohu Kaimoana. Building on the Fisheries Settlement (2018). (Retrieved 17 March 2024, https://teohu.maori.nz/wpcontent/uploads/2018/06/Building_on_the_Settlement_TOKM.pdf)

127 RNZ. Sealord confirms the purchase of Independent Fisheries. (Retrieved 17 March 2024, https://www.rnz.co.nz/news/national/508120/sealord-confirms-purchase-of-independent-fisheries, February 2024)

128 Williams, J., Stokes, F., Dixon, H., & Hurren, K. The economic contribution of commercial fishing to New Zealand's economy. (Business and Economic Research Limited (BERL), 2017).

129 Te Ohu Kaimoana. Building on the Fisheries Settlement. (Retrieved 17 March 2024, https://teohu.maori.nz/wpcontent/uploads/2018/06/Building_on_the_Settlement_TOKM.pdf, 2018)

130 Moana New Zealand. Moana New Zealand 2023 Annual Report. (Retrieved 17 March 2024 from https://ar.moana.co.nz/documents/MOANA_2023_Annual_Report.pdf, 2023).

131 Moana New Zealand. Moana New Zealand 2022 Annual Report. (Retrieved 17 March 2024 from https://ar.moana.co.nz/documents/MOANA_2023_Annual_Report.pdf, 2022).

132 Te Ohu Kaimoana. Māori Fisheries Strategy – Ka ora ki Tai – Ka Hua ki Uta: A Bountiful Ocean will Sustain Us 2017. (Retrieved 17 March 2024 from https://teohu.maori.nz/wp-content/uploads/2018/12/Maori-Fisheries-Strategy-27-February-2017.pdf, 2017)

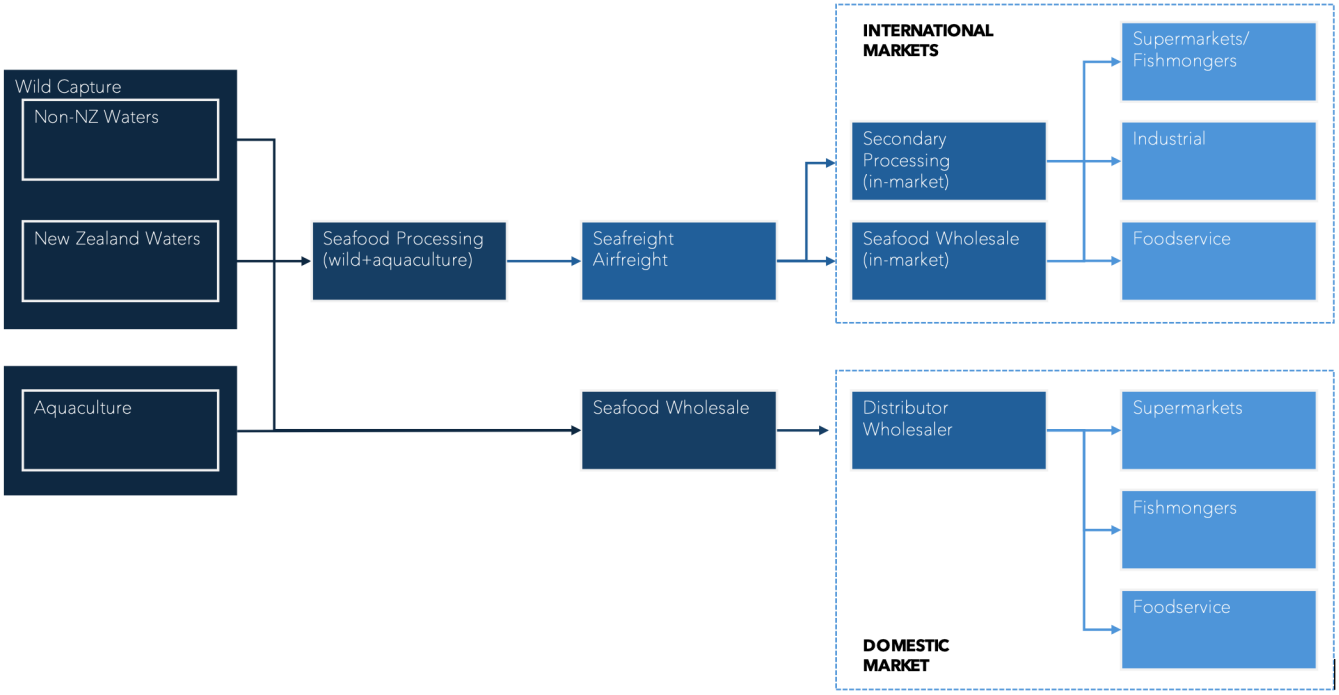

Figure 6: Simplified model of the New Zealand Seafood Supply Chain[133]

The centralisation of fishing rights into MIOs and their asset holding companies has meant that not all Māori commercial interests were recognised. During the establishment of the QMS, quota ownership was originally determined based on catch records of full-time commercial fishers and failed to recognise the rights of 'seasonal fishers', of which Māori fishers were a large proportion. This essentially meant that Māori seasonal fishers were excluded from receiving quota based on catch history.

There also remains contention over the distinction between the 58 MIOs recognised in the Māori Fishing Settlement and iwi recognised after 1992[134], and the rights of hapū to participate in commercial fishing.

There has been a recent trend of iwi divesting their operating interests in the sector, with the closure of Ngati Kahungunu's Takitimu Seafoods[135] and Wakatū Incorporation's asset sale of its Kono Seafood[136] division, affecting 30 and 300 employees respectively. Parallels can be drawn with the consolidation of the fishing industry into a small number of large-scale conglomerates, the recent acquisition of Independent Fisheries by Sealord being an example.[137] This is supported by a Return on Capital Employed (ROCE)[138] analysis, which showed low-performing sector returns when compared to Australian fisheries, primarily attributable to sub-scale operations. With added distributive demands calling on Māori capital (such as investment into social and cultural services for tribal members), commercial realities affecting the sector are providing pressure to consolidate and integrate sector interests.

Decision makers and influencers throughout the system

While the Māori Fisheries Settlement confirmed the rights guaranteed to Māori under Article II of Te Tiriti, compensating MIOs with property rights to fisheries resources, the exertion of power for Māori within fisheries is open to question.

As highlighted, the ultimate authority rests with the Minister Responsible for Fisheries. While Māori influence on marine decision making is largely based on the ownership of property rights to fish, i.e. quota, it opens two fundamental questions:

1. Is the expression of property rights commensurate with the Settlement obligations established under legislation, and
2. How organised is the exertion of this power to

133 Coriolis. The Investor's guide to the New Zealand Seafood Industry 2017 at 10. (Retrieved 17 March 2024 from https://www.mbie.govt.nz/assets/94e74ef27a/investors-guide-to-the-new-zealand-seafood-industry-2017.pdf, 2017).

134 132 iwi have been recognised after 1992 according to StatsNZ: https://www.stats.govt.nz/information-releases/iwi-affiliation-estimated-counts-2018

135 New Zealand Herald. Napier's Takitimu Seafoods shuts down. (Retrieved 18 March 2024 from https://www.nzherald.co.nz/hawkes-bay-today/news/napiers-takitimu-seafoods-shuts-down/2T54G5M44BGV3MI63K5KGFPUEM/, April 2023).

136 Wakatū Incorporation. Kono NZ announces sale of seafood assets to Talley's Ltd. (Retrieved from 18 March 2024 from https://www.wakatu.org/news-stories/2023/4/26/kono-nz-announces-sale-of-seafood-assets-to-talleys-ltd, April 2023).

137 RNZ. Sealord confirms the purchase of Independent Fisheries. (Retrieved 18 March 2024, https://www.rnz.co.nz/news/national/508120/sealord-confirms-purchase-of-independent-fisheries, February 2024)

138 Armillary Private Capital. Return on Capital Employed – December 2022 at 18. (Retrieved 18 March 2024 from https://assets.armillary.co.nz/images/2022-roce-report.pdf, January 2023)

influence as property owners, but more importantly, as Tiriti partners?

One metric to assess the influence Māori have, is the alignment between iwi and Māori collectives with the Minister's decision during fisheries consultations. For the annual review of sustainability measures for fish stocks in April 2022, Te Ohu Kaimoana, delivering the policy advisory function representing the fishing interests of 58 MIOs, reported that 50% of their advice for the nine fish stocks under review did not align with the Minister's final decisions.[139] This is perhaps indicative that Māori influence over sustainability decisions is partial, and arguably inextricable from those held by other quota owners.

On 1 August 2023, an Expert Consent Panel decided to decline Te Rūnanga o Ngāi Tahu's resource consent application to build an open ocean salmon farm. This is likewise in disagreement with the clear intention of the Southland New Space Aquaculture Agreement between Ngāi Tāhu and the Crown, and the Government's stated industry policy to encourage Māori to invest in aquaculture and to grow sector exports to $3 billion.[140]

The determination of the panel that the proposed farm would too greatly affect the aesthetic value of the 'outstanding natural landscapes' clearly signalled that the benign aesthetic value to the general public was of greater determining weight than the property rights, employment potential and tangata whenua status of Ngāi Tahu.

Moreover, iwi and Māori as quota owners have limited influence over public policy design and implementation. This is evident through many examples, the most recent being the opposition of iwi leaders to the Crown's proposed Kermadec Ocean Sanctuary.[141] Since its announcement in 2015, iwi have maintained an outspoken rejection of the Crown's attempt to unilaterally extinguish Māori commercial fishing rights (including rights of development) in the area in question (620,000km^2). In June 2023, iwi asserted that an indigenous-led approach, rooted in iwi values and customs, is necessary for future marine management in the area, a view which conflicts with the Crown's position. Iwi leaders expressed that discussions within the current framework imposed by the Crown do not lead to meaningful outcomes and highlighted the need for further discussion regarding iwi rights established in the 1992 Māori Fisheries Settlement.[142]

The proposed sanctuary, covering 15% of New Zealand's Exclusive Economic Zone (EEZ), would curtail commercial activity for two decades and protect vital marine species.[143] This conflict in view and power imbalance between Treaty partners demonstrates the limited influence that MIOs have over public policy, despite the guarantees of Te Tiriti and the Fisheries Deed of Settlement 1992 to have their fisheries rights (commercial and non-commercial) upheld. While the sanctuary's lack of establishment to date can be attributed to the success of ongoing iwi resistance, the prospect that unilateral Government policy decisions continue to be announced and progressed despite Māori protestations remains an indicator of the authority imbalance between the Crown and Māori.

There are limited mechanisms for Māori to hold the Government accountable for their decisions on commercial fisheries. According to legislation, Māori have theoretical power to influence Crown decisions, but have found no recourse in its utilisation. How marine governance decisions are made, in essence, remains unaffected or minimally influenced by Māori as Tiriti Partners.

For the aforementioned reasons, meaningful systemic influence for Māori appears dependent on pairing legislated obligations with one or more of the following:

- Credible litigation threat;
- Marshalling public sentiment; and
- Leveraging political clout.

The use of the courts to assert Te Tiriti-derived rights has led to significant advancements (such as Te Weehi in 1986[144]), but these took place prior to the promulgation of the Māori Fisheries Settlement.

Claims stemming directly from disputes under Te Tiriti o Waitangi are considered by the Waitangi Tribunal: a mechanism developed to deal with historical and contemporary Treaty grievances. The Tribunal is "a standing commission of inquiry, with exclusive jurisdiction to inquire into the meaning and effect of the Treaty of Waitangi."[145] The ability to litigate can be clouded within a post-settlement environment, with the Crown having

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139 Te Ohu Kaimoana. Alignment with recent sustainability decisions. (Retrieved 18 March 2024 from https://teohu.maori.nz/alignment-with-recent-sustainability-decisions/, March 2022).

140 Stuff. Independent panel declines Ngāi Tahu's plans for a salmon farm off the coast of Stewart Island. (Retrieved 18 March 2024 https://www.stuff.co.nz/national/132666191/independent-panel-declines-ngi-tahus-plans-for-a-salmon-farm-off-the-coast-of-stewart-island, August 2023).

141 Te Ohu Kaimoana. Iwi strongly reject Crown's Kermadec Ocean Sanctuary proposal. (Retrieved 18 March 2024 from https://teohu.maori.nz/media-release-iwi-strongly-reject-crowns-kermadec-ocean-sanctuary-proposal/, June 2023).

142 Te Ohu Kaimoana. Iwi strongly reject Crown's Kermadec Ocean Sanctuary proposal. (Retrieved 18 March 2024 from https://teohu.maori.nz/media-release-iwi-strongly-reject-crowns-kermadec-ocean-sanctuary-proposal/, June 2023).

143 Te Ohu Kaimoana. Iwi strongly reject Crown's Kermadec Ocean Sanctuary proposal. (Retrieved 18 March 2024 from https://teohu.maori.nz/media-release-iwi-strongly-reject-crowns-kermadec-ocean-sanctuary-proposal/, June 2023).

144 Te Weehi v Regional Fisheries Officer [1986] 1 N.Z.L.R. 682

145 Treaty of Waitangi Act, 1975 s 5(2)

at its disposal an inbuilt defence that any such challengeable proceedings have hitherto been considered via full and final Treaty Settlements.[146]

Active diplomacy, whether directly with lawmakers or in garnering public support, is therefore the primary pathway to pursue systemic influence, despite its challenging attributes. Settlement-derived obligations act as a relational foundation for diplomacy, and the credible threat of litigation is utilised as a last resort.

Central to this is the need for collaborative lobbying and exertion of political influence within Te Ao Māori. The complicating factor for mobilising efforts is that Māori operate across the full spectrum of interactions with our oceans. While typically operating within a unifying set of principles enshrined in te ao Māori, the diverse rights, interests, and values of Māori can be seen through a wide lens of uses and convenings, including but not limited to iwi, hapū, whānau, commercial-focused, subsistence, conservationist, and cultural use. To further complicate matters, groups may (and typically do) simultaneously occupy several points along this spectrum in their relationships with the moana. At times, the priorities and views across this spectrum may be misaligned, discordant or even work antagonistically against each other.

While there are complex and interlacing interests and viewpoints that must be considered, management approaches founded in te ao Māori principles by convention encapsulate all aspects of the system (ki uta, ki tai – from the shore to the tides). This diverges from the compartmental nature of New Zealand's marine governance regime. Land-based effects such as sedimentation and pollution present a major threat to the inshore marine environment and fisheries, but the Fisheries Act-based management regime leaves no pathway to address land-based effects and provide for a more holistic te ao Māori management approach to fisheries.

Tremendous gains for te ao Māori have historically been achieved in cases where lobbying power is organised, coordinated, and mobilised collaboratively. Examples include the original Māori Fisheries settlement in 1992, the Te Reo Māori Act 1975, the Central North Islands (Treelords) settlement, and the ultimate repeal and replacement of the Foreshore and Seabed Act 2004 with the Takutai Moana Act 2011. Coordinated approaches will therefore be crucial in future determinations of ocean governance.

Protection of Rights provided for under the Fisheries Settlement

The current system entrenches the role of Māori in commercial fishing, primarily as property rights holders of a tradeable asset, subject to sustainability constraints. Supplementary to this, Māori have a series of ongoing obligations incumbent on the Crown to discharge as a Tiriti partner. Despite legislative recognition, there remains a constant struggle to ensure the protection of these rights. There are multiple examples of ongoing tensions where conflicting Crown directives attempt to undermine the Māori Fisheries Settlement, proving itself a consistently unreliable Tiriti partner. Recent policy initiatives, such as the Kermadec Ocean Sanctuary (mentioned above) and 28N rights (detailed below), reiterate the stance of the research team, demonstrating that when faced with divergent interest groups, the Crown often chooses to ignore its obligations under the Deed of Settlement and is prepared to trespass on Māori rights to fisheries.

28N Rights

Te Ohu Kaimoana views 28N rights as "a hangover from the introduction of the Quota Management System."[147] Originally, industry participants were allocated quota based on catch histories, which, for some species, exceeded the catch limits imposed by the newly enshrined mechanism for sustainable management (of a Total Allowable Catch, capped by a Maximum Sustainable Yield). Where quota allocations due to historical catch exceeded the sustainable catch limits set under the new regime, the Government offered two options, one being the creation of 28N rights where excess quota (in terms of tonnes for a given fish stock) was "put in the fridge"[148] until fish stocks recovered. In essence, when decisions to increase a given fish stock's sustainable catch limit are made, the first allocation of the newly created "headroom" is allotted to those holders of 28N rights. At the time that 28N rights were created, the QMS structure meant that the responsibility of satisfying 28N rights sat with the Crown.

However, changes to the QMS transformed the quota entitlements of fishers from a set allocation of tonnes to an annually derived proportional share of a fish stock's sustainable catch limit. The result of this change is that the mechanism to satisfy 28N rights relies on the provision of quota shares. As new shares cannot be created the shares must be reallocated from other quota owners including iwi holding settlement quota.

Māori settlement quota was by principle based on iwi receiving a proportionate share (10% of quota for QMS species at the time of Settlement, with 20% of all new species introduced to the QMS). Treating 28N rights as preference shares before the consideration of Māori settlement quota therefore dilutes the proportionate share owned by iwi in the fishery whenever TACC

146 *Proprietors of Wakatū v Attorney-General [2017] NZSC 17, [2017] 1 NZLR 423*

147 *Te Ohu Kaimoana. What are 28N rights?. (Retrieved 18 March 2024 from https://teohu.maori.nz/what-are-28n-rights-2/, September 2021).*

148 *Te Ohu Kaimoana. What are 28N rights?. (Retrieved 18 March 2024 from https://teohu.maori.nz/what-are-28n-rights-2/, September 2021).*

increases occur, undermining the fundamental principle of the Settlement.

In light of the Crown's obligations under section 5(b) of the Fisheries Act, it has been proposed by Te Ohu Kaimoana that the Minister must ensure that any decisions that trigger 28N rights are administered by MPI in such a way that they do not have the effect of diluting the proportional share that iwi have received in the form of Settlement quota. If MPI fails to act in this way, it will have the effect of undermining the Fisheries Settlement. MPI does not share this view, and this issue is presently under litigation.[149]

The Kermadec Ocean Sanctuary and 28N rights clearly demonstrate that despite past agreements, enshrined legislation and overt commitments to Te Tiriti o Waitangi, the Crown continues to be an unreliable Tiriti partner. The burden of protection of hard-won Settlement rights and obligations typically falls on Māori. Because of these ongoing encroachments, iwi opportunities to collaborate on the advancement of collective iwi interests are diminished, the focus of Māori collectivised effort being predominantly defensive and reactive.

These issues also highlight that ongoing and sustained political collaboration is critical to the protection of fisheries settlement rights. It simultaneously highlights the difficulties in reforming an intransigent fisheries system with a demonstrated history of alienation and deterioration of Māori rights and interests, within an often volatile and uncertain Te Tiriti partnership.

Reflection of the current status

The realm of Māori commercial fishing has undergone significant evolution over the past decades, marked by positive advancements and notable challenges. Throughout this transformative period, the Māori commercial fishing industry has navigated a complex landscape shaped by the ongoing protection of Māori rights, the evolution of Māori governance, the alignment of economic interests with broader cultural and community aspirations and the tensions between different interest groups. The following reflects on some of the key challenges Māori have faced with the commercial fishing sector.

