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THE DEEP SOUTH

Te Kōmata o Te Tonga

Treaty of Waitangi duties relevant to adaptation to coastal hazards from sea-level rise

Research Report for the Deep South National Science Challenge

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Introduction

This paper addresses duties under Te Tiriti o Waitangi/the Treaty of Waitangi (the Treaty) for protection of particular Māori interests in the face of coastal hazards associated with sea-level rise.[1] Under Te Tiriti o Waitangi, the Crown has a duty to actively protect Māori lands, estates, forests, fisheries and other taonga, and must enable Māori to protect these taonga.[2] It is necessary to assess what Treaty duties may exist in relation to decisions to adopt measures to adapt in an attempt to prevent the risks of damage eventuating from coastal hazards associated with sea-level rise.

Much of the climate adaptation measures that would be necessary to actively protect Māori coastal interests fall within local government authorities' jurisdictions; they are thus guided by the procedures and standards under the Local Government Act (LGA) and Resource Management Act (RMA), as well as by district and regional plans and related documents. Local government authorities are not currently directly accountable for Treaty duties when acting pursuant to these Acts;[3] these relevant obligations are still held by the Crown, or central government. But the actions of local government, on delegated authority from the Crown, can give rise to these authorities either upholding the central government Treaty obligations or creating new, modern-day breaches of the Treaty (that the central government would have to answer for).

This paper is interested in what might be necessary in order to uphold the Crown's Treaty obligations in the area of adaptation to the coastal hazards associated with sea-level rise. The paper forms part of a New Zealand Deep South National Science Challenge project on what to do about housing that will be adversely affected by such coastal hazards. Because of the nature of Treaty interests, it is hard to limit the scope of this paper to housing only. However, housing and marae are the key focus, even while some comments may also be made on some other coastal interests protected under the Treaty. Because of the multi-layered jurisdictional

[1] While Treaty duties are largely owed to iwi and hapū, this paper frequently refers to Māori interests for ease of use.

[2] Carwyn Jones, *New Treaty New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016), at 62.

[3] See discussion below at Part. IV.2. It is an interesting question whether the common law might in the future find that councils do in fact have greater duties to uphold Treaty principles; the possibility exists but this question is not addressed here.

approach to climate adaptation measures in law and practice in Aotearoa, such an enquiry needs to address central government rules and initiatives as well as local government actions.

Coastal hazards and the climate adaptation measures likely to be required

Because so much development has occurred in an era before climate change risks were properly factored into planning decisions, enormous amounts of maladaptive development has already occurred. In New Zealand, there are already more than 44,000 homes and 1500 commercial properties within 1.5 meters of the average high tide in spring.[4]

Climate adaptation responses can be divided four very broad strategies of hazard management:

1. *Avoid* the hazard altogether by locating buildings away from hazardous areas;
2. *Accommodate* the hazard, usually by adapting buildings to be more resilient (such as by raising ground level) or making buildings relocatable;
3. *Protect* the asset against the hazard, such as by constructing hard defenses (eg, sea walls) or soft defenses (eg, planting trees to slow down erosion, or to build up natural barriers); and
4. *Retreat* from the hazard, by abandoning or removing residential buildings from the hazardous site.

These strategies can in turn be divided into those that target *prospective*/proposed developments by, for instance, prohibiting new development in a hazardous area, or imposing significant restrictions such as time limits for occupation; and those strategies that affect *existing* developments.

Legislative regime

The Resource Management Act 1991 (RMA) is the primary legislation under which climate adaptation measures are taken, along with its associated documents (policies and plans), particularly the New Zealand Coastal Policy Statement 2010 (NZCPS). Additional central government guidance is provided by the Ministry for the Environment (MfE) and Department of Conservation (DoC). The RMA creates a scheme where three layers of government (central,

[4] Jonathan Boston and Judy Lawrence, *The Case for Climate Change Adaptation Funding Instruments* (Institute for Governance and Policy Studies, IGPS Working Paper 17-05; New Zealand Climate Change Research Institute, NZCCRI 17-01 Wellington, August 2017), at 2.

regional, and district) have differing responsibilities over different areas within the coastal environment, with each being responsible for different planning documents. Despite siting at the bottom of the RMA hierarchy, district councils are major actors in climate adaptation initiatives because they are primarily responsible for the regulation of land uses through their district plans and consent procedures, including setting rules and granting consents for subdivision and for building.

The NZCPS explicitly recognises the threat of sea-level rise and adopts a 100-year planning horizon when evaluating coastal hazards.[5] It also mandates the use of a precautionary approach and provides rules for adaptation in relation to new and existing development. While there is helpful non-binding guidance from the Department of Conservation (DoC *Guidance*) on the NZCPS, there is no binding National Policy Statement or National Environmental Standard that addresses climate adaptation in more detail.

At present, the line of mean high-water springs (MHWS) marks the landward edge of the coastal marine area. As sea levels rise, even excluding advances of high-water marks from storms and floods, the greatest extent to which mean high-water springs extends will move. Even a practical administrative boundary that has been determined in the past, in order to see which rules govern which activities, will presumably need to move. This is particularly relevant for the Crown with jurisdiction over the coastal marine area which could creep inwards, newly covering land that was formerly Māori land or which contains other coastal taonga, for example, and altering the location of jurisdictional boundaries of local government authorities.

Effects of climate change on Māori

Māori are predicted to be disproportionately affected by climate change, as are indigenous people across the world.[6] Physical changes to the climate will be felt economically as well as culturally. Māori have strong cultural and spiritual ties to lands, waters and ecosystems, so damage to ancestral territories will impact the wellbeing of local communities.[7] There are a

[5] Department of Conservation, *New Zealand Coastal Policy Statement 2010* (4 November 2019), Policy 24(1)(a). Hereinafter referred to as NZCPS 2010.
[6] Rachel Baird, *The Impact of Climate Change on Minorities and Indigenous Peoples* (Minority Rights Group International, 2008).
[7] Darren King, Guy Penny and Charlotte Severne "The climate change matrix facing Māori society" in Richard Nottage, David Wratt, Janet Bornman and Keith Jones (eds) *Climate Change Adaptation in New*

significant number of Māori communities in low lying areas of New Zealand, "highly vulnerable to sea-level rise and other climatic events such as storms and high tides".[8] Their identity, health and well-being, economies and their marae could all be adversely affected. There is a strong tie between specific groups of Māori and the land and other natural features from which their ancestors came. This makes replacement of that land or other features very difficult: it cannot and should not be assumed that it can simply be replaced by other land of comparable economic value, for example; cultural value is more important.

Te Tiriti of Waitangi and the Treaty principles

It is the duty of the Crown to ensure that taonga belonging to Māori are protected and that the Treaty partnership is upheld. The Treaty principles of partnership, governance, reciprocity, active protection, good faith, consultation, and development are all relevant to decision-making on climate adaptation measures. There have been no Waitangi Tribunal findings in relation to climate adaptation, although there have been two Tribunal claims and one decision in relation to the mitigation of emissions. There also appear to have been no claims to the Waitangi Tribunal for the handling of natural disasters such as floods or earthquakes. There has been a complaint to the Tribunal about the central and local government handling of the aftermath of the wreck of the MV Rena. The decisions of both the Waitangi Tribunal and the Environment Court in relation to the MV Rena are illustrative of how the Tribunal might consider claims of Treaty breaches about the government's handling of such a disaster. Further, it provides lessons for likely Treaty duties in relation to adaptation decision-making.

The Rena saga shows that the Treaty obligations of active protection and partnership, especially the facilitation of consultation, will apply no matter what the process is. This includes commercial negotiations with an overlay of confidentiality and urgency. Treaty duties require that Māori be involved in all or most adaptation decision making, including beyond the processes provided in the RMA. These duties are placed on the Crown but, if local government authorities are making the decisions, the duties still need to be upheld in order to help avoid the creation of future Treaty breaches on the part of the Crown. This will require consultation, but also more active facilitation/resourcing to allow genuine Māori input into whatever strategies are decided upon.

Zealand: Future scenarios and some sectoral perspectives (New Zealand Climate Change Centre, Wellington, 2010).

[8] King, above n 7, at 108.

Treaty obligations relevant to climate adaptation decision-making

It is possible to make some suggestions for what Treaty obligations might require of climate adaptation decision-making, based on previous determinations of Treaty principle requirements.

The Crown, for its part, must not create policies and laws that undermine the ability of iwi to protect the land. In the case of climate adaptation, this is hard because the duty is on the Crown, yet many – if not most – climate adaptation decisions are made by local and regional government under the RMA. Thus, under current law, even if actions of local government breach the Treaty guarantees, any claim will be made against the Crown, and thus will be defended by central government. However, councils have decision-making powers that have been delegated by the Crown and, especially as they are generally considered to be a delegated Treaty partner, they are exercising some of those functions and should do so in order to avoid creating Treaty breaches, even when acting under the RMA.

Councils will need to be paying particular attention to the active protection of things that are protected by Article 2.

Central government should provide guidance on how to best uphold procedural and substantive standards in relation to Article 2 Treaty assets in climate adaptation decision-making.

Active protection suggests the maintenance of Māori relationships with the coast. This entails the protection of kaitiakitanga and the tikanga and mātauranga Māori that underpin it. Central government funding – i.e., as the Treaty partner – should first be directed towards maintaining those relationships.

The first substantive step is arguably the identification of culturally significant coastal land, resources and other taonga that will be at risk of inundation. It would be helpful to clearly identify who should undertake such identification and impose such a requirement.

In the choice of coastal protection works, active protection of taonga requires that decision-makers consider the protection of the tapu and mauri of the place, and how that will be best facilitated and not diminished. Involvement of Māori in decision-making will be necessary in

order to determine what kinds of coastal protection works are most appropriate in an area. This applies even if coastal protection works are funded through private-public partnerships, and thus even if they are funded through commercial negotiations between local government, local residents or businesses, and the Crown.

Resources may be needed to *protect* existing sites or infrastructure, or for modifications to be made to important Māori assets to *accommodate* climate change. For example, Māori may wish to maintain a presence in a hazardous coastal area due to an ancestral connection, but might require assistance or a special resource consent to allow a building to be made removable upon sea-level rise trigger points being reached.

Where managed retreat needs to be discussed, especially from ancestral lands, there would have to be truly joint decision-making, more than just consultation, and more than significant consultation. These decisions should be made by the affected tangata whenua, in conjunction with central government if necessary; tangata whenua will likely need to be at least an equal partner in decision making. While the Treaty onus is on central government, it is expected that district and/or regional government would also become involved.

If there is to be managed retreat from the coast, relationships with traditional territories would still need to be maintained even in the absence of ownership. For that, access to those coastal territories is needed. Māori may also require some form of assistance if they are to relocate away from sites of ancestral significance. Some efforts may in turn be needed to reestablish a presence in the same area, especially where there is limited public land available for resettlement, for example.

It is conceivable that property owners faced with the hazards of climate change may wish to leave certain structures and materials where they currently are rather than paying for a full clean up. If the Crown is to take on these obligations, then it must make sure that it does not enter into duties which conflict with its duty of good faith to Māori. For example, it must do what it can by way of submission in the consenting process in order to actively protect Māori Treaty interests. As with the MV Rena, the Treaty obligations of active protection and partnership, especially the facilitation of consultation, will apply, even in confidential, urgent and/or commercial negotiations.

