WHIRIA NGĀ AHO O TE WHĀRIKI:

Using litigation as a tool in the pursuit of rangatiratanga and kaitiakitanga

JULY 2022

WHĀIALEGAL

NEW ZEALAND'S BIOLOGICAL HERITAGE
Ngā Koiora Tuku Iho

National SCIENCE Challenges

Acknowledgements

We extend our thanks to the co-leads of the Adaptive Governance and Policy aspect of the New Zealand's Biological Heritage National Science Challenge, Dr Carwyn Jones and Associate Professor Maria Bargh. Thank you for entrusting Whāia Legal to undertake this work and for the mahi you do for iwi, hapū, and whānau across Aotearoa. E kore e mutu ngā mihi ki a kōrua.

We also acknowledge those who have led, or participated in, the cases that are referred to in this Report. Choosing the litigation path requires sacrifice, perseverance and patience. He toka tū moana koutou.

Disclaimer

This Report has been prepared for Māori. The power to realise rangatiratanga and kaitiakitanga is for Māori to ultimately drive. Whilst non-Maori can assist, it is the Authors' position that non-Māori cannot be kaitiaki so, in that regard, the approaches set out in this Report are tailored to Māori.

Nothing in this Report should be relied upon or taken as legal advice. To the extent that parties seek to rely on or advance arguments proffered in the Report, independent legal advice should be sought before doing so.

The Authors note that Whāia Legal has acted in a number of the cases referred to in the Report. Whāia Legal confirms that no confidential information has been disclosed through the provision of this Report and that information referred to has only been drawn from the judgments issued by the court and available within the public domain and general experience.

Finally, this Report was prepared and finalised in July 2022, prior to the introduction of the Natural and Built Environment Bill and Spatial Planning Bill to the New Zealand House of Parliament. Accordingly, this Report does not consider the nature of, or impact of, the proposed reforms.

CONTENTS

EXECUTIVE SUMMARY

1. This Report has been developed as part of the New Zealand Biological Heritage National Science Challenge and is intended to contribute to the Adaptive Governance and Policy Strategic Outcome. The purpose of the Report is to provide guidance on novel legal arguments that could be used within the legal system to advance the recognition of rangatiratanga and kaitiakitanga within the context of te taiao.

2. The Authors of the Report undertook a literature and case law review, which demonstrated that kaitiakitanga and rangatiratanga in the context of te taiao cannot be fully realised within the existing constitutional and legal framework. Instead, change will require a coordinated and sustained approach across a number of fronts. Leveraging legal arguments, through litigation and other forms of advocacy, will have an important role to play in this transformation.

3. Based on the Authors' assessment of the literature, the Report uses the following parameters to guide the analysis of rangatiratanga and kaitiakitanga:

   (a) **Rangatiratanga**: the exercise of self-determination and full authority of iwi, hapū and whānau over their lands, territories, resources and taonga, including over people and place.

   (b) **Kaitiakitanga**: an obligation derived from whakapapa and whanaungatanga to care for, nurture and protect all aspects of te taiao for future generations.

4. The case law review revealed both the limitations of the current system in recognising rangatiratanga and kaitiakitanga on its own terms, and the potential for greater recognition through the courts. This is because in current times, the courts appear to be receptive to novel legal arguments concerning tikanga and the effect of Te Tiriti o Waitangi, including arguments based on rangatiratanga and kaitiakitanga. There is also a trend towards trying to understand tikanga on its own terms and as defined by iwi and hapū, rather than to try to fit it into a Western legal framework.

5. Particular arguments that are identified in the Report as having the potential to advance rangatiratanga and kaitiakitanga include:

   (a) *Rāhui*: arguing that rāhui should be recognised as legally enforceable prohibitions;

   (b) *Challenging freshwater allocation*: arguing that the 'first in first served' approach to freshwater allocation under the RMA is flawed and should be overturned;

   (c) *Challenging the status of Te Tiriti o Waitangi*: arguing that Te Tiriti o Waitangi is a valid treaty at international law or alternatively that it is directly enforceable by the New Zealand courts;

(d) *Testing legal personality*: bringing a case on behalf of natural bodies with legal personality, such as Te Urewera and Te Awa Tupua (the Whanganui river);

(e) *Tort*: bringing a tort claim to hold persons accountable when they have caused harm to the environment; and

(f) *Native title*: asserting rangatiratanga and kaitiakitanga in respect of te taiao by way of a native title claim.

6. The Report also builds a 'toolkit' for potential claims, setting out what elements are needed to run a good case. This includes things like a strong legal argument, standing to bring the case, funding, evidence, and the support of iwi and hapū.

7. The decision to bring a legal claim in the courts is not one that should be made lightly. There are many factors and risks to consider. However, a strong and strategically considered case can have a big impact, and can set an important precedent for future legal cases and for public decision-making. Legal arguments can also be leveraged very effectively outside of court, for example in direct negotiations with local or central government, to seek greater recognition of rangatiratanga and kaitiakitanga.

8. The Report concludes that there is much scope for legal arguments to advance rangatiratanga and kaitiakitanga, even within the existing Western legal framework. That is, litigation can be a very useful tool in the kete. However, full realisation of rangatiratanga and kaitiakitanga will require a sustained approach across a number of areas, including broader constitutional and legal reform.

BACKGROUND

9. In 2014, the Government established the 'National Science Challenges' with the aim to tackle the biggest science-based issues and opportunities facing New Zealand. Eleven publicly funded Challenges were created, spanning across multiple disciplines, including healthy homes, technological innovation, youth and environmental.

10. The New Zealand Biological Heritage National Science Challenge (**Bioheritage Challenge**) aims to reverse the decline of the biological heritage of Aotearoa by protecting and managing native biodiversity, improving biosecurity, and enhancing resilience to harmful organisms. The Bioheritage Challenge is divided into strategic outcomes that focus on distinct areas. One such strategic outcome is Adaptive Governance and Policy (**AGP**), which tackles the ways in which governance and policy need to change to better protect te taiao.

11. This Project, resulting in this Report completed by Whāia Legal, forms part of the AGP strategic outcome.

Purpose

12. As part of the research undertaken for the AGP aspect of the Bioheritage Challenge, Whāia Legal were asked to consider and provide guidance on novel legal arguments to advance the recognition of rangatiratanga and kaitiakitanga within te taiao.

13. The purpose of this Report is to set out such novel legal arguments, with the key focus of this project being on how litigation can be utilised to push for greater recognition of rangatiratanga and kaitiakitanga within te taiao.

Methodology

14. The following methodology was followed in the research for, and drafting of, this Report:

    (a) **Targeted Literature and Case Law Review to set parameters of Rangatiratanga and Kaitiakitanga:**

        (i) Throughout the Project, we have been conscious not to set narrowing definitions or parameters of what rangatiratanga or kaitiakitanga can mean. We have also been mindful of the interconnectedness of our tikanga when considering the focus areas of this Project – rangatiratanga and kaitiakitanga.

        (ii) As such, the Project undertook a targeted literature review,[1] a review of selected environmental reports from the Waitangi

[1] The literature reviewed was: Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) *21 Waikato Law Review 1* (**Lex Aotearoa**); *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of*

Tribunal, and a litigation review of leading case law to illustrate parameters and expressions of kaitiakitanga and rangatiratanga within te taiao at present. The targeted review was not intended to provide comprehensive coverage of the literature covering rangatiratanga and kaitiakitanga. Rather, it aimed to provide a snapshot of key understandings of these concepts to then apply in the next stages of the Project. The litigation review also considered how the courts have approached arguments seeking recognition of kaitiakitanga and rangatiratanga.

(b) **Idea Generation for Novel Legal Approaches:**

(i) The Whāia Legal team undertook idea generation and development of novel legal approaches to advance rangatiratanga and kaitiakitanga, and where relevant utilised case examples to demonstrate how approaches taken to date result in better recognition of rangatiratanga and kaitiakitanga across the three areas of influence, namely, litigation, policy and political. The idea generation included a discussion of the potential application of previous novel approaches to litigation in different areas and scenarios, as well as a discussion of areas yet to be tested substantively in the courts to date.

(ii) Risk analysis and identifying limitations to novel approaches was necessary, particularly given that litigation will always be context and fact specific.

(c) **Toolkit – What does a 'good' case look like?** Based on Whāia Legal's litigation experience, the team has prepared practical guidance on what a 'good' case looks like in order to advance rangatiratanga and kaitiakitanga arguments in the environmental context. This includes:

(i) considering the plethora of environmental forums;

(ii) assessment of recent cases taking a novel approach and how those were presented successfully to the Court / environmental forum;

(iii) what contributes to a 'good' fact scenario before the Courts; and

---

Indigenous Peoples in Aotearoa New Zealand (2019) (**He Puapua**); *Kāhui Wai Māori Report to Hon Minister David Parker*, "Te Mana o Te Wai – Mana Whakahaere: The Health of our Wai, The Health of our Nation" (August 2021); Maria Bargh and Ellen Tapsell, "For a Tika Transition: strengthen rangatiratanga" (2021) *Policy Quarterly - Special Issue: Just Transitions*, Vol. 17, Issue 3, page 13 – 22; and Maria Bargh and Tame Malcolm, "Te Tai Ao and 'Biodiversity'" " in M Bargh, J MacArthur (ed) *Environmental Politics and Policy in Aotearoa New Zealand* (Auckland University Press, 2022). The literature for the targeted literature review was provided by Associate Professor Maria Bargh and Dr Carwyn Jones, who are the project co-leads for the AGP aspect of the Bioheritage Challenge.

(iv) the types of evidence required for a robust case, including tikanga evidence.

(d) **How novel litigation can be leveraged in the policy and political space:** The Whāia Legal team completed analysis on how novel legal approaches can be utilised within the policy and political areas of influence, acknowledging that there are a range of spaces in which iwi, hapū and whānau can impact. While these areas of advocacy will be discussed separately, we acknowledge that the areas are often linked and advanced in a collaborative or cohesive manner as part of an effective litigation strategy.

SOME PRECEDING WHAKAARO

15. The purpose of this section is to frame the analysis to follow and note areas of change that would assist Māori to realise their roles as Rangatira and kaitiaki, but that sit outside the bounds of the courts. These areas of change have been surmised from the literature reviewed in the course of this Project. We have opted to highlight these matters upfront and separate to the parameters of rangatiratanga and kaitiakitanga discussed further below in the targeted literature review. This is in part due to the system change which would be required to implement the areas of change.

Spheres of influence and devolution of power:

16. *Matike Mai*,[2] *He Puapua* and the Waitangi Tribunal's report *Ko Aotearoa Tēnei*, emphasise shared decision-making, devolution of power and funding for whānau, hapū, iwi, and Māori in order for rangatiratanga to be truly realised. This requires both exclusive as well as shared jurisdiction. While formal recognition and substantive influence within the mainstream legal system is necessary, true realisation of rangatiratanga also requires that Māori (nationally as well as through iwi, hapū, and whānau) have exclusive spheres of influence without oversight / input from Government, particularly regarding the function and applicability of tikanga Māori in Aotearoa.[3]

17. *He Puapua* discusses that ensuring there is a rangatiratanga sphere requires delegation of government powers to Māori. For kaitiakitanga, this must include a delegation of government powers in the resource management and conservation spaces.[4] Examples of what this looks like in practice include:[5]

    (a) an enlarged iwi/hapū/whānau estate, supported by significantly increased return of land and waters;

    (b) policy and legislation that enable iwi/hapū/whānau to contribute towards the control, access to, and management of all lands and resources within their rohe in accordance with tikanga and mātauranga Māori;

    (c) transfer of power from Crown-assumed exclusive kāwanatanga authority over land, resources and taonga to Māori; and

    (d) legislation, policy, processes, and entities that support a successful bicultural joint sphere of governance and management of resources, taonga and Crown lands.

[2] He Whakaaro Here Whakaumu mō Aotearoa – The Report of Matike Mai Aotearoa: The Independent Working Group on Constitutional Transformation (2016) (**Matike Mai**).
[3] He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand (2019) at (iv); and Matike Mai.
[4] He Puapua.
[5] He Puapua.

Proper recognition and weighting of te ao Māori:

18. One of the major barriers to realising kaitiakitanga and rangatiratanga are the statutory criteria and broad discretions given to environmental decision-makers, which enable Māori interests to be 'balanced out' of any assessment.[6]

19. It is critical that there be stronger language in legislation and policy to ensure that Māori decision-making and involvement is directed. This could include increased statutory weighting of iwi and hapū management and strategic plans, and critically, the removal of discretion where matters Māori are concerned.[7] For true recognition of kaitiakitanga and rangatiratanga to occur, Māori must play a leadership role rather than simply a participatory role. This requires legislation and policy to provide for Māori leadership and / or governance in substance.

Adequate resourcing

20. Adequate resourcing is integral to enable rangatiratanga and kaitiakitanga. This requires the Crown to actively enable and resource Māori to be active Te Tiriti partners in the full co-design of policy and practices through resourcing.[8] The Waitangi Tribunal in *Ko Aotearoa Tēnei* noted that inadequate funding and resourcing, as well as a lack of infrastructure necessary to engage effectively, are long-standing issues within the resource management system, which perpetuate a lack of Māori capacity and capability.[9] As such, resourcing and funding need to enable Māori to be active Te Tiriti partners, which necessarily includes building capacity and capability.

[6] See *Lex Aotearoa;* and Maria Bargh and Ellen Tapsell, "For a Tika Transition: strengthen rangatiratanga" (2021) Policy Quarterly - Special Issue: Just Transitions, Vol. 17, Issue 3, page 13 – 22.
[7] See *Lex Aotearoa;* and Maria Bargh and Tame Malcolm, "Te Tai Ao and 'Biodiversity'" in M Bargh, J MacArthur (ed) *Environmental Politics and Policy in Aotearoa New Zealand* (Auckland University Press, 2022).
[8] Maria Bargh and Tame Malcolm, "Te Tai Ao and 'Biodiversity'" in M Bargh, J MacArthur (ed) *Environmental Politics and Policy in Aotearoa New Zealand* (Auckland University Press, 2022). See also Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, Wellington, 2019).
[9] See Waitangi Tribunal, *Ko Aotearoa Tēnei (A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and identity)* (Wai 262, Wellington, 2011).

KAITIAKITANGA AND RANGATIRATANGA – TARGETED LITERATURE REVIEW

21. Kaitiakitanga and rangatiratanga have been discussed at length in academic writings, literature, and case law. This section of the Report considers the parameters and inter-woven content of kaitiakitanga and rangatiratanga, as they emerge from specific literature identified by the co-leads of the AGP.

Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law"

22. In this article, Justice Tā Joe Williams tackles mapping the Māori dimension that permeates throughout modern New Zealand law by considering what he terms the "third law", being a hybrid of the first law, tikanga Māori, and the second law, the Western system that arrived with Pākehā and suppressed the first law. The third law is where Māori customary law principles are drawn into mainstream decision-making and expressed in that context. In doing so, his Honour considers specific areas of the law where tikanga Māori has been incorporated, including environmental law.

23. In articulating core values of tikanga Māori, Williams J states:[10]

    (a) Whanaungatanga is "the source of the rights and obligations of kinship" or the "fundamental law of the maintenance of properly tended relationships" (including those relationships with ancestral rights);

    (b) Mana is "the source of rights and obligations of leadership";

    (c) Tapu is "both a social control on behaviour and evidence of the indivisibility of divine and profane";

    (d) Utu is "the obligation to give and the right (and sometimes obligation) to receive constant reciprocity";

    (e) Kaitiakitanga is an "obligation to care for one's own", it requires an ongoing reciprocal relationship and is a "natural (perhaps even inevitable) off-shoot of whanaungatanga"; and

    (f) Tino rangatiratanga is the right to autonomy, or "self-determination in modern English", with customary law being an expression of that self-determination.[11]

24. Notwithstanding the incorporation of tikanga Māori into the RMA and other statutes, his Honour identifies that it has been largely limited in the environmental context for the following reasons:

[10] Lex Aotearoa, page 3.
[11] Lex Aotearoa, page 9.

(a) Māori customary law/principles are too often discretionary and limited weight is given to them, both by the judiciary and in legislative instruments.

(b) The discretionary element given to these considerations means that optional systems of power transfer (at the local government level, for example) are not implemented.

(c) There is a need for the judiciary to upskill and broaden their knowledge and expertise of Māori customary law, especially now that it is recognised that tikanga Māori is not foreign and separate, but rather integrated and mainstream.