Protection of Rights provided for under the Fisheries Settlement

The current system entrenches the role of Māori in commercial fishing as property rights holders of a tradeable asset, subject to sustainability constraints. Supplementary to this, the Crown holds a series of ongoing obligations to discharge as a Tiriti partner. Despite this, there remains a constant struggle to ensure the protection of these rights. There are multiple examples of ongoing tensions where conflicting Crown directives attempt to undermine the Māori Fisheries Settlement. These reiterate the stance of the research team that the Crown often chooses to ignore its Tiriti and Settlement obligations in its governance role and is prepared to trespass on Māori rights to fisheries without Māori consent.

Environmental and Conservation Edict

There is increasing acknowledgement of the importance of sustainability and environmental concerns in the fishing sector, largely in response to both domestic and international pressure[150] to preserve marine ecosystems and fish populations for future generations. The sector is predicted to face continued challenges, including climate change, unavailability of resources, and ineffective governance[151] leading to poor management. Global sentiment is encouraging the industry to adopt measures which promote long term sustainability of fishing practices, populations, ocean health, and biodiversity, and which mitigate the environmental effects of fishing.

One of the key drivers of this shift towards sustainability is consumer behaviour. Consumers are increasingly seeking out sustainably sourced products. In a 2022 consumer study in partnership with the Marine Stewardship Council, of over 5,000 customers surveyed, nearly seven in ten North Americans agreed that "they will need to eat seafood from a sustainable source in order to save the ocean."[152]

New Zealand's fishing industry is facing the challenge of rising sea temperatures due to climate change. There is uncertainty as to how adaptable the existing management regime is to warming oceans, and how it may account for impacts on sensitive commercial species (such as pāua) and the shifting distribution of fish species.

Additionally, climate change has made commercial fishing revenue streams more volatile for iwi. The system needs to be adaptable to account for impending climate-related changes, acknowledging the nature and value composition of fisheries and aquaculture interests may experience some change.

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149 Te Ohu Kaimoana. What are 28N rights?. (Retrieved 18 March 2024 from https://teohu.maori.nz/what-are-28n-rights-2/, September 2021).

150 The United Nation's Sustainable Development Goal 14 is to "Conserve and sustainably use the oceans, seas and marine resources for sustainable development." (Retrieved 18 March 2024 from https://sdgs.un.org/goals/goal14).

151 OECD/FAO. OECD-FAO Agricultural Outlook 2021-2030. (OECD Publishing, Paris, Retrieved 18 March 2024 from https://doi.org/10.1787/19428846-en, July 2021)

152 Globe Scan. Changing Food Choices: Consumers' Responses to COVID, Cost of Living and Climate (Americas) at 12. (Retrieved 18 March 2024 from https://www.msc.org/docs/default-source/default-document-library/for-business/changing-food-choices---msc-globescan-webinar-slides-n-america-2022.pdf?sfvrsn=43d9e075_5, November 2022)

The growth trajectory of the commercial fishing sector depends on two factors: maintaining (or increasing) current production levels (while mitigating and decreasing environmental impacts), and utilising available resources more efficiently. Aquaculture production is predicted to overtake capture fisheries production in 2027 and account for 52% of all fish production by 2030[153], presenting its own environmental challenges.[154] It is critical for iwi to understand how their rights and interests in the marine environment are likely to be affected, in order to determine the appropriate collective response and maintain agency in future decision-making processes. Economic analysis is required alongside the science exploring the effects of climate change on fish stocks.[155]

The evolution of iwi since the development of the Fisheries Settlement

The Fisheries Settlement was the first Treaty settlement and signalled a change in the dynamics of the Treaty relationship between Māori and the Crown. At that point in time there was a strong degree of paternalism towards iwi and their ability to exercise their tino rangatiratanga. In today's era, following the Māori Fisheries Settlement, the Māori Commercial Aquaculture Settlement, and historic land settlements for many iwi and hapū, there has been a maturation and widespread acceptance of iwi and their ability to manage their own affairs.

In his 2015 review of Te Ohu Kaimoana, Tim Castle recognised the significant evolution of iwi in New Zealand.[156] He acknowledged that in 2004, iwi were considered "notional" owners of Settlement assets but have since transformed into more experienced and capable entities. Today, iwi organisations are mandated and accountable, with the capacity and desire to fully exercise their ownership rights. This evolution has allowed iwi to become influential entities not only in the fishing industry but also in other sectors of society. Their continued growth and development will undoubtedly shape the future of Aotearoa, and their contributions to New Zealand's economy and cultural identity will only continue to expand.

The fishing industry in New Zealand is heavily interlinked with the Māori Fisheries Settlement. The allocation of settlement quota to iwi as well as the industry prominence of iwi-owned companies such as Moana and Sealord create a unique influence of iwi over the sector. Iwi are advocating and expecting greater influence over the sector not only in terms of ensuring commercial rights are protected but that their obligations to the taiao (environment) are upheld. The review has led to proposed amendments to 'shorten the gap' between the companies and their iwi owners to enable direct connection.

Growing distance between iwi as quota owners and active fishers

Within Māori as well as across the sector, there is a growing disconnect between quota owners and ACE fishers as the increasing rise in costs of operations, infrastructure and compliance makes it more difficult for fishers to return an operating profit without owning the underlying quota.

The review of Te Ohu Kaimoana between 2015[157] and 2017[158] highlighted the growing concern around the growing distance between iwi and the active fishing of their quota assets. There were calls by iwi for greater 'practical experience' in the governance of collective assets.[159] While this did not gain enough support to become a recommendation for amendment in the Māori Fisheries Act, it was borne of the perceived diminishing experience in fisheries operations by iwi.

This has also been exacerbated by the evolving iwi commercial landscape where, particularly in post-settlement environments, the dwindling proportion of fisheries assets in iwi asset bases reduces the importance placed on its active management and advocacy by iwi governors.

Escalating tension between commercial and recreational fishing

The current fisheries regime creates a distinction between commercial, customary non-commercial, and recreational fishing. This is an artificial separation that was imposed upon Māori. Raniera Tau notes that "once the

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153 OECD/FAO. OECD-FAO Agricultural Outlook 2021-2030. (OECD Publishing, Paris, Retrieved 18 March 2024 from https://doi.org/10.1787/19428846-en, July 2021)

154 Warming sea temperatures has been attributed with mass salmon farm mortality events in New Zealand, including in 2022 – The Guardian. Major New Zealand salmon producer shuts farms as warming waters cause mass die-offs. (Retrieved 18 March 2024 from https://www.theguardian.com/world/2022/may/26/major-new-zealand-salmon-producer-shuts-farms-as-warming-waters-cause-mass-die-offs, n.d.)

155 OECD/FAO. OECD-FAO Agricultural Outlook 2021-2030. (OECD Publishing, Paris, Retrieved 18 March 2024 from https://doi.org/10.1787/19428846-en, July 2021)

156 Tim, Castle. Tāia Kia Matariki (Māori Fisheries Review 2015). (Wellington, 2015)

157 Tim, Castle. Tāia Kia Matariki (Māori Fisheries Review 2015). (Wellington, 2015)

158 Te Ohu Kaimoana. Māori Fisheries Review – Draft legislative amendments, version for iwi comments. (Retrieved 18 March 2024 from https://teohu.maori.nz/wp-content/uploads/2018/09/DFT_Guide_MFA_amendments_7JUN2017.pdf, June 2017).

159 Tim, Castle. Tāia Kia Matariki (Māori Fisheries Review 2015). (Wellington, 2015); Te Ohu Kaimoana. Māori Fisheries Review – Draft legislative amendments, version for iwi comments. (Retrieved 18 March 2024 from https://teohu.maori.nz/wp-content/uploads/2018/09/DFT_Guide_MFA_amendments_7JUN2017.pdf, June 2017).

Act was passed into law, fishing to feed the whānau became re-categorised as recreational fishing."[160]

The creation of the 'customary non-commercial' fishing category also limited the scope of iwi fishing rights. This is noted by Tā Tipene O'Regan, who discussed the need for constant evolution of customary rights, stating "they must be constantly defined and re-defined, articulated and re-articulated – wrestled with to make them real and invested with life."[161]

The process for determining TAC allocations is one of the most contentious fisheries management issues because it is characterised by competing self-interests and conflicts. The Minister must use discretion in weighing up these interests when deciding what would be reasonable allocations in the circumstances.[162] This is an especially difficult issue for Māori to grapple with when, during the balancing exercise, settlement rights in the commercial sector are forced to compete with the more common usage by Māori for sustenance.

Evolution of the commercial drivers in Ocean Sector decision-making

The fundamental role that the ocean, and ocean-derived sectors, play in the economy presents an accelerating divergence from traditional views. Long-held economic approaches hold that the ocean's natural resources, including fisheries, yield no economic rent prior to human extraction and use.[163] This traditionalist approach, coupled with the privatisation of property rights within New Zealand's QMS, has tightly aligned extractive or exploitative behaviour with economic rents, and by extension, the lack of extraction with a loss of rents.[164]

"Natural capital" is the stock of renewable and non-renewable natural resources (e.g., plants, animals, air, water, soils, and minerals) that combine to yield a flow of benefits or services to people.[165] The emerging recognition of the economic value of unexploited (or sustainably managed) natural resources provides a valuable counterfactual argument to established extractive oceans industries, which have hitherto enjoyed a prevailing position in decision-making due to the systemic overweighting towards property rights, and their economic contribution to communities and wider society.

Numerous studies have highlighted the importance of investing in natural capital for economic growth, poverty reduction, and environmental sustainability.[166] For example, a study by Costanza and others estimated that the total value of global ecosystem services is around $125 trillion per year, which is more than twice the global GDP.[167] The study also found that investing in ecosystem restoration could generate significant economic returns.

The proliferation of non-financial risk reporting standards, including Climate-based Financial Risk and Nature-Related Risk disclosures, is part of an international shift. These standards have led to enhanced domestic regulatory protection of ecosystems and biodiversity as part of a transition to "nature-positive" regulatory structures.

Corporations are increasingly required to measure, redress, and/or enhance their climate, ecosystem, and biodiversity impacts as part of their activities, whether due to an expanding regulatory environment,[168] or changing investor sentiment and customer preferences.

In recent years, there has been growing recognition among businesses and governments of the need to invest in natural capital to mitigate risks associated with environmental degradation (such as climate change) and ensure long-term sustainability.[169] Many global companies are now incorporating natural capital considerations into their decision-making processes and developing strategies to reduce their environmental footprint.[170]

In New Zealand, the adoption of climate and nature-related disclosure obligations remains nascent as the regulatory and policy landscape continues to develop. Recent developments include the finalisation of the

160 *Raniera, Tau. Iwi Chairs Hui. (Wellington, 2006).*

161 *Tā Tipene, O'Regan. Tā Tipene O'Regan's Waitangi address at Ōnuku. (Christchurch, New Zealand, February 14 2019).*

162 *Randall, Bess. What's the Catch?: The state of recreational fisheries management in New Zealand. Wellington at 46. (The New Zealand Initiative, 2016).*

163 *Scott, H, Gordon. The Economic Theory of a Common Property Resource: The Fishery. (Journal of Political Economy, 62(2), 124-142, 1954)*

164 *Ragnar, Arnason. Loss of economic rents in the global fishery. (Journal of Bioeconomics, 13, pages 213–232, 2011).*

165 *The Aotearoa Circle. Chapman Tripp Legal Opinion 2023 Instructured by The Aotearoa Cricle - New Zealand Director Duties to manage nature-related Risk and Impact on Natural Capital. Retrieved 18 March 2024 from The Aotearoa Circle: https://static1.squarespace.com/static/62439881aa935837b9ad6ac9/t/64221b57e81a935d081dfa40/1679956827718/2023.03.28+-+Aotearoa+Circle+Chapman+Tripp+legal+opinion+-+nature+related+risk.pdf, March 2023).*

166 *Costanza, Robert, Rudolf De Groot, Paul Sutton, Sander Van der Ploeg, Sharolyn J. Anderson, Ida Kubiszewski, Stephen Farber, and R. Kerry Turner. Changes in the global value of ecosystem services. (Global environmental change 26 (2014): 152-158); World Health Organization. Ecosystems and Human Well-Being - Health Synthesis - A Report of the Millennium Ecosystem Assessment. (France: World Health Organization, 2005).*

167 *Costanza, Robert, Rudolf De Groot, Paul Sutton, Sander Van der Ploeg, Sharolyn J. Anderson, Ida Kubiszewski, Stephen Farber, and R. Kerry Turner. Changes in the global value of ecosystem services. (Global environmental change 26 (2014): 152-158).*

168 *In July 2022 the External Reporting Board (XRB) published the Aotearoa New Zealand Climate Standards, introducing mandatory climate disclosures for large (> $60 million market cap) listed companies, large registered banks, licensed insurers, credit unions, building societies, and managers of investment schemes (large meaning in excess of $1 billion in assets) https://www.xrb.govt.nz/standards/climate-related-disclosures/resources/.*

169 *De Vit, C., & Katz, J.. Natural capital: What it is, why it matters, and how Fortune 500 companies are moving now to create opportunities and mitigate rising risks. (McKinsey & Company, 2023)*

170 *World Business Council for Sustainable Development. Natural Capital Protocol. (Retrieved 18 March 2024 from https://www.wbcsd.org/Archive/Assess-and-Manage-Performance/Natural-Capital-Protocol, n.d.)*

Aotearoa New Zealand Climate Standards (July 2022) and building understanding of the final recommendations issued by the Taskforce on Nature-related Financial Disclosures (October 2023).[171]

The traditional perceived value of commercial fishing, and indeed the definition of value and its accretion or destruction by way of extraction, is facing challenges from many sides. These include changing investor and consumer demands, rapidly escalating scarcity of natural resources, and significant environmental shifts. Within this context, changing reporting and assurance frameworks such as climate-based and nature-based risk reporting will continue to embed novel concepts such as natural capital, biodiversity, and ecosystem services into future cost-benefit considerations of Māori-owned commercial interests.

Of particular interest is whether, through this developing economic shift, concepts such as natural capital can challenge the current paradigm, which assigns value based solely on the economic rents accruing to private actors. A shift could incorporate te ao Māori principles that centre the ocean's capacity to create and sustain life as inherently of value. In such a system, the ocean's life-sustaining ability (drawing parallels to the concept of mauri) could provide some unique impetus to shift from an anthropocentric to an oceans-centric Aotearoa economic model.

Frictions between commercial and customary fishing

Over the past twenty years, iwi organisations have dedicated significant time and effort to establish mechanisms for the stewardship of commercial fisheries assets.

According to Te Ohu Kaimoana, there are two tensions that exist between commercial and customary fisheries.[172]The first tension is between MIOs' and Asset Holding Companies' management of the commercial assets, and tangata whenua/kaitiaki in the authorisation of customary fishing. The second tension centres on the relationship between the different scales of management: fisheries management at the scale of quota management areas on the one hand, and community level concern about the management of local fisheries, on the other. These tensions are exacerbated where the different fisheries sectors fail to work together.

Collective solutions are required to address the incongruence of these two systems, as the delineation is arbitrary and both systems ultimately rely on the same fish populations. As highlighted in Te Ohu Kaimoana's 2017 Māori Fisheries Strategy:[173]

> *Māori fishing interests span all sectors: commercial, recreational, and customary non-commercial. Through greater alignment Māori fisheries entities will be in a much stronger position to deal with the threats to all their fishing rights from the Crown and local government policies and influence other players including industry.*

Industry headwinds and aggregation

Iwi and Māori fishing businesses face increasing regulatory, environmental, and economic challenges. Hale & Rude outline some challenges in the following:[174]

1. Limited access to quota: Despite the settlement process allocating fisheries quota to iwi, many Māori fishing companies still have limited access to quota – particularly when companies are private and not connected to iwi. The high cost of purchasing quota can be a barrier for smaller companies.

2. Limited capacity: Many Māori fishing companies are small, lacking the scale, resources, and capacity to compete with larger, more established companies. Companies lacking scale may find it more difficult to access capital to secure quota or invest in new technologies and infrastructure to be competitive.

3. Cultural and environmental concerns: Many Māori fishing companies have a strong cultural and environmental focus, which can sometimes conflict with the commercial imperatives of the industry.

4. Regulatory challenges: Māori fishing companies must navigate a complex regulatory environment, which can be challenging for smaller companies with limited resources.

Ambiguity regarding overlapping legislation creates business uncertainty for fishers. Attorney General v The Trustees of the Motiti Rohe Moana Trust (2019) found in favour of the use of regional plans within the Resource Management Act to limit or control fishing efforts in the marine coastal area. This was for the express reason of "protect[ing] indigenous biodiversity from the effects of unsustainable fishing activity that has been permitted under the Fisheries Act."[175]

A further challenge faced by the Seafood sector is the

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171 Climate Governance Initiative. The Taskforce on Nature-related Financial Disclosures (TNFD): a briefing to address nature in the boardroom. (Retrieved 18 March 2024 from https://hub.climate-governance.org/article/TNFD_briefing, October 2023).

172 Te Ohu Kaimoana. Weaving together our common interests in fishing: Discussion Paper. (Retrieved 18 March 2024 from Yumpu: https://www.yumpu.com/en/document/view/51751904/weaving-together-our-common-interests-in-fishing-te-ohu-kaimoana, 2011).

173 Te Ohu Kaimoana. Māori Fisheries Strategy – Ka ora ki Tai – Ka Hua ki Uta: A Bountiful Ocean will Sustain Us 2017. (Retrieved 17 March 2024 from https://teohu.maori.nz/wp-content/uploads/2018/12/Maori-Fisheries-Strategy-27-February-2017.pdf, 2017)

174 Lynne Zeitlin, Hale & Jeremy, Rude. Learning from New Zealand's 30 Years of Experience Managing Fisheries Under a Quota Management System (Arlington, Virginia, USA: The Nature Conservancy, 2017) at 22; Michael, Harte. Assessing the road towards self. Case studies in fisheries self-governance at (504) 323. (2008).

175 Attorney-General v The Trustees of the Motiti Rohe Moana Trust & Ors [2019] NZCA 532 [4 November 2019]

lack of economies of scale, as Australia and New Zealand are small players in the global seafood sector. Wild catch fishery companies also operate on lower margins, primarily due to being price takers in the global market, largely producing bulk seafoods at lower volumes than international companies.[176] The aquaculture sector faces further exposure to compounding risk factors such as climate-related stock mortality rates.

Conclusion

Over the past three decades, the landscape of commercial fishing within Māori communities has undergone significant transformation. This period has witnessed a notable emphasis on environmental and conservation imperatives, driven by the growing recognition of the balance sought between exploiting marine resources and preserving ecological integrity. Concurrently, some have observed a widening gap between quota ownership by iwi and active participation in the fishing industry, raising questions about the alignment of economic interests with broader cultural and community aspirations for the sector.

Since the inception of the Māori Fisheries Settlement, the evolution of iwi has elevated them into influential actors, not solely within the fishing domain, but across a range of sectors in society. Despite this increasing influence, iwi authority over fisheries decisions and public policy remains circumscribed, with constant destabilising actions by the Crown compromising the foundational obligations set out in the Settlement.

Tensions endure between divergent priorities and values between commercial, recreational, and customary fishing interests, not to mention the wider public, NGOs and other ocean users. The complex interest landscape underscores the necessity for cross-interest group cooperation efforts to navigate conflicts among sectors and interest groups.