It is also conceivable that local government and/or the Crown could enter into commercial agreements for future removal processes significantly in advance of sea-level rise and/or climatic hazards reaching dangerous levels – for example, by entering into long term leaseback arrangements with clean-up clauses, or agreements to remove property as a precondition to allowing new coastal development to occur. In these scenarios, the Crown agency would be wise to make sure that what is agreed to will not adversely affect taonga in the future.

The Crown will need to follow the Treaty principles in relation to partnership and good faith, including consultation. The Treaty principles suggest that there be a Māori-specific process when decisions affect Treaty-guaranteed assets. This should not vary between councils (other than as required to accord with local circumstances and wishes) because the Crown is required to provide that partnership is carried out, such as through consultation rights.

In this area of climate adaptation policy and guidance, partnership will also include the need to use mātauranga Māori alongside science.

In accordance with previous Waitangi Tribunal recommendations, Māori advisory bodies should be appointed to assist climate adaptation decision-making around the country.

For local government, likely the most important measure to be adopted in order to uphold the Treaty principles will be the establishment of procedures and structures for good faith cooperation in decision-making between Māori and relevant councils. Such systems need to go beyond the minimum requirements of the RMA and utilise more of the optional methods of cooperation and decision-making that implement best practice. In summary, it is clear that Māori must be involved in all or most adaptation decision making. This will require at least consultation, but also more likely active roles in decision-making. This will in turn require active facilitation and resourcing so as to allow genuine Māori input into such decision-making.

Local government and the protection of Māori interests

Both the LGA and the RMA contain provisions requiring local government authorities to implement both procedural and substantive protections for Māori and tangata whenua. However, these statutory provisions do not go as far as requiring Treaty principles to be upheld and there have been many criticisms of them. Importantly, the Waitangi Tribunal has held that some provisions of the RMA itself breach the Treaty. Local government authorities have duties

to mitigate damage from climate change and natural disasters; but in making decisions on climate adaptation measures, for example, it is possible that a local authority could follow the relevant legislation yet still be in breach of Treaty principles. This is particularly the case if they limit themselves to minimum legislative requirements and do not avail themselves of the optional procedures designed to better protect Māori interests.

Without better provision for upholding Treaty principles it is quite possible – if not likely – that Treaty guarantees could be breached by climate adaptation decisions made by local government authorities, and thereby give rise to modern claims against the Crown in the Waitangi Tribunal. Authorities will likely need to adopt best practices in at least partnership and consultation procedures that go beyond the LGA and RMA requirements. A case study on such an alternative procedure as adopted in the Hawke's Bay Clifton to Tangoio Strategy process is provided in this Working Paper.[9] It would be best if standard advice on upholding Treaty principles in this manner were published by the Crown as the Treaty partner, particularly advice that is tailored to climate adaptation decision-making. Examples of government guidance are discussed below, such as the Department of Conservation *Guidance Notes* on the New Zealand Coastal Policy Statement 2010,[10] and the Ministry for the Environment 2017 *Guidance* for local government on adapting to climate change.[11]

The NZ Coastal Policy Statement 2010 and the 2017 DoC *Guidance* on it contain helpful and extensive recommendations on how to carry out Treaty obligations. These documents still operate within the RMA framework, and thus Māori interests can be outweighed by other considerations; nevertheless, they provide some strong suggestions for protection of procedural and substantive Māori interests in the coastal environment. The DoC *Guidance Notes* provide a breadth of information and guidance to councils and decision makers more generally and are an excellent resource for how to uphold Treaty principles. If followed by local authorities in discussing and accepting climate adaptation measures, such measures are much more likely to be compliant with these principles. There is value in exploring whether there should be more specific guidelines along the lines of the DoC *Guidance* for how best to protect Māori coastal land and taonga when making climate adaptation decisions in particular.

[9] See Part VIII.4.
[10] See Part VI.4.
[11] Ministry for the Environment, *Coastal Hazards and Climate Change: Guidance for Local Government* (ME 1341, December 2017), discussed below, Part VII.1.

Upholding the Treaty in climate adaptation decision-making

Two significant New Zealand reports were released in December 2017 addressing how New Zealand might best prepare for the future effects of climate change, including sea-level rise. One was guidance for local government for addressing coastal hazards and climate change from the Ministry for the Environment (the MfE *Guidance*). The other was a report and set of recommendations to the government by the independent Climate Change Adaptation Technical Working Group (CCATWG). Both of these reports helpfully address issues such as the impact of climate change on Māori coastal communities and government's obligations for addressing them, including within a Treaty framework. They both identify that council decision making should be done with iwi partners and recognise that this partnership approach to decision making derives from an obligation under the Treaty of Waitangi.[12]

Perhaps the most significant aspect of the MfE *Guidance* is its suggestion of new community decision-making procedures for deciding on the appropriate adaptation measures for that community's coastal environment. In the discussion of how decision-making should proceed, attention is paid to the needs and participation of tangata whenua, with advice that they should be included in a way that reflects the Treaty partnership. There are other provisions of the recommended process that will benefit Māori. If it is followed, Māori interests are much more likely to be protected and Treaty principles upheld, even if the *Guidance* could do with including more detail on some aspects. The key drawback with this *Guidance* is not its substance but is its status: it is only guidance, and local authorities may choose not to follow it.

The Climate Change Adaptation Technical Working Group provides recommendations to the Government about possible pathways for dealing with climate change.[13] In 2018, a *Stocktake Report*[14] and the above *Recommendations* were released providing information about the predicted impacts of climate change into the future. Based on the assessment that was made about current policies and scientific and other knowledge, the group has made recommendations for how the Crown should handle the increasing climate threat to the coasts.

[12] See, Climate Change Adaptation Technical Working Group, *Adapting to Climate Change in New Zealand: Recommendations.* (Ministry for the Environment, Wellington, 2017), at 52.
[13] MfE, *Recommendations,* above n 12.
[14] Climate Change Adaptation Technical Working Group, *Adapting to Climate Change in New Zealand: Stocktake Report.* (Ministry for the Environment, Wellington, 2017).

Effects on Māori are explicitly addressed, as are their consequent adaptation needs, along with the need for more attention to be paid to this. It is recommended that decision-makers "act in partnership, as whakamua, in a way that is based on the Treaty principles", with strong consultation in decision-making. The importance of mātauranga Māori is acknowledged. The *Stocktake Report* and *Recommendations* are not comprehensive, with a lack of acknowledgement of kaitiakitanga, for example; but, overall, they positively recognise and recommend measures for the protection of Māori interests.

Case studies

The Working Paper contains five case studies to illustrate a range of issues of climate adaptation and the protection of Māori interests. The case studies discussed cover case law, council decision-making procedure, and coastal wāhi tapu under threat from sea-level rise and inundation. The studies were limited to published materials; no interviews or consultations were able to be undertaken.

At the Mōkau River mouth, an important urupā is facing the risk of erosion; yet there have been years of inaction by the local council, even in the face of illegal private land protections for an inappropriate coastal subdivision. I suggest that there is a failure of active protection of an Article 2 taonga.

In respect of the Māori freehold land at Waitara, the New Plymouth District Council rejected the community's calls for coastal protection works for their land. However, I suggest that the reason that was publicly given for the rejection was wrong and was at least not Treaty-compliant.

In respect of the situation in Matatā, the climate adaptation decision-making process has not paid sufficient heed to the significant interests of local Māori nor of Treaty of Waitangi obligations. This paper discusses some of the issues and deficiencies that have arisen.

A recent Hawkes Bay community decision-making procedure recently adopted the Clifton to Tangoio Coastal Hazards Strategy 2120 on preferred options for future climate adaptation measures. It helpfully upheld both procedural and substantive interests of mana whenua. However, the results of that community decision-making process only amount to recommendations to the local and regional councils, which still have to make their own decisions; the councils will of course make their decisions in accordance with the RMA and Local

Government Act processes. I suggest that the overall process and eventual resulting outcomes should be evaluated for how well they uphold Māori and Treaty interests.

In 2010, the Environment Court case of *Hemi v Waikato District Council* was decided on the basis of valuing Māori ancestral links to land over the avoidance of risk.[15] This case study finds that it would most likely been decided very differently today with the more recent guidance, law and policies available. Particularly with the assistance of the MfE *Guidance* and the directive policies of the NZCPS, it is likely that the Court would decline such an application on the basis that the risk of coastal inundation was unacceptable. This needs to be considered from the perspective of valuing Māori ancestral ties and finding alternative ways to uphold and exercise kaitiakitanga.

Conclusion

Treaty duties may extend to increasing efforts to mitigate climate emissions, while at the same time doing more to protect specific areas of significance through adaptation. All decision-making, even including any retreat from coastal lands, must be undertaken in a manner that genuinely attempts to ensure that Māori do not lose ties to ancestral lands and can maintain their relationships with the coastal environment, while recognising their authority to preferably control but at least share in making decisions over those assets.

The case studies illustrate that some councils have found it difficult to protect Māori interests in their climate adaptation decision-making. While the existing framework of laws and policies can be used to uphold the Treaty principles, on their own they do not require that the Treaty be upheld. However, this paper also shows that there is already a lot of knowledge and guidance available to local authorities and to central government that can assist them to make good decisions in this area, both in respect of procedure and substance. The various guidance, reports and recommendations address Treaty principles and protections explicitly; this is particularly case for the MfE *Guidance* and the CCATWG recommendations that are even more helpfully tailored to climate adaptation decision-making.

Despite the existence of such guidance available to local government, there are still unresolved issues around how the Crown is to discharge its obligations to Māori in respect of climate

[15] *Hemi v Waikato District Council* [2010] NZEnvC 216.

adaptation. As a result, more detailed guidance is needed that is specifically tailored to addressing these issues.

There may also be a need for more than guidance from central to local government. First, flexible, non-binding guidance risks non-compliance from some councils, and/or inconsistent application across different councils. Second, the existing guidance intended for local government also does not explicitly deal with what aspects ought to be addressed by central government.

Central and local government need to keep in mind the wider picture of upholding the Treaty principles rather than solely the minimum conditions in the RMA. The climate adaptation measures that will be needed both now and in the future will likely have significant implications for the protection of Article 2 assets; this means that this wider picture must be taken in order to avoid modern Treaty breaches in relation to these assets. It also means that more attention will need to be paid to factual and legal issues in this area to ensure that justice is done.

Appendices

Four appendices contain additional information that is relevant to the overall topic of this report but is not necessary for inclusion alongside the precise issues discussed above.

1. Appendix 1 summarises the Manaaki Whenua: Landcare Research Guidance on consultation with Iwi Groups for research.
2. Appendix 2 summarises additional case studies on Māori coastal adaptation.
3. Appendix 3 contains information on kaupapa Māori expertise in the Environment Court, relevant to achieving resource management decisions that better provide for Māori interests, through better understanding the issues involved.
4. Appendix 4 identifies some legal issues for further research.

For example, a suggestion for obtaining better information to assist adaptation decision-making is for better identification of coastal taonga that might be at risk due to sea-level-rise.

There are a number of interesting legal issues involved that deserve more attention through further study, that are not the focus of this preliminary report. These range from the general movement of the common law over time – such as could happen to alter the imposition of Treaty principles – to several more specific issues. For example: how legal jurisdiction might

change as sea levels rise and alter the line of mean high-water springs; what changes might mean for coastal Māori land or customary rights; and what laws might need altering in order to address any losses of Māori land or customary rights.