Maria Bargh and Tame Malcolm, "Te Tai Ao and 'Biodiversity'"[12]

25. This article is about Māori involvement in biodiversity and the role of tikanga. It discusses key issues in biodiversity management for Māori, and three case studies that show mātauranga Māori in action. Key points from the article regarding kaitiakitanga and rangatiratanga include:

(a) Tikanga, as a form of governance, encompasses kaitiakitanga, which is a responsibility that comes with whakapapa and the kinship bonds giving rise to reciprocal obligations. This role is both spiritual and political, stemming from Te Tiriti o Waitangi and the principles of partnership and active protection.

(b) Active protection includes the recognition of rangatiratanga in both the use and control of Māori resources in accordance with traditional culture and customs and any necessary modern extensions of them.

(c) The Crown needs to actively enable and resource Māori to be active Treaty partners in the full co-design of policy and practices in this area.

He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand (2019)[13]

26. *He Puapua* sets out the Working Group's vision to realise UNDRIP by 2040. The Group makes recommendations across five thematic areas: rangatiratanga; participation in kāwanatanga Karauna; lands, territories and resources; culture; and equity. The key themes of relevance to this project are: rangatiratanga, and lands, territories and resources.

27. Realising rangatiratanga is:

(a) Māori exercising authority over Māori matters as agreed by Māori, and including exclusive and/or shared jurisdiction over their lands,

[12] Maria Bargh and Tame Malcolm, "Te Tai Ao and 'Biodiversity'" in M Bargh, J MacArthur (ed) *Environmental Politics and Policy in Aotearoa New Zealand* (Auckland University Press, 2022).
[13] *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand* (2019).

territories and resources and over matters to do with taonga tuku iho and culture.

(b) Iwi and hapū will have agreed on and established their governance structures, with their authority recognised.

(c) Tikanga Māori will be functioning and applicable across Aotearoa under Māori (national, iwi, hapū, whānau) authority and also, where appropriate, under Crown/kāwanatanga authority.

28. The vision in relation to lands, territories and resources is predicated on the following:

(a) Aotearoa will know and appreciate iwi tribal boundaries, where mana whakahaere is evident.

(b) We will see an enlarged iwi/hapū/whānau estate, supported by significantly increased return of land and waters.

(c) Law, policy, and processes will support flourishing iwi territories, including where iwi/hapū/whānau can positively contribute towards the control, access to, and management of all lands and resources within their rohe in accordance with tikanga and mātauranga Māori.

(d) There will be greater relinquishment of Crown-assumed exclusive kāwanatanga authority over land, resources and taonga.

(e) Law, policy, processes, and entities will support a successful bicultural joint sphere of governance and management of resources, taonga and Crown lands.

29. Immediate and interim options for thriving rohe include:

(a) Adequately recognise and resource the role of kaitiaki.

(b) Delegate government powers to Māori in the resource management and conservation space.

(c) Increase the statutory weighting of iwi/hapū strategic plans and develop long-term visions/plans alongside iwi and hapū in relation to their rohe.

(d) Prioritise policy and processes that ensure Māori can easily access culturally significant lands.

30. Immediate and interim options for thriving whenua include:

(a) Acknowledging Māori rights and interests in all Crown lands, legislating to require local governments to seek section 33 of the Resource Management Act 1991 (the **RMA**) transfers and joint management agreements and law reform prioritising tikanga Māori and use of Māori land.

(b) Return land to Māori, create exemptions for Māori from land rates and provide resources to develop underutilised Māori land.

(c) Provide mutual opportunities for the Crown and Māori to learn from each other in relation to governance and management of land and resources.

Kāhui Wai Māori Report to Hon Minister David Parker, "Te Mana o Te Wai – Mana Whakahaere: The Health of our Wai, The Health of our Nation" (August 2021)[14]

31. This report is a summary of findings that draws together the relevant findings from Phase 1 of the mana whakahaere project. This report concludes that mana whakahaere has the potential to bring transformative change to the way in which freshwater is managed to meet kaitiaki obligations and ensure the best possible outcome for wai. Some key points include:

(a) Mana whakahaere is based in whakapapa. Whakapapa is the source of tangata whenua power, authority, and obligation to practice mana whakahaere. Kaitiaki obligations are imposed through tangata whenua whakapapa to wai, the most pertinent obligation being to the mauri of the wai itself.

(b) Mana whakahaere supports kaitiakitanga. Mana whakahaere requires inclusive tangata whenua participation in freshwater management and does not focus on one type of tangata whenua entity.

(c) Mana whakahaere provides for whanaungatanga and an inclusive process that will best represent the various tangata whenua rights and interests that exist in relation to taonga, whenua, and wai. Iwi and hapū must play a leadership role in ensuring that the various rights and interests are appropriately considered and represented in freshwater management.

(d) Mana whakahaere is a transformative approach to freshwater management. Tangata whenua inherit kaitiaki obligations to maintain and enhance the mauri of freshwater, which means they must participate in freshwater management.

Maria Bargh and Ellen Tapsell, "For a Tika Transition: strengthen rangatiratanga"[15]

32. This article explores a 'tika transition', whereby Māori (the rangatiratanga sphere) and the Crown (the kāwanatanga sphere) exist within distinct and equal political entities, with the rangatiratanga sphere leading and governing tikanga and mātauranga Māori policy and legislation.

[14] Kāhui Wai Māori Report to Hon Minister David Parker, "Te Mana o Te Wai – Mana Whakahaere: The Health of our Wai, The Health of our Nation" (August 2021).
[15] Maria Bargh and Ellen Tapsell, "For a Tika Transition: strengthen rangatiratanga" (2021) Policy Quarterly - Special Issue: Just Transitions, Vol. 17, Issue 3, page 13 – 22.

33. Overall, the article recommends that policy and legislation include stronger instruments for shared decision-making, and specific funding for iwi, hapū and mana whenua to strengthen the rangatiratanga sphere. A tika transition requires good relationship building and trust, power sharing and knowledge sharing, and policy and legislation that allows for and supports the rangatiratanga sphere as its own distinct space for tikanga-based governance and jurisdiction.

Ko ngā repoata nā te Rōpu Whakamana i te Tiriti o Waitangi

34. In addition, we also examined how specific Waitangi Tribunal panels considered rangatiratanga and kaitiakitanga. The Waitangi Tribunal is instructive because of its focus on what is required to uphold Te Tiriti o Waitangi rather than being confined to specific legislative provisions or case law regarding te taiao. Instead, the Waitangi Tribunal provides a broader characterisation of rangatiratanga and kaitiakitanga that is not limited by the statutory and common law constraints.

35. In summary:[16]

    (a) The principle of 'Rangatiratanga', incorporated into the Māori text of the Treaty of Waitangi under Article II, illustrates that in 1840 the Crown recognised Māori authority and control over their landscapes.[17] Rangatiratanga has been defined by the Waitangi Tribunal as "full chieftainship", "tribal self-management", and "full authority, status and prestige as regards Māori possessions and interests".[18]

    (b) In the Tribunal's *Stage 2 Freshwater Report,* the Tribunal stated that the guarantee of tino rangatiratanga under Article II of the Treaty gives rise to a guarantee of pre-existing Māori autonomy or self-government (often referred to as mana motuhake) and to determine our own internal political, economic and social rights and objectives.[19] Referring to the Waitangi Tribunal's *Taranaki Report*, the Tribunal held that 'autonomy' means "the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy,

[16] This is not a comprehensive summary of Waitangi Tribunal Reports, but rather a snapshot of key findings from relevant Reports.
[17] See Maia Wikaira "Maori Ownership of Freshwater: Legal Paradox or Potential?" (LLB (Hons) Dissertation, University of Otago, 2010) at 25.
[18] See Maia Wikaira "Maori Ownership of Freshwater: Legal Paradox or Potential?" (LLB (Hons) Dissertation, University of Otago, 2010) at 25. See also Waitangi Tribunal, *Ko Aotearoa Tēnei: A report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Wellington, 2011) Taumata Tuatahi, p. 24; Waitangi Tribunal, *The Ngāi Tahu Report* (Wai 27, Wellington, 1991) at [4.6.6] – [4.6.7]; Waitangi Tribunal, *Mōhaka River Report* (Wai 119, Wellington, 1992) at [5.22]*;* Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, Wellington, 1985), p. 67.
[19] Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, Wellington, 2019) at [1.5.3], citing Waitangi Tribunal *The Taranaki Report: Kaupapa Tautahi* (Wai 143, Wellington, 1996), p. 5.

resources, and affairs, within minimum parameters necessary for the proper operation of the State."[20]

(c) Tino rangatiratanga is also a guarantee of property rights. For freshwater, this translates to a proprietary right or exclusive right of hapū and iwi to control access to and use of the water while it was in their rohe.[21] The *Mohaka River Report* found that rangatiratanga also "denotes something more than ownership or guardianship of the river but something less than the right of exclusive use."[22] Six years later, in the *Te Ika Whenua Rivers Report*, the Tribunal found that tino rangatiratanga should not be confused with modern day 'ownership', but that Te Ika Whenua's customary rights guaranteed to them full use and control of their rivers, including development rights. As at 1840, that conferred a proprietary interest in the rivers that could be practically encapsulated within the legal notion of ownership of the waters thereof.[23]

(d) Critically, the Tribunal in *Stage 1 of Te Paparahi o Te Raki* found that the rangatira who signed Te Tiriti "did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories. Rather, they agreed to share power and authority with the Governor."[24] This is relevant when considering what constitutional arrangements are required to truly embrace Te Tiriti o Waitangi.

(e) Mana is a similar concept to rangatiratanga. In the *Manukau Report* the Waitangi Tribunal noted that the two concepts were "really inseparable".[25] The Tribunal went on to say that both mana and rangatiratanga denote authority, however mana "personalises the authority and ties it to status and dignity". [26] You cannot have one without the other.

(f) The Tribunal in the *Stage 1 Freshwater Report* noted that authority is maintained and expressed in a number of ways: by customary use, by physical occupation, but most importantly by whanaungatanga and by caring for relationships within and between tribal groups.[27]

---

[20] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tautahi* (Wai 143, Wellington, 1996), p. 5.
[21] Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, Wellington, 2019) at [1.5.3], citing Waitangi Tribunal, *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, Wellington, 2012), pp. 79–80, 235–236.
[22] Waitangi Tribunal, *Mōhaka River Report* (Wai 119, Wellington, 1992), p. 64.
[23] Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wai 212, Wellington, 1998), pp. 126, 135-136.
[24] Waitangi Tribunal, *He Whakaputanga me te Tiriti: The Declaration and the Treaty – The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, Wellington, 2014), p. xxii.
[25] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, Wellington, 1985) at [8.3].
[26] See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, Wellington, 1985) at [8.3].
[27] Waitangi Tribunal, *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, Wellington, 2012), p. 60.

(g) Mana and rangatiratanga are also linked to kaitiakitanga. As indicated by Roimata Minhinnick, who provided evidence for Ngāti Te Ata in Stage 1 of the Freshwater inquiry, rangatiratanga and mana are tribal authority and control, and includes the kaitiaki obligation to care for the resource and the people.[28] Although kaitiakitanga is often described as 'guardianship', the concept extends beyond that simple definition. As seen in its cultural context, it is one part of an interconnected value system. Merata Kawharu states that kaitiakitanga incorporates a "nexus of beliefs that permeates the spiritual, environmental and human spheres" and embraces "social protocols associated with hospitality, reciprocity and obligation (manaaki, tuku and utu)".[29]

(h) In *Ko Aotearoa Tēnei,* the Tribunal articulated kaitiakitanga as an obligation to care for and nurture the physical and spiritual aspects of the environment.[30] It is also not contingent on ownership. The debate is not about who owns the taonga, but who exercises control over it,[31] and what needs to be resolved is the degree of control exercised by Māori, and their influence in decision-making.

36. The Tribunal concluded that the current RMA framework does not provide adequately for tino rangatiratanga or kaitiakitanga of iwi and hapū over freshwater. Additionally, those measures that are included, such as section 33 transfers and joint management agreements, have not been taken up as intended. As Justice Tā Joe Williams identifies in *Lex Aotearoa*, the RMA provided opportunity to be bold in transferring power. However, section 33 of the RMA was only utilised for the first time in 2020, where the Waikato Regional Council transferred the responsibility of monitoring water quality around Lake Taupō to the Tūwharetoa Māori Trust Board.[32]

[28] Waitangi Tribunal, *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, Waitangi Tribunal, 2012), p. 60.
[29] See Merata Kawharu "Kaitiakitanga: A Maori anthropological perspective of the Maori socio-environmental ethic or resource management" (2000) 110 Journal of the Polynesian Society 349 at 353.
[30] Waitangi Tribunal, *Ko Aotearoa Tēnei: A report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Wellington, 2011) Taumata Tuatahi, p. 23.
[31] Waitangi Tribunal, *Ko Aotearoa Tēnei: A report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Wellington, 2011) Taumata Tuatahi, p. 112.
[32] Alice Webb-Liddall "Finally, a council has transferred responsibilities to iwi for the first time under the RMA" (6 August 2020) The Spinoff <https://thespinoff.co.nz/atea/06-08-2020/a-council-has-transferred-responsibilities-to-iwi-for-the-first-time-under-the-rma>

Project parameters – Rangatiratanga and Kaitiakitanga

37. Based on our assessment of the specified literature and Waitangi Tribunal reports we used the following parameters to guide our analysis in the following sections:

    (a) **Rangatiratanga**: the exercise of self-determination and full authority of iwi, hapū and whānau over their lands, territories, resources and taonga, including over people and place.

    (b) **Kaitiakitanga**: an obligation derived from whakapapa and whanaungatanga to care for, nurture, and protect all aspects of te taiao for future generations.

EXISTING CASE LAW REVIEW

38. The treatment of rangatiratanga and kaitiakitanga within the courts often demonstrates the compromise that occurs within the statutory and common law environment. As such, while the academic literature and Waitangi Tribunal jurisprudence provide insight into the (unrestrained) parameters of kaitiakitanga and rangatiratanga, the case law highlights the limitations or barriers to obtaining full realisation of kaitiakitanga and rangatiratanga. Notwithstanding these limitations, there has been a significant shift recently in the understanding of tikanga within the courts.

39. Since the Supreme Court's decision in *Takamore v Clarke,*[33] tikanga Māori has been consistently affirmed as forming part of the New Zealand common law and an "integral strand" to the common law.[34] The common law of a country being a reflection of the local circumstances.[35] Justice Tipping in *Ngāti Apa v Attorney-General*, stated that the arrival of the English common law in New Zealand did not extinguish Māori customary title, but rather integrated such title into what then became the common law of New Zealand.[36]

40. The High Court has recently recognised that "[i]n some situations, tikanga will *be* the law, rather than merely being a source of it"[37] and that tikanga Māori is "Māori customary law, made by iwi and hapū, governing behaviour of iwi and hapū and those who belong to them. As such, it is a "free-standing" legal framework recognised by New Zealand law."[38]

41. In the environmental context, 'tikanga Māori' is defined under section 2 of the RMA as "Maori customary values and practices".[39] Justice Whata noted that while this definition is included in the RMA, "it has come to be understood as a body of principles, values and law that is cognisable by the Courts."[40] The RMA also defines 'kaitiakitanga' as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship".[41]

---

[33] *Takamore v Clarke* [2013] 2 NZLR 733 at [150].
[34] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127; [2021] 1 NZLR 801 at [177]-[178]. See also *Takamore v Clarke* [2013] 2 NZLR 733 at [150]; *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 at [17]; *Ngāti Whātua Ōrākei Trust v Attorney General* [2022] NZHC 843 at [336] and [355]; and *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2021] 3 NZLR 352 at [64].
[35] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 at [17].
[36] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 at [183].
[37] *Mercury NZ Ltd v The Waitangi Tribunal* [2021] 2 NZLR 142 at [103]. We note this case is currently on appeal.
[38] *Ngāti Whātua Ōrākei Trust v Attorney General* [2022] NZHC 843 at [355].
[39] The same definition is used in numerous legislation, including Te Ture Whenua Māori Act 1993, Māori Fisheries Act 2004, Marine and Coastal Area (Takutai Moana) Act 2011 and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
[40] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2021] 3 NZLR 352 (***Ngāti Maru Trust***) at [64].
[41] RMA, section 2.