To move forward, it is essential to find ways to protect the commercial rights guaranteed under the Settlement, ensure sustainable fishing practices, address climate change impacts, foster cooperation between commercial and non-commercial fishing, and overcome industry challenges. Enhancing collaboration and alignment between Māori fisheries entities can strengthen their position and influence in dealing with threats and industry dynamics. Considering the value of unexploited natural resources and investing in natural capital could also have positive impacts on economic growth and environmental sustainability.

Moreover, the interplay between commercial and recreational fishing has become increasingly complex, giving rise to tensions over resource allocation and management strategies. As recreational fishing interests seek to safeguard their access to marine resources, commercial operators navigate evolving regulatory frameworks and market dynamics, often leading to conflicts over catch limits and conservation measures. This dynamic landscape underscores the need for nuanced approaches to reconcile the divergent interests of various stakeholders, while ensuring the sustainable utilisation of marine resources.

In parallel, the evolution of commercial drivers in the Ocean Sector decision-making processes has reshaped the dynamics of the fishing industry. Economic imperatives, technological advancements, and shifting consumer preferences have influenced strategic decision-making within the sector, driving innovations in fishing practices, supply chain management, and market diversification. However, this evolution has not been devoid of challenges, as industry stakeholders contend with regulatory complexities, market volatility, and socio-cultural considerations.

Amidst these transformations, frictions between commercial enterprises and customary fishing practices have come to the fore, highlighting the need for collaborative approaches to resource management and governance. The tension between commercial imperatives and cultural traditions underscores the importance of incorporating indigenous knowledge systems and community perspectives into the fisheries management framework.

Furthermore, industry headwinds and market forces have spurred a wave of consolidation and aggregation within the commercial fishing sector. As smaller operators grapple with increasing compliance burdens, operational cost increases and competitive pressures, large entities seek economies of scale and market dominance through mergers and acquisitions.

In essence, these observations paint a complex picture of the Māori commercial fishing sector with a contentious history, and an uncertain future characterised by evolving environmental, socio-economic, and cultural dynamics. The course of this history remains characterised by a power imbalance within the core decision-making institutions governing commercial fisheries. Navigating these challenges requires a holistic and inclusive approach that leverages the collective heft of iwi, not just as commercial actors, but as multi-faceted representative entities prioritising sustainability, equity, and community wellbeing in the governance and management of marine resources.

176 *Armillary Private Capital. Return on Capital Employed – December 2022 at 18. (Retrieved 18 March 2024 from https://assets.armillary.co.nz/images/2022-roce-report.pdf, January 2023)*

Ko te moana, ehara rawa i te wai kau
Nō Tangaroa kē tēnā marae
He maha ōna e hua e ora ai
ngā manu o te rangi
te iwi ki te whenua[177]

The sea is not any water
It is the marae of Tangaroa
It yields life for many things
the birds in the sky
the people upon the land

177 *Sourced from Anne-Marie Jackson, Ngahuia Mita and Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (Sustainable Seas National Science Challenge, 2017) at 41, referencing T. A. C. Royal (1989). Marine Disposal of Wastes: A Māori view. Royal family: Papers (Te whānau a Roera Hukiki Te Ahukaramu) p 9. (Macrons added).*

PUSH OF THE PRESENT – TAKUTAI MOANA

Customary rights in the takutai moana

Water, the ocean and Tangaroa are revered from a te ao Māori perspective.[178] This connection to the moana is founded in whakapapa and, as it is with whenua, is undeniably inherent to the identity of Māori.[179] As articulated by Royal, the moana is not simply a body of water, rather it is the origin of life for many, and is more appropriately considered the marae of Tangaroa.[180]

The relationship between Māori, Tangaroa and the moana is embedded through kōrero tuku iho (oral histories) and is essential to the Māori way of life. As the late Rima Edwards (Ngāpuhi) describes:[181]

> *The life-giving springs of water exude from the tops of these sacred Mountains. They flow down the many streams and out into Te Moana Nui A Kiwa and Te Moana Tapokopoko A Tawhaki, binding the inner land to the Foreshore and the Sea. This is the pepeha that binds the guardianship of Ngāpuhi Nui Tonu to their Mountains, to their rivers and their seas under the mana of Tane Mahuta and Tangaroa. This is their permanent standing place in accordance with the mana kaitiaki of their whānau, hapū, iwi, and their marae. This is their supreme authority for the foreshore and the sea that was divinely handed down to them.*

Miria Pomare (Ngāti Toa), also in evidence to the Waitangi Tribunal, explained how, to her people, whakapapa and kōrero tuku iho is a part of the takutai moana. Maintaining these practices becomes an expression of Ngāti Toa rangatiratanga:[182]

> *Tauranga waka (traditional canoe landing sites), mahinga mataitai (traditional fishing grounds), nohoanga (breeding grounds), tupuna rocks and so forth, represent important reference points in Ngati Toa whakapapa and traditions and serve to reinforce Ngati Toa's rangatiratanga over its fisheries and marine resources. By keeping such relationships alive and by continuing to utilise the marine resources, Ngati Toa has retained an extensive knowledge of its fisheries and traditional techniques for sustainably managing the marine resource.*

Article II of Te Tiriti o Waitangi guarantees tino rangatiratanga to Māori over their whenua, kāinga and all of their taonga. This extends to the takutai moana, as has been previously recognised by the Crown.[183] According to the report of Te Rōpū Tai Timu Tai Pari, with which we agree, it follows naturally that the principles of Te Tiriti "require the Crown to protect actively Māori interests in the takutai moana."[184] As will become clear in the next section of this report, the regimes implemented by the Crown to regulate the takutai moana have often failed to meet this obligation, and at times have sought to extinguish Māori interests in the takutai moana in its entirety.

Historical context of the takutai moana

The purpose of this section is to outline the key moments at law and policy that altered or affected Māori rights and interests in the takutai moana, culminating in the current Takutai Moana Act 2011 (MACA Act).

Attorney-General v Ngāti Apa, and the Māori Land Court's jurisdiction

The landmark case, Attorney-General v Ngāti Apa (Ngāti Apa) opened the door for Māori to have their claims of customary ownership to areas of the foreshore and seabed determined by the Māori Land Court. The Court of Appeal confirmed the Māori Land Court had jurisdiction to determine such claims.[185]

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178 *Anne-Marie Jackson, Ngahuia Mita and Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (Sustainable Seas National Science Challenge, 2017) at 42.*

179 *Anne-Marie Jackson, Ngahuia Mita and Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (Sustainable Seas National Science Challenge, 2017) at 38 and 42, referencing T. A. C. Royal (1989). Marine Disposal of Wastes: A Māori view. Royal family: Papers (Te whānau a Roera Hukiki Te Ahukaramu) p 9.*

180 *Anne-Marie Jackson, Ngahuia Mita and Hauiti Hakopa Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment (Sustainable Seas National Science Challenge, 2017) at 41, citing T. A. C. Royal (1989). Marine Disposal of Wastes: A Māori view. Royal family: Papers (Te whānau a Roera Hukiki Te Ahukaramu) p 9. (Macrons added).*

181 *Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at 6.*

182 *Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at 10.*

183 *Tom Bennion, Andrew Irwin, Mātānuku Mahuika, Sarah Shaw and Annete Sykes Report of Te Rōpū Tai Timu Tai Pari (June 2021) at 3, referencing the Crown's closing submission in the Wai 1040 Te Paparahi o te Raki / Northland inquiry, #3.3.416 at [90].*

184 *Tom Bennion, Andrew Irwin, Mātānuku Mahuika, Sarah Shaw and Annete Sykes Report of Te Rōpū Tai Timu Tai Pari (June 2021) at 3.*

185 *Attorney-General v Ngāti Apa [2003] 3 NZLR 643 (CA) at [91]; see also Marine and Coastal Area (Takutai Moana) Act 2011, Preamble.*

Ngāti Apa was a case brought by several iwi from Te Tau Ihu. In short, the Te Tau Ihu iwi applied to the Māori Land Court for declaratory orders that certain lands below the high-water mark in the Marlborough Sounds were Māori customary land. If successful, the iwi sought an investigation into the title of that land.[186]

At the time, the Māori Land Court had jurisdiction to determine whether the status of any specified land was Māori customary land, Māori freehold land, general land owned by Māori, general land, or Crown land.[187] The Māori Land Court also had exclusive jurisdiction to investigate the title of land and to grant an order vesting it in those it found to be entitled.[188]

The application was opposed by the Attorney-General and other non-Māori interest groups[189] on the grounds that, at common law and statute, any Māori customary property rights in the New Zealand foreshore between the high and low water marks were extinguished where the contiguous landward title had been investigated by the Māori Land Court. The Attorney-General argued that only foreshore contiguous to Māori customary land[190] on the shore was capable of being Māori customary land. It was also argued that any Māori customary property rights in the foreshore and seabed had been extinguished by particular legislation and vested in the Crown.[191]

At first instance, the Māori Land Court distinguished In Re the Ninety-Mile Beach in an interim decision, finding that the legislation at issue was insufficient to extinguish any customary property rights that could be established.[192]

The interim Māori Land Court decision was appealed to the Māori Appellate Court by the Attorney-General, where it was directed to the High Court to determine several substantive points of law.[193] The High Court found that land below the low water mark in New Zealand was beneficially owned by the Crown and could therefore not be Māori customary land.[194] It was also accepted that the Māori Land Court had jurisdiction to investigate whether the land between the high and low water marks was customary land.[195] The High Court went on to say, applying the In Re the Ninety-Mile Beach, that any customary property rights in the foreshore were extinguished in cases where the land contiguous to the high-water mark lost its status as Māori customary land.[196] The decision was then appealed to the Court of Appeal.

The Court of Appeal's decision focused on whether the Māori Land Court had the jurisdiction to inquire into the substantive issues of the application before it. As summarised by the High Court in Re Tipene, the Court of Appeal in Ngāti Apa found that:[197]

> *…when the Crown acquired sovereignty under the Treaty, it acquired territorial authority over New Zealand, not ownership. Customary rights in land endured until they were extinguished in accordance with the law. This did not occur when the contiguous rights in land changed status. It required consent of the right-holder or clear statutory authority. None of the legislation considered had this effect. The Court of Appeal, taking a different view from In re Ninety-Mile Beach, concluded therefore that the Māori Land Court had jurisdiction to determine the status of the foreshore and seabed under Te Ture Whenua Māori Act.*

The Court of Appeal's findings in Ngāti Apa were met with fierce opposition from both the Government and the wider public. In some places there was a fear that Māori would control access to beaches, alongside perceptions that Māori were receiving special treatment.[198] The Waitangi Tribunal put it this way:[199]

> *It is necessary to have an understanding of complex legal concepts to discuss foreshore and seabed in an informed way. Perhaps this is why the public discourse has generally been so unsatisfying, oversimplifying the issues and thereby distorting them. It appears to us that polarised positions (not necessarily underpinned by good information) have quickly been adopted, and real understanding and communication have been largely absent.*

In the face of an upcoming election, political parties sought to exploit the seemingly widespread public anxiety that Māori were receiving some form of preferential treatment. The National Party published the "iwi vs kiwi" billboard, insinuating that, under a Labour government, beaches would be restricted to Māori only, while a National government would ensure that beaches would be accessible by all "kiwis."[200]

186 *These groups included Ngāti Apa, Ngāti Koata, Ngāti Kuia, Ngāti Rarua, Ngāti Tama, Ngāti Toa, Rangitāne and Te Atiawa Mana Whenua ki Te Tau Ihu Trust.*

187 *Te Ture Whenua Māori Act 1993, s 18(1)(h).*

188 *Te Ture Whenua Māori Act 1993, s 132.*

189 *Namely, the New Zealand Marine Farming Association Incorporated, Port Marlborough Limited and Marlborough District Council.*

190 *Attorney-General v Ngati Apa [2003] 3 NZLR 643 at [4], per Elias CJ.*

191 *Attorney-General v Ngati Apa [2003] 3 NZLR 643 at [5], per Elias CJ.*

192 *In Re the Ninety-Mile Beach [1963] 3 NZLR 461.*

193 *Attorney-General v Ngati Apa [2003] 3 NZLR 643 at [5], Per Elias CJ.*

194 *Attorney-General v Ngati Apa [2002] 2 NZLR 661 at [16].*

195 *Attorney-General v Ngati Apa [2002] 2 NZLR 661 at [53].*

196 *Attorney-General v Ngati Apa [2002] 2 NZLR 661 at [37] and [52].*

197 *As summarised in Re Tipene [2016] NZHC 3199 at [23] (footnotes omitted).*

198 *Waitangi Tribunal The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report (Wai 2660, 2020) at 4.*

199 *Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at xi.*

200 *Colin James "National Party – Party principles" (20 June 2012) Te Ara < https://teara.govt.nz/en/photograph/33891/iwikiwi-billboard>.*

The Foreshore and Seabed Act 2004

In June 2003, the then Labour Government announced its intent to introduce legislation that would "protect" the foreshore and seabed and ensure fair and equal treatment "for all New Zealanders."[201] The Government then issued a foreshore and seabed policy in August 2003.[202] The essential goals of the foreshore and seabed policy were expressed in four principles, namely:[203]

> (a) the foreshore and seabed should be public domain, with open access and use for all New Zealanders;
>
> (b) the Crown is responsible for regulating the use of the foreshore and seabed, on behalf of all present and future generations of New Zealanders;
>
> (c) processes should exist to enable the customary interests of whānau, hapū and iwi in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected; and
>
> (d) there should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions.

An urgent inquiry was conducted in the Waitangi Tribunal with the Crown's support prior to the Foreshore and Seabed Act being brought into force.[204] The Crown advised the Tribunal that the foreshore and seabed policy was intended to "establish a comprehensive, clear and integrated framework which provides enhanced recognition of customary interests of whānau, hapū and iwi in foreshore and seabed, while at the same time confirming that the foreshore and seabed belongs to, and is in principle accessible by, all New Zealanders."[205]

The Waitangi Tribunal disagreed with the Crown's assertion that Māori would see benefits from foreshore and seabed policy. Rather, the Tribunal considered that the policy would award significant benefit to others in the reinstatement of Crown ownership and eliminate the risk that Māori may claim competing rights.[206] The Tribunal found that the policy was fundamentally flawed Rodolfo Stavenhagen, 2006, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to New Zealand. E/CN.4/2006/78/Add.3, 13 March 2006, Geneva, United Nations Human Rights Commission. See also Margaret Mutu, 2011, The State of Māori Rights, Huia Publishers, Wellington, p. and breached the principles of the Treaty of Waitangi.[207] Nonetheless, the Government pressed forward with enacting its foreshore and seabed policy.

The Foreshore and Seabed Act was passed on 24 November 2004 and vested full legal and beneficial ownership of the public foreshore and seabed in the Crown.[208] The "public foreshore and seabed" was defined by the 2004 Act as the foreshore and seabed and did not include any land that was subject to a specified freehold interest. "Foreshore and seabed" were also defined as the marine area bounded on the landward side by the mean high-water springs and on the seaward side by the outer limits of the territorial sea, and included:

> (a) the beds of rivers that were part of the coastal marine area (as defined by the then Resource Management Act 1991);
>
> (b) the airspace and water space above the marine area; and
>
> (c) the subsoil, bedrock, and other matters below the marine area.

The Foreshore and Seabed Act was heavily criticised by Māori as it extinguished Māori customary rights in the foreshore and seabed, severely prejudicing their rights guaranteed by the Treaty of Waitangi.[209] Several groups and review bodies considered that the Foreshore and Seabed Act was severely discriminatory to Māori whānau, hapū and iwi, and recommended its repeal.[210]This included the United Nations Committee on the Elimination of Racial Discrimination which found that the Foreshore and Seabed Act appeared "on balance, to contain discriminatory aspects against the Māori in particular in its extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress, notwithstanding the State party's obligations under articles 5 and 6 of the Convention."[211] The United Nations Special Rapporteur, then Professor Rodolfo Stavenhagen, also found the Act to be discriminatory

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201 Maria Bargh "Changing the game plan: The Foreshore and Seabed Act and constitutional change" (2006) 1 Kōtuitui: New Zealand Journal of Social Sciences Online 13 p 13.

202 Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at xii.

203 Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at 85.

204 Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at xi.

205 Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at xiii.

206 Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at xiii.

207 Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at xiv.

208 Foreshore and Seabed Act 2004, ss 2 and 13.

209 As was found by the Waitangi Tribunal in the Report on the Crown's Foreshore and Seabed Policy, the policy that underpinned the Foreshore and Seabed Act breached the principles of the Treaty of Waitangi. See, Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at 5.1.1-5.1.3.

210 As recorded in the Marine and Coastal Area (Takutai Moana) Act 2011, the Preamble.

211 United Nations Committee on the Elimination of Racial Discrimination, 2005, Report on New Zealand Foreshore and Seabed Act 2004, Decision 1 (66), 66th Session, 11th March 2005. UN Doc CERD/C/66/NZL/Dec.1 at [6].

against Māori and a step-back from inroads made via Treaty Settlements.[212]

The political realities and the transition to a new regime

The Foreshore and Seabed Act 2004 divided the nation and its political leaders. The foreshore and seabed policy famously led Hon. Tariana Turia (now Dame Tariana Turia), a Minister in the then Labour Government, to resign from Parliament, be removed from her Ministerial positions and ultimately cross the floor in opposition to the Foreshore and Seabed Bill. Dame Tariana took the position that she would rather resign and seek a fresh mandate through a by-election than support the policy passing into law, due to its violation of Māori customary rights.[213] This in turn led to the creation of the Māori Party (Te Pāti Māori) by Dame Tariana and (now Sir) Pita Sharples: a new political vehicle for Māori to further advocate for their rights and interests as an independent voice for Māori, independent of the two major political parties.[214]

It took a change of government for Māori to see change to the widely opposed Foreshore and Seabed Act 2004. The 2008 election saw the National Party come to power, ending a nine-year term of a Labour-led Government. It also saw the Māori Party winning five of the seven Māori seats.

The National party and the Māori party entered into a Confidence and Supply Agreement in November 2008, where they agreed to conduct a review of the Foreshore and Seabed Act 2004.[215] A Ministerial Review Panel (Panel) was appointed by the Attorney-General in March 2009, chaired by retired High Court Judge Tā Taihakurei Edward Durie, along with Professor Richard Boast and Dr Hana O'Regan. The Panel reported to the Minister in July 2009, making a number of recommendations including the repeal and replacement of the Foreshore and Seabed Act 2004 with a new legislative scheme based on the Treaty of Waitangi, necessarily accommodating both the customary interests of iwi and hapū, as well as the rights of the general public.[216] The Panel found that the Foreshore and Seabed Act "failed to balance the interests of all New Zealanders in the foreshore and seabed and was discriminatory and unfair. It advised repealing the law and replacing it with new legislation."[217]

On 15 June 2010, the Government announced its intention to repeal the Foreshore and Seabed Act 2004 in light of the review and its findings. A public consultation process followed, with various options put forward. The Marine and Coastal Area (Takutai Moana) Bill was resultantly introduced into Parliament on 6 September 2010, and was enacted in March 2011. The MACA Act established the current regime for recognition of Māori customary rights in the common marine and coastal area.[218] Much like the definition of "public foreshore and seabed," the "common marine and coastal area" is the marine and coastal area other than specified freehold land in that area. However, the common marine and coastal area also does not include any area owned by the Crown that is a conservation area, national park, or reserve.[219] As with the definition of "foreshore and seabed," the marine and coastal area under the MACA Act is the area bounded on the landward side by the mean high-water springs, and on the seaward side by the outer limits of the territorial sea. It includes:

> (a) the beds of rivers that are part of the coastal marine area (as defined by the then Resource Management Act 1991);
>
> (b) the airspace and water space (but not the water) above the marine and coastal area; and
>
> (c) the subsoil, bedrock, and other matters below the marine and coastal area.