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I. Introduction

> It is generally recognised that Māori society is climate sensitive due to the strong links that exist between Māori economic, social and cultural systems and the natural environment.[16]

This paper addresses duties under Te Tiriti o Waitangi/the Treaty of Waitangi for protection of particular Māori interests in the face of coastal hazards associated with sea-level rise.[17] Many aspects of the Māori economy are environmentally dependent, much of their land is low lying and they have large investments in agriculture and forestry.[18] Furthermore, Māori have rights to continued customary practices, such as collecting seafood, and to protection of land of cultural and historical significance to them.[19] Māori coastal communities are particularly vulnerable to the hazards associated with sea-level rise.

Under Te Tiriti o Waitangi, the Crown has a duty to actively protect Māori lands, estates, forests, fisheries and other taonga, and must enable Māori to protect these taonga.[20] It is necessary to assess what Treaty duties may exist in relation to decisions to adopt measures to adapt in an attempt to prevent the risks of damage eventuating from coastal hazards associated with sea-level rise. If assessments are being made of potential liability for damage to property from climate-related coastal hazards, potential Crown liability under Te Tiriti for damage to iwi or hapū territories as a result of such hazards must also be considered.

Much of the climate adaptation measures that would be necessary to actively protect Māori coastal interests fall within local government authorities' jurisdictions; they are thus guided by the procedures and standards under the Local Government Act and Resource Management Act, as well as by district and regional plans and related documents. Local government authorities are not currently directly accountable for Treaty duties when acting pursuant to these Acts;[21]

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[16] DN King and others, *Coastal adaptation to climate variability and change: Examining community risk, vulnerability and endurance at Mitimiti, Hokianga, Aotearoa-New Zealand* (NIWA Report AKL2013-22, September 2013), at 21.

[17] While Treaty duties are largely owed to iwi and hapū, this paper frequently refers to Māori interests for ease of use.

[18] Ministry of Agriculture and Forestry, *Māori Agribusiness in New Zealand: A study of the Māori Freehold Land Resource* (March 2011), at 7.

[19] Waitangi Tribunal, *The Final Report on the MV Rena and Motoiti Island Claims* (Wai 2391, 2015), at 12.

[20] Jones, above n 2, at 62.

[21] See discussion below at Part IV.2. It is an interesting question whether the common law might in the future find that councils do in fact have duties to uphold Treaty principles; the possibility exists but is not addressed here.

these relevant obligations are still held by the Crown, or central government. But the actions of local government, on delegated authority from the Crown, can give rise to these authorities either upholding the central government Treaty obligations or creating new, modern-day breaches of the Treaty (that the central government would have to answer for).

This paper is interested in what might be necessary in order to uphold the Crown's Treaty obligations in the area of adaptation to the coastal hazards associated with sea-level rise. The paper forms part of a New Zealand Deep South National Science Challenge project on what to do about housing that will be adversely affected by such coastal hazards. Because of the nature of Treaty interests, it is hard to limit the scope of this paper to housing only. However, housing and marae are a key focus, even while some comments may also be made on some other coastal interests protected under the Treaty. Because of the multi-layered jurisdictional approach to climate adaptation measures in law and practice in Aotearoa, such an enquiry needs to address central government rules and initiatives as well as local government actions. This paper thus addresses the following matters.

Part II provides a summary introduction to the sea-level rise and related coastal hazards faced by Aotearoa New Zealand, and the climate adaptation measures likely to be required. It summarises the legislative regime under which climate adaptation measures are currently undertaken: this is provided largely by the Resource Management Act (RMA) and its associated documents, including the recent central government guidance from Ministry for the Environment and Department of Conservation. Part III provides a summary of material commenting on the effects of climate change on Māori.

Part IV addresses existing information on Crown duties under the Treaty of Waitangi with comment on application to local authorities. This includes a summary of the Treaty duties of the Crown (held by central government), and an explanation of how they are enforced. It summarises existing climate claims in the Waitangi Tribunal, and finishes with a summary of the MV Rena as an illustration of duties relevant to the handling of a disaster that damaged the coastal environment. Part V then discusses climate adaptation initiatives in the light of the Treaty obligations summarized in Part IV, suggesting what Treaty obligations might require of decision-making on climate adaptation measures.

Part VI addresses the protection of Māori interests in law relating to local government: the Local Government Act 2002 (LGA), the RMA, the NZ Coastal Policy Statement 2010 (NZCPS) and its DoC *Guidance.* It notes that climate adaptation planning will go ahead in the current legal framework that has already been criticised by the Waitangi Tribunal as not protecting of Māori interests strongly enough; yet the Department of Conservation *Guidance* on the NZCPS has strong and helpful suggestions for procedural and substantive protection of Māori interests in the coastal environment.

Part VII summarises and discusses some suggested decision-making procedures that provide better engagement with Māori: those contained in the Ministry for the Environment's 2017 *Guidance for local government* on climate adaptation decision-making ('MfE *Guidance'*)[22] and in the Climate Change Adaptation Technical Working Group *Report*[23] and *Recommendations*[24]. These are helpful guides to this area and both emphasise the need to protect Māori coastal interests and taonga, plus that that need derives from the Treaty guarantees.

Part VIII contains case studies to illustrate a range of issues of climate adaptation and the protection of Māori interests. The case studies discussed cover case law, council decision-making procedure, and coastal wāhi tapu under threat from sea-level rise and inundation. These studies are of a lack of protection for an urupā at the Mōkau River mouth, a lack of protection for Māori freehold land at Waitara, the proposed plan change to implement a managed retreat at Matatā, the Clifton to Tangoio decision-making procedure undertaken in the Hawke's Bay, and a re-examination of the 2010 Environment Court case of *Hemi v Waikato District Council*, where approval to build on ancestral land in hazard area was seen as protective of Māori culture.[25] Note that it is only a preliminary enquiry that was limited to published materials only; no interviews or consultations were able to be undertaken.

In conclusion, it is the duty of the Crown to ensure that taonga belonging to Māori are protected. This paper suggests how the Treaty principles might apply to climate adaptation decision-making by local government. All decision-making, even including any retreat from coastal lands, must be undertaken in a manner that genuinely attempts to ensure that Māori do not lose ties to ancestral lands and can maintain their relationships with the coastal environment and their

[22] MfE, *Guidance,* above n 11.
[23] MfE, *Stocktake Report,* above n 14.
[24] MfE, *Recommendations,* above n 12.
[25] *Hemi,* above n 15.

taonga. While some councils have found it difficult to protect Māori interests in their climate adaptation decision-making, there is already a lot of knowledge and guidance available to local authorities and to central government that can assist them to make good decisions in this area, both in respect of procedure and substance. This is particularly case for the MfE *Guidance* and for the Climate Change Adaptation Technical Working Group *Report* and *Recommendations*, all of which are helpfully tailored to climate adaptation decision-making.

The broader perspective of achieving environmental justice requires the respect of iwi and hapū as Treaty partners to substantive active protection of their coastal environmental assets, as well as achieving recognition of their authority to preferably control but at least share in making decisions over those assets. Central and local government thus need to keep in mind the wider picture of upholding the Treaty principles rather than solely the minimum conditions in the RMA and LGA.

II. Sea-level rise and coastal hazards

1 The Problem of sea-level rise and maladaptive residential development

The threat posed by the combination of climate change and the build-up of residential property in low lying coastal areas is a problem affecting countries worldwide. These coastal hazards will consist of both acute effects – such as intermittent but increasing frequent and violent storms – and chronic effects – such as sea-level rise and the increasing loss of biodiversity. The acute and chronic aspects of the problem raise distinctive challenges for policy makers. Both aspects are affected by uncertainty around the specific impacts and timeframes, not least because it is not yet known what emissions scenario(s) will unfold. The uncertainty around the future emissions trajectory is reflected in the decision of the Ministry for the Environment to include a range of estimates for sea-level rise in its 2017 *Guidance for local government* ('MfE *Guidance'*).[26] While the new MfE *Guidance* still provides planners and decision makers with an authoritative account of current sea-level rise projections for 2120, these projections are now formulated as four separate sea-level rise scenarios of greater or lesser severity:[27]

1. A low emissions, effective mitigation scenario (0.55 metres);
2. An intermediate-low emissions scenario (0.67 metres);
3. A high emissions scenario, no mitigation scenario (1.06 metres);
4. A higher, more extreme H+ scenario (1.36 meters).[28]

Because so much development has occurred in an era before climate change risks were properly factored into planning decisions, enormous amounts of maladaptive development has already

[26] MfE, *Guidance,* above n 11.

[27] Ministry for the Environment, *Preparing for coastal change: A summary of coastal hazards and climate change guidance for local government* (ME 1335, December 2017), at 18. See also Judy Lawrence and others, "National guidance for adapting to coastal hazards and sea-level rise: Anticipating change, when and how to change pathway" (2018) 82 Environmental Science and Policy 100 at 103 where the lead authors of the MfE, *Guidance* give the following rationale for using four plausible scenarios of varying severity:

> More recent SLR projections that include updated polar ice sheet responses mean that it is difficult to pre-determine what coastal future might eventuate for any community, even over planning timeframes of the next 100 years. It is therefore more appropriate and inherently flexible to use a range of SLR scenarios to test the emergence of an adaptation threshold for the current situation and the performance of adaptive actions, than attempting to provide either a worst-case or "most-likely" estimate of SLR to devise a policy or plan.

[28] MfE notes that this is "included primarily for the purpose of stress-testing adaptation plans or pathways and major new development at the coast". See, MfE, *Summary,* at 18.

occurred. In New Zealand, there are already more than 44,000 homes and 1500 commercial properties within 1.5 meters of the average high tide in spring.[29]

2 Possible climate adaptation responses

Climate adaptation responses can be divided four very broad strategies of hazard management:

1. *Avoid* the hazard altogether by locating buildings away from hazardous areas;
2. *Accommodate* the hazard, usually by adapting buildings to be more resilient (such as by raising ground level) or making buildings relocatable;
3. *Protect* the asset against the hazard, by for instance, constructing hard defenses (eg, sea walls) or soft defenses (eg, planting trees to slow down erosion, or to build up natural barriers); and
4. *Retreat* from the hazard, by abandoning or removing residential buildings from the hazardous site.

These strategies can in turn be divided into those that target *prospective*/proposed developments by, for instance, prohibiting new development in a hazardous area, or imposing significant restrictions such as time limits for occupation; and those that affect *existing* developments.