42. Under the RMA in its current form,[42] all persons exercising functions and powers under the RMA in respect of "managing the use, development and protection of natural and physical resources" must:

(a) Section 6(e): "recognise and provide for" the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga;

(b) Section 7(a): "have particular regard" to kaitiakitanga; and

(c) Section 8: "take into account" the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

43. Sections 6(e), 7(a) and 8 of the RMA have been described by Lord Cooke in the Privy Council case *McGuire v Hastings District Council* as "strong directions, to be borne in mind at every stage of the planning process".[43] Justice Whata added in *Ngāti Maru v Ngāti Whātua Ōrākei Whai Māia Ltd (**Ngāti Maru Trust**)* that "[w]here iwi claim a particular outcome is required to meet those directions in accordance with tikanga Māori, resource management decision-makers must meaningfully respond to that claim."[44]

44. Importantly, Whata J also highlights that, in considering Part 2 of the RMA (and kaitiakitanga within that), decision-makers do not declare or affirm tikanga-based rights, powers or authority whether in State law or tikanga Māori.[45] The jurisdiction to do so under State law rests with the High Court and/or the Māori Land Court.[46] This is an important caveat to the powers under the RMA and consideration for Māori litigants seeking to affirm or declare their rights via the courts.

45. Leading commentary describes the expression of kaitiakitanga as requiring "whānau, hapū and iwi 'to protect the spiritual wellbeing of the natural resources within their mana' by measures such as rāhui (restriction or prohibition against taking of resources or entering an area), while mana 'provides the authority for the exercise of the stewardship or protection obligation.'"[47]

Balancing under the RMA

46. The Environment Court has held that kaitiaki obligations and other guarantees under the Treaty of Waitangi do not take precedence, nor do they award Māori a right to veto developments in the exercise of their kaitiakitanga. For example, in *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa ki Kawerau* (***Carter Holt Harvey***) and *Minhinnick v Minister of*

[42] At the time of writing this Report, there was significant reform of the RMA proposed.
[43] *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.
[44] *Ngāti Maru Trust* at [68].
[45] *Ngāti Maru Trust* at [67].
[46] *Ngāti Maru Trust* at [67].
[47] A-Z of New Zealand Law [25.8.3] Environment and Natural Resources, citing New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 40.

Corrections, the High Court and the Environment Court respectively considered that interests provided for under the Treaty of Waitangi (including kaitiakitanga obligations) could not take precedence over all other considerations, such as the statutory requirements in the RMA.[48]

47. In *Minhinnick v Minister of Corrections*, Mrs Minhinnick (Ngāti Te Ata) challenged the decision to designate the ancestral land and wāhi tapu of Ngāti Te Ata for a proposed women's corrections facility. Mrs Minhinnick sought (among other orders) an enforcement order for the Crown to restore Ngāti Te Ata rangatiratanga and kaitiakitanga to the site. In determining the appeal, the Court weighed the contribution to sustainable management of the proposed corrections facility against the relationship that Ngāti Te Ata have with the site. The Court considered that in those circumstances the effect of the proposal on Ngāti Te Ata's traditional and cultural relationship with the land did not outweigh the value of the corrections facility in enabling people and the community to provide for their social, economic and cultural well-being, and for their health and safety.[49]

48. The Court declined to extend the meaning of kaitiakitanga in this context to include ownership, authority, control or aboriginal title over the area, as argued by the appellant. Instead, the Court held that the definition of kaitiakitanga in the RMA was the definition it was required to apply; nothing wider.[50] Further, notwithstanding that Ngāti Te Ata are tangata whenua and have guardianship in accordance with tikanga in relation to natural and physical resources in the area, the Court held this does not confer a power of veto over decisions to develop natural and physical resources in their rohe.[51]

49. In undertaking its broad judgment, the Court noted the following:[52]

> *[353] Even Maori traditional and cultural relationships with ancestral land are subordinate to the statutory purpose, and have to be independently weighed and placed in perspective against the overall circumstances of the case. They have to be balanced objectively against the benefits for sustainable management of the proposal, and taking into account the restrictions and conditions to be imposed.*
>
> *[354] In that balancing we place on one side of the scales the uncontested public benefits of the badly-needed proposed corrections facility, which we find would manage the use and development of the natural and physical resources of the site in a way that would enable people and the community to provide for their social, economic and cultural well-being, and for their health and safety.*

---

[48] *Carter Holt Harvey Ltd v Te Rūnanga O Tūwharetoa Ki Kawerau* (2003) 9 ELRNZ 182 at [24] and [25]; *Minhinnick v Minister of Corrections* NZEnvC A43/04, 6 April 2004 at [331] and [353]. This was also the case in *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] NZEnvC 79.
[49] *Minhinnick v Minister of Corrections* NZEnvC A43/04, 6 April 2004 at [359].
[50] *Minhinnick v Minister of Corrections* NZEnvC A43/04, 6 April 2004 at [133].
[51] *Minhinnick v Minister of Corrections* NZEnvC A43/04, 6 April 2004 at [134] and [135].
[52] *Minhinnick v Minister of Corrections* NZEnvC A43/04, 6 April 2004, at [353], [354], [355] and [357].

…

[357] On the other side of the scales, we place the traditional cultural relationship that Maori have for the subject land, as part of the Matukuturua Stonefields, and as part of the surrounds of Matukutureia maunga. The corrections facility would have no adverse physical effect on either of those valued resources, so the effect would be relatively minor in scale or degree in significance or proportion in the final outcome.

50. The Court also considered that an enforcement order which sought for the Crown to restore Ngāti Te Ata rangatiratanga and kaitiakitanga to the site was beyond its jurisdiction.[53]

51. In *Carter Holt Harvey,* the central issue concerned the ability to impose conditions on the granting of a resource consent. The Environment Court added conditions to the consent that had not been contended for by the parties, which was likely a result of evidence regarding the relationship between Ngāti Tuwharetoa and the Tarawera River as their taonga, and the impact that long-term discharge consents would have on that relationship. The Environment Court amended the conditions to provide for tangata whenua to be informed regarding the consent over the course of the term, and a requirement that the applicant consult with Ngāti Tuwharetoa and other appropriate tangata whenua interests where it intends to change or delete any condition of consent.

52. On appeal to the High Court, the Court found that the Environment Court was entitled to impose conditions aimed at addressing issues of te ao Māori provided those conditions were not implicitly forbidden by the relevant provisions within the RMA. However, the High Court found that neither the Environment Court (nor a consent authority) had jurisdiction to impose conditions without an application before it. As such, the imposition of the condition requiring parallel reporting was quashed.

53. The High Court also noted that the obligation under section 8 of the RMA to take into account the principles of the Treaty of Waitangi does not elevate that consideration above other factors that those responsible for exercising powers or functions under the RMA are required to consider.[54] Recently, in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council,* the Court accepted submissions that rangatiratanga, while a relevant resource management consideration as a principle of Te Tiriti under section 8 of the RMA, does not amount to a right to veto.[55]

54. This requirement of the Court under the RMA to balance interests of Māori with an array of other interests provided for in Part 2 of the RMA has often resulted in easy dismissal of Māori interests. As acutely highlighted by Justice Tā Joe Williams, the weighting of different interests in the RMA means that Māori interest-based considerations can be "easily set to one

[53] *Minhinnick v Minister of Corrections* NZEnvC A43/04, 6 April 2004.
[54] *Minhinnick v Minister of Corrections* NZEnvC A43/04, 6 April 2004 at [25].
[55] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388 at [195].

side if necessary in pursuit of a western empirical or scientific view of sustainable management if that was the preference of the relevant decider."[56]

55. However, the cases that follow show that while a recognition of rangatiratanga and kaitiakitanga does not provide for a veto, it does not mean that deference or preference cannot be given to mana whenua interests in such a way that enables them to exercise kaitiakitanga in accordance with their tikanga.

A changing landscape

56. There have been a number of recent cases that suggest a shift regarding the treatment and recognition of kaitiakitanga and, to a lesser extent, rangatiratanga in the environmental law context. These cases appear to reflect an increasing understanding of tikanga Māori as well as an increasing willingness of the courts to defer to tangata whenua / mana whenua on what constitutes kaitiakitanga and cultural effects. While this does not prevent these interests from being balanced out, there is a strong emphasis on requiring decision-makers to properly understand and engage with these issues as part of their decision.

Tauranga Environmental Protection Society Inc v Tauranga City Council[57]

57. A recent decision of the High Court affirms that it is for iwi to determine the cultural significance of a particular site and the nature of any cultural effects arising. The Court cannot substitute its own view for the view of the iwi or hapū concerned: where the considered, consistent, and genuine views of the iwi are that there will be an adverse impact, it is not open to the Court to decide otherwise. [58]

58. In coming to this conclusion, Palmer J drew on a number of recent cases concerning the status of Māori values within the RMA context. In particular:[59]

    (a) the Court of Appeal decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* which held it was necessary for a decision-maker to "squarely engage with the full range of customary rights, interests and activities identified by Māori

[56] Lex Aotearoa, page 18.
[57] *Tauranga Environmental Protection Society Incorporated v Tauranga City Council* [2021] NZHC 1201. The resource consent applicant in this case, Transpower New Zealand Ltd, had sought consents for a realignment of electricity transmission lines from Maungatapu Peninsula to the Matapihi Peninsula. Ngāti Hē, while initially supportive of the relocation of the existing transmission lines, opposed the construction once it became clear that a large new pole would be constructed next to the Maungatapu Marae. Transpower sought to appeal the High Court decision to the Court of Appeal but was declined leave to do so (*Transpower New Zealand Limited v Tauranga Environmental Protection Society Incorporated* [2022] NZCA 9).
[58] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [65].
[59] Ibid at [99]; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [170].

as affected by the TTR proposal, and to consider the effect of the proposal on those existing interests";[60]

(b) the Supreme Court decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* which reinforced the decision of the Court of Appeal regarding customary rights, and also held that the Treaty provision's direction to take into account the effects of the proposed activity on an "existing interests" in the statute (being the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**)) included tikanga-based customary rights and interests;[61]

(c) Justice Whata in *Ngāti Maru Trust* held:[62]

> *[73] But the statutory obligation to recognise and provide for the relationship of Māori and their culture and traditions with their whenua and tāonga, to have regard to their kaitiakitanga and to take into account the principles of the Treaty of Waitangi, does not permit indifference to the tikanga-based claims of iwi to a particular resource management outcome. On the contrary,* ***the obligation "to recognise and provide for" the relationship of Māori and their culture and traditions with their whenua and other tāonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision.*** *To ignore or to refuse to adjudicate on divergent iwi claims about their relationship with an affected tāonga (for example) is the antithesis of recognising and providing for them and an abdication of statutory duty.*
>
> *…*
>
> *[102] However, as I have also explained, when exercising functions under the RMA, the Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori in order to discharge express statutory duties to Māori. Thus, where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e), 6(g) 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond still applies when different iwi make divergent claims as to what is required to meet those obligations, and this may mean a choice has to be made*

[60] The Court noted in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [174]: In this case, the DMC needed to engage meaningfully with the impact of the TTR proposal on the whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment, with the sea and other significant features of the marine environment seen not just as physical resources but as entities in their own right – as ancestors, gods, whānau – that iwi have an obligation to care for and protect.

[61] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [149], [154]–[155] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]-[297] per Williams J and [332] per Winkelmann CJ.

[62] *Tauranga Environmental Protection Society Incorporated v Tauranga City Council* [2021] NZHC 1201 at [100], citing *Ngāti Maru Trust* at [73] and [102].

> *as to which of those courses of action best discharges the statutory duties under the RMA. As [Ngai Te Hapū] [sic] aptly illustrates, that may (for example) require evidential findings about who, on the facts of the particular case, are kaitiaki of a particular area and how their kaitiakitanga, in accordance with tikanga Māori, is to be provided for in the resource manage outcome.*
>
> [Emphasis added]

59. Accordingly, where matters Māori are raised in RMA proceedings, decision-makers must meaningfully respond to those claims. That is, where an iwi or hapū gives cogent evidence as to the cultural significance of a site and the cultural effects of a project, it is not open to the Court to diverge from that view. This principle goes some way to recognising the rangatiratanga that iwi and hapū have to define their own relationships with the environment in a way that must be considered as part of the RMA decision-making process. While it does not mean that Māori interests are determinative, it does require that the decision-maker have a full and informed understanding of cultural impacts and must factor these into the decision.

60. Justice Palmer also found in *Tauranga Environmental Protection Society Inc* that deciding otherwise would be inconsistent with the iwi management policies in the Bay of Plenty Regional Coastal Environment Plan, which required decision-makers to "recognise that only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua."[63]

61. Similar statements can be found in other planning documents around the motu. Therefore, this is a helpful precedent to rely upon where cultural effects are disputed or minimised by other parties.

Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation

62. The Supreme Court decision in *Ngāi Tai ki Tāmaki Trust* recognises that Treaty principles may require a degree of preference be given to Māori in some situations, in order to recognise their unique relationship with their lands and waters.

63. The case concerned a decision by the Department of Conservation (**DOC**) to grant tourism concessions on Rangitoto and Motutapu islands to third party operators. Ngāi Tai ki Tāmaki judicially reviewed the decision, claiming that DOC had made an error of law by failing to preference their own application ahead of others, and was therefore inconsistent with

[63] *Tauranga Environmental Protection Society Incorporated v Tauranga City Council* [2021] NZHC 1201 at [38] citing Bay of Plenty Regional Coastal Environment Plan, Iwi Management, Policy IW 1(d).

section 4 of the Conservation Act 1987 requiring the Act to be administered so as "to give effect to the principles of the Treaty of Waitangi".

64. The Supreme Court held that although section 4 did not confer on the applicant a right to veto concession applications, the applicant was entitled to have the decisions made after proper consideration of the application of s 4.[64] The majority considered that if section 4 had been properly considered, the decision-maker may have reached a different result. Namely, the Majority held:[65]

> *[73] The decision-maker's dismissal of the possibility of preference being accorded to an iwi with mana whenua over the land … and of the economic benefit that could accrue to such an iwi being taken into account meant she did not give proper consideration to those possibilities as s 4 required her to do.*

65. In coming to its decision, the Majority endorsed comments from the *Ngai Tahu Maori Trust Board v Director-General of Conservation*[66] case (**the *Whale-watching* case**), which had concluded that Ngāi Tahu were "entitled to a reasonable degree of preference" regarding whale-watching concession applications.

66. Fundamentally, the Supreme Court also found errors in DOC's General Policy, which had stated that when other statutory provisions conflict[67] with the principles of the Treaty, those conflicting provisions prevail. The Court disagreed and stated that the requirement is for the statutory provisions to be applied consistently with section 4.[68] DOC has since amended its General Policy to remove this statement and is undertaking a review of the entire policy in light of the Supreme Court judgment.

<u>*Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*</u>

67. The *Trans-Tasman* decisions were successful appeals against consents granted under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**) enabling the mining of ironsands from the seabed offshore of Taranaki. One of the grounds for allowing the appeals was that the decision-maker failed to properly take into account and engage with cultural effects, and the impact of the mining proposal on the kaitiakitanga relationship between local iwi and the marine area.

68. As outlined above, the Court of Appeal decision stated that the decision-maker must "squarely engage with the full range of customary rights,

---

[64] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 at [95], [99] and [100].
[65] *Ngāi Tai ki Tāmaki Tribal Trust* at [73].
[66] *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (**the *Whale Watching* case**).
[67] In those Acts listed in the First Schedule of the General Policy.
[68] *Ngāi Tai ki Tāmaki Tribal Trust* at [76] and [77].

interests and activities identified by Māori as affected by the TTR proposal, and to consider the effect of the proposal on those existing interests".[69]

69. The Supreme Court appeared to endorse this finding on appeal, holding that the decision-maker erred by failing to properly engage with the nature of the interests affected. While the decision-maker considered a range of interests, such as kaitiakitanga and the duty of active protection, it did not engage effectively with the true effect of the proposal for iwi or how ongoing monitoring could address iwi concerns over their inability to exercise kaitiakitanga.[70]

70. The Supreme Court went further to find that the statutory requirement to consider "existing interests" included tikanga-based customary rights and interests, and that tikanga itself formed part of the "applicable law" that must be considered as part of the decision. The Court held this interpretation was required to give effect to the principles of the Treaty, and in particular to the guarantee of tino rangatiratanga in article 2.[71]

71. The Court also considered that more modern and apparently 'narrower' Treaty clauses, such as the one in the EEZ Act, will not be read as excluding the application of Treaty principles to parts of the Act that are not explicitly mentioned in the Treaty clause. Instead, the Court held that Treaty provisions must be given broad and generous construction and any constraint on statutory decision-makers to respect Treaty principles must be made very clear.

Conclusion: existing case law review

72. The case law demonstrates that while rangatiratanga and kaitiakitanga cannot be fully expressed within the existing statutory and common law environment, there is an increasing emphasis on the need for environmental decision-makers to meaningfully engage with cultural interests and effects. It is also accepted that it is for iwi and hapū to define those interests and effects, which in itself is a recognition of rangatiratanga.