We discuss the MACA Act in more detail further in this section.

A Bespoke Arrangement - Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019

Following the decision of the Court of Appeal in Ngāti Apa, the (then) Rūnanga o Ngāti Porou and other affiliated hapū and whānau groups applied to the Māori Land Court for orders declaring the foreshore and seabed in their rohe to be Māori customary land.[220]

As noted, the government shortly after the Ngāti

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212 Rodolfo Stavenhagen, 2006, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to New Zealand. E/CN.4/2006/78/Add.3, 13 March 2006, Geneva, United Nations Human Rights Commission. See also Margaret Mutu, 2011, The State of Māori Rights, Huia Publishers, Wellington, p.

213 Leahy, H (2015) Crossing the Floor – The Story of Tariana Turia (Huia Publishers). See also The Māori Party "Te Paati Māori About us" Māori Party <https://www.maoriparty.org.nz/about_us>.

214 Ibid.

215 The Beehive "Repeal of Foreshore and Seabed Act announced" New Zealand Government (15 June 2010) <https://www.beehive.govt.nz/release/repeal-foreshore-and-seabed-act-announced>The National Party also had Confidence and Supply agreements with United Future and the ACT party.

216 Ministerial Review of the Foreshore and Seabed Act 2004 Pākia ki uta, pākia ki tai: Summary Report of the Ministerial Review Panel (2 July 2009), p. 13.

217 The Beehive "Repeal of Foreshore and Seabed Act announced" New Zealand Government (15 June 2010) <https://www.beehive.govt.nz/release/repeal-foreshore-and-seabed-act-announced>

218 Marine and Coastal Area (Takutai Moana) Act 2011, section 5, and the Preamble.

219 Marine and Coastal Area (Takutai Moana) Act 2011, section 9(1).

220 Ngā Hapū o Ngāti Porou Deed to Amend Deed of Agreement, dated 9 August 2017, p 9.

Apa decision announced its intention to implement legislation removing the Māori Land Court's jurisdiction to make the declarations sought. Te Rūnanga o Ngāti Porou then entered into discussions with the Crown. The Foreshore and Seabed Act 2004 was later passed into law.

Ngā hapū o Ngāti Porou entered into a Deed of Agreement with the Crown in October 2008 which provided for legal recognition, protection, and recognition of the mana of ngā hapū o Ngati Porou in relation to the foreshore and seabed in their rohe ("ngā rohe moana o ngā hapū o Ngati Porou" or ngā rohe moana). A Bill was introduced to Parliament to give effect to the Deed of Agreement, the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill (No 1). However, steps to give effect to the Deed of Agreement and progress the Bill were paused when the incoming National-led Government committed to review, and later replace, the Foreshore and Seabed Act 2004.

The Deed of Agreement was later amended in August 2017 (the Amended Deed of Agreement) to reflect the repeal of the Foreshore and Seabed Act 2004, and the passing of the MACA Act. Ngā hapū o Ngāti Porou and the Crown agreed to apply the legal tests for customary marine title (CMT) as set out in the MACA Act, and to realign the Deed of Agreement with the new legislation, where appropriate.[221] Some elements in the Amended Deed of Agreement are not present in the MACA Act.

The Amended Deed of Agreement repeated significant Crown acknowledgments[222], particularly that the mana of ngā hapū o Ngāti Porou, in relation to ngā rohe moana o ngā hapū o Ngāti Porou was:[223]

> (a) unbroken, inalienable, and enduring; and
>
> (b) held and exercised by ngā hapū o Ngāti Porou as a collective right.

The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill (No 2) (giving effect to the Amended Deed of Agreement) was introduced to Parliament in April 2018 and subsequently passed. The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (the Ngā Rohe Moana Act) came into force on 29 May 2019.[224]

Significantly, the Ngā Rohe Moana Act features several provisions that are not available to applicant groups under the MACA Act. As the High Court applications have progressed, these differences in outcomes have become clearer. For example, under the Ngā Rohe Moana Act, a wāhi tapu area can be agreed to across the whole of an application area, not just in respect of the CMT area.[225]

The Ngā Rohe Moana Act also provides for a greater role for ngā hapū o Ngāti Porou, as represented by the respective management arrangements, than what is provided for under the MACA Act:[226]

> *The Whakamana Accord is significant where it provides a space for Ngā Hapū o Ngāti Porou and the Crown to meet on an annual basis to discuss matters such as the state of their relationship, the operation of the Act, and proposed changes or issues relating to the coastal marine area in ngā rohe moana. The relationship instrument agreements contained in the Act include the artefact relationship instrument, the conservation relationship instrument, the environment relationship instrument, the fisheries relationship instrument, and the minerals relationship agreement.*
>
> *The relationship instruments, combined with the Whakamana Accord are intended to facilitate discussion between Ngā Hapū o Ngāti Porou, the corresponding Minister and their departments, as well as the Gisborne District Council and New Zealand Transport Agency, to establish binding agreements on the nature and extent of their relationships. Key matters include participation in resource consents; environmental covenants and their inclusion in the Council's district and regional plans, policy statements and the long-term community council plan; decision-making processes under the Local Government Act 2002; appraisal of regulations or bylaws that impact Ngā Hapū o Ngāti Porou; monitoring protected customary activities; observing the provisions of the wāhi tapu instrument; alteration of maps or name changes; management by the council of sites that are significant to Ngā Hapū o Ngāti Porou; coastal occupation charges; and disposal of property by the council. The broad effect of these provisions is that they provide for future negotiated outcomes; outcomes which are not attainable for applicant groups under the [MACA Act].*

Under the Ngā Rohe Moana Act, Part 3 of the MACA Act (pertaining to the rights and instruments which go with Customary Marine Title and Protected Customary Rights) ceases to apply to ngā hapū o Ngāti Porou.[227] Instead, the Ngā Rohe Moana Act provides alternative provisions, including some provisions that do not feature in the MACA Act, and provisions that provide for stronger rights recognition than the MACA Act (for example, the Permission Right applies to a wider range of activities than the RMA Permission Right under the MACA Act). However, the test for CMT under section

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221 *Ngā Hapū o Ngāti Porou Deed to Amend Deed of Agreement, dated 9 August 2017, p 11.*

222 *Noting these acknowledgements were in the 2008 Deed of Agreement.*

223 *Ngā Hapū o Ngāti Porou Deed to Amend Deed of Agreement, dated 9 August 2017, p 13.*

224 *Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 2.*

225 *Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 102.*

226 *Season-Mary Downs "Nga Taumata o te Moana: A return to rangatiratanga over the takutai moana" (PhD (LLB) Thesis, University of Waikato, 2019) pp 167-168.*

227 *Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 6,*

Image credit: Naomi Aporo-Manihera

58 of the MACA Act continues to apply under the Ngā Rohe Moana Act (through sections 111 and 113 of the Ngā Rohe Moana Act).

The High Court has recognised in Re Edwards that this appears to have inspired some applicants to assume that recognition orders under the MACA Act could contain similar provisions. The Court emphasised that this understanding was incorrect as it may only award CMT and protected customary rights (PCR) as those concepts are defined in the MACA Act.[228]

Current State - The Marine and Coastal Area Act 2011

The MACA Act was enacted in 2011 and repealed the Foreshore and Seabed Act 2004, restoring any customary rights to the takutai moana which were unjustly confiscated under the 2004 Act. Fundamentally, the MACA Act was intended to translate the intrinsic and inherited rights of iwi, hapū and whānau to the moana into codified legal rights and interests which are inalienable and enduring, while balancing public rights of access and use.[229] The legal rights are sui generis in nature, meaning that they are unique and not akin to fee simple title.[230]

Unlike its predecessor, the purpose of the MACA Act is to restore and create a durable regime for recognising Māori customary rights in the takutai moana. The MACA Act establishes a scheme that was intended to protect the interests of all New Zealanders, recognise the mana tuku iho of tāngata whenua and provide for the exercise of customary interests in the marine and coastal area.[231] In doing so, the MACA Act expressly restores customary interests in the common marine and coastal area, previously extinguished under the Foreshore and Seabed Act 2004.[232] The MACA Act also guarantees continuation of public access and recreational activities in, on or over the takutai moana, and other existing uses (such as recreational fishing and access).[233]

The MACA Act provides two mechanisms to translate customary rights into legal rights within the common marine and coastal area, namely via protected customary rights and/or customary marine title.[234] Under the MACA Act "affected iwi, hapū, or whānau" can also participate in certain conservation processes in the marine and coastal area. This is not dependant on holding CMT or PCR.[235]

There were two pathways for whānau, hapū or iwi (Applicants) to pursue recognition of CMT and/or PCRs:

228 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [394].*

229 *Marine and Coastal Area (Takutai Moana) Act 2011, the Preamble (4).*

230 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [38].*

231 *Marine and Coastal Area (Takutai Moana) Act 2011, s 4.*

232 *Marine and Coastal Area (Takutai Moana) Act 2011, s 6(1). Marine and coastal area is defined in section 9 of the MACA Act to mean the area that is bounded, on the landward side, by the line of mean high-water springs; and on the seaward side, by the outer limits of the territorial sea. This includes beds of rivers that are a apart of the coastal marine area, the airspace above, and the water space above the area, and includes the subsoil, bedrock, and other matter beneath the area. Common marine title is also defined in the MACA Act, meaning marine and coastal area other than freehold land, conservation areas, national parks and reserves owned by the Crown and the bed of Te Whaanga Lagoon.*

233 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 11, 20 and 28. Noting that the Foreshore and Seabed Act 2004 also guaranteed continued public access and recreational activities (see sections 7 and 9).*

234 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 51, 60 and 71 and Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [40]-[55].*

235 *Marine and Coastal Area (Takutai Moana) Act 2011, s 47; as summarised in Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [40].*

either through the High Court for a recognition order,[236] and/or through direct engagement with the Crown for a recognition agreement.[237] Applicants could also make applications under both pathways. Regardless of the pathway, the MACA Act imposed a statutory deadline which required all applications to be made by 3 April 2017.[238] As captured in the Waitangi Tribunal report, The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report, by the deadline, 385 applications for Crown engagement had been received. 202 sought High Court orders and 176 applicants applied under both pathways.[239]

Customary Marine Title

For CMT to be recognised, an applicant group must show that they:[240]

> (a) hold the specified area in accordance with tikanga; and
>
> (b) have, in relation to the specified area:
>
> (i) exclusively used and occupied the area from 1840 to the present day without substantial interruption; or
>
> (ii) received it at any time after 1840 through a customary transfer.

A CMT effectively confers a bundle of rights to the successful applicant group. It is the most substantial recognition that can be obtained by an Applicant under the MACA Act to give legal effect to their customary rights and interests in the takutai moana.[241] Among other things, a CMT provides the relevant group with an interest in the underlying land, but it does not confer the right to alienate any part of a customary marine title area (or confer any other rights akin to fee simple title).[242] In Re Clarkson, the Court described a CMT, in general terms, as providing the holder with "an elevated influence in the area."[243] Such influence does not come without limitations though, noting that the MACA Act provides carve outs for certain activities including accommodated activities and accommodated infrastructure.

Before setting out the bundle of rights provided for a CMT Group, it is relevant to note that how these rights work in practice is yet to be seen or tested.

RMA Permission Right[244]

A CMT provides what is described in Re Clarkson as effectively a form of veto over activities within the CMT area.[245] A CMT group may give or decline permission, on any grounds, for an activity to which an Resource Management Act 1991 (RMA) permission right applies.[246] An RMA permission right applies to activities that are to be carried out under a resource consent (including a consent for a controlled activity), to the extent that consent is for an activity to be carried out within a customary marine title area.[247]

However, an RMA permission right does not extend to the grant or exercise of consent for an accommodated activity.[248] An accommodated activity is defined by section 64 of the MACA Act and includes any activity granted resource consent prior to the effective date of any: recognition order or recognition agreement, accommodated infrastructure, and management activities, which are connected to existing marine reserves, wildlife sanctuary, marine mammal sanctuary and concession.

Conservation permission right[249]

A conservation permission right allows a CMT group to give or decline permission, on any grounds, for the Minister of Conservation or the Director-General of Conservation to consider an application or proposal for a specified conservation activity.[250] The conservation activities to which this right applies include activities that are wholly or partly within the customary marine title area, and for which:

> (a) an application is made to declare or extend a marine reserve;
>
> (b) a proposal is made to declare or extend a conservation protected area; or
>
> (c) an application for a concession is made.

236 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 98 to 108.*

237 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 95 to 97.*

238 *Waitangi Tribunal The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report (Wai 2660, 2020) at 24.*

239 *Waitangi Tribunal The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report (Wai 2660, 2020) at 24.*

240 *Marine and Coastal Area (Takutai Moana) Act 2011, s 58.*

241 *Marine and Coastal Area (Takutai Moana) Act 2011, s 60.*

242 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 60, 66-93.*

243 *Re Clarkson [2021] NZHC 1968 at [40].*

244 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 66-70.*

245 *Re Clarkson [2021] NZHC 1968 at [40].*

246 *Marine and Coastal Area (Takutai Moana) Act 2011, s 66(2).*

247 *Marine and Coastal Area (Takutai Moana) Act 2011, s 66(1).*

248 *Marine and Coastal Area (Takutai Moana) Act 2011, s 66(4).*

249 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 71-75.*

250 *Marine and Coastal Area (Takutai Moana) Act 2011, s 71(1). Noting that a conservation permission right does not apply to an accommodated activity (see section 71(6) of the MACA Act).*

The Minister or the Director-General may proceed with a proposal (either to declare or extend a marine reserve or conservation protected area that is wholly or partly in a CMT area) without the permission of a CMT group, if they are satisfied the proposal is for a protection purpose that is of national importance.[251] In proceeding with this proposal, the MACA Act includes several matters that must be given regard. This includes the views of the CMT group, whether the proposal minimises as far as practicable any adverse effects on their interests, and whether there are no practicable options for achieving the protection purpose other than within the CMT area.[252]

Wāhi tapu[253]

Under the MACA Act, a CMT Group may seek to include recognition of a wāhi tapu or wāhi tapu area in the CMT order, or in a recognition agreement, in order to protect those sites.[254] In order to do so, the CMT group must be able to establish their connection with the wāhi tapu in accordance with tikanga, and that they require the proposed prohibitions or restrictions on access to protect the wāhi tapu.[255]

The MACA Act sets out certain conditions for a wāhi tapu protection right which must be specified in the CMT order or recognition agreement, including:[256]

(a) the location of the boundaries of the wāhi tapu;

(b) the prohibitions or restrictions that are to apply, and the reasons for them; and

(c) any exemption for specified individuals to carry out a protected customary right in relation to, or in the vicinity of the wāhi tapu, and any conditions applying to the exercise of the exemption.

Wāhi tapu conditions may affect the exercise of fishing rights but must not prevent fishers from taking their lawful entitlement in a quota management area[257] or fisheries management area. Accordingly, wāhi tapu conditions are one of the few examples in the MACA Act which may impact on the guaranteed rights of fishing, access, and navigation under sections 26 to 28.

Wāhi tapu conditions also do not affect the exercise of kaitiakitanga by the CMT group over a wāhi tapu in the CMT area.[258]

Marine mammals and coastal policy statements[259]

The MACA Act awards certain rights in relation to marine mammal watching permits within the CMT area.[260] Before an application can be determined, the Director-General of Conservation must give written notice to the CMT Group in that area, and the views of the CMT Group must be recognised and provided for.[261]

In respect of a New Zealand coastal policy statement, the Minister of Conservation is required to seek and consider the views of CMT Group(s) in the preparation, issue, change, review, or revocation of a New Zealand coastal policy statement.[262]

Taonga tūturu[263]

The MACA Act provides that any taonga tūturu found in a CMT area on or after its effective date is prima facie the property of the relevant CMT Group, displacing the presumption, under section 11 of the Protected Objects Act 1975 that any taonga tūturu are prima facie the property of the Crown.[264]

Ownership of non-nationalised minerals[265]

A CMT Group has, and may exercise, the ownership of minerals (other than petroleum, gold, silver, and uranium existing in their natural condition), including receiving royalties from those minerals within the CMT area.[266]

Planning document[267]

A CMT group has the right to prepare a planning

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251 *Marine and Coastal Area (Takutai Moana) Act 2011, s 74.*
252 *Marine and Coastal Area (Takutai Moana) Act 2011, s 75.*
253 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 78-81.*
254 *Marine and Coastal Area (Takutai Moana) Act 2011, s 78(1).*
255 *Marine and Coastal Area (Takutai Moana) Act 2011, s 78(2).*
256 *Marine and Coastal Area (Takutai Moana) Act 2011, s 79.*
257 *Marine and Coastal Area (Takutai Moana) Act 2011, s 79(2)(a).*
258 *Marine and Coastal Area (Takutai Moana) Act 2011, s 79(2)(b).*
259 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 76-77.*
260 *Marine and Coastal Area (Takutai Moana) Act 2011, s 76(1).*
261 *Marine and Coastal Area (Takutai Moana) Act 2011, s 76(2).*
262 *Marine and Coastal Area (Takutai Moana) Act 2011, s 77.*
263 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 76-77.*
264 *Marine and Coastal Area (Takutai Moana) Act 2011, s 82.*
265 *Marine and Coastal Area (Takutai Moana) Act 2011, s 83.*
266 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 83-84.*
267 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 85-93.*

document in accordance with its tikanga.[268] The purposes of the planning document are to:[269]

(a) identify issues relevant to the regulation and management of the CMT area; and

(b) set out the regulatory management objectives of the group for its customary marine title area; and

(c) to set out policies for achieving those objectives.

If the planning document is lodged with a local authority in accordance with the MACA Act, the local authority must take the planning document into account when making any decisions under the Local Government Act 2002, in relation to the customary marine title area.[270] Further obligations are imposed on Heritage New Zealand Pouhere Taonga, the Director-General of Conservation, Minister of Fisheries and regional councils to have regard to the planning document in carrying out their relevant duties.[271]

Protected Customary Rights

A PCR allows a successful PCR Group to exercise certain customary rights without a resource consent, regardless of any prohibition or restriction under the RMA.[272] A holder of a PCR is also exempt from some charges under the RMA.[273]

In order to get a PCR, an applicant must show that the right has been:[274]

(a) exercised since 1840 and continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga (whether it continues to be exercised in the same or similar way, or evolves over time); and

(b) and is not extinguished as a matter of law.