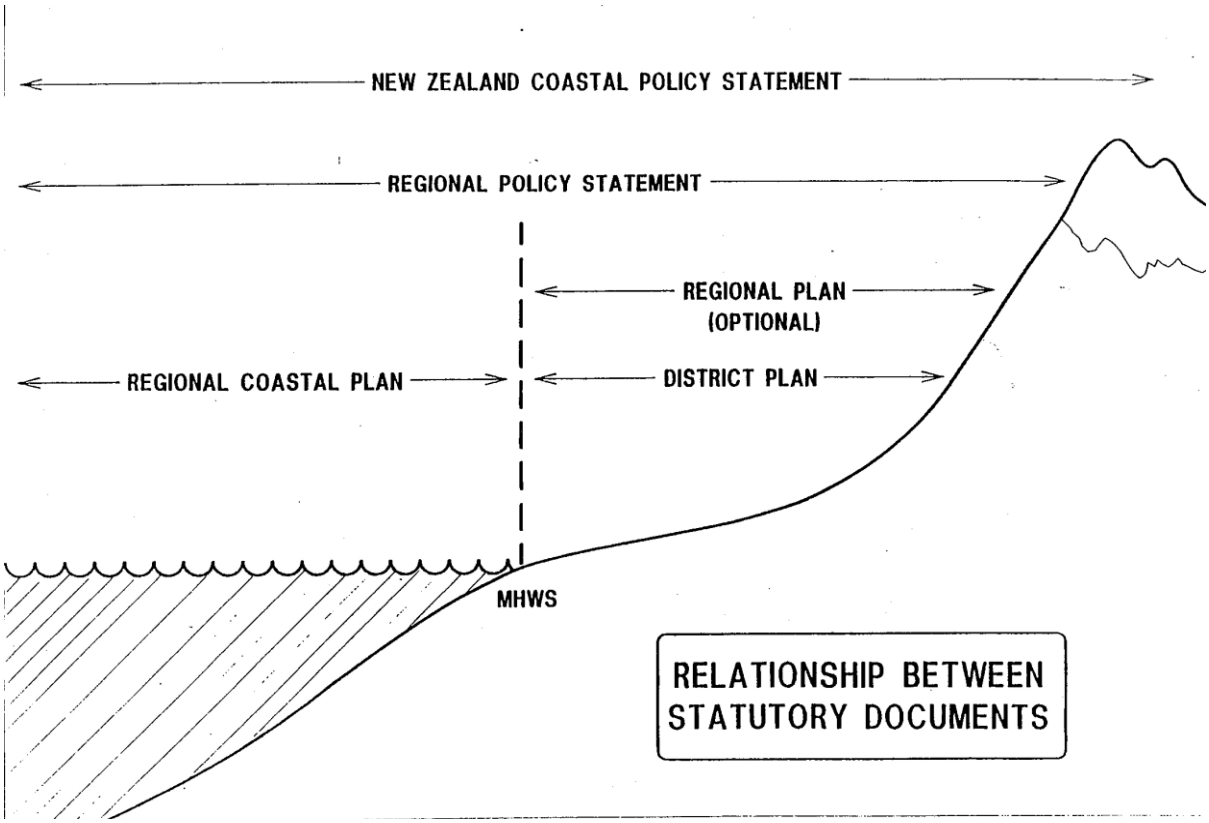
3 Overview of the Resource Management Regime

The RMA creates a scheme where three layers of government (central, regional, and district), exercise different statutory functions over different areas in order to achieve the overarching purpose of "sustainable management". Importantly, the different levels of government have differing responsibilities over different areas within the coastal environment, with each responsible for different planning documents. The Act provides for the promulgation of policies and plans within a formal statutory hierarchy of documents, with central government at the top, regional councils in the middle, and territorial authorities (district and city councils) at the bottom. In addition to giving substantive effect to the overarching purpose of sustainable

[29] Boston and Lawrence, above n 4, at 2.

management contained in section 5, each document is required to give effect to any higher-level documents.[30]

Figure 1: The relationship between statutory documents on the coastal environment[31]



The RMA provides central government with significant power to pass both framing instruments and regulatory instruments which can guide and/or set the parameters for the promulgation of local government plans. For example, in relation to the coastal environment, the Minster of Conservation is responsible for the NZ Coastal Policy Statement, which the other documents lower in the hierarchy must be consistent with. Direct action on climate adaption is the prerogative of regional councils and territorial authorities, who are responsible for creating and

[30] In 2014 the Supreme Court ruled in the *King Salmon* decision that, contrary to a decade and a half of practice in the Environment Court, s 5 should not to be used for the purpose of making operative decisions because the Act intends for plans and policies to be set as the primary means of achieving sustainable management. See *Environmental Defence Society v King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [151].

[31] Diagram obtained from *Environmental and Resource Management Law* (LexisAdvance), at 5.6.

implementing local plans and policies as well as granting resource consents. Regional councils are tasked with producing regional and regional coastal plans and policies which facilitate the integrated management of natural and physical resources within the region.[32] The regulation of land use for this purpose is common between regional and district councils, but district councils must give effect to directives passed by the regional council.[33]

Despite siting at the bottom of the RMA hierarchy, district councils are major actors in climate adaptation initiatives because they are primarily responsible for the regulation of land use through their district plans and consent procedures, including setting rules and granting consents for subdivision and for building.

All documents under the RMA are required to undergo a section 32 evaluation, which requires a robust assessment of the costs, benefits and alternatives to passing any plan or policy. Public consultation is also required on all documents, albeit to differing standards depending on the document in question. The type of consultation required also differs for the different levels of government.[34] A further hurdle is that the content of any plan or policy can also be subject to review in the Environment Court. The RMA confers upon the Environment Court the power to review the content of district and regional plans and even make changes.[35]

4 Climate Adaptation and the RMA

There is no specific mention of climate adaptation in the RMA. However, the underlying subject matter – namely, hazard management and climate change – are now both expressly addressed in Part 2 of the Act following amendments in 2004 and 2017. The Resource Management (Energy and Climate Change) Amendment Act 2004 added climate change to the section 7 list of "other matters" that decision-makers "shall have particular regard to". This amendment is credited

[32] Resource Management Act 1991 (RMA), s 30(1)(a).
[33] RMA, s 30(1). See *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189, [1995] NZRMA 452, at 459.
[34] With the passing of the Resource Legislation Amendment Act 2017, all "national directions" are now required to be passed through a single process (see RMA, ss 46A-51). However, this process is not described in a prescriptive manner (RMA, s 46A(4)). By contrast, there is much less discretion for consultation obligations by local authorities (see See Schedule 1 of the RMA).
[35] Provided that the applicant made a submission on the notified plan. See RMA, sch 1, cl 14 and 16.

with removing climate scepticism from the planning process.[36] The Resource Legislation Amendment Act 2017 added "the management of significant risks from natural hazards" to the list of "matters of national importance" under section 6 of the Act.[37]

The need to be cautious is not expressly included within the text of the RMA, but is accepted as being implicit within many key sections of the statute, notably the definition of "effect" in section 3, and the purpose statement in section 5.[38] Its relevance to decisions about coastal development is demonstrated by its inclusion in the 1994 New Zealand Coastal Policy Statement, and the current 2010 New Zealand Coastal Policy Statement (NZCPS).

5 New Zealand Coastal Policy Statement 2010

The passing of the 2010 NZCPS has tipped the balance further in favour of disallowing developments which increase the exposure of residential property to natural hazards in the coastal area. In contrast to its predecessor, the 2010 NZCPS explicitly recognises the threat of sea-level rise and adopts a 100-year planning horizon when evaluating coastal hazards.[39] It also mandates the use of a precautionary approach for decisions affecting activities in the coastal

[36] Vernon Rive and Teresa Weeks "Adaptation to Climate Change in New Zealand" in Alastair Cameron (ed), *Climate change law and policy in New Zealand* (LexisNexis, Wellington, 2011) 345 at 9.7.1. The High Court subsequently ruled in *Meridian Energy v Central Otago District Council* [2011] 1 NZLR 482, [2010] NZRMA 477, at [157] that it was not open to decision-makers to raise questions about "the causes, direction and magnitude" (footnotes omitted). However, consideration of climate change under s 7(i) has been limited to climate adaptation ("effects of climate change") rather than climate change mitigation (eg, "contribution to climate change"). Research indicates that climate change considerations began to feature more prominently in local government policies and plans after 2004 reforms. See Andy Reisinger and others "The role of local government in adapting to climate change: Lessons from New Zealand" in James Ford and Lea Berrang-Ford (eds), *Climate Change Adaption in Developed Nations: From Theory to Practice* (Springer Netherlands, Dordrecht, 2011) 303, at 312.

[37] RMA, s 6(h). Following the 2012 earthquakes, the Canterbury Earthquakes Royal Commission recommended adding an amendment to the principles in ss 6 and 7 of the Act to explicitly bring management of natural hazards into the list of things that should be considered when councils are exercising their functions under the RMA. See Canterbury Earthquakes Royal Commission, *Final Report Volume 7: Roles and Responsibilities* (Department of Internal Affairs, 2012), at 99.

[38] This has been discussed in cases concerning residential development in hazardous coastal areas. See, *Fore World Developments Ltd & Anor v Napier City Council* [2006] NZEnvC 120.

[39] NZCPS 2010, Policy 24(1)(a).

environment.[40] Further, a number of listed objectives and policies reference the necessity of considering managed retreat for existing development.[41]

Although the term "adaption" or "adaptation" is not included in the document, Objective 5 lists several objectives that would be core to any adaptation initiative in respect of at-risk coastal property. It reads:

Objective 5

To ensure that coastal hazard risks taking account of climate change, are managed by:

- locating new development away from areas prone to such risks;
- considering responses, including managed retreat, for existing development in this situation; and
- protecting or restoring natural defences to coastal hazards.

Relatedly, the protection of the coastal environment from inappropriate "subdivision, use and development" is also provided for by Objective 6. Objectives 5 and 6 of the NZCPS are also supplemented by several policies that explicitly endorse the implementation of adaptation initiatives that are of direct relevance to coastal hazards effecting residential property. Most importantly, Policy 25, addressing "[s]ubdivision, use, and development in areas of coastal hazard risk" states that decision makers should:

In areas potentially affected by coastal hazards over at least the next 100 years:

(a) avoid increasing the risk of social, environmental and economic harm from coastal hazards;

(b) avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards;

(c) encourage redevelopment, or change in land use, where that would reduce the risk of adverse effects from coastal hazards was held to be entitled, including managed retreat by relocation or removal of existing structures or their abandonment in

[40] See NZCPS 2010, policy 3. Policy 3(1) of the NZCPS 2010 requires decisions to "[a]dopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse." This extends to both current uses of the coastal environment, and proposed activities.

[41] As a result of these changes, the NZCPS 2010 has altered the field with respect to residential development in hazardous coastal areas, making Environment Court decisions before the passing of the NZCPS 2010 of "little assistance" for current appeals. *Gallagher v Tasman District Council* [2014] NZEnvC 245, at [176].

extreme circumstances, and designing for relocatability or recoverability from hazard events;

(d) encourage the location of infrastructure away from areas of hazard risk where practicable;

(e) discourage hard protection structures and promote the use of alternatives to them, including natural defences; and

(f) consider the potential effects of tsunami and how to avoid or mitigate them.

The NZCPS also contains a specific policy addressing "[s]trategies for protecting significant existing development from coastal hazard risk" under Policy 27. This includes considering managed retreat as a strategy, as well as the limited use of protection structures.