73. This reflects a broader trend towards the recognition of tikanga in the law. If nothing else, the case law indicates that the courts currently appear to be receptive to novel legal arguments grounded in tikanga or the Treaty, including arguments which advance kaitiakitanga and rangatiratanga. We cover some of these arguments in the next section of the report.

[69] The Court noted in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [174].
[70] At [160] per William Young and Ellen France JJ.
[71] At [149] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

ADVANCING THE RECOGNITION OF KAITIAKITANGA AND RANGATIRATANGA – NOVEL LEGAL APPROACHES

Ka kuhu au ki te ture, hei matua mō te pani[72]

I seek refuge in the law for it is a parent to the oppressed

74. These words were spoken by the infamous prophet, revolutionist and Rangatira, Te Kooti Arikirangi Te Turuki (commonly known as Te Kooti). As described by Justice Tā Joe Williams, despite the persecution that Te Kooti had suffered during his life and the injustice he faced at the hands of the colonial settler government, at the end Te Kooti saw that the law could be used to achieve justice and peace:[73]

> *This was a man who was arrested and jailed without charge on a trumped up allegation that was really about resolving the commercial competition between him and Mr Read. His land was confiscated without proof that he was involved in a rebellion. The famous house that he helped to build with his uncle Raharuhi Rukupo had been stolen by Richmond, dismantled and sent to Wellington and is now still on display at Te Papa, Te Hau ki Turanga. His people, hundreds of them, were either killed in battle or summarily executed. He was pardoned and then arrested for trying to go home – a place to which he was never able to return. And yet – and yet – he said to his people at the end "Ka kuhu au ki te ture, hei matua mō te pani" – I seek refuge in the law for it is a parent to the oppressed.*
>
> *When I first heard that story I thought what? How could he do that? How could he say that? The law had given him nothing but grief. I think he was on the journey that we, at a much safer level, are also on. You see, he saw hope in the law that surpasses all other paths to justice. He tried the alternatives, and they led to a trail of blood. He knew that with all of its problems, with all of its human frailties, with all of its biases and imbalances, the law is our best chance for peace.*

75. In this spirit, litigation and the testing of ideas via the courts is often utilised as a mechanism to seek greater recognition of the fundamental rights of Māori as guaranteed by Te Tiriti o Waitangi, including the recognition of tikanga Māori as a source of law. This section of the Report considers how litigation can be utilised in novel ways, drawing on recent examples and considering areas which are yet to be tested before the courts.

76. Before we turn to such novel approaches, we discuss the limitations of what can be achieved by litigating within the current legislative and constitutional framework. This is important because it sets the bounds of this exercise, and allows us to discuss the merits of these approaches while acknowledging that more meaningful transformation is beyond the scope of what court decisions can achieve. Nevertheless, litigation can be an

[72] Te Kooti Arikirangi Te Turuki

[73] Justice Tā Joe Williams, 'Ka Huhu au ki te ture, hei matua mō te pani', Speech given at Te Hunga Rōia Māori o Aotearoa, Hui-a-Tau 2018 (published via the Māori Law Review, November 2018. Accessible at **Māori Law Review**).

effective tool to advance kaitiakitanga and rangatiratanga, particularly when used in combination with other approaches (i.e. advocacy more generally).

Constitutional content in Aotearoa

77. Our current, largely colonial, constitutional arrangements are based on the Westminster system brought to Aotearoa by the British settlers. This Western system of government and law sought to displace the first law of the land, which was tikanga Māori. While tikanga has always continued to operate within Māori communities, the foundations of our current legal system are rooted in English tradition, not tikanga.

78. Although references to tikanga are now in legislation and are recognised as part of the common law, the courts do not have the expertise nor the mandate to apply tikanga on its own terms. Instead, they can only apply it to the extent that it is consistent with legislation, with common law principles and precedent, and with principles which are said to be at the "root" of the Western legal system.[74] This is a significant limitation on the extent to which kaitiakitanga and rangatiratanga can be given effect to through litigation alone.

79. We note that some experts are wary of incorporating tikanga in this way, because of the risk it may compromise the nature of tikanga itself.[75] They argue it is more appropriate to have a parallel tikanga based system in its own right, and that true recognition of kaitiakitanga and rangatiratanga is not possible without constitutional reform. This report proceeds on the basis that there is value in seeking *further* recognition of kaitiakitanga and rangatiratanga within the state legal system (including through the courts), even if imperfect.

80. Another limitation on recognition of kaitiakitanga and rangatiratanga is the principle of Parliamentary supremacy. This means that Parliament can override court decisions or take away common law or tikanga-based rights. This happened with the Foreshore and Seabed Act 2004, which was enacted to extinguish customary rights that had been recognised by the Court of Appeal.[76] While litigation is often a useful tool for protecting and advancing minority rights, it always pays to keep in mind that any outcome could be overturned by Parliament, particularly on politically "hot" issues.

81. On the other hand, litigation can be an effective tool for advancing minority interests and generating change that cannot otherwise be achieved by political means, where the will of the majority must prevail.

[74] *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [127].
[75] For example, as is shown in the writings of the late Dr Moana Jackson and Ani Mikaere.
[76] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

Caveat – the risks and limitations of litigation as a tool

82. Litigation is a tool in your kete, but not the kete itself. It is a tool often best used alongside a suite of other advocacy tools. Rather than litigation being the end goal, a party needs to be clear on what their underlying position is and ultimately what they are trying to achieve via the courts. Early identification of objectives is a critical part of a group's overall strategy and litigation strategy.

83. Accordingly, litigation is often used as a last resort. It is a costly, adversarial and Western system of dispute resolution which can be a blunt instrument as it confers the ultimate decision on a third party. Conversely, the independent nature of the courts offers a pathway where Māori can test the Crown's assumptions of legislation and legal frameworks. This includes the application and interpretation of Te Tiriti o Waitangi.

84. Nevertheless, there are inherent risks in bringing a case to court and these should be critically considered, with legal advice, before determining the best course of action. When considering litigation as an avenue it is critical to:

    (a) Assess the risks in taking the case, what may be gained but also what may be lost as a result of a negative court decision (both in terms of your specific case and wider considerations that may affect other of your objectives).

    (b) Consider what success looks like in the current legal framework and whether a court can deliver a decision which assists in the overall objective, e.g. is it a permissive planning framework, does the statute provide hooks to argue better provision for exercising tikanga Māori, what does the regulatory framework look like?

    (c) Consider whether the facts of the case assist with reaching the legal outcome you are seeking.

    (d) The potential cost ramifications, noting that costs in the High Court, Court of Appeal and Supreme Court are typically awarded on a standard scale and follow the event.

    (e) Whether there are other avenues available to achieve the same means or which should be utilised alongside litigation to bolster the chances of achieving the overall objective. For example, litigation can be used as a tool to get the Crown to the negotiating table, which can often produce more flexible and bespoke outcomes than the courts can.

85. Further, when making arguments based on tikanga Māori, we need to be alive to the fact that parties may be pigeonholed into definitions of rangatiratanga and / or kaitiakitanga in particular contexts. This may mean that those definitions are ultimately codified in the common law with some rigidity. Inherent in tikanga is its contextual fluidity; that is, how

kaitiakitanga manifests in one setting won't be the same in another. Therefore, courts should be cautious about setting hard and fast rules about tikanga Māori. But there is a risk to placing these tikanga before the courts.

86. There are also limitations as to what litigation can achieve within a particular legal framework. For example, cases that only challenge a resource consent decision due to a procedural issue, such as the lack of consultation with iwi / Māori, will not achieve the outcome of overturning a decision outright as there is no duty to consult under the RMA.[77] Instead, the Court may make comments which indicate a better process is required in the future or that there were faults in the approach taken. However, ultimately the relief sought (overturning the decision) is not achieved. This often occurs in resource consent appeals where the issues raised by appellants are legitimate issues but do not amount to the level required to decline consent outright.

87. The efficacy of judicial review can be similarly limited because it is focused on process rather than substance. Relief is discretionary, and so a flawed process does not always lead to a decision being overturned. Even where decisions are quashed, the most common remedy is that the decision-maker is required to make the decision again according to the proper process, but they are not required to reach any particular outcome. This is in part due to the principle that senior courts will not substitute its own factual conclusions for that of the decision-maker. Instead, the courts will only determine as a matter of law whether the proper procedures were followed and whether the decision was reasonable.[78]

88. This is not to say litigation should not be considered as a viable pathway. But it is important that parties go into litigation knowing the risks and what is at stake. We are also aware that sometimes 'winning' in a strict legal sense isn't the driving force behind taking litigation for Māori.

89. In the end, a decision will need to be made as to whether the benefits of advancing the case outweigh any risks in losing. Where the risks involve the potential for Courts to rule against the recognition of Māori rights and interests, considerable caution is required.

90. Despite these caveats, there are certainly pathways to advance recognition of kaitiakitanga and rangatiratanga within our existing framework. As outlined above, this is consistent with general trends towards greater recognition of tikanga and of Te Tiriti across all areas of government, and in particular by the courts.

[77] RMA, section 36A. For resource consent applications and notices of requirement, there is no duty on the Applicant to consult with any person about the application.
[78] *Pring v Wanganui District Council* [1999] NZRMA 519 (CA) at 523–524. See also A to Z of New Zealand Law, Environment and Natural Resources – A to Z of New Zealand Law Chapter 25.6 – The Role of Administrative Law at [25.6.5.1].

Legal Framework for the Environment

91. The statutory landscape for the environment is complex. There are approximately 33 pieces of primary legislation that govern different aspects of the environment, not including the various environmental arrangements that have been negotiated as part of settling Treaty of Waitangi historical claims.[79] Additionally, there are an extensive number of policy and planning documents which sit under primary legislation.[80]

92. The environmental law framework is further complicated by the current large-scale reforms happening across the environmental sector, including reforms to the resource management sector, Three Waters, conservation, and the anticipated ocean management reforms. However, for the purposes of this Report, we consider that the large-scale reforms provide real opportunity to advocate within the policy and political areas of influence which we discuss later in this Report.

93. Typically, arguments by Māori litigants for the better recognition of rangatiratanga and kaitiakitanga in an environmental law context arise predominately under the RMA, the Conservation Act 1987, and more recently, the Marine and Coastal Area (Takutai Moana) Act 2011. We have also seen key shifts in environmental law (and recognition of tikanga Māori more generally) from cases taken under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**), namely the Trans-Tasman Resources line of cases,[81] as well as the implementation of various Treaty of Waitangi Settlement arrangements which have been utilised to plug the gaps of what the RMA was arguably intended to achieve.[82]

94. Looking at the resource management system specifically, it is important to note that the majority of resource consent applications are non-notified. This means that there is typically no submission process or hearing, and the consent is determined by local authority staff without wider members of the community having a voice. The 2018/2019 *National Monitoring System Report on Trends in Resource Management Act Implementation* found that 96% of all consents were non-notified with no hearing, with only 1.2% of consents publicly notified with a hearing.[83]

---

[79] For example, the Waikato River co-management arrangements, Te Awa Tupua, the legal personhood for the Whanganui River and the Te Urewera Settlement.

[80] For example, the current RMA provides a number of planning documents including national policy statements, district and regional plans, regional coastal plans, freshwater farm plans and freshwater plans more broadly. In the conservation space there is also the general policy for conservation, conservation management strategies and management plans, and national park management plans.

[81] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.

[82] Lex Aotearoa, pages 22 and 23, and footnote 77.

[83] Resource Management Review Panel, *New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel June 2020*, pages 263 and 264, citing *Trends in Resource Management Act implementation: National Monitoring System 2014/15 to 2018/19*. Wellington: Ministry for the Environment.

95. It follows that the environmental cases that reach a decision-maker, whether that be the local authority or the courts, are typically reactive in nature, i.e. where hapū and iwi are having to respond to an issue which arises within their rohe from another group. Reactive litigation can also be in response to central or local government initiatives like policy statements, plan changes, resource consents, or in the conservation context, national park plans, conservation management strategies and plans, or concessions. We have considered these 'reactive' because hapū and iwi have to respond to matters outside of their control and which are not initiated by them.

96. That is not to say there isn't proactive and strategic litigation led by hapū and iwi. There are many examples of Māori taking action via the courts in this way to:

    (a) question decision-makers (judicial review);[84]

    (b) test particular points;[85]

    (c) to seek clarity from the Courts on specific issues (declaratory judgments).[86]

97. We note that there is often an added layer of complexity with proactive litigation (and to a lesser extent reactive), which is the issue of overlapping Māori interests or mandate disputes. This can result in the case centring on *who* are mana whenua or *who* has the right to exercise rangatiratanga and kaitiakitanga in a particular area (see paragraphs 154 - 159 for a discussion on the type of evidence which assists in addressing this issue).

98. Irrespective of whether a case is reactive or proactive, the arguments which can be run will be limited by the facts of the case, the statutory and planning framework the matter operates within, and the constitutional reality of the current New Zealand court system.

99. As is explained above, the statutory landscape for the environment often means that arguments of rangatiratanga or kaitiakitanga are balanced out by decision-makers. Justice Tā Joe Williams describes that the Māori considerations within the RMA have to "compete for the attention of the final decision-maker against a multi-layered menu of other interests. Ancestral relationships, kaitiakitanga and the Treaty were all relevant, each differently weighed in the statute, but ultimately easily set to one side if necessary in pursuit of a western empirical or scientific view of sustainable management if that was the preference of the relevant decider."[87]

---

[84] See paragraph 92(a) for a discussion on judicial review. For example, the decision of whether to classify a consent application as non-notified or any other notification status is regularly challenged via judicial review proceedings.

[85] For example, whether a fiduciary duty exists (*Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.); the enforceability of customary take (*Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

[86] See paragraph 92(b) for a discussion on declaratory judgments.

[87] Lex Aotearoa, page 18.

Available pathways for advancing rangatiratanga and kaitiakitanga in the context of te taiao

100. Depending on the statutory regime in operation, and the specific facts being challenged, there are a wide range of ways to bring an action before the courts. The opportunity to advocate for rangatiratanga and/or kaitiakitanga within the environmental context will often arise in the following types of cases:

(a) **Judicial Review** is an inquiry into whether a decision was reached according to the law and to proper procedure, and reasonably. There are three broad types of judicial review: illegality, unreasonableness or irrationality, or procedure impropriety (including the doctrine of legitimate expectation).[88] In the environmental context, judicial review most often occurs where a party challenges the notification decision for a resource consent, or where due process has not been properly followed by a decision-maker giving rise to an alleged error of law.

(i) **Example:** the *Ngāi Tai ki Tāmaki* case (discussed earlier in this Report) was a judicial review proceeding challenging a DOC decision to grant commercial tour concessions on Rangitoto and Motutapu Islands to a third party. Ngāi Tai ki Tāmaki Trust argued that the concessions sought were activities that fell within the scope of the customary rights and responsibilities Ngāi Tai ki Tāmaki is entitled to exercise in accordance with their rangatiratanga and tikanga. The Supreme Court held that section 4 of the Conservation Act required the decision-maker to consider whether preference should have been accorded to mana whenua, including considering the potential economic benefit that could have been derived. Without doing so, the requirement to "give effect" to the principles of the Treaty of Waitangi were not satisfied and therefore amounted to a reviewable error of law.

(ii) **Example:** in *Lysaght v Whakatāne District Council*, the Lysaghts and Te Rūnanga o Ngāti Awa both respectively challenged a decision by the Whakatāne District Council to grant a non-notified resource consent for a proposed unmanned petrol station located on a Māori roadway in Whakatāne.[89] Te Rūnanga o Ngāti Awa (**Ngāti Awa**) challenged the process of the Whakatāne District Council in granting the consent, citing that Ngāti Awa should have been notified of the application as an affected party as kaitiaki and as the mandated iwi authority. Ngāti Awa also submitted that

[88] Under the modern orthodox principles of administrative law. See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, [1984] 3 All ER 935 at 950. See also *Secretary of State for the Home Department, ex parte Brind* [1990] 1 All ER 469 at 480.
[89] *Lysaght v Whakatāne District Council* [2021] NZHC 68; (2021) ELRNZ 383.

there was a legitimate expectation arising from communications with the Council, including an expectation Ngāti Awa would be kept 'in the loop'. The Court held that such a legitimate expectation existed and the breach of it had a material consequence on the Council's assessment of whether to notify the application to affected persons.[90] This case ultimately turned on traffic effects (this being one of the restricted discretionary activity criteria) and whether pedestrian safety was adequately considered by the Council in reaching its decision. In short, the Court held that Te Rūnanga o Ngāti Awa was not an affected person under the RMA as there were no potentially relevant adverse effects on the iwi which were minor or more than minor.[91] His Honour noted that "iwi authorities may in other fact scenarios qualify as an affected person."[92]

(b) **Declaratory Judgment**: The High Court has a general equitable jurisdiction to make declarations.[93] As has recently been confirmed by the Supreme Court decision in *Ngāti Whātua Ōrākei v Attorney-General,* the High Court's jurisdiction to "declare what the law is" means that plaintiffs may seek declarations of legal right, *including* rights and interests at tikanga.[94] Declaratory proceedings may therefore be a good vehicle for seeking recognition of tikanga-based rights, particularly where there is no other procedure available.