It is notable that an applicant group does not need to have an interest in land, either in or abutting the specific part of the common marine and coastal area, in order to establish a PCR.[275]

In addition, a local authority cannot grant a resource consent for an activity (including a controlled activity) in a PCR area if the activity will, or is likely to, have adverse effects that are more than minor on the exercise of a PCR unless the PCR holder has given permission.[276] However, the existence of a PCR does not limit or otherwise affect the grant of a coastal permit for existing aquaculture activities to continue to be carried out or resource consents for emergency activities, an existing accommodated infrastructure or deemed accommodated activity.[277]

Exclusions to Protected Customary Rights[278]

The MACA Act also excludes a range of activities from the scope of PCRs. Significantly, a PCR cannot be found if it is based on a spiritual or cultural association, unless that association is manifested by the group in a physical activity or use related to a natural or physical resource.[279] Exclusions also include activities:[280]

(a) that are regulated under the Fisheries Act 1996;

(b) that are a commercial aquaculture activity (within the meaning of the Māori Commercial Aquaculture Claims Settlement Act 2004);

(c) that involve the exercise of:

(i) any commercial Māori fishing right or interest, being a right or interest declared by section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to be settled; or

(ii) any non-commercial Māori fishing right or interest, being a right or interest subject to declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; or

(d) that relate to:

(i) wildlife within the meaning of the Wildlife Act 1953, or any animals specified in Schedule 6 of that Act;

(ii) marine mammals within the meaning of the Marine Mammals Protection Act 19878; or

Scope and effect of protected customary rights[281]

A PCR allows the holder to exercise certain customary

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268 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 85(1).*
269 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 85(2).*
270 *Marine and Coastal Area (Takutai Moana) Act 2011, s 88.*
271 *Marine and Coastal Area (Takutai Moana) Act 2011, ss 89-93.*
272 *Marine and Coastal Area (Takutai Moana) Act 2011, s 52.*
273 *Marine and Coastal Area (Takutai Moana) Act 2011, s 52.*
274 *Marine and Coastal Area (Takutai Moana) Act 2011, s 51.*
275 *Marine and Coastal Area (Takutai Moana) Act 2011, s 51(3).*
276 *Marine and Coastal Area (Takutai Moana) Act 2011, s 55.*
277 *Marine and Coastal Area (Takutai Moana) Act 2011, s 55(3).*
278 *Marine and Coastal Area (Takutai Moana) Act 2011, s 51(2).*
279 *Marine and Coastal Area (Takutai Moana) Act 2011, s 52(2)(e).*
280 *Marine and Coastal Area (Takutai Moana) Act 2011, s 51(2).*
281 *Marine and Coastal Area (Takutai Moana) Act 2011, s 52.*

rights over the takutai moana, without a resource consent under the RMA.[282] The PCR group is also exempt from certain charges under the RMA.[283] However, these provisions only apply if the PCR is exercised in accordance with:[284]

(a) tikanga; and

(b) the requirements of subpart 2 of Part 3 of the Act; and

(c) the PCR order or agreement that applies to the customary rights group; and

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

A PCR group may also do any of the following:[285]

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

(b) derive a commercial benefit from exercising its PCRs, except in the exercise of –

(i) a non-commercial aquaculture activity; or

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

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

(d) limit or suspend, in whole or in part, the exercise of a PCR.

Conservation processes

Aside from CMTs and PCRs, another way in which the rights and interests of Māori in the takutai moana are provided for in the MACA Act is through conservation processes.[286] Affected iwi, hapū or whānau are given the right to participate in conservation processes in the marine and coastal area, and participation is not dependant on applicant groups holding CMT or PCR.[287] For the purposes of this process, affected iwi, hapū or whānau means those that exercise kaitiakitanga in a part of the common marine and coastal area where a conservation process is being considered.[288]

The rights conferred under this part also extend to create an obligation on a marine mammals officer, when making decisions about a stranded marine mammal, to have particular regard to the views of any affected iwi, hapū or whānau.[289]

How the courts have applied the regime to date

We are beginning to see complex and overlapping applications for CMT and PCRs progressing through the courts. At the time of writing this report, several decisions have been released on priority applications under the MACA Act.[290] In these decisions, the High Court has tested significant issues under the MACA Act pertaining to the statutory tests for PCRs and CMTs. These issues and the Court's current analysis are elaborated on further on in this report. However, some caution is required as we are yet to see if the High Court's interpretation of the MACA Act will stand under further scrutiny of the senior courts as various appeals progress.[291] It is not until the Supreme Court ultimately determines the scope and requirements of the legal tests that applicant groups will have greater certainty and clarity.

The first substantive case for CMT under the MACA Act was Re Tipene.[292] This case concerned a claim for CMT by Mr Tipene over the Pohowaitai and Tamaitemioka Islands (being two of the Tītī / Muttonbird Islands located near Rakiura / Stewart Island). In Re Tipene, her Honour Mallon J determined that the evidence overwhelmingly established that the areas at issue were held in accordance with tikanga.[293] Further, given the overwhelming evidence and the relatively discrete issues at play, the Court did not need to meaningfully engage with what the legal tests meant under the MACA Act and title was ultimately granted. The situation in the

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282 Marine and Coastal Area (Takutai Moana) Act 2011, s 52(1).

283 Marine and Coastal Area (Takutai Moana) Act 2011, s 52(2).

284 Marine and Coastal Area (Takutai Moana) Act 2011, s 52(3).

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286 Marine and Coastal Area (Takutai Moana) Act 2011, ss 47-50.

287 Marine and Coastal Area (Takutai Moana) Act 2011, s 47; as summarised in Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [40].

288 Marine and Coastal Area (Takutai Moana) Act 2011, ss 47(1).

289 Marine and Coastal Area (Takutai Moana) Act 2011, s 50.

290 See for example, Re Tipene [2016] NZHC 3199, Re Edwards (Te Whakatohea (No.2)) [2021] NZHC 1025, Re Clarkson [2021] NZHC 1968; Re Reeder (Ngā Pōtiki Stage 1 – Te Tāhuna o Rangataua) [2021] NZHC 2726 and Re Ngāti Pahauwera [2021] NZHC 3599.

291 A number of these judgments have been appealed to the higher courts with the Court of Appeal hearing the first appeals on the legal tests, in a complex factual setting, in February 2023.

292 Re Tipene [2016] NZHC 3199.

293 Re Tipene [2016] NZHC 3199 at [153].

second substantive case to be heard (Re Edwards (Te Whakatōhea)) was much different.

Re Edwards (Te Whakatōhea) was the first case to consider the complexities of the legal tests in the context of a number of overlapping applications and challenging factual and legal contexts (i.e. the factual and legal implications of raupatu).

The next section sets out how the Courts have interpreted key elements of the test for CMT.

The meaning of "holds in accordance with tikanga"

Justice Churchman held that the focus of both statutory tests for CMTs and PCRs is on the rights exercised by applicant groups as at 1840 in accordance with tikanga, and the continued exercise of those rights.[294]

In Re Edwards there was disagreement between the applicants and non-applicant parties (including the Attorney-General) about the meaning of "holds in accordance with tikanga" being an element of the test for CMT. The key divergence was whether to consider section 58(1)(a) in two parts by considering "holds the specified area" separately to the concept of "in accordance with tikanga."[295]

It was put to the Court that, to hold an area in accordance with tikanga required something more than the operation of tikanga in the area. Rather, section 58(1)(a) contemplated territorial rights, and as such a court needed to be satisfied the evidence showed a level of intention and ability to control the area.[296] In other words, that it was held in a proprietary-like manner.[297] Counsel referred to Canadian jurisprudence on proving customary rights (native / customary title) in land, in support of this position.

The Court held that it would be wrong to impose a requirement to demonstrate something in the nature of a proprietorial interest, as was argued by some parties, and that it would be inconsistent with the purpose of the MACA Act.[298] The Court determined that application of the Canadian and Australian jurisprudence on Aboriginal title was not useful in the circumstances, finding that CMT under the Act is not the equivalent of customary title in the takutai moana.[299] Whether the statutory test is met is determined "not in accordance with common law or other principles addressing customary title to land, but in accordance with the tikanga that is applicable to the specified area of the takutai moana."[300]

The Court's focus should therefore begin with tikanga. The Court in Re Edwards said that whether or not the applicant group has held an area in accordance with tikanga must be determined by focusing on the evidence of tikanga, and the lived experience of that applicant group.[301] His Honour Justice Churchman described this as an exercise that looks "outward from the applicant's perspective rather than inward from the European perspective and trying to fit the applicant's entitlements around European concepts."[302]

It was accepted that the applicant must establish more than simply that a system of tikanga existed; rather, the first essential step in the process is the identification of that tikanga.[303] Whether a specified area is held in accordance with tikanga is a factual assessment that will be heavily influenced by the views of tikanga experts.[304]

Exclusivity

In an application for CMT, section 58(1)(b)(i) requires exclusive use and occupation from 1840 to the present day, without substantial interruption. It was raised by the Attorney-General in Re Edwards that the key question should be whether the use and occupation had been exclusive and continuous without substantial interruption since 1840.[305]

The Attorney-General submitted that the words "exclusive use and occupation" required an intention to control the area against third parties, referring to Canadian jurisprudence on proving Aboriginal title.[306]The Court rejected this position, as it did in considering the meaning of "held in accordance with tikanga." The Canadian tests promulgated a different kind of property right to that of a CMT and were of little relevance.[307] The Court said:[308]

> *More importantly, such an interpretation would under-*

294 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [57].*
295 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [109].*
296 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [106] and [133].*
297 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [106].*
298 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [128].*
299 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [138]-[139].*
300 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [139].*
301 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [130].*
302 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [130].*
303 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [131].*
304 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [131].*
305 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [146].*
306 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [149]-[150].*
307 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [149]-[150].*
308 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [174].*

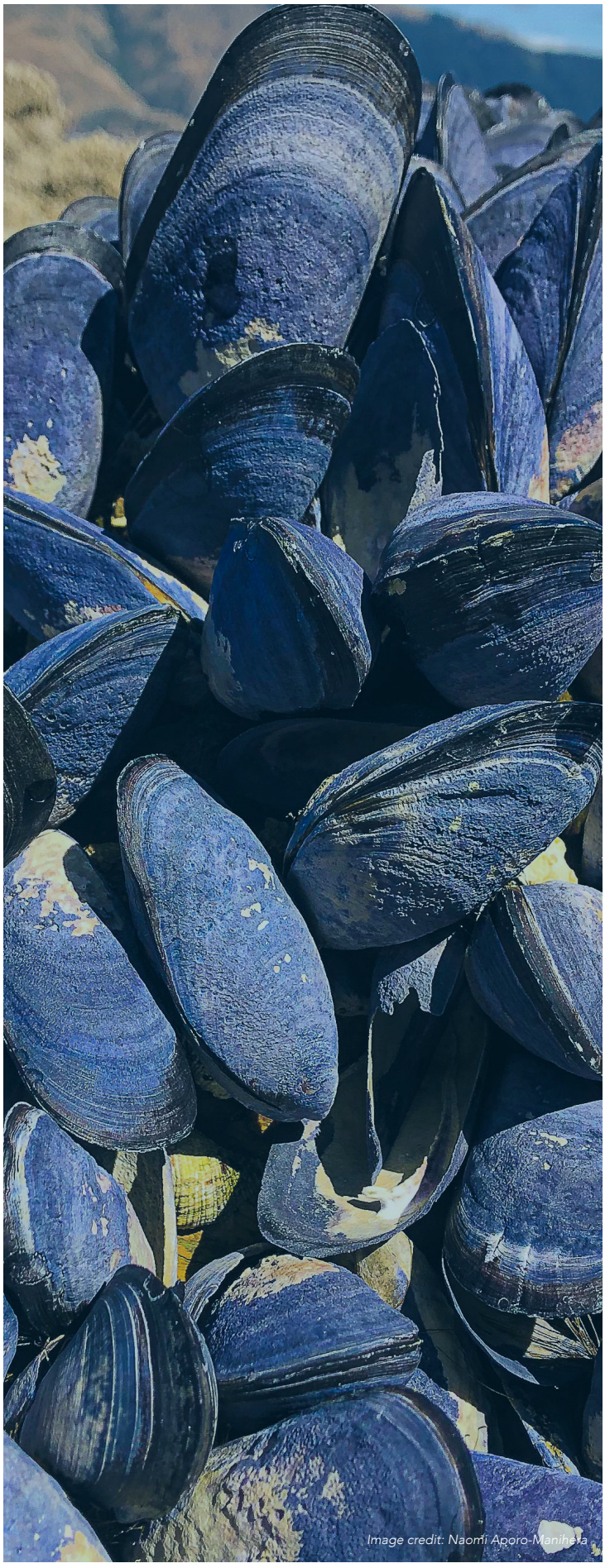
Image credit: Naomi Aporo-Manihera

> *mine the test in s 58(1)(a) to the effect that the specified area was held in accordance with tikanga. The ability to exclude others in the sense propounded by counsel for the Attorney-General and the Landowners Coalition, is at odds with the important tikanga values of whānaungatanga and manaakitanga.*

Arguably, the Court in Re Reeder took a different approach to the relevance of Canadian jurisprudence in the interpretation of "exclusivity." His Honour Justice Powell considered that, when considering comments made by the Supreme Court in Canada, it is important to keep in mind the context of the common marine and coastal area (including the nature and type of activities able to be exercised) and the central importance of tikanga.[309] Regardless, both Powell and Churchman JJ landed in ultimately the same place, namely that tikanga Māori is the touchstone to "exclusive use and occupation."

In addressing exclusivity, some difficulties arose in the reconciliation of overlapping claims and applications to the same area of the takutai moana. In Re Edwards, counsel submitted that the MACA Act permitted the concept of shared exclusivity.[310] That is, an order for CMT under MACA Act can recognise shared interests in an area. However, parties differed as to whether this interpretation required applications be formally combined into one applicant group.[311]

The Court acknowledged that the Canadian jurisprudence allowed for the possibility of several groups to hold an area of dry land on the basis of "shared exclusivity," and that shared exclusivity is not inconsistent with the provisions of the MACA Act or holding the area in accordance with tikanga.[312] The Court found that shared exclusivity is available in New Zealand, but must be viewed through the lens of whether the area is held in accordance with tikanga.[313] It was determined by the Court that, instead of issuing two overlapping CMTs for the same area to different groups, the MACA Act allowed a CMT to be jointly held.[314]

The Court in Re Ngāti Pahauwera gave some further insight on "exclusive use and occupation" where there are overlapping claims between applicants, namely:[315]

> (a) Applicants must establish as an issue of fact that they held the specified area in accordance with tikanga (which will involve establishing their whakapapa to the takutai moana area and it will not be unusual for two or more groups able to be able to establish this whakapapa connection).
>
> (b) The relevant tikanga needs to be established, as

309 *Re Reeder [2021] NZHC 2726 at [38].*
310 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [154].*
311 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [155]-[156].*
312 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [161].*
313 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [168].*
314 *Re Edwards (Te Whakatohea (No. 2)) [2021] NZHC 1025 at [169].*
315 *Re Ngāti Pahauwera [2021] NZHC 3599 at [167]-[180].*

well as the holding of that area in accordance with that tikanga.

(c) Applicants will need to acknowledge their shared interest in CMT with the other applicant group, which then needs to be acknowledged by the other party (who also needs to seek a shared CMT).

(d) If there is complete denial by an applicant group of any shared interest with another applicant group, that applicant group cannot expect the Court to award it shared CMT if it rejects its claim to exclusivity but concludes customary rights were shared.

In Re Edwards, the argument was posed that ownership of land abutting the application area and the ability to control access to the takutai moana, would be indicative of an intention to control the area against a third party[316]. Such an approach undermines the requirement in section 58(1)(a) that the area is held in accordance with tikanga.[317] The loss of abutting coastal land did not, the Court said, server the applicants' connection with the takutai moana.[318]

Substantial interruption

The MACA Act is silent as to what it means to hold a specified area from 1840 "without substantial interruption." It was submitted in Re Edwards that raupatu, resource consents granted prior to 1 April 2011 (the commencement of the MACA Act), permanent structures in the area and third-party use and occupation amounted to substantial interruption of the applicants' exclusive use of the takutai moana.[319] Particularly, in relation to Ōhiwa Harbour, there were existing resource consents held by local councils and third parties, such as an oyster farm consent for Ōhiwa Marine Oyster Farm and consents pertaining to the construction of a wharf.[320] In relation to these arguments, the Court found that:

(a) Raupatu did not constitute a substantial interruption as it did not sever the applicants connection to the takutai moana, nor does a resource consent issued prior to the commencement date of the MACA Act.[321] The Court did not accept it could draw an inference that there had been a substantial interruption simply because an activity in the coastal marine area is carried out under a resource consent authority that pre-dates the MACA Act.[322] Rather, the activity itself must have that effect. This would be dependent on its nature, scale, and intensity.[323]

(b) A CMT cannot be issued over reclaimed land where a certificate of title has been issued as it is no longer within the takutai moana.[324] Whether a structure has the effect of substantial interruption to the area in which it is located is a question of fact yet to be determined conclusively.[325] Some structures, such as sewerage outfall pipelines and working wharves, will amount to a substantial interruption.[326]

(c) Whether third-party use or occupation of the takutai moana amounts to substantial interruption is also a question of fact.[327] The Court concluded that the fact that third parties undertake commercial and recreational fishing activities in the area does not amount to a substantial interruption of the holding of the specified area in accordance with tikanga.[328]

The Court also held that whether something constitutes a "substantial interruption" is a factual inquiry.[329]

The Court in Re Ngāti Pahauwera followed His Honour Justice Churchman's reasoning in Re Edwards, acknowledging that some structures, such as sewage outfall pipelines will amount to a substantial interruption of the exclusive use and occupation of that part of the specified area.[330] This is because such structures limit the applicant group's ability to undertake activities in the area immediately surrounding the structure.[331]

In Re Ngāti Pahauwera, the Court grappled with opposition from Pan Pac Forests Ltd (Pan Pac). Pan Pac operated a mill and pipeline that discharged treated effluent material (previously sewage) in one of the areas where CMT was sought.[332] Pan Pac argued that its

316 *At [171].*
317 *At [174].*
318 *At [172].*
319 *At [189].*
320 *At [213]-[214].*
321 *At [204], [206], [209], [223], and [224].*
322 *At [229].*
323 *At [230].*
324 *At [250].*
325 *At [251].*
326 *At [252].*
327 *At [256].*
328 *At [264].*
329 *At [256].*
330 *Re Ngāti Pahauwera [2021] NZHC 3599 at [235].*
331 *Re Ngāti Pahauwera [2021] NZHC 3599 at [235].*
332 *Re Ngāti Pahauwera [2021] NZHC 3599 at [218]-[219].*

occupation and use of the area amounted to substantial interruption, precluding CMT.[333]

In the Court's analysis, it was acknowledged that the Maungaharuru-Tangitū Trust (the applicant group, representing a collection of hapū) had traditionally used and occupied the area of the takutai moana in the vicinity of Whirinaki, particularly for gathering kaimoana and fishing[334]. However, their own evidence showed that from the 1970s and 1980s onwards, hapū members lessened or ceased these activities as a result of the pollution from the Pan Pac operations.[335]

While the Court accepted that the applicant group still held the general area in accordance with tikanga, the second part of the statutory test could not be satisfied due to substantial interruption in relation to the area around the pipeline.[336]

Wāhi tapu

Under the MACA Act, a group seeking a CMT can seek to include in their application the recognition of a wāhi tapu, or a wāhi tapu area.[337] As has been touched on previously in this report, if a CMT is recognised by the Court, a CMT order or agreement must set out the wāhi tapu conditions that apply.[338] These conditions must include the boundaries of the wāhi tapu, prohibitions, and restrictions that are to apply (as well as the reasons for them) and any exemption for relevant PCRs.[339]

One of the issues in Re Ngāti Pahauwera, was the assertion that the entirety of the claimed area for CMT by Ngāti Pahauwera was either wāhi tapu or wāhi tapu area.[340] Ngāti Pahauwera argued that the entirety of the application area is sacred, and in some circumstances required protection through restriction of access.[341]

The Court found that the language in the MACA Act allows for such an application in the CMT order or in an agreement, and concluded that:[342]

> *wāhi tapu conditions could be utilised in limited circumstances to temporarily exclude third parties and members of the public from specified locations designated as wāhi tapu and subject to wāhi tapu conditions under a CMT order, through the implementation of a rāhui wāhi tapu condition by the parties. However, these must be specified locations.*

The Court left this point open however, and considered it was conceivable for the entirety of an application area to be considered wāhi tapu:[343]

> *This approach was effectively affirmed in Re Edwards. In that decision, the Court held that if the applicants are able to prove both the statutory tests for CMT, as well as providing evidence which on the balance of probabilities proves that specific defined locations within that CMT area are capable of meeting the wāhi tapu threshold under s 78(2), then CMT-holders may be able to exclude the public or public activities from that particular area through wāhi tapu conditions in s 79, which may include exercise of rāhui within those locations. However, an important qualification to this is that wāhi tapu conditions in relation to rāhui would need to comply with the identification of boundary requirements in s 79.*

Ultimately, the Court found there was insufficient evidence to conclude that the entirety of the application area for Ngāti Pāhauwera was a wāhi tapu.[344] The Court gave three reasons for this conclusion:[345]

> (a) Firstly, that the takutai moana is of major importance and significance to Māori based on foundational whakapapa connections to the natural environment.
>
> (b) Secondly, although all aspects of the natural environment are of great significance to Māori, there are certain areas of heightened significance, or tapu nature, due to a number of possible factors.
>
> (c) Thirdly, it was not clear enough on the evidence as to the tikanga being practised within the application area, that the entirety was a wāhi tapu. Only limited evidence was given in relation to the tapu nature of the whole area, all of which related to defined areas, as opposed to the entirety of the application area.