While the passing of the 2010 NZCPS has unquestionably strengthened the mandate of local government and the Environment Court to take more stringent action on preventing hazardous residential development, questions remain over how stringent that mandate is, and how it ought to be exercised. The Supreme Court recently held that provisions of the NZCPS could constitute mandatory bottom lines if the relevant provisions were worded in an obligatory manner.[42] In the *King Salmon* case, the two NZCPS Policies at issue contained the word "avoid". In light of this precedent, Policy 25 of the NZCPS, which requires decision makers to "avoid increasing the risk of social, environmental and economic harm from coastal hazards" potentially contains a clear directive for decision-makers to both prohibit future resident development in areas subject to natural hazards, and prevent redevelopment that would intensify these risks. By contrast, Policy 27 is identified by the Supreme Court as allowing for "a range of strategies".[43]

6 Non-binding guidance

National guidance documents give an indication of what central government deems to be best practice for decision-making on climate adaptation measures. They are based on firm evidence and have been helpful to territorial authorities and the Environment Court in deciding upon

[42] *King Salmon,* above n 30, at [126]-[127].
[43] At [127].

climate adaptation measures (for example, adopting a 100-year planning period when assessing the impact of sea-level rise).[44]

The most recent guidance from the Ministry for the Environment on sea-level rise and coastal hazards was released in December 2017.[45] Unlike the 2008 guidelines, the 2017 MfE *Guidance* goes beyond the mere provision of sea-level rise estimations by providing a detailed "adaptive planning" framework for managing the uncertainties around sea-level rise. It sets out a 10-step process for fostering "adaptive pathways planning".[46] To achieve this objective, the new MfE *Guidance* contains extensive detail about how local government ought to consult with the community around issues of sea-level rise, and how uncertainty ought to be factored into planning and decision-making. Each of these issues is addressed by a separate chapter in the MfE *Guidance*: Chapter 3 on 'Community Engagement Principles' adopts an approach based on the approach of the International Association of Public Participation;[47] and Chapter 4 on uncertainty in risk management includes a proposed taxonomy for four types of uncertainty that planners will encounter.[48] It is expected that the new MfE *Guidance* will provide valuable evidential assistance for disputes over coastal adaptation measures, particularly councils wishing to implement more stringent controls on new or intensified residential development in hazardous coastal areas.

The MfE *Guidance* also proposes a new framework for adaptive planning. This framework takes account of the need for local policies, plans and decisions to undertake extensive consideration of the uncertainty that is inherent in sea-level rise, and the need for extensive public consultation. There are aspects of the approach that are new to New Zealand and these will take some time to implement.[49] A pilot initiative underway in the Hawkes Bay of a community

[44] Prior to 2010 the Environment Court had struggled to reconcile the many contradictory estimates provided in government documents or asserted by expert witnesses. By 2010 the Environment Court had begun to rely upon the 2008 Ministry for the Environment guidelines in combination with official estimates from the IPCC. This has brought far greater consistency to Environment Court decisions. See Rive, above n 36, at 9.7.1-2. See also *Southern Environmental Association (Wellington) v Wellington City Council* [2010] NZEnvC 114, at [85], "For all practical purposes it would be prudent to design for a 100-year planning period, according to MfE guidelines".
[45] MfE*, Guidance,* above n 11.
[46] MfE, *Summary,* above n 27, at 5.
[47] MfE, *Guidance*, at 51.
[48] MfE, *Guidance*, at 141.
[49] Lawrence, above n 27, at 102.

consultative decision-making procedure similar to that contained in the MfE *Guidance* is discussed in Case Study 4 of Part VIII, below.[50]

The Department of Conservation (DoC) have prepared a comprehensive set of guidance notes to accompany the New Zealand Coastal Policy Statement 2010.[51] The guidance notes ('*DoC Guidance*') are an online resource prepared for the purpose of supporting the implementation of the NZCPS. There is an individual note for each NZCPS policy, as well as an introductory note to explain the purpose and structure of the *Guidance* notes generally. The *Guidance* notes place great emphasis on the importance of understanding the way in which the policies are expressed. The wording of policies indicates the deliberate intent to differentiate levels of flexibility and direction. The aim is to ensure that those with responsibilities, that involve coastal management and planning, have the necessary information to provide correct and coherent decision making.

Due to the related nature of objective 5 and policies 24-27, the DoC *Guidance Note on Coastal Hazards* is the most extensive. This *Guidance Note* covers the coastal hazard objective and the four policies that primarily address coastal hazards. These share a common rationale and origin and raise many of the same issues around interpretation and implementation. Such guidance contributes to the substance and promotion of Part 2 of the RMA within the coastal environment.

7 Proposals for additional guidance

Under the RMA central government can provide leadership through the promulgation of national policy statements and national standards. There are four National Policy Statements currently in effect as of 2019;[52] however, none yet address coastal climate adaptation. The Ministry for the Environment considered developing an NPS on Flood Risk Management in 2008, but these plans were subsequently abandoned.[53] A recent report recommended that all

[50] The Clifton to Tangoio Coastal Hazards Strategy Joint Committee, (Clifton to Tangoio Coastal Hazards Strategy 2120, 2016) <www.hbcoast.co.nz>. See also Lawrence, above n 27, at 102.
[51] See Part VI.5, below, for discussion of the DoC *Guidance* in respect of its recognition and protection of Māori interests.
[52] See the Ministry for the Environment, *National Policy Statement on Electricity Transmission 2008*; *National Policy Statement for Renewable Electricity Generation 2011*; *National Policy Statement for Freshwater Management 2014* (amended 2017) and; *National Policy Statement on Urban Development Capacity 2016*.
[53] See Ministry for the Environment, *Meeting the challenges of future flooding in New Zealand* (ME 900, August 2008), at appendix 2.

information, modelling and mapping of natural hazards now incorporate the impact of climate change.[54] If these recommendations are followed then the resulting national policy statement could be especially valuable for synthesising climate change with natural hazard management together with the precautionary approach – arguably the three most important concepts for regulating hazardous coastal development. Such a synthesis would provide valuable guidance for local government.

National Environmental Standards (NES) provide central government with the means to set nationwide standards[55] and thereby guarantee consistency across regional and district council plans.[56] "[S]ea-level rise is an obvious candidate for a national environmental standard under the RMA".[57] In 2009 there were indications from the Ministry for the Environment that a national environmental standard on sea-level rise would be developed, but this plan was subsequently abandoned in 2011 with the Ministry choosing instead to rely on non-binding guidelines, which are outlined above.[58]

8 Jurisdiction and boundary changes – mean high water springs

Note that jurisdictional boundaries between different areas in the coastal environment will presumably have to move as sea levels rise and all levels of government will need to keep an eye on them. At present, the line of mean high-water springs (MHWS) marks the landward edge of the coastal marine area. This is determined by "cautiously" identifying the greatest extent to which mean high water springs extend, while excluding the line determined by individual events such as storms and floods.[59] Even though it may change with beach accretion and erosion, courts have taken a practical approach in order to determine "an administrative boundary which is conveniently ascertainable, so that people can tell without difficulty which set of rules govern

[54] Tonkin & Taylor Ltd, *Risk Based Approach to Natural Hazards under the RMA* (31463.001, June 2016). This report was prepared by Tonkin and Taylor as part of the scope of a potential policy statement: at 1. While the report is not government policy, it may inform the future direction of the law on natural hazards, including the development of a national policy statement.
[55] RMA, ss 43-44A.
[56] Kenneth Palmer *Local authorities' law in New Zealand* (2nd ed, Brookers, Wellington, 2012), at 17.5.2.
[57] Rive, above n 36, at 9.5.5.
[58] At 9.7.2.
[59] *Gisborne District Council v Falkner* Planning Tribunal Auckland, A 82/94, 13 October 1994.

their activities".[60] Occasionally, a more precise determination is required, such as where a precise boundary will determine whether a criminal penalty could be imposed or not.[61]

As sea levels rise, even excluding advances of high-water marks from storms and floods, the greatest extent to which mean high water springs extends will move. Even a practical administrative boundary that has been determined in the past, in order to see which rules govern which activities, will presumably need to move. There will come a point at which even a practical administrative boundary cannot become too divorced from reality. This is particularly relevant for the Crown with jurisdiction over the coastal marine area which could creep inwards, newly covering land that was formerly Māori land or which contains other coastal taonga, for example, and altering the location of jurisdictional boundaries of local and regional councils.

One issue will be whether the movement of a practical jurisdictional boundary based on MHWS would be determined by agreement between the relevant government bodies, or whether it would likely be moved by a court (and thus effectively determine the rules governing a particular situation in retrospect). Perhaps of greater concern in terms of certainty is that the more precise approach may be required for some determinations relevant to climate adaptation. While it may not be a matter of criminal penalties, there could be financial liability such as to remove structures that have become located within the coastal marine area due to the landward movement of mean high-water springs. Of course, this has already happened in some areas around New Zealand, whereby beaches have eroded and undermined the land beneath existing housing. With sea-level rise, this is expected to happen a lot more around the whole country; it would be sensible to anticipate such changes and provide for them in advance rather than to leave disputes such as those about climate adaptation measures and any attendant liabilities to be settled ad hoc through the courts.

9 Comment

Overall, councils can utilise the Resource Management Act in order to adopt some climate adaptation measures; however, the RMA's planning and consenting regime is not particularly well-suited to the adoption of all of the measures that will be needed. Presently, different local

[60] *Gisborne v Falkner*, above n 59, at 31.

[61] See, for example, *Freeman v Savage* DC Gisborne CRN 6016003621-22, 11 September 1196 and *Freeman v Savage* [1997] NZRMA 126 (HC), in respect of a prosecution involving the deposit of fill on the foreshore.

and regional authorities are taking different approaches to plans, policies and consents for housing near and in the coastal environment and to the range of coastal adaptation measures needed. Better guidance and direction for territorial authorities is needed, and possibly also reform of some aspects. This applies to all measures needed, not just those in respect of particular Māori interests, and may even extend to the determination of jurisdictional boundaries between the different areas in the coastal environment.

III. Effects of Climate Change on Māori

> The detrimental effect of climate change on ecosystems caused by climate change will have a devastating impact on economic, social and cultural values across Māori society.[62]

Māori are predicted to be disproportionately affected by climate change, as are indigenous people across the world.[63] Physical changes to the climate will be felt economically as well as culturally. Māori have strong cultural and spiritual ties to lands, waters and ecosystems so damage to ancestral territories will impact the wellbeing of local communities.[64] "[M]any Māori communities are situated along coastal margins"[65] and Māori have a larger amount of low-lying coastal land as a proportion of the population than other groups of New Zealanders, where such land is likely to be inundated by sea-level rise over time. Primary industries are a large proportion of the Māori economy, making their economic resilience to climate change lower. [66] This Part summarizes some ways in which Māori coastal communities will be affected by sea-level rise and associated coastal inundation, with a primary focus on housing and marae and thus on land and adaptation measures.

Property

Changes to the physical environment have tangible economic consequences and more nuanced psychological effects on people. In the Wai 2607 Statement of Claim it was argued that the Crown needed to strengthen climate mitigation goals. The claim that was made by a range of Māori noted the particular vulnerability of ecosystems and coastal communities and the negative wellbeing effects on Māori communities when the natural environment is harmed.[67]

1 Māori Land

The Māori Land Court describes Māori land as "taonga tuku iho, of special significance to Māori passed from generation to generation."[68] Māori land is different to general land in New Zealand.

[62] Waitangi Tribunal, *Mataatua Statement of Claim* (Wai 2607, 2017), at [23].
[63] Baird, above n 6.
[64] King, above n 7.
[65] King, above n 7, at 107.
[66] King, above n 7.
[67] Waitangi Tribunal *Memorandum of counsel for the Applicant in support of urgency application* (Wai 2607, 2017), at [19].
[68] Māori Land Court, "Your Māori Land" (2018) <www.Māorilandcourt.govt.nz>.