(i) **Example**: Ngāi Tahu are currently seeking a judgment declaring that they have pūtake mauka and rangatiratanga entitlements to freshwater in their rohe.[95] It is therefore a declaration of tikanga-based right, of the type envisaged by the Supreme Court in *Ngāti Whātua*. There are also other declarations sought as to what effect the right has – in

[90] *Lysaght v Whakatāne District Council* [2021] NZHC 68; (2021) ELRNZ 383 at [99] – [100].
[91] *Lysaght v Whakatāne District Council* [2021] NZHC 68; (2021) ELRNZ 383 at [105].
[92] *Lysaght v Whakatāne District Council* [2021] NZHC 68; (2021) ELRNZ 383 at [101].
[93] *Ngāti Whātua* (HC) at [453], citing *Association of Dispensing Opticians of NZ Inc v Opticians Board* [2000] 1 NZLR 423 at [10]. See generally Rachael Schmidt-McLeave "Declaratory Relief" in Sir Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2012).
[94] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 (SC) at [77] and [78] per Elias CJ; and at [34] per William Young, O'Regan, Ellen France and Arnold JJ .
[95] See *Tau & Others v Attorney-General* [2021] NZHC 3108. This was an interlocutory proceeding of the Ngāi Tahu freshwater claim and sets out the declarations sought by Ngāi Tahu based on asserted rangatiratanga over wai Māori. The interlocutory proceeding sought to have the following preliminary question determined: "Does Ngāi Tahu have pūtake-mauka / rangatiratanga entitlements to wai māori within its takiwā?". The High Court dismissed the application for a preliminary hearing finding that the question was not a standalone question and was inherently linked to positive defences put forward by the Crown in the substantive proceedings. The Court also referred to the principle in *Haden v Attorney-General* (2011) 22 PRNZ 1 (HC) at [50(e)], that there is some reluctance in the case law to determine novel areas of the law via High Court Rule 10.15 procedure (orders for decision). Noting that such cases are better resolved within their full factual settings.

particular, obligations on the Crown to develop policy and legislation in conjunction with Ngāi Tahu.

(ii) **Example**: *Tuwharetoa Maori Trust Board v Taupo Waters Collective Ltd* was an application for a declaration under the Declaratory Judgments Act 1908, concerning the interpretation of a Deed between the Trust Board and the Crown.[96] The Trust Board sought and was granted a declaration that under the Deed, it could: require commercial users to obtain from the Trust Board rights to occupy or use parts of the Taupō Waters (being the bed of Lake Taupō, and parts of the beds of associated waterways) for commercial activities; and charge Commercial Users for the same.

This was an example of proactive litigation by the Trust Board seeking to clarify the scope of its rights, in the context of ongoing negotiations regarding a proposed commercial licensing regime for Taupō Waters.

We note the Declaratory Judgments Act 1908 procedure is available where the validity or interpretation of a statute, regulation, deed, agreement, or any other written document is in issue. It can be useful for determining the scope of rights existing under Treaty settlement deeds or legislation.

(iii) **Example**: In the recently released High Court decision in *Ngāti Whātua,* Ngāti Whātua Ōrākei sought declarations that they held mana whenua and ahi kā within central Auckland. The Court declined to issue the declaration in a form that would be legally enforceable against any other party, although it has left it open to Ngāti Whātua to seek a declaration of its rights *"according to the tikanga and historical tribal narrative and tradition of Ngāti Whātua Ōrākei"* only.[97] While this is not strictly an environmental case, it is an assertion of mana whenua which is intrinsically about connection to land and to te taiao.

(c) **Takutai Moana proceedings** are applications for recognition orders under the MACA Act which enable applicants to seek customary marine title and/or protected customary rights in respect of the marine and coastal area. The MACA Act has two pathways to achieve customary marine title and / or protected customary rights; either via the High Court or via direct engagement with the Crown. We note that there was a statutory time limit to lodge applications by 3 April 2017. While no further applications can be lodged, the majority of applications in the High Court and via Crown engagement are yet to be heard or negotiated. Therefore, significant opportunity remains

[96] *Tuwharetoa Maori Trust Board v Taupo Waters Collective Ltd* [2021] NZHC 1871.
[97] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2021] NZHC 843.

for applicants to advance recognition of rangatiratanga and kaitiakitanga.

(i) **Example:** in the landmark decision *Re Edwards (Te Whakatōhea No. 2)*, the High Court grappled for the first time with the complex legal and factual issues in the interpretation of the MACA statutory scheme with multiple overlapping applicant groups. Fundamentally, the High Court held that the critical focus for determining whether an applicant group meets the test for customary marine title is tikanga Māori, and whether or not a specified area was held in accordance with the applicant group's tikanga.[98] This is a question of fact, and it starts and ends with tikanga Māori.

(d) **Appeals** are lodged in various courts and identify errors in fact and/or law that challenges decisions. Environment Court appeals are heard *de novo*, which means that the Environment Court will consider the case and evidence as if it was being heard for the first time. Appeals against an Environment Court decision made under the RMA to the higher courts are limited to questions of law.

(i) **Example**: The *Trans-Tasman Resources* case was brought by way of an appeal against a decision of the EPA to grant consents under the EEZ Act.[99] The appeal progressed on points of law all the way up to the Supreme Court. The appeal was allowed and the consents overturned. As explained in more detail above, the case is significant because it recognises the importance of kaitiakitanga relationships and requires that those interests be properly understood and weighed in the decision-making process.

101. Litigation by Māori is inherently collective and will almost always be taken on behalf of whānau, hapū, iwi, or in some cases, all Māori collectively i.e. litigation led by the New Zealand Māori Council.[100] While collective action by Māori may not be seen to be 'novel' within te ao Māori or before the Courts, class actions,[101] or representative proceedings,[102] may be a novel way to approach recognition of collective interests by multiple iwi, hapū or

[98] *Re Edwards (Te Whakatōhea No.2)* [2021] NZHC 1025 at [144]. This case is currently on appeal in the Court of Appeal.
[99] *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801; *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248.
[100] The New Zealand Māori Council is a statutory body as created by the Māori Community Development Act 1962.
[101] A class action is a court proceeding in which multiple people(s) with similar interests collectively sues one or more defendants. Aotearoa does not have a class actions regime except for the extent that representative proceedings are provided for under specific statutes, and under rules 4.24 and 4.27 of the High Court Rules. The New Zealand Law Commission has recently recommended that a statutory regime for class actions be implemented in New Zealand (see Te Aka Matua o te Ture | New Zealand Law Commission, Report 147 – Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class Actions and Litigation Funding (2022)).
[102] Provided for under rule 4.24 of the High Court Rules 2016.

whānau. It could also be utilised as a way to test novel arguments or seek broad declarations as to the rights recognised under Te Tiriti o Waitangi where multiple groups may wish to be involved. As litigators, we are hesitant to recommend broad-reaching declaratory proceedings given the high level of risk associated, but if a case was to be taken, a representative proceeding (or class action) could be a way to structure the case, and potentially limit costs exposure (i.e. costs awarded against unsuccessful parties, not the cost of the litigation itself).

Potential novel areas / arguments / approaches

102. This section of the Report discusses the content of novel areas, arguments and approaches that could be used to advance recognition of rangatiratanga and kaitiakitanga in te taiao.

103. As discussed above, there has been an open approach in recent years towards greater recognition of tikanga in, and as, the law generally. Arguments can arise in a huge variety of contexts, and their success often depends on the surrounding legal framework and whether there is 'room' for tikanga to operate. Any argument must be informed by the facts of the case and by the relevant tikanga at issue. The arguments set out below are only a small selection of many possible arguments that could arise in the future and often as a result of a particular set of facts.

Rāhui

104. Rāhui is a practice that often involves restricting the terms of access to an area and/or the types of activities that may be performed there. Rāhui are imposed for different reasons, such as the temporary presence of tapu, or for sustainability or conservation purposes. Imposing a rāhui is an exercise of both kaitiakitanga and rangatiratanga.

105. It is possible that rāhui might be recognised as legally enforceable prohibitions. This argument would seek direct recognition of rāhui by the courts, as a rule of tikanga that is cognisable at common law. Procedurally, this argument could be put forward by way of a declaratory judgment seeking recognition of a rāhui, or the ability to impose a rāhui, as in *Ngāti Whātua* and the Ngāi Tahu freshwater claim. It might also arise in a reactive context: for example, if an iwi has enforced a rāhui and is then pursued by way of criminal prosecution, nuisance claim or action based on breach of the New Zealand Bill of Rights Act 1990 (**NZBORA**).

106. In the MACA jurisdiction, the High Court has recently considered whether a rāhui is permissible as a form of a wāhi tapu condition under section 79(2) of MACA. In *Re Ngāti Pāhauwera*, the High Court held that "Rāhui over particular specified and defined wāhi tapu locations may be able to be imposed and enforced through the Act when wāhi tapu conditions are in place and a CMT order / agreement has been granted."[103] Further, that

[103] *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [122].

rāhui as a form of temporary exclusion of third parties could be utilised as a wāhi tapu condition but only for specified locations.[104] Accordingly, if an applicant under MACA can meet the test for customary marine title and, within that area, met the test for wāhi tapu, then conditions can be imposed which restrict or exclude the public from the wāhi tapu area if required to protect the wāhi tapu or wāhi tapu area.

107. In our view, there are potential barriers and limitations on the rāhui argument. For example, if there is a statute that regulates access to the area, or what activities can be performed at that area, the imposition of rāhui cannot be inconsistent with that framework. There would also likely be enforcement and punishment limitations without those parameters being explicitly framed.

108. We note that the iwi checkpoints that were set up in collaboration with Police and local councils during COVID-19 lockdowns are one example of iwi exercising a rāhui-type power. However, in that case, the restriction on the freedom of movement was authorised by the public health and COVID response legislation and regulations. It would likely be much more contentious without such a legislative basis, or one of the type discussed above in relation to MACA.

Allocation regimes for freshwater

109. Another possible challenge is to the current freshwater allocation regime.

110. Rights to take and use water are currently managed on a case-by-case basis under the terms of the RMA, national policy statements and regional plans. The case law has interpreted the Act as requiring a 'first in first served' approach to water allocation.[105] Where there are multiple competing applications, the courts have found that merit-based comparisons are not allowed, making it difficult to argue that iwi should receive preferential access to water to recognise their rangatiratanga or to exercise kaitiakitanga.[106]

111. The case for preferential access to freshwater for Māori has been made before and rejected, both in the context of planning documents seeking to preference Māori,[107] and in the context of the 'first in first served' rules for consent applications.[108] However, these decisions do not directly confront the issue of whether this rule best serves the purpose of sustainable management, or indeed whether it is consistent with the combined effect of sections 6(e), 7 and 8. Instead, they simply apply precedent that was

[104] *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [123].
[105] *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA); *Central Plains Water Trust v Ngai Tahu Properties* [2008] NZCA 71, [2008] NZRMA 201.
[106] *Fleetwing Farms* at 264.
[107] *Hauraki Maori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-99, 4 March 2004; *Te Whanau a Kai Trust v Gisborne District Council* [2021] NZEnvC 115, (2021) 22 ELRNZ 920.
[108] *Re New Zealand Māori Council* [2009] NZAR 601 (HC).

first set in a decision where there were no tikanga or Treaty issues engaged.[109]

112. There have been indications, both at the Court of Appeal and Supreme Court level, of a willingness to revisit this issue despite the apparently settled precedent.[110] This would appear to be possible because the 'first in first served' rule is not explicit in the RMA, but is a judicial gloss applied based on assumptions as to the apparent policy of the Act.

113. Further, the *Ngāi Tai ki Tāmaki* decision confirms that the principles of the Treaty *may* require preferential treatment be given to Māori to recognise their unique relationship with the environment. While that decision was made in the context of the Conservation Act, the underlying rationale applies equally in the resource management context, where Treaty principles and kaitiakitanga are also engaged by virtue of sections 6(e), 7 and 8.

114. The 'first in first served' principle has yet to be tested in light of this authority; nor has it been tested at the Supreme Court level. It is therefore one option for advancing recognition of kaitiakitanga and rangatiratanga. We note that the 'first in first served' principle may not be carried over as part of the ongoing resource management reform, and that allocation of freshwater is a matter still to be resolved between the Crown and Māori. Nevertheless, a finding from the Supreme Court overturning the 'first in first served' principle under the current version of the RMA might be very useful in progressing those negotiations.

Challenging status of Te Tiriti to directly enforce rights

115. Despite the increase in Treaty-related litigation following the changes to the Treaty of Waitangi Act in 1985, the leading authority on the pure legal status of the Treaty is still the 1941 Privy Council decision in *Te Heuheu v Aotea District Maori Land Board*.[111] That case stands for the principle that the Treaty is not directly enforceable by the courts unless incorporated into legislation.

116. While the courts have made significant inroads into this principle – for example, by applying interpretive presumptions in favour of Treaty compliance[112] – no decision since *Te Heuheu* has tested the legal status of the Treaty at large and the direct enforceability of rights as a result of that status.

---

[109] The leading authority, *Fleetwing Farms,* concerned competing applications by Fleetwing Farms Ltd and Aqua King Ltd for coastal permits. Neither party was Māori and so the question of preferential access to recognise kaitiakitanga and rangatiratanga did not arise.
[110] See Christian Whata, Jimee Kirby-Brown and Horiana Irwin "Resource Management and the Allocation of Customary Resources – Where Does the Priority Lie?" (Paper published in the Māori Law Society of New Zealand Law Society Seminar, September 2010) at [3.20]–[3.21].
[111] *Te Heuheu Tukino v Aotea District Maori Land Board* [1939] NZLR 107 (CA).
[112] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179.

117. One significant gap in the case law is the question of whether the Treaty is valid treaty at international law. As noted by Matthew Palmer in his text *The Treaty of Waitangi*, the case law tends to suggest it is, without explicitly confirming it.[113] Palmer posits that if the Supreme Court were to examine the issue today, it would hold that the Treaty is a valid international Treaty. The implications of this finding are:

(a) although an international Treaty cannot be enforced by the domestic courts, the Treaty is nevertheless a "legal" obligation on the Crown;

(b) that obligation may have normative force, even though it cannot be enforced within New Zealand; and

(c) it may be possible to seek remedies at international law.

118. More broadly, the legal effect and status of the Treaty in New Zealand continues to grow despite the fact that the Treaty itself is not directly enforceable. Instead, the courts have found other means to give effect to the Treaty; for example, by indicating that the Treaty is part of the *"fabric of New Zealand society"*[114] and is a *"constitutional foundation in New Zealand"*.[115] It may therefore inform the development of the common law, the interpretation of legislation, and can form the basis of judicial review. There are therefore many inventive ways that Treaty arguments can be used in support of a particular outcome without directly challenging the *Te Heuheu* decision.

119. Alternatively, a higher risk approach could be to revisit *Te Heuheu* on the basis that it was wrongly decided. The argument could be that the Treaty of Waitangi should not be treated as simply another 'international' Treaty. Rather, it is a founding document that is not subject to the rules of dualism that were subsequently established under colonisation. Accordingly, the Courts should find that the Treaty is directly enforceable, without requiring legislative incorporation. While this is a high-risk approach and would require a case to go to the Supreme Court, a situation may arise that necessitates the argument being squarely put forward.

Testing Legal Personality

120. Legal personality is a relatively new tool, at least in the Aotearoa context, that has been used in Treaty settlements to recognise the significance of natural features or landscapes, and their status as tūpuna. There are two examples in New Zealand where legal personality has been given to environmental features, Te Urewera and Te Awa Tupua (the Whanganui River), although there are more examples internationally. Legal personality is a status that means the 'person' is the subject of legal rights and duties. A legal person can be either a natural person (i.e a human being), or a non-

[113] Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 177.
[114] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.
[115] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at [593].

natural person such as a company, or in this case, a natural feature. Giving legal personhood to environmental features opens new potential pathways for environmental protection. In particular, a legal person has:

(a) rights in substance;

(b) standing to bring legal proceedings in which they have a proper interest; and

(c) recognition of its injuries.