Further critiques of the MACA Act

The MACA Act has garnered polarising views since its inception, leading to a breadth of political, academic, and legal commentary. The purpose of this part is to

333 *Re Ngāti Pahauwera [2021] NZHC 3599 at [220].*
334 *Re Ngāti Pahauwera [2021] NZHC 3599 at [227].*
335 *Re Ngāti Pahauwera [2021] NZHC 3599 at [230].*
336 *Re Ngāti Pahauwera [2021] NZHC 3599 at [232]-[233].*
337 *Marine and Coastal Area (Takutai Moana) Act 2011, s 78(1).*
338 *Marine and Coastal Area (Takutai Moana) Act 2011, s 78(3).*
339 *Marine and Coastal Area (Takutai Moana) Act 2011, s 78(3).*
340 *Re Ngāti Pahauwera [2021] NZHC 3599 at [70].*
341 *Re Ngāti Pahauwera [2021] NZHC 3599 at [83].*
342 *Re Ngāti Pahauwera [2021] NZHC 3599 at [72] and Marine and Coastal Area (Takutai Moana) Act 2011, s 78(1).*
343 *Re Ngāti Pahauwera [2021] NZHC 3599 at [126].*
344 *Re Ngāti Pahauwera [2021] NZHC 3599 at [128].*
345 *Re Ngāti Pahauwera [2021] NZHC 3599 at [129]-[131].*

outline aspects of the discussion that has emerged since the repeal of the Foreshore and Seabed Act 2004, and how the MACA Act measures up as its replacement.

Political and academic commentary

Hon Tariana Turia (now Dame Tariana) introduced the Marine and Coastal Area (Takutai Moana) Bill (the Bill) to its third reading. By way of introduction to the Bill, she said:[346]

> *The challenge is now to test this new law. The message we have been getting from some iwi leaders is that now that the right of access to the courts has been restored, case law and customary rights may be politically achievable. Whānau, hapū, and iwi must grasp the opportunity on a case-by-case basis to go to the courts and begin to establish customary rights and title in our legal system on a progressive basis. But we are fooling no one if we think we have solved everything by restoring access to the courts and repealing the 2004 Act, no matter how significant this is. Our journey is a lifelong one, as it has been for our tūpuna before us and will be for our mokopuna ahead of us.*
>
> *The bill is another step in our collective pursuit of Treaty justice. We have absolutely no doubt that there will come a day when this bill, like every single piece of legislation debated in this House, is reviewed and improvements are made, and we will move on together. This bill was never just about the Māori Party; it started with the leadership of the eight iwi who took an application to the Māori Land Court at the top of the South Island. It has been shaped by innovative jurisprudence created by some of our finest legal minds. It has been critiqued by many, many thousands of New Zealanders who have joined the hikoi; written petitions, submissions, and emails; and composed haka and waiata. They have walked the talk.*

Minister Turia's positive introduction was not shared across the floor and was immediately met with opposition from the Labour party. The Honourable Shane Jones criticised the Māori Party's perspective on the Bill, stating that it is "designed to fossilise Māori rights in the seabed and foreshore."[347] Minister Jones pointed out that the existing rights of "corporate New Zealand" and private landholders had not been eroded or weakened, in contrast to the rights of Māori.[348] Minister Jones went on to say that the MACA Act had been drafted with criteria "so narrow, whose threshold is so high, and the politics of which are so divisive that… no one of any substance will achieve anything approximating customary interests, or, indeed, Treaty-based justice."[349]

Common marine and coastal area

Minister Jones' initial comments have since been echoed by Dr Season-Mary Downs in her recent thesis on the takutai moana regime. Dr Downs concludes that the MACA Act is inconsistent with te Tiriti o Waitangi, citing four key reasons:[350]

> (a) the MACA Act was developed and implemented without negotiation and consent from Māori;
>
> (b) the MACA Act continues to remove the customary rights and procedure for recognition of those rights that were previously available at common law;
>
> (c) the MACA Act fails to provide for the exercise of rangatiratanga by Māori over the takutai moana as guaranteed under Article II of te Tiriti o Waitangi; and
>
> (d) the MACA Act breaches the principle of equity and equal treatment under Article 3 of te Tiriti o Waitangi, as Māori rights to the takutai moana are treated differently to how all other right / interest holders in the foreshore and seabed are treated.

A key criticism in Dr Downs' thesis is the encroachment on the rights of Māori in the takutai moana and the reaffirmation of the rights of private citizens and the Crown. Section 11 of the MACA Act accords a special status to the foreshore and seabed as the "common marine and coastal area."[351] The Crown, nor any other person, is capable of owning the common marine and coastal area. Dr Downs refers to this as the Crown's balancing exercise, where this status "balances all interests where neither the Crown, nor anyone else, can own the 'common marine and coastal area', and all public rights of access, navigation and fishing are protected."[352] The rights of private title owners are preserved and excluded from this status.[353] Dr Downs notes that:[354]

> *In the Crown's "balancing" exercise, only Māori interests are reframed, meaning they come off second-best, whereas private and public interests remain intact and unchanged. No other interest group has had their rights changed by law, and no other interest group must go to the lengths that Māori are required to go to in order to*

346 *(24 March 2011) 671 NZPD 17626.*

347 *(24 March 2011) 671 NZPD 17628.*

348 *(24 March 2011) 671 NZPD 17628.*

349 *(24 March 2011) 671 NZPD 17628.*

350 *Season-Mary Downs "Nga Taumata o te Moana: A return to rangatiratanga over the takutai moana" (PhD (LLB) Thesis, University of Waikato, 2019) p iv and 112.*

351 *Marine and Coastal Area (Takutai Moana) Act 2011, s 11(2).*

352 *Season-Mary Downs "Nga Taumata o te Moana: A return to rangatiratanga over the takutai moana" (PhD (LLB) Thesis, University of Waikato, 2019) p 132, referring to section 26 of the MACA Act.*

353 *Season-Mary Downs "Nga Taumata o te Moana: A return to rangatiratanga over the takutai moana" (PhD (LLB) Thesis, University of Waikato, 2019) p 132 and the MACA Act, s 21.*

354 *Season-Mary Downs "Nga Taumata o te Moana: A return to rangatiratanga over the takutai moana" (PhD (LLB) Thesis, University of Waikato, 2019) p 152.*

have their rights recognised.

In a primer published on the Bill, Moana Jackson also notes the discriminatory nature of the confiscation of iwi and hapū rights in the takutai moana, particularly as the Bill did not affect non-Māori interests, only redefining the rights of iwi and hapū.[355]

Dr Downs argues that in the removal of the High Court and Māori Land Court jurisdiction to grant customary rights at common law, the MACA Act effectively removed those rights in the same way as the Foreshore and Seabed Act 2004.[356]

Customary marine title and protected customary rights

The nature and scope of CMT and PCRs show that these statutory rights are a significant reduction compared to what otherwise may have been achieved by the courts under the common law regime.[357] According to Dr Downs, the level of authority awarded to Māori through CMT and PCRs "fails to provide for the authority encompassed in tino rangatiratanga under the treaty."[358] Moana Jackson echoes Dr Downs concerns, writing that the Māori customary title provided for in the Bill is not the title exercised by iwi and hapū prior to 1840, nor is it tino rangatiratanga as guaranteed by te Tiriti o Waitangi.[359] "Rather it is a limited bundle of rights subject ultimately to the presumed authority of the Crown to define their limit and extent."[360]

Applicants for CMT and PCRs must meet the statutory tests set out under the MACA Act.[361] It was initially believed that these tests were overly restrictive, and unlikely to be met by many iwi and hapū.[362] Moana Jackson writes that while the Bill restores access to the courts it remains prejudicial, particularly as the tests Māori have to meet are so difficult. It could well be a costly exercise with no hope of success.[363] In relation to PCRs, Professor Richard Boast KC in a 2016 article also observes that the new statutory pathway is likely to prove more expensive than the Māori Land Court, which could be off-putting to Māori claimant groups.[364] Moana Jackson further reiterates that no "similarly impossible [tests]" are imposed on others, nor are there requirements to prove the extent of their interests.[365]

Contrastingly, Professor Boast's first impression of CMT was that, in short, that CMT is "a bit easier to get than was formerly the case," and is substantially more worthwhile to have.[366] Boast describes the benefits of holding CMT to be both proprietary, by way of ownership of minerals and prima facie rights to ownership of newly found taonga tūturu, as well as managerial / consultative.[367] According to Boast, it could be said that the MACA Act "facilitates the continuing recasting of iwi as partners in local and regional government that is also developing under historic claims settlement legislation and other special-purpose statutes."[368]

Boast points out that while the MACA Act is an improvement from the repressive Foreshore and Seabed Act framework, analytical and practical difficulties remain. He queries how much Māori would interact with the MACA Act, given the more pressing matters iwi and hapū face in negotiating and settling historic claims:[369]

> *It is quite possible that the Act will result in nothing much. What it offers may seem to Māori to be less appealing than what they might obtain by negotiation with the Crown. Customary marine title can be recognised by judicial determination or by negotiation with the Crown. Maybe the real point of the legislation is to encourage Māori to opt for the latter, likely to be the preference of iwi and hapū in any case. But this, of course, remains to be seen.*

Legal commentary: Waitangi Tribunal – The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report

The Waitangi Tribunal has begun its inquiry into the

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355 *Moana Jackson "A Primer on the Marine and Coastal Area (Takutai Moana) Bill" (7 March 2011) p, accessible at http://www.converge.org.nz/pma/mj070311.pdf.*

356 *Season-Mary Downs "Nga Taumata o te Moana: A return to rangatiratanga over the takutai moana" (PhD (LLB) Thesis, University of Waikato, 2019) p 133.*

357 *Season-Mary Downs "Nga Taumata o te Moana: A return to rangatiratanga over the takutai moana" (PhD (LLB) Thesis, University of Waikato, 2019) p 134.*

358 *Season-Mary Downs "Nga Taumata o te Moana: A return to rangatiratanga over the takutai moana" (PhD (LLB) Thesis, University of Waikato, 2019) p 134.*

359 *Moana Jackson "A Primer on the Marine and Coastal Area (Takutai Moana) Bill" (7 March 2011) p 3, accessible at http://www.converge.org.nz/pma/mj070311.pdf.*

360 *Moana Jackson "A Primer on the Marine and Coastal Area (Takutai Moana) Bill" (7 March 2011) p 3, accessible at http://www.converge.org.nz/pma/mj070311.pdf.*

361 *Refer to the Current State for a detailed report on the relevant statutory tests.*

362 *Season-Mary Downs "Nga Taumata o te Moana: A return to rangatiratanga over the takutai moana" (PhD (LLB) Thesis, University of Waikato, 2019) p 134.*

363 *Moana Jackson "A Primer on the Marine and Coastal Area (Takutai Moana) Bill" (7 March 2011) p 4, accessible at http://www.converge.org.nz/pma/mj070311.pdf.*

364 *Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271 at 282.*

365 *Moana Jackson "A Primer on the Marine and Coastal Area (Takutai Moana) Bill" (7 March 2011) p 4, accessible at http://www.converge.org.nz/pma/mj070311.pdf.*

366 *Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271 at 281.*

367 *Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271 at 281.*

368 *Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271 at 281.*

369 *Richard Boast "Foreshore and Seabed, Again" (2016) 9(2) NZJPIL 271 at 283.*

Image credit: Naomi Aporo-Manihera

MACA Act, with the report on the first stage of the inquiry released in June 2020. The first stage was focused on whether the MACA Act's procedural and resourcing arrangements breached the Treaty of Waitangi and prejudicially affected Māori.[370] Stage Two is considering the substantive nature of the MACA Act and accompanying regime.[371]

The Tribunal found that the claimants were, and continue to be, prejudiced by certain aspects of the MACA Act's procedural and resourcing regime.[372] Key findings in Stage One were:[373]

(a) On the provision of information to Māori about the MACA Act and its supporting regime, the Crown was found to have acted reasonably in the extent of distribution, the distribution methods and the timeliness of the information provided. However, the provision of information could have been improved.

(b) While flawed, the consultation with Māori in the 2013 and 2016 consultation rounds was executed reasonably and in good faith, consistent with the principles of partnership and active protection.

(c) The procedures put in place to support the High Court registry and the operation of the High Court pathway was inconsistent with the principles of partnership and active protection, however, given the mitigating steps taken by the High Court, were not prejudicial to Māori. It was recommended that cultural competency training for registry staff would further assist the Crown to meet its Treaty obligations and better meet claimant needs.

(d) The Crown failed to provide adequate and timely information regarding the Crown engagement pathway. The Tribunal identified a lack of cohesion between both pathways, which was a breach of the principle of active protection. Both failures significantly prejudiced Māori seeking to use the Crown engagement or both pathways.

(e) The Crown failed to support groups with applications that involved overlapping interests, which was a breach of the principle of active protection.

(f) Only partially funding applications under both pathways was a failure by the Crown that will cause significant prejudice to Māori. The Tribunal recommended the Crown cover all reasonable costs that claimants incur in pursuing applications, regardless of the pathway.

(g) The Tribunal expressed its concerns with the retrospective funding model, specifically the length of delays that often occurred in reimbursements, although it did not have enough evidence to make formal findings. Nonetheless, the Tribunal recommended the Crown take insight from the legal aid model to address its concerns.

(h) Funding caps and milestones set out in funding matrices were broadly inadequate, breaching the Crown's duty to act reasonably and in good faith with Māori and to actively protect their interests.

(i) Having the same Crown agency administer funding, deal with Crown engagement applications, and instruct Crown Law on litigation in the High Court places the Crown in a position where its obligations to actively protect Māori interests and its own interests may conflict. The Tribunal recommended that the funding regime be administered by an independent agency.

(j) Processes for reviewing funding decisions lacked clarity, accessibility, transparency, and independence. The Crown should offer independent mechanisms allowing claimants to review funding decisions.

Reflections on the current state

In addition to the academic commentary on the MACA Act, the authors offer the following further reflections on the current state. These reflections are drawn from the literature review and the authors' experience with the practical implementation of the MACA Act through the two pathways:[374]

(a) It has been well documented that Māori did not delineate iwi or hapū territories by lines on a map. Rather, it was knowledge passed down to each generation. Boundaries, both at land and sea, were minutely known, and natural features, streams, hills, rocks, or prominent trees, served to define both land borders and the location of fishing grounds at sea."[375] The MACA Act forces groups to delineate application areas through co-ordinates and lines on a map.

(b) The MACA Act, in one sense, represents a political compromise: a political compromise that could be interpreted as one that dilutes customary

370 *Waitangi Tribunal The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report (Wai 2660, 2020) at 3.*

371 *Waitangi Tribunal The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report (Wai 2660, 2020) at 3.*

372 *Waitangi Tribunal The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report (Wai 2660, 2020) at 127-134.*

373 *Waitangi Tribunal The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report (Wai 2660, 2020) at 127-134.*

374 *As at the date of this Report, the authors have participated in two lengthy High Court trials (in Te Whakatōhea (Stage One and Stage Two), Reeder (Stage Two) and a Court of Appeal hearing of the Te Whakatōhea (Stage One) judgment). The authors' firm also acts for clients who are negotiating with the Crown under the Crown engagement pathway.*

375 *Waitangi Tribunal Muriwhenua Fishing Report (Wai 22, 1988) at 36.*

rights to be a mere aspect of what they were pre-Foreshore and Seabed Act.[376]

(c) A rush of applications were made immediately prior to the 2017 statutory deadline for making an application. Several applicants applied under both pathways (noting that the High Court pathway attracted a filing fee). This timing also coincided with the first judgment of the High Court under the MACA Act, which successfully granted the applicant group customary marine title in Re Tipene [2016] NZHC 3199. An observation of the authors is that a number of applicant groups with applications under both pathways have opted to progress their High Court applications after the High Court's judgment granting customary marine title to a number of Applicant Groups in Te Whakatōhea (Stage One).

(d) The High Court hearings are often lengthy fixtures.[377] The High Court process is often adversarial and not conducive to fostering positive relationships between whānaunga (relations). Whilst there is flexibility in how evidence can be received and treated under the MACA Act,[378] the High Court processes remain formal and fairly rigid such that it is likely not a particularly comfortable environment for Applicant Groups.[379] A parallel process to assist with healing and rebuilding relationships could be put in place to run alongside the MACA Act processes (with a focus on healing trauma, often caused by Crown processes, and not causing further harm to relationships through these processes).

(e) It is unclear how the tests under the MACA Act will ultimately be interpreted by the Higher Courts. In that regard there remains a level of uncertainty of how the tests will ultimately be interpreted and applied. This creates a level of uncertainty for applicant groups currently progressing their applications via either pathway.

(f) It is unclear how the arrangements will work in practice (i.e. when CMT is granted by the Courts, and particularly when CMT is granted on a shared basis). This will be tested in time but there is a level of uncertainty currently which may lead to further litigation in the future.

Conclusion

The literature is largely critical of the MACA Act: from both a procedural and substantive standpoint. Procedurally, it is critical of the processes that the MACA Act prescribes for Applicant Groups to comply with in order to participate in MACA proceedings. Substantively, it is critical in relation to the tests set for recognition of CMT and PCRs, and the rights attached to those, which in most aspects are less than those afforded under the common law. The authors' experience in assisting clients with the MACA Act echo the criticisms in the literature.