Only approximately 5% of all land in New Zealand is Māori land.

A very small proportion of Māori land is held customarily, in accordance with tikanga Māori.[69] Māori customary land is land that continues to be used for the purposes it was used for before 1840; there are only approximately 700 hectares of Māori customary land left.[70]

Most Māori land is held as Māori freehold land. Under Te Ture Whenua Māori Act 1993, this is land that can be owned by one or a group of people, a majority of which are Māori.[71] This land is governed by the Māori Land Court and can be sold to Māori and non-Māori alike, so long as it is done so in accordance with the Act, and the specific Māori Land Court process.[72] This includes giving the right of first refusal to the 'preferred class of alienees'; a key group of people who are recognised as having a whakapapa connection with the land owner or the land itself.[73]

There is also a category of land that is owned by Māori but is not freehold land nor Crown land reserved for Māori.[74] This land is general land owned by Māori and has less stringent restrictions around its use.

Today, the average Māori land block has a size of 50.98ha.[75] It is not possible to say how much Māori land will be affected by sea-level rise and related inundation because the effects have not been determined, neither on a national scale, nor consistently around the country. Mapping of such effects is just beginning in a few districts.

Māori land is at risk of being lost or devalued by coastal inundation. Any coastal customary land or Māori freehold land that is lost to sea-level rise cannot be replaced under the Māori Land Court's current jurisdiction. The loss of or damage to Māori freehold land is perhaps most significant as such land constitutes a far greater proportion of Māori land. Māori freehold land lies predominantly in rural areas and contains little arable value while remaining mostly

[69] Elizabeth Toomey and others (ed), *Revised Legal Frameworks for Ownership and Use of Multi-dwelling Units* (Report ER23, May 2017), at 125.
[70] Above n 68.
[71] Te Ture Whenua Māori Act 1993, s 129
[72] Section 146.
[73] Section 147A.
[74] Section 129.
[75] Māori Land Court, *Māori Land Update – Ngā Āhuatanga o te whenua* (June 2018).

uninhabited and, until recently, not actively managed.[76] The loss of or damage to Māori land, particularly Māori freehold land, from coastal inundation will have significant cultural effects. Marae and other property have certain tapu attached to them. Often, the marae and other whare contain carvings and other taonga that tell the stories of that rōpū. Risks to Māori land from coastal inundation must be carefully managed with the cultural needs of those to whom the property belongs.

2 Coastal Communities

There are a significant number of Māori communities in low lying areas of New Zealand, "highly vulnerable to sea-level rise and other climatic events such as storms and high tides."[77] Their identity, health and well-being, economies and their marae could all be adversely affected.

Identity

Coastal areas are intrinsic to Māori identity due to the cultural, historical, social and economic significance they embody.[78] They are a source of identity in that they are places of learning whereby communities can pass on their knowledge and significance of that place.[79] This is achieved through customary practices that seek to ensure Māori maintain the connection between the living and the past. The coastal environment provides fishing grounds and diving rocks that are an important source of food for Māori. Significant social, cultural and economic impacts on Māori in many coastal regions is likely to occur with "coastal erosion and changes to the productivity of inshore fisheries and shellfish gathering areas".[80] These effects include the direct threat to Māori commercial and customary fisheries. Those whose cultural identity is linked with the coastal environment will experience the impacts the most due to the adverse, yet indirect, impacts on cultural practices and the overall wellbeing of Māori communities.[81]

Health and Wellbeing

Māori wellbeing is tied to the wellbeing of the natural environment from which that iwi are

[76] Toomey, above n 69, at 125.
[77] King, above n 7, at 108.
[78] Ministry for the Environment and Treasury, *The Framework for a New Zealand Emissions Trading Scheme* (ME 810, September 2007), at 8.1.
[79] Wai 2607, *Statement of Claim,* above n 62, at [45].
[80] Above n 78, at 8.2.
[81] Wai 2607, *Statement of Claim*, at [23], citing King, above n 7.

bound to via interconnected and interrelated whakapapa reference systems. The local environment frames the worldview of that group.[82] Through tikanga Māori, the cultural system that is centered around the environment is created. This cultural system of ethics includes the idea that "cultural order comes from the natural environment and hence people have a responsibility to care for these systems."[83] A key characteristic of Māori society is that they should be seen as cultural guardians of the land (kaitiaki).[84] Issues such as ecosystem degradation, extinction of vulnerable species[85] and the adverse effects on the waterways over which they hold customary rights,[86] will have direct impacts on the ability of Māori to protect their land. Any reduction in the health and well-being of the environment will in turn adversely affect health and well-being of the people, with their inability to exercise kaitiakitanga affecting the mauri and therefore health of the community.[87]

Therefore, climate change affecting property goes deeper than economic loss for Māori. "Adverse mental health and psychological issues" can result from changes to the ecosystems.[88] Loss in property value leading to loss in wealth amongst the Māori community could "dramatically decrease community health and wellbeing."[89]

As well as accessing the physical environment, having safe places to live in the community is vital. If property was lost to sea-level rise, there may not be enough left to physically house the community; continued cultural wellbeing will then be much more difficult to maintain.

Economic

A good financial position is critical to being prepared for risks in the community.[90] As with many indigenous groups across the world, Māori are predicted to be among the New Zealanders most vulnerable to adverse effects from sea-level rise. This is partly because Māori hold

[82] Wai 2607, *Statement of Claim,* at [19].
[83] At [20].
[84] At [21].
[85] Phillip Munday, "Behavioral impairment in reef fishes caused by ocean acidification at CO_2 seeps" (13 April 2014), Nature Climate Change 4, 487.
[86] Wai 2607, *Statement of Claim*, at [26]
[87] For example, the effects of the grounding of the MV Rena. Wai 2391, above n 19, at 2.3; and *Ngai Te Hapū Incorporated v Bay of Plenty Regional Council* [2017] NZEnvC 73 at [95] and [99]. Discussed below at part IV.5.
[88] Wai 2607, *Memorandum,* above n 67.
[89] At [51].
[90] Jones, above n 2, at 94.

proportionally higher amounts of coastal land than non-Māori, partly because many Māori have socio-economic characteristics that make it financially difficult to adapt, plus "almost 50 per cent of the total Māori asset base is invested in climate sensitive primary industries (forestry, fishing, agriculture and to a lesser extent tourism)".[91] It is noted that:[92]

> Climate-induced changes in regional ocean temperature, currents, winds, nutrient supply, ocean chemistry and increasing acidification (as well as extreme weather conditions) are expected to alter regional fisheries productivity and operations, fishing incomes and ocean-based investment.

Coastal marae

Marae are the focal point and hope of a Māori community, so they are particularly important to consider in the context of the effects of climate change. There are 774 marae in New Zealand.[93] The majority of these are in the North Island. A disproportionate number of the marae are situated on the coast or near the coast. While the precise risks of all coastal marae have not yet been determined (eg, erosion, flooding), it is clear that the susceptibility of coastal properties to hazards will increase over time.

The Māori Maps website provides detail about land and marae.[94] It does not provide detail about its characteristics or any other assets or taonga that might also be on the land.

There have been previous occasions where rivers have flooded marae and the hapū has had to bear the cost.[95] Without explicit government intervention, this is expected to also be the case for coastal flooding and other damage as a result of sea-level rise and its associated coastal hazards.

Other aspects

There are many other Māori interests that will be affected by climate change in general and sea-level rise in particular. For example, any customary interests recognised under the Marine and

[91] King, above n 7, at 102.
[92] WAI 2607, *Statement of Claim,* above n 62, at [21], citing King above n 7.
[93] Māori Maps, "Map" Te Potiki National Trust Limited <www.Māorimaps.com>.
[94] Baird, above n 6. This mapping is only an approximation of at-risk marae due to the site Māori Maps lacking geographical data.
[95] Peter de Graaf, "Mission to raise flood-hit marae" (27 March 2017) New Zealand Herald <www.nzherald.co.nz>.

Coastal Area (Takutai Moana) Act may be affected, as may Māori fisheries. However, these issues are not within the scope of this report and so cannot be discussed, even if they may raise interesting legal issues. The primary focus of this project is housing; that has been extended to marae and lands under them for this report, but that is as far as this report can go.

Adaptation measures

Both emission mitigation measures as well as measures designed to adapt to the effects of climate change will need to be undertaken if Māori taonga are to be protected. The Māori worldview of protecting their territories puts extra pressure on the New Zealand Government to try to prevent the worst effects of climate change.[96] Coastal erosion and landslides are among the changes to the natural coastal ecosystem that are already affecting the way Māori connect with the land for cultural, economic and spiritual purposes.[97] Low lying communities are likely to need to adjust significantly in order to prevent the worst effects. While hapū and iwi in their specific areas have generations of knowledge about protecting the land, it may not be enough on its own to prevent harm. In the future, it is predicted that erosion of coastal infrastructure will affect structures such as marae.[98] Some infrastructure will be able to be protected by more modern solutions but more natural landscape features risk being inundated or damaged. Modern engineering cannot stop global sea-level rise. Sea walls and similar structures are not long-term solutions. Nor does a concrete wall align with the worldview of Māori to protect the land in its natural state.

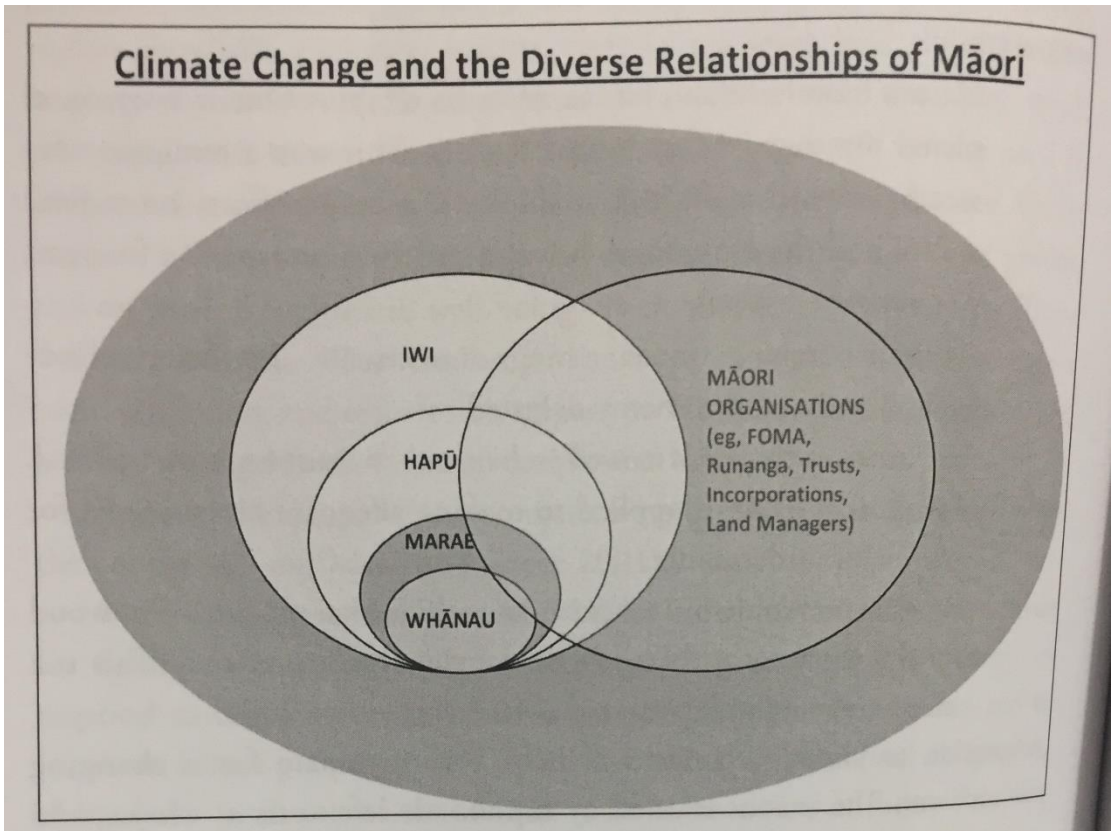
Māori have strong ties to the land and other natural features from which their ancestors came. This makes replacement of that land or other features very difficult: it cannot and should not be assumed that it can simply be replaced by other land of comparable economic value, for example; cultural value is more important.