121. This opens up possibilities for litigation to be brought on behalf of these features, as persons in their own right. This could be particularly significant in the context of tort law and injuries suffered by the environment. For example, issues of standing and harm often prevent tort claims succeeding where a person bringing the case does not have an interest greater than the interest of the general public – which can be difficult to prove in cases of environmental harm. Where the 'person' affected is an environmental feature, this element will be much more easily satisfied.

122. Ultimately, the potential to use legal personhood as a tool for advancing kaitiakitanga and rangatiratanga has not yet been tested, but is one that holds much potential.

Tort

123. Tort claims are another potential avenue for preventing or compensating harm caused to the environment. Torts are private law actions, or "civil wrongs", pursued by one party against another where an action has caused damage or injury to person or property. The number of tort claims arising in an environmental context has increased in recent years, especially in the United States, and can be useful where it is easy to attribute harm to a particular person or action. The most commonly used torts to address environmental damage are nuisance, negligence and trespass.

124. In particular, there is now an international trend towards using tort as a vehicle for addressing climate change. However, as noted in an article by Winkelmann CJ, Glazebrook and Ellen France JJ, the case law tends to show that tort is not well-suited to dealing with climate change issues:[116]

> *The difficulties of tort law are starkly apparent. In fact, climate change has been described as the "paradigmatic anti—tort" due to its "diffuse and disparate" origin, its "lagged and latticed" effect; "a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible".*

[116] Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change *and* the Law" (paper presented at the Asia Pacific Judicial Colloquium, Singapore, May 2019) at [109], citing Douglas A Kysar"What Climate Change C an D o A bout Tort Law" (2011) 41 Environmental Law 1 at 4.

125. Nevertheless, they conclude in their article that "headway is being made".[117]

126. There is currently a case of this type before the New Zealand Supreme Court: *Smith v Fonterra*. It is a claim against a number of companies involved in high-emissions activities, alleging negligence, public nuisance, and a new tort termed "breach of duty". While the claim has failed in the High Court[118] and Court of Appeal,[119] the outcome of any Supreme Court decision may well open further avenues for claims of this type. The Court will also consider what effect tikanga may have on the torts of negligence and public nuisance, as well as on development of a new tort. This will be an important decision to watch.

127. More generally, tort claims can be a useful tool for addressing other, more easily attributable kinds of environmental harm. While proving standing can be difficult (as it typically requires 'personal' damage or damage to property), it could be argued that as kaitiaki, iwi and hapū should always have sufficient standing concerning harm to whenua and water bodies within their rohe. Equally, legal personhood could be useful, as discussed above.

Native title

128. Native title is a doctrine which recognises that customary land tenure and proprietary rights persist after the assumption of sovereignty, until extinguished by consent or by statute. Native title has been found to apply in New Zealand in a number of significant decisions.[120]

129. While the focus of the doctrine is on "proprietary" type rights, it is not limited to ownership as that term is understood in English law, but can include "non-territorial" rights to natural resources, which are not dependent on underlying ownership of the land. The High Court decision in *Te Weehi* is an example of a "non-territorial" customary right, being the right to gather and take seafood for personal use, despite not having underlying ownership (customary or legal) of the area.[121]

130. Importantly, the landmark Court of Appeal decision in *Ngāti Apa* confirmed that native title applies to customary proprietary rights as defined by tikanga or custom, and that common law assumptions about the nature of property rights or tenure do not apply to extinguish those rights: "the common law as received in New Zealand was modified by recognised Maori customary property interests".[122] The result in that case was that customary title to the foreshore and seabed was made out, despite the

[117] Ibid.
[118] *Smith v Fonterra Co-Operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394.
[119] *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284.
[120] *R v Symonds* (1847) NZPCC 387 (SC); *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24; *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 at 363; and *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).
[121] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.
[122] *Ngāti Apa* at [86] per Elias CJ.

English common law doctrine that no one can own land below the high water mark.

131. The native title cases are an early recognition that tikanga-based rights continue to exist until extinguished by consent or by statute. Although arguments based on native title have fallen away somewhat now that it is accepted that tikanga can be independently recognised at common law, they are important because they carry with them an assumption that has not been translated into the more general case law: that tikanga trumps the common law.

132. This line of cases could therefore be used to establish customary rights to freshwater, air or other resources which typically cannot be 'owned' at English common law. While there would be real questions about the extent to which statutory regulation had abridged those rights, there may be circumstances where a customary title argument is available in the right context.

133. There is currently an application before the Māori Land Court seeking a determination that parts of the bed of the Waikato River is Māori customary land. Part of the claim is that the water above it is also held in accordance with tikanga Māori, given the river is treated as a whole and indivisible entity. In a recent decision, the Court has declined to strike out the claim, finding that it is arguable that the riverbed remains Māori customary land despite the fact that Mercury has title to parts of that land under the Land Transfer Act 2017.[123] Equally, the Court held that the claim to the water was not "clearly untenable" and raised arguments of ownership that are novel, and therefore, should be considered by the Court in full.[124]

134. *Mercury NZ Ltd v Cairns – Pouakani River Bed* therefore shows the potential for native title-type arguments to be made in support of novel, tikanga-based rights that may not have historically been recognised in the English common law. The case will be one to watch on appeal or substantive hearing as it may well open new avenues for customary title claims.

135. We note that a native title argument was recently raised in the context of a Regional Plan change appeal under the RMA. There, Te Whānau a Kai Trust sought recognition of their customary interests in freshwater through changes to the Gisborne Regional Freshwater Plan. The Environment Court held that neither it nor the Council had jurisdiction under the RMA to recognise those types of rights; but did not rule out the possibility that native title extends to freshwater, and noted that the issue had yet to be addressed by a court of competent jurisdiction.[125] The decision was subsequently upheld on appeal to the High Court.

[123] *Mercury NZ Ltd v Cairns – Pouakani River Bed* (2022) 227 Waiariki MB 174 (227 WAR 174) at [94].
[124] At [102]–[104].
[125] *Te Whanau a Kai Trust v Gisborne District Council* [2021] NZEnvC 115.

136. The *Te Whānau a Kai* decision further confirms that the question of native title to freshwater is unresolved, however, it is one that can only be determined by the Māori Land Court or the High Court.

TOOLKIT – WHAT IS NEEDED TO RUN A GOOD CASE?

136. Even where a promising opportunity or legal argument is identified, there are a number of important practical and strategic factors to consider before making the decision to litigate. These include factors such as: the strength of the legal argument, the surrounding legal framework, the facts at issue, the availability of evidence, standing, choice of forum, resourcing, and alignment with other parties. This section of the Report discusses each of these factors in an attempt to build a 'toolkit' that can be used to assess the potential strength of a claim and assist in building a litigation strategy should such a pathway be pursued.

Avenues to run your case – Environmental Forums

137. There are a range of panels and courts within the environmental system tasked with determining the various aspects of our environmental legal system. Each has a different jurisdiction and rules of process that are important to consider as part of what is required to run a good case. Where there are multiple forums potentially available for advancing a claim, it is important to compare what each can offer, and to assess their benefits and risks.

138. We set out a summary of the different fora and their functions in the table below.

FORUM	ACTIVITY	DESCRIPTION
Local authority (district and regional)	Resource Consents Plan Changes Private Plan Changes Plan Variations	A cornerstone of the RMA is the right to public participation. Council level hearings are the initial place where parties will be heard on a resource consent, plan change or plan variation. It is the first step and enables the public or those with a particular interest to submit on issues (within the relevant statutory and planning framework). Councils regularly appoint independent commissioners to undertake the statutory decision-making role at this stage. Where provided for, mediation can occur.
Heritage NZ Pouhere Taonga	Archaeological Authorities	It is unlawful to modify or destroy any part of an archaeological site without the prior authority of Heritage New Zealand Pouhere Taonga. Before any earthworks, construction or activity which could disrupt an archaeological site, an archaeological authority is required.

FORUM	ACTIVITY	DESCRIPTION
Environmental Protection Authority	General	The Environmental Protection Authority (**EPA**) is the government agency responsible for regulating activities that affect New Zealand's environment. It has various roles under a number of statutes, including the RMA, the EEZ, the Hazardous Substances and New Organisms Act 1996, the COVID-19 Recovery (Fast-track Consenting) Act 2020, and the Emissions Trading Scheme.
	COVID-19 Fast-track Consenting	The Covid-19 Fast Track Consenting Panels are independent decision-making bodies that are set up for fast-track projects under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**the Act**). The Act provides for a short-term consent process to fast track 'listed' or 'referred' projects and was created to speed up recovery from COVID-19 and increase job numbers. The EPA provides advice and secretariat support to the Panel. Appeal rights are limited to specific persons and only on questions of law.
Boards of Inquiry	Resource consents	Boards of Inquiry are established for nationally significant proposals. The process is publicly notified and is estimated to take 9 months from notification to final decision. If the consent is land-based, the Minister for the Environment will appoint members of the Board, with the support of the EPA. In cases of coastal proposals, this will be the Minister of Conservation.

FORUM	ACTIVITY	DESCRIPTION
Freshwater Hearing Panels	Freshwater planning instruments to give effect to the National Policy Statement Freshwater Management 2020	Freshwater Hearing Panels (**FW Panels**) are panels established to consider the freshwater planning instrument in issue under the new Freshwater Planning Process (**FPP**). The FPP must be followed by regional councils and unitary authorities when preparing, changing, or varying regional policy statements and regional plans (freshwater instruments) that give effect to any national policy statement for freshwater management, or otherwise relate to freshwater. Appeal rights are limited and depend on whether a regional council accepts or rejects a FW Panel recommendation.
Environment Court	*De novo* Appeals	The Environment Court is a specialist Court with jurisdiction over environmental and resource management matters. It is an appellate court, which largely considers appeals about the RMA on a *de novo* basis i.e. the appeal runs as if it was a first instance hearing starting from the start.
	Direct Referrals	In certain circumstances, an applicant may seek for their application to be directly referred to the Environment Court rather than by the relevant council. This process streamlines decision-making for large scale and/or complex applications that are otherwise likely to end up in the Environment Court on appeal following the council hearing and decision. The direct referral process can only be used for notified applications regarding: • Resource consents (including changes or cancellations to resource consent) • Notice of requirement for a designation order, heritage order, or an alteration to a designation or heritage order Submitters can get involved in a direct referral court proceeding by becoming a section 274 party.

FORUM	ACTIVITY	DESCRIPTION
	Declarations	Councils or individuals can make applications for declarations, which is where Court is asked to define or clarify a matter relating to the operation of the RMA. Some examples of declarations include: • A council may apply for a declaration that an activity is not allowed by the RMA or by a council plan. • Individuals can seek a declaration, such as in cases where they consider that they have existing rights to use an area. The court can declare that a person must adopt the best option to minimise adverse effects on the environment. • Individuals can seek a declaration about the work of a council – for example, that a proposed provision in a plan is inconsistent with a regional policy statement.
High Court	Appeals Originating Applications (Judicial Review, Declaratory Judgments)	The High Court is an appellate court as well as a first instance for originating applications, such as judicial reviews and declaratory judgments. In the environmental context, the majority of the cases heard in the High Court are appeals on matters of law from the Environment Court or Environmental Protection Authority.
Court of Appeal	Appeals (by leave only)	The Court of Appeal is the second-highest court in Aotearoa. In the RMA jurisdiction, the Court of Appeal may only hear appeals on matters of law and if leave has been granted.
Supreme Court	Appeals (by leave only)	The Supreme Court is the highest court in Aotearoa and appeals may only be heard if leave has been granted. Importantly, one of the criteria for leave being granted is whether the appeal involves a significant issue relating to the Treaty of Waitangi.

Legal arguments and levers

139. The factual circumstances and corresponding strength of legal arguments determine the likelihood of success of any case. Novel legal arguments will by their nature always be subject to risk and uncertainty. However, the key is to find areas where there is sufficient space for those novel arguments to operate and ensure that you have methodically worked through all aspects of the argument.

140. For example, where outcomes are determined by a dense statutory or regulatory regime which 'covers the field', there may be little room for arguments based on rangatiratanga or kaitiakitanga to succeed without a specific statutory or policy lever. Equally, where common law precedent would seem to exclude considerations of rangatiratanga or kaitiakitanga, there may be little chance of success.

141. Arguments have typically been more successful in two types of scenarios, those being:

(a) where there is a statutory or policy lever that requires compliance with or consideration of te Tiriti, tikanga, or kaitiakitanga;

(b) where a public decision-maker exercises a relatively broad power of decision to which kaitiakitanga or rangatiratanga is relevant, and is required to engage meaningfully with those concepts.

142. In many successful cases, both of these elements are present.

143. For example, *Ngāi Tai ki Tāmaki* and the *Whale-watching* case rely on the powerful Treaty clause in the Conservation Act 1989. Many cases under the RMA rely on sections 6, 7 and 8 of that Act. While a statutory lever is certainly useful, we note that the Treaty has been found to be engaged even in contexts where there is no explicit lever. Courts are therefore becoming more willing to 'read in' these types of obligations.

144. *Trans-Tasman Resources* and *Ngāti Maru Trust* are examples of cases in the second category, where environmental decision-makers were required to engage more fully with concepts of kaitiakitanga and rangatiratanga as part of their decision-making (noting there were also statutory levers at play in both of those cases).

145. In cases of this type, the criticism is usually that the decision-maker failed to fully appreciate the nature of the concept and therefore failed to properly factor it into their decision. While challenges are therefore successful on the basis of process, it is seldom the case that kaitiakitanga or rangatiratanga will require a particular substantive outcome – particularly where broad discretions are at play. This underscores the importance of putting these types of arguments before the first instance decision-maker, who may be persuaded by them, rather than relying on appeal or review.

Connection to issue and outcome

146. Because rangatiratanga and kaitiakitanga are context-specific and can vary by rohe, it is important to step through how each concept manifests in the case at hand. The question as to what the role of kaitiaki dictates in the circumstances must also be detailed in the evidence, to connect it to the issue at hand and what should happen as a consequence. For example, if a resource consent application will have adverse effects on your ability to exercise kaitiakitanga, it will be important to explain to the Court the underpinning values and elements which enable you to be a kaitiaki, and

how the practices will be affected by the proposed activity. Tying those values to the adverse effects can then show causation to the Court.

Standing

147. Litigants must have a legal right to bring a claim before the court, otherwise known as "standing". The principle is that the person or group must have a sufficient interest in the subject matter of the dispute to justify their presence before the Court.

148. In many environmental contexts, the relevant statute provides for broad powers of public participation. Where a project or development is taking place within the rohe of an iwi, and could have environmental effects, iwi will also usually be "affected parties" within the meaning of the RMA and have participatory rights even in applications that are not notified.

149. However, standing and mode of participation are factors that should be considered before entering into litigation. In some cases, there will be a choice available to join either as a full party or only as an interested party, a decision which may have consequences for costs and rights of participation and appeal.

150. Within the context of iwi and hapū litigation, standing can be important from a representative perspective. It is important that the person or organisation who is named as a party has the appropriate representative mandate and capacity. Frequently these issues can be avoided if the party is a body that is mandated to represent an iwi, hapū or group of people for other purposes.

151. Another factor to be aware of is that hapū and iwi are not legal persons, and so cannot be named as parties to litigation.[126] To get around this, an organisation, company, or individual with legal personhood can be named to represent the hapū or iwi. Frequently, the representative is either an iwi or hapū-mandated body, or a kaumatua who has the mana to stand on behalf of the iwi or hapū.

Alignment with other iwi / hapū

152. Litigation seeking recognition of kaitiakitanga or rangatiratanga is much more likely to be successful if all iwi and hapū who are party to the proceeding are aligned and unified. Nuances in articulation, or different manifestations, are not likely to be fatal. If there is conflicting evidence as to how those concepts should be *applied* to the case at hand which would lead to difference results, whether that conflict is between or within iwi, it is more challenging. This is because the courts are extremely reluctant to rule on conflicting points of tikanga.[127]

[126] *Te Ara Rangatu o te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2018] NZHC 2886, [2019] NZAR 12.
[127] See for example, *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843.