Whilst there has been recent recognition of CMT and PCRs by the High Court, it is unclear how the tests will be interpreted by the higher courts through the appeals process. It is also unclear how CMT will operate between groups who have been granted CMT on a shared exclusivity basis. Whilst there is an opportunity to strengthen relationships, if the relationships between the groups are currently strained, it is unclear whether a grant of CMT on a shared basis will assist with relationships or further aggravate them.

The ngā hapū o Ngati Porou agreement, and the structures under that agreement, could provide some guidance for groups who have been awarded CMT and PCRs under High Court judgments. These structures are also in their relative infancy, but learnings from this example will likely be of assistance to other groups who are navigating the phase after being granted CMT or PCRs (particularly on a shared basis).

The authors agree with calls for reform of the MACA Act. The processes under the MACA Act are time-consuming and not conducive to strengthening relationships between whānaunga. The current complication is that Applicant Groups have now been granted CMT and PCRs; however, the granting of these rights should not impede at least a discussion in the first instance of whether the MACA Act is fit for purpose.

We conclude with the words of Anaru Kira, as reproduced in the Waitangi Tribunal Foreshore and Seabed Report:[380]

> *Komuruhia te poioneone kia toe ko te kirikiri kotahi.*
>
> *Ahakoa tana kotahi, e honoa ana ia ki te whenua, mai i te whenua ki te rangi, te rangi ki te whenua, ki te maunga, ki te moana, ki te tangata e tu ake nei;*
>
> *ko au tēnei te kirikiri nei.*[381]

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376 As is evidenced in particular through the requirements for the application area maps as prescribed by the 2022 Practice Note: Mapping guidelines for applications to the High Court under the Marine and Coastal Area (Takutai Moana) Act 2011 (available at https://www.courtsofnz.govt.nz/assets/6-Going-to-Court/practice-directions/practice-notes/high-court/20220323-Practice-Note-of-Mapping-Guidelines-in-MACA-Applications.pdf).

377 Te Whakatōhea (Stage One) ran for 11 weeks and Reeder (Stage Two) ran for 8 weeks.

378 Marine and Coastal Area (Takutai Moana) Act 2011, s 105.

379 That is the feedback that the authors have received from their clients.

380 Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy (Wai 1071, 2004) at 12.

381 Rub away the earthen clump to leave but one lone grain of dirt; whilst it is but one, yet it is inextricably joined to the land, from the land to the sky, the sky to the land, to the mountain to the sea, to the people; tis I who is that one lone grain.

CASUAL LAYERED ANALYSIS

In the realm of strategic foresight and futures thinking, a myriad of methodologies exists to analyse and understand complex societal issues, trends, and potential futures. One such powerful framework is Causal Layered Analysis (CLA), pioneered by futurist Sohail Inayatullah. CLA offers a structured and multidimensional approach to examining phenomena, going beyond surface-level observations to uncover underlying causes, cultural dynamics, and deep-seated assumptions that shape our understanding of the world.

This method delves into multiple layers of analysis, allowing the researchers to explore issues from various perspectives and unearth insights that might otherwise remain obscured. As we delve into the intricacies of CLA, we embark on a journey that transcends mere diagnosis, aiming instead to foster a deeper understanding of the complex interplay between events, structures, worldviews, and the underlying narratives that shape our collective consciousness. Through CLA, we gain the tools to navigate the complexities of our rapidly changing world and envision futures that are only not plausible but also transformative.

Using the CLA as the framework, for each focus area the following questions are posed:

1. What are the litany of events happening within this focus area?
2. What are the systemic causes of these events, what are causing the problems identified in the litany of events?
3. What are the worldviews and or discourses associated with this focus area?
4. What are the myths, metaphors, collective unconscious that are associated with this focus area?

Through utilising the CLA it is anticipated that within the realms of the 'weight of the past' and the current customary, commercial and takutai moana regimes, it offers a pathway to comprehensively grasp not only the immediate obstacles but also the underlying structural, cultural, and symbolic factors. By employing CLA, we can gain insight into the complexities that impede the establishment of marine governance frameworks aligned with tikanga Māori and Te Tiriti o Waitangi. A table for each CLA will follow.

To conclude this section will finish with an overview of the deep immediate challenges and the systemic, cultural, and underlying consciousness that will then guide the development of the marine governance models in the next phase of this research project.

Image credit: Naomi Aporo-Manihera

Weight of the past - pre-colonial and post-colonial

LITANY OF EVENTS				
Pre-colonisation Māori reliance on the ocean for sustenance, with established knowledge of oceans, fisheries, and ownership systems	The erosion of Māori rights over time by successive governments and legislation	Legal cases such as Te Weehi v Regional Fisheries Officer (1986) and findings of the Waitangi Tribunal in reports such as the Muriwhenua Fishing Report and the Ngāi Tahu Sea Fisheries Report	The government's initiation of measures to protect and reinstate Māori rights in the 1980s. The Fisheries Settlement as a landmark agreement recognizing and enshrining Māori rights within legislation, particularly in fisheries.	The ongoing struggle, resilience, and adaptation of Māori to uphold their rights under tikanga, ensuring protection against further erosion or neglect
SYSTEMIC CAUSES (What is causing the problems)				
Colonialism and Erosion of Rights The signing of the Treaty of Waitangi in 1840 marked the beginning of a complex and evolving process for Māori rights, particularly concerning the ocean. Pre-colonisation, Māori had established systems of ownership and governance over fisheries, grounded in their cultural practices and tikanga (values). However, successive governments and legislation eroded these rights over time.	***Lack of Legal Recognition and Definition*** While the Treaty of Waitangi recognised and guaranteed Māori rights, it left the specific nature of these rights undefined. This lack of clarity enabled governments to exploit loopholes and diminish Māori fishing rights through legislative means.	***Western Legal Frameworks*** The western legal system, based on codified statutes and regulations within a Westminster system, often clashed with the fluid and holistic nature of tikanga. This mismatch resulted in a disconnect between Māori customary practices and legal interpretations, contributing to the erosion of Māori rights. ***Legal Battles and Negotiations*** Māori resilience and commitment to upholding their rights under tikanga led to significant legal battles, such as Te Weehi v Regional Fisheries Officer case in 1986, which clarified and upheld Māori fishing rights. Additionally, findings from the Waitangi Tribunal and subsequent settlements like the Fisheries Settlement played crucial roles in expanding the scope of Māori fishing rights.	***Governmental Ignorance and Resistance*** Until the 1970s successive governments largely ignored or resisted Māori efforts to protect and reinstate their fishing rights. It was only through persistent advocacy, legal battles, and negotiations that some recognition and protection were achieved	***Paradigm Shift and Contemporary Governance*** The Fisheries Settlement marked a paradigm shift in acknowledging and enshrining Māori rights within legislation, particularly in the realm of fisheries. This agreement heralded the dawn of contemporary governance structures for Māori, providing a framework for recognition and protection of our rights.
WORLDVIEW AND DISCOURSE (Systems of thought composed of ideas, attitudes, beliefs, and practices)				
Pre-Colonial Māori Relationship with the Ocean This highlights the deep connection Māori had with the ocean, emphasising our reliance on it for sustenance and their intricate knowledge of oceanic ecosystems and fisheries management systems based on tikanga	***Tikanga as Fundamental to Māori Governance*** The discussion of tikanga emphasises its core values and principles, contrasting them with Western legal systems. Central to this discourse is the idea that tikanga governs behaviour and decision-making within Māori communities, promoting values whānaungatanga and kaitiakitanga.	***Erosion and Recognition of Māori rights*** This traces the historical erosion of Māori fishing rights by successive governments and legislative measures. It also highlights the efforts made, particularly since the 1970s, to recognise and reinstate these rights through legal cases, Waitangi Tribunal findings and the Fisheries Settlement.	***Legal and Legislative Milestone*** The legal cases and legislative measures, such as the Te Weehi case and the Fisheries Settlement, are pivotal moments in the recognition and protection of Māori fishing rights. These milestones represent shifts in governmental attitudes and policies towards Māori rights.	***Continued Struggle and Adaptation*** There is acknowledgement of the ongoing challenges faced by Māori in safeguarding our fishing rights, despite significant legal and legislative advancements. It emphasises the importance of continued advocacy and vigilance to prevent further erosion of these hard-won rights.
MYTHS AND METAPHORS – Collective Unconscious				
The context of the journey of Māori rights relating to the ocean, encapsulates the deep-seated values, principles, and cultural norms inherent within Māori communities Rooted in centuries of tradition and cultural heritage, the collective unconscious represents the shared reservoir of knowledge, beliefs, and experiences that shape Māori perspectives and behaviour. the collective unconscious is exemplified through the concept of tikanga, which embodies the fundamental precepts and values governing Māori systems of control. Unlike rigid legal systems prevalent in Western societies, tikanga emphasizes overarching principles such as whānaungatanga (kinship), mana (authority), utu/ea (reciprocity and balance), tapu/noa (sanctity and maintenance), and kaitiakitanga (obligations and responsibilities). These values serve as guiding forces, informing decision-making, and behaviour within Māori communities, fostering relationships, sustainability, and responsibility. Moreover, the collective unconscious finds expression in the historical resilience and adaptation demonstrated by Māori in the face of challenges to their rights and cultural identity. Despite the erosion of rights by successive governments and legislation since the signing of the Treaty of Waitangi in 1840, Māori have persevered through legal battles and negotiations to assert and protect their fishing rights under tikanga. Thus, the collective unconscious, embodied in tikanga, serves as a foundational framework that underpins Māori resilience, advocacy, and collective action in safeguarding their cultural heritage and rights. It represents not only a repository of cultural knowledge but also a source of strength and resilience in the face of adversity.				

Push of the present - Māori customary fishing

LITANY OF EVENTS				
Promises of rangatiratanga not fulfilled. Under the Fisheries Settlement the preamble states: "the Crown recognises that traditional fisheries are of importance to Māori and that the Crown's Treaty duty is to develop policies to help recognise use and management practices and provide protection for and scope for exercise of rangatiratanga in respect of traditional fisheries." Whilst for some Māori progress has been made, for a large majority the promises of the Act (like Te Tiriti o Waitangi) are far from being obtained.	***Māori rights constrained by policies.*** Settler-colonial policies continue to constrain the full exercise of Māori rights over our fisheries by diluting key tikanga like rangatiratanga and kaitiakitanga. For Māori there is an ongoing struggle with the Crown for the equitable expression of indigenous rights, such as rangatiratanga and kaitiakitanga (to name a couple).	***Mātauranga Māori and tikanga considered subservient to Western knowledge.*** Mātauranga Māori and tikanga are often perceived as a mere source of ecological information to supplement Western Scientific knowledge, rather than a holistic system that integrates the Māori worldview, values, norms, governance structures, and environmental management practices.	***Environmental injustices*** Decisions or actions made by the Crown that harms the environment while simultaneously alienating Māori from the moana.	***Returning resource management to the people at place*** Governance arrangements like Taiapure are not enabled to make decisions that work best at place. Instead, government departments are opposing local decisions by reverting to colonial fisheries mechanisms over tikanga mechanisms. With the climate crisis and the declining biodiversity of ecological systems, there is an urgent need to return resource management to the people at place. This offers an opportunity to preserve and restore biological and cultural diversity.
SYSTEMIC CAUSES (What is causing the problems)				
Reluctance by the Crown to devolve power and authority to Māori. The Crown has tasked itself to "develop policies to help recognise use and management practices and provide protection for and scope for exercise of rangatiratanga in respect of traditional fisheries." However, it shouldn't be defining rangatiratanga nor developing the management and protection practices, as this can only be done by whānau, hapū and iwi.	Centralisation of decision-making in the hands of Ministers restricts the ability of whānau, hapū and iwi to exercise (let alone fully exercise) tikanga that is appropriate for that whānau, hapū and iwi. The Crown should not be defining Māori terms like rangatiratanga, kaitiakitanga, or developing management and protection practices. Instead, the Crown should be enabling Māori to express these tikanga in ways that	Indigenous knowledge, like mātauranga Māori, is often marginalised or appropriated within Western scientific frameworks, hindering holistic and culturally appropriate approaches to fisheries management. When prioritising Western scientific knowledge over indigenous knowledge, there is a risk of eroding the cultural identity and heritage of indigenous communities. This can lead to the loss of traditional practices, language, and ways of knowing. The perception of indigenous knowledge as inferior to Western scientific knowledge reflects a colonial mindset that has historically devalued indigenous cultures and knowledge systems. Overcoming this mindset is essential for fostering true respect, equity, and collaboration among diverse knowledge holders.	Actions or decisions made by the government are causing harm to the environment. Pollution, habitat destructions, species depletion and resource exploitation are having detrimental effects on ecosystems and biodiversity. The government does not recognise the authority of Māori and continues to make decisions and take action that alienates Māori from their food sources and customary practices and decreases their ability to access and have a relationship with the moana.	Lack of local autonomy – Māori and the community are not empowered to make decisions that are most suitable for their specific local contexts. There is conflict between tikanga and Western-influenced regulatory frameworks. Ongoing power imbalances where the Western/colonial way of being and doing dominates the governance and management of the marine environment. This marginalises Māori perspectives and undermines our ability to manage resources in accordance with tikanga. The climate crisis and declining biodiversity necessitate a shift from centralised decision-making and colonial frameworks, as these are inadequate for addressing the pressing environmental challenges.
WORLDVIEW AND DISCOURSE (Systems of thought composed of ideas, attitudes, beliefs, and practices)				
Power imbalance There is an uneven power dynamic between the Crown and Māori. Colonial legacies cause the ongoing struggle for Māori self-determination. ***Recognition of Māori rights*** The Crown's obligation under the Fisheries Settlement to recognise and protect traditional fisheries practices and rangatiratanga is insufficient if it does not involve genuine empowerment of Māori communities to exercise their own authority over fisheries management.	***Decolonisation*** Centralised control reflects a colonial legacy where power and authority were concentrated in colonial administrations. Decolonisation advocates for the redistribution of power, and the recognition of indigenous self-governance and decision-making authority. ***Cultural autonomy*** This is the right of Māori communities to govern ourselves according to our own cultural values, norms, and traditions without external interference.	***Marginalisation and appropriation*** There is a tendency within Western scientific frameworks to marginalise or appropriate indigenous knowledge, such as mātauranga Māori. Indigenous knowledge is often not given equal value or recognition compared to Western scientific knowledge. Sometimes, it is co-opted without proper acknowledgement or respect for its origins and cultural significance.	***Environmental justice*** The actions and decisions of the government disproportionately harm indigenous peoples, like our Māori communities. This emphasises the unequal distribution of environmental benefits and burdens and calls for equitable decision-making processes that consider the rights and needs of all. ***Preservation of cultural heritage and customary knowledge systems*** These are threatened by government actions that alienate indigenous peoples from our food sources, cultural practices and spiritual connections to the land and sea.	***Conflict between Indigenous and Western systems*** The tension between Māori governance systems and externally imposed colonial structures, reflects broader debates around cultural preservation, sovereignty, and legal pluralism (a situation in which two or more systems co-exist in the same social field). ***Power imbalances and marginalisation*** The marginalisation of Māori perspectives and the undermining of our ability to manage resources in accordance with tikanga highlights issues of cultural hegemony, discrimination, and structural inequality (a system where prevailing social institutions offer an unfair or prejudicial distinction between different segments of the population in a specific society).

The definition and exercise of rangatiratanga It is inappropriate for the Crown to define and exercise rangatiratanga. True authority and decision-making power resides with whānau, hapū and iwi, reflecting the importance of indigenous governance and self-determination. ***Community-based management*** This discourse challenges top-down approaches to governance and highlights the value of participatory and culturally appropriate management practices.	***Mātauranga Māori*** Māori have the authority to define and implement our own approaches to environmental management and protection based on our cultural values and practices. ***Empowerment and enablement*** The Crown should focus on enabling Māori to express our tikanga in ways that are meaningful and effective for us. This centres on empowerment and capacity-building, emphasising the importance of supporting indigenous communities in asserting their rights and self-determination.	***Holistic and culturally appropriate approaches*** Indigenous knowledge systems often offer comprehensive perspectives that integrate ecological, cultural, and spiritual dimensions, which can contribute to more effective and sustainable management practices. However, the marginalisation or appropriation of indigenous knowledge hinders the adoption of these approaches. ***Risk of cultural erosion*** The broader consequences of privileging one knowledge system over another, including the potential loss of customary practices, language, and ways of knowing that are integral to indigenous cultures.	***Decolonisation and Empowerment*** There are calls to challenge colonial structures and systems that perpetuate harm to both the environment and indigenous communities. There is a need for self-determination, community-led conservation efforts, and collaborative decision-making processes that prioritise indigenous perspectives and knowledge.	***Urgency of environmental challenges*** The environmental challenges that we face as a society emphasise the inadequacy of centralised decision-making and colonial frameworks, calling for a shift towards more inclusive, participatory, and environmentally sustainable approaches to governance management.
MYTHS AND METAPHORS – Collective Unconscious				
The collective unconscious lens reveals a multifaceted narrative surrounding the power dynamics between the Crown and Māori communities, underscored by colonial legacies and the ongoing quest for Māori self-determination. The discourse emphasises the necessity for the Crown to genuinely recognise and empower Māori rights, particularly in fisheries management, acknowledging that true authority resides within Māori governance structures. Values and community-based management is advocated as a culturally appropriate alternative to top-down approaches, aligning with broader calls for decolonisation and cultural autonomy. However, the persistence of power imbalances and marginalisation threatens to erode indigenous knowledge systems and cultural heritage, exacerbating environmental injustices. Urgent action is needed to address environmental challenges through inclusive and sustainable governance approaches that prioritise indigenous perspectives and knowledge, thus fostering equitable decision-making and environmental stewardship for the benefit of all.				

Push of the present - commercial fishing

[382] Raniera, Tau. Iwi Chairs Hui. (Wellington, 2006).

LITANY OF EVENTS

Growing distance between iwi as quota owners and active fishers

There is a widening gap between quota owners and Annual Catch Entitlement (ACE) fishers as the increasing rise in costs of operations, infrastructure and compliance makes it more difficult for fishers to return an operating profit without holding quota.

Escalating tensions between commercial and recreational fishing

An artificial separation of Māori fishing rights and interests was imposed on Māori – "fishing to feed the whānau became re-categorised as recreational fishing."[382]

The process for determining Total Allowable Catch allocations is one of the most contentious fisheries management issues because it is characterised by competing self-interests and conflicts. The Minister must use discretion in weighing up these interests when deciding what would be reasonable allocations in the circumstances.

This is particularly difficult for Māori to grapple with when balancing Settlement rights in the commercial sector with the usage by our whānau for sustenance.

Evolution of the commercial drivers in ocean sector decision-making

There is a departure from traditional economic perspectives that viewed ocean resources, including fisheries, as lacking economic value until extracted and used by humans.

New Zealand's implementation of the Quota Management System (QMS) coupled with traditional economic views has linked extractive behaviour with economic rents, shaping decision-making.

Changing investor and consumer demands, resource scarcity, and environmental shifts challenge traditional views on the value of commercial fishing and extraction.

There's speculation about whether concepts like natural capital could challenge the current economic paradigm, possibly incorporating Māori principles that emphasise the ocean's capacity to sustain life.

Frictions between commercial and customary fishing

Over the past twenty years, iwi organisations have devoted significant time and effort to establish mechanisms for the stewardship of commercial fisheries assets.