Note that relationships with traditional territories can be maintained even in the absence of ownership, but access is needed. This is often easier to achieve in relation to the coastal marine environment, because of the public access.

[96] Wai 2607, *Memorandum,* above n 67, at [20].
[97] At [45].
[98] At [47].

It is important to understand the diversity within the Māori culture when assessing both how Māori may be affected by climate change and the likely responses to it.[99] A diversity of approaches will likely be necessary when adapting and building Māori resilience to climate change.

Figure 2: Diagram outlining the diverse relationships of Māori in relation to climate change[100]:



For example, Kanawa presents a range of adaptation ideas including upgrading or relocating marae and papakainga that are located in coastal or flood prone areas, land-use changes, protection of taonga species, and maintaining kaupapa Māori within adaptation. Kanawa suggests that Māori are inherently resilient, as "Māori have always adapted to the environment, adapted practices to suit conditions, and adapted to the ever-changing landscape created by development and other external pressures".[101] Kanawa argues that "adaptation offers great

[99] L Kanawa, "Climate change implications for Māori" in Rachel Selby, Pātaka Moore and Malcolm Mulholland, *Māori and the Environment: Kaitiaki*. (Huia Publishers, Wellington, 2016) 109.
[100] At 116.
[101] Kanawa, above n 99, at 118-119.

opportunity for Māori to engage in climate change debates, to be proactive in future planning for climate change, and to provide a sustainable future for future generations".[102]

Government consultation on climate change with Māori from diverse iwi and hapū concluded that it was important to recognise Māori values when considering the ways in which Māori might be affected by climate change.[103] Those consulted considered that New Zealand's climate policies in respect of both mitigation and adaptation needed to be better aligned with Māori values such as utu and kaitiakitanga. Other researchers have similarly concluded that Māori values are crucial to climate adaptation. For example, that "adaptive capacity is rooted in the collective strength of whanau and hapū relationships, as well as more elemental cultural principles defined by whakapapa and tikanga, and therefore action through practical values of whanaungatanga, manaakitanga, kotahitanga and aroha."[104]

In order to achieve better incorporation of Māori values in decisions, and alignment of policies with such values, a partnership approach to decision-making is needed. Similar conclusions have been reached in relation to government consultation undertaken on the framework for an emissions trading scheme: "Māori should have input into the policy development, Māori perspectives should be adequately considered in regards to climate change and the proposed policy should protect the environment."[105]

[102] Kanawa, above n 99 , at 119.
[103] Ministry for the Environment, *Consultation with Māori on climate change: Hui Report* (ME 830, November 2007), at 4-29.
[104] King, *Coastal Adaptation*, above n 16, at 109.
[105] MfE, *New Zealand Emissions Trading Scheme*, above n 78, at 8.2.

IV. Te Tiriti o Waitangi and the Treaty principles

The Treaty of Waitangi was signed in 1840. It is New Zealand's founding document between the Crown and tangata whenua, establishing governorship by the Crown. There are a number of discrepancies between the two versions such that the Treaty has not been honoured in many ways. There are ongoing processes that aim to settle disputes between Māori and the Crown over breaches of the Treaty. The primary way of settling these disputes is through the Waitangi Tribunal. The establishment of the Treaty of Waitangi Act and the Waitangi Tribunal, as well as the incorporation of Treaty obligations in legislation, has led to a large amount of material explaining what is required of the Crown for it to honour the Treaty.

This Part summarises the Treaty principles, their application to local and regional authorities, and their enforcement. It then turns to summarise past and present climate claims made to the Waitangi Tribunal, and discusses in detail the application of Treaty principles to the handling of the disaster that occurred due to the grounding of the MV Rena. The findings of the Waitangi Tribunal in relation to the MV Rena are instructive for how breaches of the Treaty may be caused by government responses to a disaster. It provides lessons for the implementation of procedural and substantive measures required in order to uphold the Treaty principles that can be applied to decision-making in respect of the adoption of climate adaptation measures.

1 The Treaty principles

New Zealand Māori Council v Attorney-General (*SOE* case) is the foundational legal case outlining the Treaty principles.[106] The Court of Appeal elicited principles from the two versions of Treaty, utilising Tribunal jurisprudence.[107] Discussion from the Court of Appeal in the *SOE* case among others form the foundation of what is required of the Crown today. The salient principles are laid out below.

[106] *New Zealand Māori Council v Attorney-General (SOE Case)* [1987] 1 NZLR 641.
[107] At 663.

Partnership

In the words of the President of the NZ Court of Appeal, "the Treaty signified a partnership between the races" and each partner has to act towards the other "with the utmost good faith which is the characteristic obligation of partnership".[108] This includes Crown consultation with the Māori Treaty partner on "major" issues and to obtain the full, free, and informed consent of the correct rights-holders in any transaction for their land.[109]

Right to Govern

Article 1 of the Treaty of Waitangi as accepted in New Zealand law as having given the Crown the right to govern.[110] The right of the Crown to govern is very important and cannot be constantly hampered by "unreasonable restrictions".[111] Notwithstanding this right to govern, Māori retained the rights to their territories and resources. Where decisions made by the Crown affect such Māori rights, there is a duty to act in the interests of Māori. These duties are to actively protect and give effect to property rights, management rights and self-regulation of Māori. The Crown's role extends to protection of tikanga and other taonga, including mātauranga Māori.

The right to govern as a partner links with the partnership duties of consultation established in the *SOE* case.[112]

Reciprocity

Reciprocity is an overarching principle that guides the interpretation of other Treaty principles.[113] The benefit of governing the territory does not exist without the permission of Māori; therefore, the Crown should respect the interests that Māori have in that territory. Acknowledging such interests could require consultation with Māori. Any such consultation should be widespread and genuine.[114]

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[108] *SOE Case,* above n 106, at 662.
[109] See the discussion on 'good faith' at Pt IV.1.e, below.
[110] It is accepted that this is only specified in the English version, but that is the legal position in New Zealand today.
[111] *SOE Case,* above n 106.
[112] At 683.
[113] At 663.
[114] *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA), at 560.

Active Protection[115]

The principle of active protection signifies that the cession of sovereignty (kawanatanga) to the Crown by Māori in article 1 of the Treaty was in exchange for the protection by the Crown of Māori tino rangatiratanga, as stated in Article 2. Accordingly, both the Crown's right of governance and Māori authority and control are qualified by the unique relationship established by the Treaty. The essence of the principle of active protection is that, to the extent that is consistent with the Māori cession of sovereignty, the Crown is obliged to take positive steps to ensure that Māori interests under Article 2 are protected. What steps are required to be undertaken in any particular situation, and to what degree, is a question of fact and thus varies.

Pursuant to this Treaty principle, the Crown has a responsibility to protect Māori lands, estates, forests, fisheries and other taonga. This is "analogous to fiduciary duties."[116] In case law, such duties have been described as honourable conduct and fair process. Thus, active protection sometimes amounts to consultation rights for Māori. [117] However, in other circumstances, the Crown is required to allow Māori to continue to protect those things that are sacred to Māori.[118] But the duty is still on the Crown to take active steps to protect those Article 2 lands, estates, forests, fisheries and other taonga.

Taonga are things that are central to the identity of Māori: language, places, skills and resources, among other things. The definition of 'taonga' used by the Waitangi Tribunal is "any material or non-material thing having cultural or spiritual significance for a given tribal group";[119] further:[120]

> a taonga will have korero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested.

The Privy Council found that where a taonga is more vulnerable, the duty to protect it might be stronger.[121] The protection of taonga requires the Crown to consult with iwi when they make decisions regarding the taking or using of taonga, although this has not found to be a broad

[115] *Ngai Tahu,* above n 114, at 663.
[116] At 663.
[117] At 560.
[118] *MV Rena Final Report*, above n 19, at 13.
[119] Waitangi Tribunal, *Ngawha Geothermal Resource Report* (Wai 304, 1993), at 20.
[120] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into claims concerning New Zealand law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, (Wai 262, 2011), at 269.
[121] *Ngai Tahu*.

rule.[122] Active protection of taonga may also require Māori being entitled to a "reasonable degree of preference" in decisions about that taonga.[123]

Good faith

Both parties are expected to act in good faith at all stages of the Treaty process as "what matters is the spirit."[124] It is a particular role of the Crown to act in good faith to Māori.[125]

A key sign of good faith as well as partnership is consultation: the Crown should not make decisions without the input of tangata whenua.[126] Moreover, consultation must be meaningful. As held in the *Wellington Airport* case:[127] consultation is more than notification, and more than simply telling or presenting the results of a decision that has already been made. There can be a proposal but one that is not yet finally decided upon, and there must be sufficient time to comment on it. Consultation requires listening to what others have to say about it, considering their responses, and then deciding.[128]

> Consultation is not negotiation, for that involves two persons, which has as its object arriving at an agreement (although consultation may well lead to negotiation and agreement).

The nature of consultation with tangata whenua under RMA case law has been summarized as:[129]

i. The nature and object of consultation must be related to the circumstances.
ii. Adequate information of a proposal is to be given in a timely manner so that those consulted know what is proposed.
iii. Those consulted must be given a reasonable opportunity to state their views.

[122] Waitangi Tribunal, *He Maunga Rongo*, *Report on Central North Island Claims, Stage One* (Wai 1200, Vol 4, 2008), at 1234.
[123] See *Ngai Tahu,* above n 114. Where Ngai Tahu was held to be entitled to a "reasonable degree of preference" in the allocation of commercial whale watching permits due to the cultural significance of whale watching to Ngai Tahu and their exercise of kaitiakitanga.
[124] *Ngai Tahu*, at 663.
[125] *SOE Case,* above n 106, at 665.
[126] *Ngai Tahu*, at 663.
[127] *Wellington International Airport Ltd v Air New Zealand* [1993] 1NZLR 671.
[128] *Wellington International Airport.*
[129] *Land Air Water Association v Waikato Regional Council* Unreported A110/2001, Environment Court 23 October 2001, at [453]. Also reproduced in Ministry for the Environment, *Guidelines for Consulting with Tangata Whenua under the RMA: An Update on Case Law* (ME 496, December 2003), at [5.2].

iv. While those consulted cannot be forced to state their views, they cannot complain if, having had both time and opportunity, they for any reason fail to avail themselves of the opportunity.
v. Consultation is never to be treated perfunctorily or as a mere formality.
vi. The parties are to approach consultation with an open mind.
vii. Consultation is an intermediate situation involving meaningful discussions and does not necessarily involve resolution by agreement.
viii. Neither party is entitled to make demands.
ix. There is no universal requirement as to form or duration.
x. The whole process is to be underlain by fairness.