153. It is therefore vital to engage with any potentially interested iwi or hapū before bringing litigation, to ensure that they are either uninterested in participating or are largely aligned and supportive. While this is challenging in a cross-claims environment, and litigation may be necessary as a last resort, it is best to make all attempts to resolve or narrow conflicting points of tikanga via alternative dispute resolution processes before bringing the claim before the Court. Those processes could in turn be driven by tikanga, as occurred to narrow issues in the *Re Edwards* and *Ngāti Whātua* decisions.

Tikanga evidence

154. When advancing arguments on the basis of rangatiratanga and kaitiakitanga, it is essential to present evidence from pūkenga (or tikanga experts). Tikanga evidence should be presented by at least one person from within the relevant hapū or iwi (if applicable), given that tikanga is exercised at the hapū level and its expression can vary from hapū to hapū. Whether independent expert evidence is required should also be considered.

155. This ensures that all bases are covered in the event that objections are raised as to expertise or independence.

156. In terms of content, whakapapa evidence should always be presented by the relevant iwi or hapū regardless of the subject matter of the dispute. Evidence concerning a specific site or natural feature should also be presented, if applicable.

157. The depth of the evidence required may also depend to some extent on the forum. In general, judges do not have an intuitive understanding of tikanga and so it may be necessary to present evidence about the broader tikanga framework and its underlying principles, even if the issue itself may be quite confined. A less extensive approach is required in forums that have greater familiarity with tikanga, such as in the Māori Land Court and, to some extent, the Environment Court.

158. The Environment Court in *Ngati Hokopu ki Hokowhitu v Whakatane* District *Council* helpfully set out a "rule of reason" approach to evaluating tikanga evidence, particularly where there is conflicting evidence. The factors that go into this assessment include:[128]

    (a) whether values correlate with physical features of the world;

    (b) people's explanations of their values and traditions;

    (c) whether there is external evidence (e.g. Maori Land Court minutes) or corroborating information (e.g. waiata, whakataukī) about the values;

    (d) the internal consistency of people's explanations;

[128] *Ngati Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvC) at [53].

(e) the coherence of those values with others; and

(f) how widely the beliefs are expressed and held.

159. These factors should be taken into account when evidence is being prepared.

Environment Legal Assistance Fund

160. The Environment Legal Assistance Fund (**ELA Fund**) is for not-for-profit groups advocating for matters of environmental public interest. The purpose behind the ELA Fund is to enable applicants to participate more effectively in matters affecting the environment.[129] The fund is available to cover the time and expenses of legal representatives and/or expert witnesses used in preparing for, resolving and/or presenting cases before the Environment Court and higher courts.

161. Not-for-profit groups are eligible to apply for funding. This includes iwi and hapū groups, including post-settlement governance entities, hapū incorporations or whānau trusts. ELA funding is available for appeals to higher courts including the High Court, Court of Appeal and Supreme Court. Before applying for funding, a group must already be engaged in the proceedings by being a party to the case. Funding is also open to interested parties although the extent of the funding may be limited as a result of limited participation.

162. There are six application rounds each financial year, each determined by an independent advisory panel.[130] There is no minimum grant, but the maximum grant is $50,000 (excluding GST) per group, per application, for any one case. The fund has a total budget of $600,000 (excluding GST) per financial year. There is no guarantee that any or all requested funding will be awarded. The applicant must be eligible for funding and only reasonable costs will be considered for funding.

163. The ELA Fund website sets out the funding assessment criteria. Relevant considerations include:

(a) whether the issue relates to the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga;

(b) whether the issue has the potential to create useful case law;

(c) the commitment of the applicant to the issue at hand; and

[129] Ministry for the Environment "Environmental Legal Assistance Fund" Ministry for the Environment <https://environment.govt.nz/what-you-can-do/funding/environmental-legal-assistance-fund/>.
[130] Panel members are Phil Page (Chair, Legal), Sarah Dawson (Planning), Ani Pitman (Māori / Cultural), Kuru Ketu (Legal / Māori), Loretta Lovell (Legal / Māori), Rachel Devine (Legal) and Gregory Carlyon (Planning).

(d) whether the case relates to Māori undertaking resource management / environmental duties and functions (i.e. kaitiaki obligations).

164. In addition to the ELA Fund, the cost of litigation can be reduced by applying for a waiver or reduction of court fees such as filing fees, scheduling fees, and hearing fees. Fee waivers are available in the Environment Court[131] and all senior courts.

165. Where security for costs are required, parties can also seek to have security for costs waived. This typically requires consent of all parties to a proceeding, as security for costs is intended to ensure any potential costs award against an appellant can be satisfied. Accordingly, if a respondent agrees to waive such a protection, the Court will typically agree.

[131] RMA, section 281A.

FURTHER AREA OF INFLUENCE – POLICY AND POLITICAL

Leveraging arguments to influence change

166. Litigation and novel legal arguments are tools which can influence and drive policy change and political negotiations. A landmark Supreme Court decision regarding the status of the Treaty or tikanga can spur change across a range of government departments, in areas that stretch well beyond the particular issue that was decided in the case. This is because public actors anticipate that these decisions will have a "precedent" effect, and will often adopt new practices in anticipation that this is what will be required.

167. A key example of litigation that has influenced policy is *Ngāi Tai Ki Tāmaki*. As discussed earlier, this case concerned the effect of section 4 of the Conservation Act, which requires the Act to be administered as to give effect to the principles of the Treaty of Waitangi. Prior to the decision, DOC's Conservation General Policy stated that where "there is clearly an inconsistency between the provisions of any of these Acts and the principles of the Treaty, the provisions of the relevant Act will apply."[132] DOC removed this statement from its General Policy following the Supreme Court decision.

168. Good negotiators can leverage these types of decisions to advance kaitiakitanga and rangatiratanga in direct negotiations with the Crown and with local government. For example, assertions as to what the Treaty requires, or what settlement legislation requires, with reference to recent case law can be very effective even where the law on the exact point is untested. Indeed, it can often be strategic *not* to bring a case testing the limits of a decision until it becomes imperative. In many situations more can be achieved by working directly with decision-makers or with policy makers than by bringing litigation.

169. However, litigation or the threat of litigation can be useful where a party has not been able to get a seat at the table, or where negotiations have stalled. In some cases, winning the litigation itself may not be the end goal, rather the litigation is used to apply pressure or to draw public attention to an issue.

Protest Action

170. Protest can also be an effective tool for protecting te taiao (whether alongside litigation or not). In preparing this Report, we have collated a number of examples of protest actions that have advanced environmental goals. These demonstrate the effectiveness of political pressure to inspire change where all other avenues, including litigation, have perhaps failed. Case studies include:

    (a) *Not one more acre:* On 13 October 1975, about 5000 people arrived at Parliament to present a petition about the loss of Māori land,

[132] See *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 at [76].

signed by 60,000 people, to the Prime Minister.[133] The march to Parliament began with 50 people in Te Hāpua, Northland and as the group marched down the North Island, many joined in support.[134] The protest was driven by the Māori land rights group Te Rōpū o Te Matakite and Dame Whina Cooper, under the slogan "Not one more acre of Māori land."[135] While the younger people tended to march each day, the elders were driven to the next marae where the march would stop for the night. In the evenings, kaumātua would speak about the purpose behind the hīkoi.[136] Over 150 years of systematic alienation of Māori land culminated in the Land March, marking a new era of protest and reform, and uniting many Māori supporters in their fight for Māori land.[137]

(b) *Bastion Point:* The 1977-78 occupation of Bastion Point Takaparawhau was prompted by a proposed housing development on land that had been gifted by Ngāti Whātua Ōrākei to the Crown. It lasted 506 days. Protestors were eventually forcibly removed from the site, but the protest was successful in stopping the development from going ahead. The land was subsequently returned as part of the Ngāti Whātua Treaty settlement.

(c) *Pākaitore Moutoa Gardens:* Te Rūnanga Pākaitore and supporters occupied Pākaitore (also called Moutoa Gardens) from 28 February to 18 May 1995.[138] The purpose of the occupation was to restore the mana of the Whanganui people over the site and highlight frustration with the lack of progress towards a settlement of the Whanganui River claim issues.[139] In 2001, the Government, Whanganui District Council and Whanganui Māori agreed to a joint board to govern the

[133] Ministry for Culture and Heritage "Whina Cooper leads land march to Parliament" New Zealand History (27 October 2021) <https://nzhistory.govt.nz/whina-cooper-led-land-march-te-ropu-o-te-matakite-reaches-parliament>.
[134] Imogen Rider "A sacred mission to secure a future for Māori" Waitangi (13 October 2021) <https://www.waitangi.org.nz/land-march-arrives-in-wellington1975/>.
[135] Imogen Rider "A sacred mission to secure a future for Māori" Waitangi (13 October 2021) <https://www.waitangi.org.nz/land-march-arrives-in-wellington1975/> and New Zealand Parliament "Celebrating Dame Whina Cooper and the fight for Māori land rights" New Zealand Parliament (9 December 2020) <https://www.parliament.nz/mi/get-involved/features/celebrating-dame-whina-cooper-and-the-fight-for-maori-land-rights/>.
[136] Paul Diamond "Not one more acre" National Library <https://natlib.govt.nz/schools/teaching-and-learning-resources/te-kupenga-stories-of-aotearoa-nz/not-one-more-acre>.
[137] Imogen Rider "A sacred mission to secure a future for Māori" Waitangi (13 October 2021) <https://www.waitangi.org.nz/land-march-arrives-in-wellington1975/>; Ministry for Culture and Heritage "Whina Cooper" New Zealand History <https://nzhistory.govt.nz/people/dame-whina-cooper> and Ministry for Culture and Heritage "The Treaty in practice" New Zealand History <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-practice/the-treaty-debated>.
[138] Numia Ponika-Rangi "Pākaitore celebrations remember Moutoa Gardens occupation" Te Ao Māori News (1 March 2015) <https://www.teaomaori.news/pakaitore-celebrations-remember-moutoa-gardens-occupation>.
[139] Diane Beaglehole "Whanganui region – Māori and Pākehā" Te Ara – The Encyclopedia of New Zealand <https://teara.govt.nz/en/whanganui-region/page-10> and Ministry for Culture and Heritage "Moutoa Gardens protest" New Zealand History (20 October 2021) <https://nzhistory.govt.nz/media/photo/moutoa-gardens-protest>.

area and in 2007 the area where Whanganui Courthouse stands was returned to Māori as a part of the settlement of their land claims.[140]

(d) *Foreshore and Seabed protest 2004:* The proposed Foreshore and Seabed Bill inspired vehement protest from Māori. Thousands of protestors marched from Northland, arriving at Parliament on 5 May 2004.[141] The protest and the subsequent passing of the Act led to the establishment of the Māori Party.[142] In 2008, as a part of a confidence-and-supply agreement with the Māori Party, the National-led government undertook a review of the Act. This led to the Act's repeal by the Marine and Coastal Area (Takutai Moana) Act 2011 which recognised Māori may have exclusive customary interests in otherwise public areas of the foreshore and seabed.[143]

(e) *The Dakota Access Pipeline protest:* This was a protest against the construction of the pipeline that would traverse a sacred burial ground of the Standing Rock Sioux tribe, and would extend underneath the Missouri River, the tribe's primary water source.[144] Attempts were made to halt the project, which included a petition to the Governor of Iowa, court proceedings against the decision to permit the project, as well as an occupation at the site of the Pipeline.[145] However, these attempts were unsuccessful and the protestors, who had been occupying the construction sites since April

[140] Laurel Stowell "Pakaitore should have been reserve" Whanganui Chronicle (3 March 2016) <https://www.nzherald.co.nz/whanganui-chronicle/news/pakaitore-should-have-been-reserve/WZWDQOM37IG24Y27PNNPUOR22Y/>.

[141] Ministry for Culture and Heritage "Foreshore and Seabed hikoi" New Zealand History (11 May 2915) <https://nzhistory.govt.nz/media/photo/foreshore-and-seabed-hikoi>; Mark Hickford "Law of the foreshore and seabed – Challenge and controversy" Te Ara – The Encyclopedia of New Zealand (1 Jan 2015) <https://teara.govt.nz/en/photograph/8541/hikoi-about-the-foreshore-and-seabed-bill; https://www.nzherald.co.nz/nz/thousands-march-against-seabed-and-foreshore-legislation/WBWQC7OV3H3UMEINJX6QAX3N6Q/>; Rāwiri Taonui "Te ture – Māori and Legislation – Restoring Māori customary law" Te Ara (20 June 2012) <https://teara.govt.nz/en/photograph/36552/foreshore-and-seabed-protest-2011> and Mark Hickford "Law of the foreshore and seabed – Challenge and controversy" Te Ara – The Encyclopedia of New Zealand (1 Jan 2015) <https://teara.govt.nz/en/law-of-the-foreshore-and-seabed>.

[142] Te Pāti Māori "About Us" Te Pāti Māori <https://www.maoriparty.org.nz/about_us>.

[143] Mark Hickford 'Law of the foreshore and seabed – Challenge and controversy" Te Ara – The Encyclopedia of New Zealand (1 Jan 2015) <https://teara.govt.nz/en/law-of-the-foreshore-and-seabed/page-5>.

[144] Justin Worland "What to Know About the Dakota Access Pipeline Protests" Time (28 October 2016) <https://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/>.

[145] William Petroski "Branstad won't stop Bakken oil pipeline through Iowa" Des Moines Register (14 October 2014) <https://www.desmoinesregister.com/story/news/politics/iowa-politics-insider/2014/10/14/branstad-wont-stop-iowa-bakken-oil-pipeline/17246713/> and Justin Worland "What to Know about the Dakota Access Pipeline Protests" above n 36.

2016, were removed by February 2017.[146] The project continued and was completed later that year.[147]

(f) *Mauna Kea protest:* This was a series of protests that occurred in Hawaii against using Mauna Kea as a base for telescopes. Protests occurred in the 1970s, and a series of more recent occupations were sparked by the proposed construction of one of the world's largest telescopes, the Thirty Meter Telescope.[148] Mauna Kea is sacred to indigenous Hawaiians as it forms part of their creation story, and the protest sought to halt further desecration. The protest has resulted in legislative change that will permit joint management of the Mauna.[149]

(g) *Protect Ihumātao:* A group of mana whenua (**SOUL**) protested the sale and future development of Puketapa (known as Ihumātao).[150] SOUL unsuccessfully challenged the development, seeking the return of the land, through the courts and the Waitangi Tribunal.[151] While those mechanisms did not succeed, the occupation made a political statement which eventually led to the Government agreeing to purchase the land from Fletcher Building.[152]

(h) *Protect Pūtiki:* The Protect Pūtiki occupation began in March 2021 in response to construction of a floating marina at Kennedy Point in Pūtiki Bay, Waiheke Island.[153] Protest sparked out of concern for the impact the development could have for kororā who have burrows in the existing breakwater next to the construction site. A further point of contention was the lack of consultation with the wider iwi, as only the Ngāti Pāoa Iwi Trust were notified or consulted about the

[146] Sam Levin, Nicky Woolf and Damian Carrington "North Dakota pipeline: 141 arrests as protestors pushed back from site" The Guardian (28 October 2016) <https://www.theguardian.com/us-news/2016/oct/27/north-dakota-access-pipeline-protest-arrests-pepper-spray>; Julie Carrie Wong "Police remove last Standing Rock protestors in military-style takeover" The Guardian (23 February 2017) <https://www.theguardian.com/us-news/2017/feb/23/dakota-access-pipeline-camp-cleared-standing-rock>; and Ladonna Bravebull Allard "Why the Founder of Standing Rock Sioux Camp Can't Forget the Whitestone Massacre" Yes Magazine (3 September 2016) <https://www.yesmagazine.org/democracy/2016/09/03/why-the-founder-of-standing-rock-sioux-camp-cant-forget-the-whitestone-massacre> and BBC News "Life in the Native American oil protest camps" BBC News (2 September 2016) <https://www.bbc.com/news/world-us-canada-37249617>.

[147] Jacey Fortin and Lisa Friedman "Dakota Access Pipeline to Shut Down Pending Review, Federal Judge Rules" The New York Times (6 July 2020) <https://www.nytimes.com/2020/07/06/us/dakota-access-pipeline.html>.

[148] Megan Moseley "The Hawaiian elders awaiting trial for protesting the world's largest telescope", above n 28.

[149] HNN staff "Lawmakers pass bill to remove UH as sole management authority on Mauna Kea" Hawaii News Now (4 May 2022) <https://www.hawaiinewsnow.com/2022/05/04/lawmakers-pass-bill-remove-uh-sole-management-authority-mauna-kea/>.

[150] Kymberlee Fernandes "Ihumātao land battle: a timeline", above n 12.

[151] *King v Heritage New Zealand Pouhere Tāonga* [2018] NZEnvC 214.