As Te Ohu highlights there are two tensions between commercial and customary fishing:

1) Between the management of commercial assets by Mandated Iwi Organisations (MIOs) and Asset Holding Companies (AHCs), and authorisation of customary fishing by tangata whenua

2) The relationship between different scales of management, specifically between fisheries management at the scale of quota management areas and community level concerns about the management of local fisheries.

The tension between commercial imperatives and cultural traditions underscores the importance of incorporating indigenous knowledge systems and community perspectives into fisheries management framework.

Industry headwinds and aggregation

Industry headwinds and market forces have spurred a wave of consolidation and aggregation within the commercial fishing sector. As smaller operators grapple with increasing compliance burdens, operational cost increases and competitive pressures, entities seek economies of scale and market dominance through mergers and acquisitions.

SYSTEMIC CAUSES (What is causing the problems)

Less reliance on fishing quota

Iwi, in particular AHCs are less reliant on fishing quota to resource the operations of our iwi organisations. AHCs are diversifying and generating a return through areas other than fishing quota.

Economic incentives and market dynamics Despite Māori ownership of quota there are challenges related to access to capital, market competition, or profitability concerns.

Divergent priorities and values

The differing goals and perspectives among commercial, recreational, and customary fishing interests suggests that each group has its own set of priorities and values regarding how marine resources should be utilised.

Tensions with the wider public, NGOs, and other ocean users

The conflicts extend beyond just fishing interests to include various stakeholders such as the general public, non-government organisations (NGOs) and other users of the ocean. This indicates that the issues are not isolated to the fishing community but involve broader societal concerns.

Traditional economic perspectives

The departure from traditional economic perspectives is causing a shift in the understanding of ocean resources. Previously, these resources were viewed as lacking economic value until extracted and used by humans. This traditional view may not fully account for the complexities and value of ocean ecosystems, leading to potentially unsustainable practices.

Quota Management System

The implementation of the QMS in New Zealand, along with traditional economic views, has linked extractive behaviour with economic rents. This linkage may incentivise excessive extraction rather than sustainable management of ocean resources, affecting decision-making processes.

Changing demands and resource scarcity

Shifting investor and consumer demands, coupled with resource scarcity and environmental shifts, are challenging traditional views on the value of commercial fishing and extraction. These changes may highlight the limitations of purely economic approaches to ocean resource management, especially in the face of sustainability concerns.

Mandated by the same people, but different approaches to resource management.

Considering customary and commercial entities are mandated by the same iwi/hapū, one might expect them to have aligned perspectives and approaches to resource management.

However, tensions arise due to differences in priorities and management approaches between commercial and customary fishing sectors.

Scale management.

Another source of tension arises from the difference in scales of management. On one hand, there is fisheries management at the scale of quota management areas, which is typically driven by commercial imperatives. On the other hand, there are community-level concerns about the management of local fisheries, which may not align with commercial interests. This misalignment creates friction between centralised management systems and community-level perspectives.

Industry headwinds and market forces

These refer to external factors such as changing regulations, environmental concerns, fluctuations in fish populations, and shifts in consumer preferences that create challenges for businesses in the fishing industry.

Increasing compliance burdens

There are regulatory requirements related to environmental sustainability, fishing quotas, gear restrictions and safety standards. Compliance with these regulations often requires investments in equipment, training, and administrative efforts, which can be burdensome for smaller operators.

Cultural and community aspirations

The disconnect between ownership of fishing quota and active participation in fishing industry suggests a misalignment between economic interests and broader cultural and community aspirations of Māori. This stems from differing priorities, goals, and operating regimes between customary cultural practices and economic pursuits within the fishing industry.

Deep seated conflicts over resource allocation and management:

The tensions are not merely surface-level disagreements but are rooted in deeply conflicting ideas about how resources should be allocated and managed. This suggests structural issues within the management systems governing marine resources.

Potential paradigm shifts

There is speculation about whether concepts like natural capital could challenge the current economic paradigm. This speculation suggests a growing recognition of the need to incorporate non-monetary values, such as ecological sustainability, into economic decision-making processes. Additionally, there is mention of incorporating Māori principles that emphasise the ocean's capacity to sustain life, suggesting a broader perspective that includes indigenous knowledge and cultural values.

Conflict between commercial imperatives and cultural beliefs

The tension between commercial imperatives (such as profit maximisation) and cultural beliefs (such as sustainable harvesting practices and respect for ancestral fishing grounds) highlights the clash between economic objectives and indigenous values. This conflict underscores the importance of incorporating indigenous knowledge systems and community perspectives into fisheries management frameworks to ensure sustainable and culturally appropriate management practices.

Competitive pressures

As larger entities consolidate and gain market dominance, they may have greater bargaining power with buyers, access to more efficient technology, and the resources to withstand market fluctuations. This can put pressure on smaller operators, making it difficult for them to compete.

WORLDVIEW AND DISCOURSE (Systems of thought composed of ideas, attitudes, beliefs, and practices)

Diversification of income streams

The emphasis on AHCs diversifying and generating returns from areas other than fishing quota indicates a discourse around economic empowerment and financial independence. This suggests that Māori are expanding their economic activities beyond the fishing industry to reduce reliance on a single revenue source.

Alignment of economic interests with cultural aspirations:

Economic pursuits within the fishing industry are perceived to not align with broader cultural and community aspirations of Māori. There is an underlying concern about maintaining cultural integrity and values while engaging in economic activities.

Economic pursuits should not overshadow or compromise cultural values and goals.

Diversity of values

The differing goals and perspectives among commercial, recreational, and customary fishing interests highlight the existence of pluralism in values. Each group likely has its own worldview and set of priorities regarding how marine resources should be utilised. There should be recognition of the diverse cultural, economic, and social perspectives in discussions about resource management.

Structural issues and systemic challenges

The mention of deep-seated conflicts over resource allocation and management points to structural issues within the management systems governing marine resources. This discourse suggests a recognition of systemic challenges and institutional barriers that hinder effective resource management efforts. It implies a need for addressing underlying structural issues to achieve sustainable and equitable resource management outcome.

Revaluation of economic perspectives

There is a shift away from traditional economic perspectives that solely focus on the extraction and utilisation of ocean resources for economic gain, to recognising the broader value of marine ecosystems beyond their immediate economic benefits.

Association of extractive behaviour with economic rents

The traditional economic framework, actions like fishing are seen as ways to generate economic profits or rents. Additionally, the implementation of te QMS has reinforced this connection between extractive behaviours and economic gains.

Speculation on potential paradigm shifts

In the economic approach to ocean resource management, concepts like natural capital and Māori principles emphasising the ocean's capacity to sustain life could challenge the current economic paradigm. This implies a broader reconsideration of the values and principles guiding ocean resource management practices.

Unity and consistency in values and knowledge systems

Entities mandated by the same iwi/hapū would share common values and knowledge systems. This implies an expectation for alignment and consistency in perspectives and approaches to resource management, stemming from the belief that shared whakapapa and working for the collective should result in unified decision-making processes.

While both groups may share overarching cultural values and knowledge systems, being part of the same iwi and/or hapū, the application of these values within the context of commercial and customary fishing can differ significantly due to the different management structures and objectives associated with each sector.

Recognition of diverse perspectives and local knowledge

It is acknowledged that there are diverse perspectives and knowledge systems within communities. It highlights the importance of incorporating local knowledge and community-level concerns into resource management processes, recognising that centralised management structures may not adequately address the unique needs and perspectives of local communities.

Recognition of interconnectedness

The fishing industry is influenced by a complex array of external forces beyond its immediate control.

Emphasis on sustainability

Increasing compliance burdens related to regulatory requirement for environmental sustainability shows a focus on prioritising long-term health and viability of marine ecosystems. This perspective recognises the importance of ensuring that fishing practices are conducted in a manner that preserves and protects the environment for future generations.

Awareness of power dynamics

Competitive pressures resulting from the consolidation of larger entities in the industry reflects an awareness of power dynamics within the fishing sector. This worldview acknowledges that larger entities may have advantages such as greater bargaining power, access to advanced technology, and resources to weather market fluctuations, potentially disadvantaging smaller operators.

Concern for equity and fairness

There are concerns for equity and fairness within the fishing industry. This worldview recognises the potential for disparities in market power and resources to create challenges for smaller businesses, highlighting the need for policies and practices that promote a level playing field.

MYTHS AND METAPHORS – Collective Unconscious

Through the lens of the collective unconscious, it becomes evident that the challenges and opportunities facing the fishing industry are deeply intertwined with broader cultural, economic, and environmental narratives. The diversification of income streams among MIOs and the emphasis on generating returns from areas beyond fishing quotas signify a discourse centred around economic empowerment and financial independence. This shift suggests a collective desire among Māori to expand economic activities beyond the fishing industry, reducing reliance on a single revenue source and aligning economic interests with cultural aspirations.

However, it is crucial to recognise that economic pursuits within the fishing industry may not always align with broader cultural and community aspirations. There is an underlying concern about maintaining cultural integrity and values while engaging in economic activities, suggesting that economic pursuits should not overshadow or compromise cultural goals. This underscores the need for unity and consistency in values and knowledge systems among entities mandated by the same iwi or hapū, ensuring alignment in perspectives and approaches to resource management.

Moreover, the recognition of diverse perspectives and local knowledge systems within communities highlights the importance of incorporating these voices into resource management processes. Centralised management structures may not adequately address the unique needs and perspectives of local communities, emphasising the interconnectedness between economic activities and cultural values.

As the fishing industry navigates through structural issues and systemic challenges, there is a growing emphasis on sustainability and equity. Increasing compliance burdens related to regulatory requirements for environmental sustainability underscore a commitment to preserving marine ecosystems for future generations. Awareness of power dynamics and concerns for equity and fairness within the industry highlight the need for policies and practices that promote a level playing field, ensuring that smaller operators are not disadvantaged.

Speculation on potential paradigm shifts, such as the incorporation of natural capital and Māori principles into ocean resource management, suggest a broader reconsideration of values and principles guiding industry practices. This signifies a collective willingness to challenge traditional economic perspectives and embrace alternative frameworks that prioritise sustainability, cultural integrity, and community well-being.

In conclusion, the collective unconscious reveals a complex interplay of cultural, economic, and environmental factors shaping the fishing industry. By recognising and addressing these underlying dynamics, we can work towards achieving sustainable and equitable resource management outcomes that uphold cultural values and promote the well-being of both present and future generations.

Push of the present - takutai moana

LITANY OF EVENTS

Diluting Māori Rights

The MACA Act, in one sense, represents a political compromise: a political compromise that could be interpreted as one that dilutes customary rights to a mere shadow of what they were pre-Foreshore and Seabed.

Defining Territories

Māori did not delineate iwi or hapū territories by lines on a map. Rather, it was knowledge passed down to each generation. Boundaries, both at land and sea, were minutely known and natural features, streams, hills, rocks, and prominent trees served to define both land borders and the location of fishing grounds at sea." The MACA Act forces groups to delineate application areas through co-ordinates and lines on a map.

Adversarial Court Process

The High Court process is often adversarial and not conducive to fostering positive relationships between whānaunga (relations)

The Marine and Coastal Act Test

It is unclear how the tests under the MACA Act will ultimately be interpreted by the Higher Courts. In that regard there remains a level of uncertainty of how the tests will ultimately be interpreted and applied. That creates a level of uncertainty for applicant groups currently progressing their applications via either pathway.

Practical Implementation

It is unclear how the arrangements will work in practice (i.e. when CMT is granted by the courts, particularly when CMT is granted on a shared basis). This will be tested in time but there is a level of uncertainty currently which may lead to further litigation in the future.

SYSTEMIC CAUSES (What is causing the problems)

Inadequate recognition and protection of Māori rights.

The subordination of Māori rights to other interests.

The implications of political compromise in shaping the provisions of the MACA Act.

The enforcement of methods that conflict with Māori approaches to defining territories, leading to a loss of cultural significance, erosion of customary knowledge, and challenges in representing Māori territories accurately.

Adversarial nature of the High Court process stems from the inherent characteristics of the legal system.

Its impact on interpersonal relationships, and clashes with cultural values and norms within Māori communities

Lack of clarity and certainty surrounding the interpretation and application of the tests under the MACA Act.

Uncertainty creates challenges for applicant groups, contributes to legal complexities, and undermines confidence in the effectiveness of the Act in protecting Māori rights in the marine and coastal area.

Lack of clarity creates challenges in understanding the rights, responsibilities and implications of customary marine title granted by the Courts.

Where legal frameworks that are ambiguous or untested, stakeholders may resort to legal action to resolve disputes or seek clarification. This can result in prolonged legal battles, increased costs, and ongoing instability in governance arrangements(a story many Māori are unfortunately familiar with).

WORLDVIEW AND DISCOURSE (Systems of thought composed of ideas, attitudes, beliefs, and practices)

Indigenous Rights and Sovereignty

The inadequate recognition and protection of Māori rights can lead to the erosion and loss of those rights.

Māori rights are often subordinate to other interests. This can disrupt the balance and undermine Māori communities' ability to maintain their way of life.

Power and politics

The implication of political compromise in shaping the provisions of the MACA Act highlights the influence of various stakeholders including government bodies, industry interests, and the wider community. It raises questions about whose interests are prioritised in policymaking, and the role of power imbalances in shaping legislative outcomes.

Cultural Hegemony

Colonial powers impose their systems of governance, often disregarding indigenous knowledge and practices.

Tikanga Māori compared to the requirements of the MACA Act highlights how different forms of knowledge production and representation shape perceptions of territory, identity and belonging.

The Foreshore and Seabed Act, which revoked the right of Māori to claim ownership to the foreshore and seabed in the Māori Land Court. The focus has never been on recognising or accommodating Māori rights, instead it was about extingushing them. Consequently, any subsequent measures within these Acts will not adequately fulfill Māori aspirations for meaningful recognition of their rights in the foreshore and seabed.

Legal System

The adversarial nature of the legal process involves two opposing parties presenting their cases before an impartial adjudicator, such as a judge.

Legal disputes often strain relationships between individuals, families and communities involved leading to heightened emotions, breakdowns in communication and long-lasting repercussions (again, something as iwi, hapū and whānau we are familiar with).

Cultural Values and Norms

The imposition of Western legal frameworks undermines or conflicts with tikanga Māori, leading to tensions and challenges in navigating the legal system.

Legal Interpretation and Adaptation

Ambiguities or lack of clarity in the language of the new law can lead to uncertainty for applicant groups and legal practitioners.

Legal complexity can hinder access to justice, increase costs, and create barriers for Māori to have their rights recognised in the courts.

Confidence in the Legal System

When laws are perceived to be unclear or ineffective in protecting rights, it can undermine public confidence in the fairness and reliability of legal institutions.

Ambiguity and Uncertainty

There is ambiguity in how shared customary marine title will work in practice, leading to challenges in understanding rights, responsibilities, and implications, thereby complicating decision-making processes and governance arrangements.

Stakeholders may resort to legal action to seek clarification or resolve disputes. This can result in prolonged battles, increased costs, and ongoing instability in governance arrangements.

Historical Context and Institutional Bias

Historical context and institutional biases contribute to the lack of clarity and uncertainty surrounding legal arrangements, particularly concerning Māori rights. It acknowledges the systemic barriers and injustices faced by Māori within legal systems, reflecting a pattern of marginalisation and discrimination.

MYTHS AND METAPHORS – Collective Unconscious

The challenges surrounding the dilution of Māori rights and the complexities of defining territories underscore deep-seated issues of power dynamics, cultural hegemony, and legal interpretation.

The inadequate recognition and protection of Māori rights not only threatens the erosion and loss of these rights but also disrupts the delicate balance essential for maintaining Māori communities' way of life. This imbalance is further exacerbated by political compromises and the influence of various stakeholders, often prioritising interests other than those of our Māori communities.

Colonial powers have historically imposed their systems of governance and disregarding indigenous knowledge and practices, undermining the cultural autonomy and sovereignty of Māori. The adversarial nature of the legal system and the imposition of Western legal frameworks often conflict with tikanga Māori, leading to strained relationships, tensions, and challenges in navigating the legal landscape.

The ambiguity and uncertainty surrounding legal arrangements, particularly concerning Māori rights, reflects historical biases and institutional barriers that perpetuate marginalisation and discrimination. This uncertainty complicates decision-making processes and governance arrangements, potentially leading to prolonged legal battles and increased costs.

In essence, the challenges faced for those working through the Marine and Coastal Act in defining territories, navigating legal processes, and implementing practical solutions underscore the urgent need for systemic change that acknowledges and respects Māori rights, values, and aspirations. Only through genuine recognition, empowerment, and collaboration can we hope to address the deep-rooted injustices and achieve equitable outcomes for all stakeholders involved.

CONCLUSION

In conclusion, the application of the causal layered analysis to the multifaceted issues surrounding the focus areas of the weight of the past, customary and commercial fishing and the takutai moana.

Within the realm of the weight of the past, the core of these issues lies in the collective unconscious of Māori communities, embodied in tikanga, which serves as a foundational framework guiding Māori resilience, advocacy, and collective action in a shared reservoir of knowledge, beliefs, and experiences that shape Māori perspectives and behaviour, providing a lens through which to understand the complexities of marine governance.

In the domain of customary fishing, the CLA unveils power dynamics between the Crown and Māori communities, underscored by colonial legacies and ongoing struggles for self-determination. It emphasises the necessity for genuine recognition and empowerments of Māori rights by the Crown, as well as the advocacy for values-based and community driven management and governance aligned with broader calls for decolonisation and cultural autonomy. Urgent action is imperative to address environmental challenges through inclusive and sustainable governance approaches that prioritise tikanga Māori, mātauranga Māori and Te Tiriti o Waitangi.

Similarly in the context of commercial fishing, the CLA reveals a complex narrative intertwined with broader cultural, economic, and environmental considerations. While there is a collective desire among Māori to diversify economic activities beyond fishing industry, economic pursuits must align with broader cultural and community aspirations to preserve cultural integrity and values. This highlights the need for unity and consistency in tikanga Māori and mātauranga Māori among Māori, as well as the recognition of diverse perspectives within communities.

Lastly, within the framework of the Takutai Moana, the CLA identifies the vulnerability and inadequate safeguarding of Māori rights by the Crown. In the case of the takutai moana, colonial powers imposed their governance systems, disregarding indigenous knowledge and practices, thereby undermining the cultural autonomy and sovereignty of Māori. The adversarial nature of the legal system, coupled with the imposition of Western legal frameworks, frequently clashes with tikanga Māori resulting in strained relationships, tensions, and legal complexities.

This ambiguity and unpredictability surrounding legal arrangements, especially concerning Māori rights, mirror historical biases and institutional barriers that perpetuate marginalisation and discrimination. This uncertainty complicates decision-making processes and governance structures, potentially leading to protracted legal disputes and escalated costs.

In essence the CLA provided a comprehensive approach to understanding the layers of complexity surrounding Māori rights relating to the ocean. By delving into the collective unconscious and examining power dynamics, cultural hegemony, and legal interpretations, we can work towards achieving sustainable and equitable resource management outcomes that uphold cultural values and promote wellbeing of both present and future generations. Through a commitment to systemic change, genuine recognition, empowerment, collectivisation, and collaboration, we can navigate towards a future where tikanga Māori and the rights guaranteed under Te Tiriti o Waitangi are fully recognised and respected in the governance of the marine environment.

National SCIENCE Challenges

SUSTAINABLE SEAS

Ko ngā moana whakauka

TANGAROA ARARAU