[152] Fletcher Building "Fletcher Building announces sale of Ihumātao land to Crown" Fletcher Building (17 December 2020) <https://fletcherbuilding.com/news/fletcher-building-announces-sale-of-ihumatao-land-to-crown/>.

[153] Protect Pūtiki "#Protect Pūtiki" Our Action Station <https://our.actionstation.org.nz/petitions/protectputiki>.

development.[154] Protestors have been occupying the area by swimming and kayaking in restricted construction areas to stall development.[155] The protest was led initially by a group called Save Kennedy Point, and later assumed by the group Protect Pūtiki.[156] The development has been challenged through the courts unsuccessfully.[157]

[154] Jenny Nicholls "Protect Pūtiki – The Battle for the Bay" Metro (4 October 2021) <https://www.metromag.co.nz/society/protect-putiki-the-battle-for-the-bay>.
[155] Josephine Franks "Protecting Pūtiki: The ongoing fight to stop Waiheke's Kennedy Point marina" Stuff News (10 January 2022) <https://www.stuff.co.nz/national/127351957/protecting-ptiki-the-ongoing-fight-to-stop-waihekes-kennedy-point-marina>.
[156] Josephine Franks "Four-year court fight over as Waiheke marina developers and campaigners settle" Stuff News <https://www.stuff.co.nz/national/125324148/fouryear-court-fight-over-as-waiheke-marina-developers-and-campaigners-settle> and Protect Pūtiki "#Protect Pūtiki", above n 7.
[157] *SKP Incorporated v Auckland Council* [2018] NZEnvC 81; *SKP Incorporated v Auckland Council* [2019] NZHC 900; *SKP Incorporated v Auckland Council* [2019] NZEnvC 199; *SKP Inc v Auckland Council* [2020] NZHC 1390, (2020) 21 ELRNZ 879 (Gault J); *SKP Inc v Auckland Council* [2020] NZCA 610, (2020) 2 ELRNZ 268; *SKP Inc v Auckland Council* [2021] NZSC 35 and *SKP Inc v Auckland Council* [2021] NZSC 37.

CONCLUSION

171. As the literature and case law review demonstrates, kaitiakitanga and rangatiratanga in te taiao cannot be fully realised within the existing system. Broader systemic change is needed to ensure greater use and control of Māori resources is returned to iwi and hapū, enabling them to fully exercise their role as kaitiaki.

172. Realising this change will require a coordinated and sustained approach across a number of fronts. Litigation can be used strategically to advance recognition of kaitiakitanga and rangatiratanga through the courts. It is a useful tool to have in the kete, as it can achieve outcomes that may not be politically feasible. Used in conjunction with law reform and political action, it can be effective for forging new pathways for protecting te taiao.

173. This Report sets out a number of areas where progress could be made. Recent case law suggests that the courts are currently receptive to novel arguments concerning tikanga and the effect of the Treaty, both generally and in relation to te taiao. There is great potential for positive steps to be taken in coming years, particularly in conjunction with the ongoing RMA reform, which suggests there will be an increased role for iwi and hapū in stages of environmental decision-making.

BIBLIOGRAPHY

Texts

1. Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

2. Rachael Schmidt-McLeave "Declaratory Relief" in Sir Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2012).

Journal Articles

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

4. Maria Bargh and Tame Malcolm, "Te Tai Ao and 'Biodiversity'" in M Bargh, J MacArthur (ed) *Environmental Politics and Policy in Aotearoa New Zealand* (Auckland University Press, 2022).

5. Maria Bargh and Ellen Tapsell, "For a Tika Transition: strengthen rangatiratanga" (2021) *Policy Quarterly – Special Issue: Just Transitions*, Vol. 17, Issue 3, page 13 – 22.

6. Merata Kawharu "Kaitiakitanga: A Maori anthropological perspective of the Maori socio-environmental ethic or resource management" (2000) 110 Journal of the Polynesian Society 349 at 353.

Waitangi Tribunal Reports

7. Waitangi Tribunal, *He Whakaputanga me te Tiriti: The Declaration and the Treaty – The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014).

8. Waitangi Tribunal, *Ko Aotearoa Tēnei (A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and identity)* (Wai 262, Wellington, 2011).

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

10. Waitangi Tribunal *Mōhaka River Report* (Wai 119 Waitangi Tribunal 1992).

11. Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, Wellington 1985).

12. Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212 Waitangi Tribunal 1998).

13. Waitangi Tribunal *The Ngāi Tahu Report* (Wai 27 Waitangi Tribunal 1992).

14. Waitangi Tribunal *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358 Waitangi Tribunal 2012).

15. Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, Wellington, 2019).

16. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tautahi* (Wellington: GP Publications 1996).

17. Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8 Wellington 1985).

Online materials

18. Alice Webb-Liddall "Finally, a council has transferred responsibilities to iwi for the first time under the RMA" (6 August 2020) The Spinoff <https://thespinoff.co.nz/atea/06-08-2020/a-council-has-transferred-responsibilities-to-iwi-for-the-first-time-under-the-rma>.

19. BBC News "Life in the Native American oil protest camps" BBC News (2 September 2016) <https://www.bbc.com/news/world-us-canada-37249617>.

20. Diane Beaglehole "Whanganui region – Māori and Pākehā" Te Ara – The Encyclopedia of New Zealand (1 June 2015) <https://teara.govt.nz/en/whanganui-region/page-10>.

21. Fletcher Building "Fletcher Building announces sale of Ihumātao land to Crown" Fletcher Building (17 December 2020) <https://fletcherbuilding.com/news/fletcher-building-announces-sale-of-ihumatao-land-to-crown/>.

22. HNN staff "Lawmakers pass bill to remove UH as sole management authority on Mauna Kea" Hawaii News Now (4 May 2022) <https://www.hawaiinewsnow.com/2022/05/04/lawmakers-pass-bill-remove-uh-sole-management-authority-mauna-kea/>.

23. Imogen Rider "A sacred mission to secure a future for Māori" Waitangi (13 October 2021) <https://www.waitangi.org.nz/land-march-arrives-in-wellington1975/>.

24. Jacey Fortin and Lisa Friedman "Dakota Access Pipeline to Shut Down Pending Review, Federal Judge Rules" The New York Times (6 July 2020) <https://www.nytimes.com/2020/07/06/us/dakota-access-pipeline.html>.

25. Jenny Nicholls "Protect Pūtiki – The Battle for the Bay" Metro (4 October 2021) <https://www.metromag.co.nz/society/protect-putiki-the-battle-for-the-bay>.

26. Josephine Franks "Four-year court fight over as Waiheke marina developers and campaigners settle" (2 June 2021) Stuff News

<https://www.stuff.co.nz/national/125324148/fouryear-court-fight-over-as-waiheke-marina-developers-and-campaigners-settle>.

27. Josephine Franks "Protecting Pūtiki: The ongoing fight to stop Waiheke's Kennedy Point marina" Stuff News (10 January 2022) <https://www.stuff.co.nz/national/127351957/protecting-ptiki-the-ongoing-fight-to-stop-waihekes-kennedy-point-marina>.

28. Julie Carrie Wong "Police remove last Standing Rock protestors in military-style takeover" The Guardian (23 February 2017) <https://www.theguardian.com/us-news/2017/feb/23/dakota-access-pipeline-camp-cleared-standing-rock>.

29. Justin Worland "What to Know About the Dakota Access Pipeline Protests" Time (28 October 2016) <https://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/>.

30. Ladonna Bravebull Allard "Why the Founder of Standing Rock Sioux Camp Can't Forget the Whitestone Massacre" Yes Magazine (3 September 2016) <https://www.yesmagazine.org/democracy/2016/09/03/why-the-founder-of-standing-rock-sioux-camp-cant-forget-the-whitestone-massacre>.

31. Laurel Stowell "Pakaitore should have been reserve" Whanganui Chronicle (3 March 2016) <https://www.nzherald.co.nz/whanganui-chronicle/news/pakaitore-should-have-been-reserve/WZWDQOM37IG24Y27PNNPUOR22Y/>.

32. Mark Hickford "Law of the foreshore and seabed – Challenge and controversy" Te Ara – The Encyclopedia of New Zealand (1 Jan 2015) <https://teara.govt.nz/en/photograph/8541/hikoi-about-the-foreshore-and-seabed-bill>.

33. Megan Moseley "The Hawaiian elders awaiting trial for protesting the world's largest telescope", The Guardian (7 February 2020) <https://www.theguardian.com/world/2022/feb/08/hawaii-elders-awaiting-trial-for-protesting-worlds-largest-telescope-mauna-kea>.

34. Ministry for the Environment "Environmental Legal Assistance Fund" Ministry for the Environment <https://environment.govt.nz/what-you-can-do/funding/environmental-legal-assistance-fund/>.

35. Ministry for Culture and Heritage "Foreshore and Seabed hikoi" New Zealand History (11 May 2015) <https://nzhistory.govt.nz/media/photo/foreshore-and-seabed-hikoi>.

36. Ministry for Culture and Heritage "Whina Cooper leads land march to Parliament" New Zealand History (27 October 2021) <https://nzhistory.govt.nz/whina-cooper-led-land-march-te-ropu-o-te-matakite-reaches-parliament>.

37. Ministry for Culture and Heritage "Whina Cooper" New Zealand History (27 October 2021) <https://nzhistory.govt.nz/people/dame-whina-cooper>.

38. Ministry for Culture and Heritage "Moutoa Gardens protest" New Zealand History (20 October 2021) <https://nzhistory.govt.nz/media/photo/moutoa-gardens-protest>.

39. Ministry for Culture and Heritage "The Treaty in practice" New Zealand History (7 July 2014) <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-practice/the-treaty-debated>.

40. New Zealand Parliament "Celebrating Dame Whina Cooper and the fight for Māori land rights" New Zealand Parliament (9 December 2020) <https://www.parliament.nz/mi/get-involved/features/celebrating-dame-whina-cooper-and-the-fight-for-maori-land-rights/>.

41. Numia Ponika-Rangi "Pākaitore celebrations remember Moutoa Gardens occupation" Te Ao Māori News (1 March 2015) <https://www.teaomaori.news/pakaitore-celebrations-remember-moutoa-gardens-occupation>.

42. Paul Diamond "Not one more acre" National Library <https://natlib.govt.nz/schools/teaching-and-learning-resources/te-kupenga-stories-of-aotearoa-nz/not-one-more-acre>.

43. Protect Pūtiki "#Protect Pūtiki" Our Action Station <https://our.actionstation.org.nz/petitions/protectputiki>.

44. Rāwiri Taonui "Te ture – Māori and Legislation – Restoring Māori customary law" Te Ara (20 June 2012) <https://teara.govt.nz/en/photograph/36552/foreshore-and-seabed-protest-2011>.

45. Sam Levin, Nicky Woolf and Damian Carrington "North Dakota pipeline: 141 arrests as protestors pushed back from site" The Guardian (28 October 2016) <https://www.theguardian.com/us-news/2016/oct/27/north-dakota-access-pipeline-protest-arrests-pepper-spray>.

46. Te Pāti Māori "About Us" Te Pāti Māori <https://www.maoriparty.org.nz/about_us>.

47. New Zealand Herald journalist "Thousands march against seabed and foreshore legislation" New Zealand Herald (5 May 2004) <https://www.nzherald.co.nz/nz/thousands-march-against-seabed-and-foreshore-legislation/WBWQC7OV3H3UMEINJX6QAX3N6Q/>.

48. William Petroski "Branstad won't stop Bakken oil pipeline through Iowa" Des Moines Register (14 October 2014) <https://www.desmoinesregister.com/story/news/politics/iowa-politics-insider/2014/10/14/branstad-wont-stop-iowa-bakken-oil-pipeline/17246713/>.

Legislation

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

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

51. Resource Management Act 1991.

52. Te Ture Whenua Māori Act 1993.

Other

53. A-Z of New Zealand Law [25.8.3] Environment and Natural Resources, citing New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 40.

54. A to Z of New Zealand Law, Environment and Natural Resources - A to Z of New Zealand Law, Chapter 25.6 - The Role of Administrative Law at [25.6.5.1].

55. Christian Whata, Jaimee Kirby-Brown and Horiana Irwin "Resource Management and the Allocation of Customary Resources – Where Does the Priority Lie?" (Paper published in the Māori Law Society of New Zealand Law Society Seminar, September 2010).

56. *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand* (2019).

57. He Whakaaro Here Whakaumu mō Aotearoa – The Report of Matike Mai Aotearoa: The Independent Working Group on Constitutional Transformation (2016).

58. Helen Winkelmann, Susan Glazebrook and Ellen France JJ "Climate Change *and* the Law" (paper presented at the Asia Pacific Judicial Colloquium, Singapore, May 2019).

59. Kāhui Wai Māori Report to Hon Minister David Parker, "Te Mana o Te Wai – Mana Whakahaere: The Health of our Wai, The Health of our Nation" (August 2021).

60. Maia Wikaira "Maori Ownership of Freshwater: Legal Paradox or Potential?" (LLB (Hons) Dissertation, University of Otago, 2010).

61. Resource Management Review Panel, *New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel June 2020.*

62. Sir Justice Joe Williams, 'Ka Huhu au ki te ture, hei matua mō te pani', Speech given at Te Hunga Rōia Māori o Aotearoa, Hui-a-Tau 2018 (published via the Māori Law Review, November 2018. Accessible at **Māori Law Review**).

CASE LIST

63. *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

64. *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179.

65. *Carter Holt Harvey Ltd v Te Rūnanga O Tūwharetoa Ki Kawerau* (2003) 9 ELRNZ 182.

66. *Central Plains Water Trust v Ngai Tahu Properties* [2008] NZCA 71, [2008] NZRMA 201.

67. *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, [1984] 3 All ER 935.

68. *Faulkner v Tauranga District Council* [1996] 1 NZLR 357.

69. *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA).

70. *Hauraki Maori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-99, 4 March 2004.

71. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

72. *King v Heritage New Zealand Pouhere Tāonga* [2018] NZEnvC 214.

73. *Lysaght v Whakatāne District Council* [2021] NZHC 68; (2021) ELRNZ 383.

74. *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] NZEnvC 79.

75. *Mercury NZ Ltd v Cairns – Pouakani River Bed* (2022) 227 Waiariki MB 174 (227 WAR 174).

76. *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.

77. *Mercury NZ Ltd v The Waitangi Tribunal* [2021] 2 NZLR 142.

78. *Minhinnick v Minister of Corrections* NZEnvC A43/04, 6 April 2004.

79. *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122.

80. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

81. *Ngati Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvC).

82. *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2021] 3 NZLR 352.

83. *Ngāti Whātua Ōrākei Trust v Attorney-General* [2021] NZHC 843.

84. *Ngāti Whātua Ōrākei Trust v Attorney General* [2022] NZHC 843.

85. *Pring v Wanganui District Council* [1999] NZRMA 519 (CA).

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

87. *Re Edwards (Te Whakatōhea No.2)* [2021] NZHC 1025.

88. *Re Ngāti Pāhauwera* [2021] NZHC 3599.

89. *Re New Zealand Māori Council* [2009] NZAR 601 (HC).

90. *R v Symonds* (1847) NZPCC 387 (SC).

91. *Secretary of State for the Home Department, ex parte Brind* [1990] 1 All ER 469 at 480.

92. *SKP Incorporated v Auckland Council* [2018] NZEnvC 81.

93. *SKP Incorporated v Auckland Council* [2019] NZHC 900.

94. *SKP Incorporated v Auckland Council* [2019] NZEnvC 199.

95. *SKP Inc v Auckland Council* [2020] NZHC 1390, (2020) 21 ELRNZ 879.

96. *SKP Inc v Auckland Council* [2020] NZCA 610, (2020) 2 ELRNZ 268.

97. *SKP Inc v Auckland Council* [2021] NZSC 35.

98. *SKP Inc v Auckland Council* [2021] NZSC 37.

99. *Smith v Fonterra Co-Operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394.

100. *Takamore v Clarke* [2013] 2 NZLR 733.

101. *Tau & Others v Attorney-General* [2021] NZHC 3108.

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

103. *Te Heuheu Tukino v Aotea District Maori Land Board* [1939] NZLR 107 (CA).

104. *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388.

105. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA).

106. *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

107. *Te Whanau a Kai Trust v Gisborne District Council* [2021] NZEnvC 115, (2021) 22 ELRNZ 920.

108. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248.

109. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127; [2021] 1 NZLR 801.

110. *Transpower New Zealand Limited v Tauranga Environmental Protection Society Incorporated* [2022] NZCA 9.