There will be instances where significant consultation could actually "hold up the processes of Government in a way contrary to the principles of the Treaty".[130] However, generally, some kind of input is required from affected Māori, even if it does not extend to following through with action in accordance with the wishes expressed. There is certainly no right of veto of the matter being consulted on.[131]

In a governance situation, consultation works best when it is formalised and regular, rather than ad hoc, and even better if it is institutionalised. However, it is dependent on an assessment of a decisionmaker as to when, how and with whom such consultations may be undertaken.

The tikanga of those being consulted may also help determine what is acceptable or reasonable conduct, and thus form part of best practice; however, following tikanga is not a requirement of consultation, at least in the RMA context.[132]

Development

The Court of Appeal has said that the Treaty must be regarded as a living instrument, capable of adapting to changing circumstances.[133] This includes the ability to develop and modify

[130] *Ngai Tahu,* above n 114, at 663.
[131] RMA case law stresses that tangata whenua do not possess a right of veto over resource management consent or planning proposals, although this is more because of the legislation than Treaty principles. See the discussion below in part VI.2.
[132] *Beadle v Minister of Corrections* NZEnvC [2002] NZEnvC 124, at [627].
[133] *SOE Case,* above n 106, at 655-656, per Cooke P.

traditional practices, such as to take advantage of scientific developments and modern technologies, for example, and uphold the Treaty principle of mutual benefit.[134] This has also been extended to a "principle of options", whereby Maori have the choice "to develop along customary lines", "to assimilate into a new way", or "to walk in two worlds", the last one of which "may represent the ultimate in partnership".[135] As a result, "[t]he Crown is obliged to offer reasonable protection to Maori in the exercise of the rights so guaranteed to them."[136]

Redress

When the Crown has breached the principles of the Treaty it has a duty to set matters right. The Court of Appeal in the *SOE* case found that there was a right of redress whenever there is a breach of the partnership.[137] The principle of redress requires the Crown to restore the integrity and mana of the status of Māori.[138] It has been argued that such redress requires mana tangata (the ability to reclaim and promote their identity in relation to the land), mana whenua (protection and use of the land), and mana rangatira (the enhancement of the relationship with the land).[139] Redress will involve compromise on both sides and should not create fresh injustice to other groups. There would be very few reasons where it would be justifiable to not grant any kind of redress.

The Treaty settlements between iwi and the Crown are provided as redress for Treaty breaches. The types of measures included have varied but typically include an apology, with cash paid and some Crown-owned land (and sometimes over natural resources) returned to the iwi. Additional cultural redress options vary depending on the circumstances, ranging from replacing English place names with their Māori names, to formal acknowledgements of association with land and

[134] Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (Wai 22, 1988), at 194-195. See also Waitangi Tribunal, *Radio Spectrum Management and Development Final Report* (Wai 776, 1999), at 52.
[135] *Muriwhenua Fishing Claim*, at 195.
[136] Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report* (Wai 27, 1992), at 274.
[137] *SOE Case,* above n 106, at 694.
[138] At 694.
[139] Jones, above n 2, at 101.

resources and consultation rights in relation to them, to formal guardianship of land and resources.[140]

2 Treaty Duties and Local Authorities

The Waitangi Tribunal has found that territorial authorities generally are agents of the Crown in relation to honoring Treaty obligations, and must thus give effect to and implement them. The High Court has affirmed this view and said that local government needs to "accept responsibility" for delivering on the Article 2 Treaty guarantees.[141] However, in relation to the RMA, the Environment Court has held that territorial authorities are not subject to uphold the Treaty duties, as the RMA only provides that they must "take into account" the principles of the Treaty (s 8).[142] The greater protections for Māori under the RMA are thus provided not via Treaty duties but via sections 6 and 7, specifying that decision-makers under the Act must provide for particular taonga to certain extents.[143]

Decisions on climate adaptation measures have typically been seen as the province of the RMA; local government is therefore subject only to RMA requirements and not to uphold Treaty duties more generally in these decisions (unless the higher courts should decide otherwise). Where decisions on climate adaptation measures might be made outside the RMA, such as pursuant to processes conducted under the Local Government Act, the same reasoning is likely to apply.[144]

However, even if local government is not legally required to uphold Treaty duties when undertaking RMA activities and decision-making, any breaches of Treaty duties that are caused by a local government authority – such as a failure to actively protect an Article 2 asset – could still give rise to liability on the part of the Crown, even if not liability on the part of the local

[140] For more information, see Catherine Iorns, "Reparations for Māori Grievances in Aotearoa New Zealand" in Frederico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, Oxford, 2008) 523, at 552-553. See also, Catherine Iorns, "Māori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment" 21:2 Widener Law Review 273 (2015).

[141] *Ngāti Maru ki Hauraki Inc v Kruithof* HC Hamilton CIV-2004-485-330, 11 June 2004 [2005] NZRMA 1, at [57].

[142] See, for example, *Seatow Ltd v Auckland Regional Council* [1994] NZRMA 204 (EC); *Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 (EnvC).

[143] See the discussion of ss 6(e), (f) & (g) and s 7(a), at part VI.2

[144] See Part VI, below, for discussion of legislative protections for Māori interests in the LGA and RMA.

government authority itself. (Although Crown liability may also depend on the Crown actions undertaken.)

3 Enforcement of Treaty duties

Where the Crown has breached the Treaty principles, Māori can lodge a claim with the Waitangi Tribunal for a determination of that breach and can request recommendations of measures for redress. Such claims can be about conduct from the historical past or about conduct (or legislation) that is happening today.[145] In order to lodge a claim it must be demonstrated how the law, practice, policy, action, or omission made by the Crown was inconsistent with the principles of the Treaty. It must then be shown how it prejudicially affected the claimant group.

While most claims pertain to the loss of land and resources by individual iwi and hapū, it is also possible for claims affecting all Māori to be made. Kaupapa claims are nationally significant, affecting Māori across the regions of New Zealand in broadly similar ways.[146] A wide range of kaupapa claims have been made, from culture and language, to the radio frequency spectrum and natural resources, to governmental institutional racism, for example.[147]

Generally, the Waitangi Tribunal can only make non-binding recommendations to the Crown.[148] It can recommend that Crown land be given to Māori as redress[149] but not private land.[150]

Where a Treaty duty is provided in legislation, that may be adjudicated in the normal way, such as via a claim before the High Court for judicial review.[151] Any Court decision is then binding. The precise legal duty will depend on the wording of the provision. For example, a wide but loose duty to "take into account the principles of the Treaty of Waitangi", such as in s 8 of the

[145] The *SOE* case is an example of an action by the Crown going through the Tribunal process to settle whether a decision made by the government of the day was correct given the principles of the Treaty. See, *SOE Case,* above n 106.
[146] Waitangi Tribunal, *Te Rohe Potae Inquiry: Scope of inquiry issues* (Wai 898, 2012).
[147] See, for example, Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wai 26, 1990); Waitangi Tribunal, *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017).
[148] Treaty of Waitangi Act 1975, s 6(3).
[149] Section 8A-8I.
[150] Section 6(4A).
[151] For more information see, Philip Joseph, *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014).

RMA will be fairly easily satisfied by a decision-maker considering the principles and what is required of them, even if they decide not to uphold them in their final decision. It is much harder to satisfy a duty to uphold or to "not contravene" the principles of the Treaty. In between these are more specific provisions referring to individual duties or protection of specific taonga (such as rights to consultation in specific decisions in particular ways, or rights to protection of specified interests[152]).

Even where the Treaty is not enshrined in legislation, it may be used as an aid to interpretation, and can thereby affect a legal duty. Note that interpretations can change over time as Treaty principles evolve in response to changed circumstances and application. Thus some Treaty principles may be implied in situations that might not have been envisaged previously.

4 Climate claims in the Tribunal

Existing Waitangi Tribunal claims relating to climate change have been about the mitigation of emissions, even while claimants have clearly got the future adverse effects of climate change firmly in their minds. The Waitangi Tribunal has already determined that emissions mitigation is a kaupapa issue because of the need to act to prevent harm to Māori coastal property around the whole country.[153] Issues in relation to coastal climate adaptation will vary, with some affecting all Māori coastal property owners, while some will be specific to individual hapū, iwi and/or regions.

Wai 898

In 2012 a claim for Governmental action on climate change was made in relation to New Zealand's 2030 emissions reductions targets. The Te Roopu Huringa Aahurarangi heard that the Crown needs to reduce greenhouse gas emissions to reduce the threat of climate change to Māori.[154] They argued that the current goal set for 2030 is "in breach of Treaty principles because it does not seek to take all reasonable steps to prevent the threat to Māori."[155] That there will continue to be an increase in greenhouse gas emissions is "a breach of Treaty

[152] See, s 14 EEZ Act.
[153] *Te Rohe Potae,* above n 146, at 10.
[154] At 10.
[155] At 10.

principles in relation to Māori children and youth today and immediate next generations who will have to pay significant costs" because of the delayed action on climate change mitigation today.[156]

This claim was deferred because the claimed breach affected not only the rōpū involved in this hearing; instead, all Māori would be affected such that the Tribunal said that the claim needed to be run as a kaupapa claim. Such a kaupapa claim would "require an examination of Crown policy and action throughout the period from 1840 to date."[157]

Wai 2607

The Wai 2607 Claim is a climate change claim lodged by the Mataatua District Māori Council in 2017. The aim was to hold the Government to create more ambitious climate change policies. The claimants argued that in order to protect taonga, the Crown should be planning for potential effects of climate change.[158] Acknowledgement of the costs of acting and not acting on climate change should include consultation with affected parties. As the claimants were likely to be affected by coastal hazards in the future, they wanted the Treaty obligations to compel the Crown to act. It was argued that in "failing to implement adequate policies to address ongoing detriment and future threats posed by global climate change" the Crown was breaching its obligations to Māori.[159] This claim was found to be better addressed in a kaupapa claim. No timeframe has been indicated by the Tribunal, but it has been indicated that they will not start to look into 'contemporary claims' until after 2020.[160]

5 Treaty duties relevant to the handling of a disaster: The MV Rena

To my knowledge, there have been no claims to the Waitangi Tribunal for the handling of natural disasters such as floods or earthquakes. There has been a complaint to the Tribunal about the central and local government handling of the aftermath of the wreck of the MV Rena. This section examines the Tribunal findings in respect of this claim.[161]

[156] At 10.
[157] At 10.
[158] Wai 2607, *Memorandum*, above n 67 at [19].
[159] At [1].
[160] See Nicole Smith, *Climate Change Disputes and the Rights of Affected Populations: A Global Stocktake and a Review of the New Zealand Approach* (Paper submitted for the AMINZ-ICCA International Arbitration Day in Queenstown, New Zealand, 19 April 2018).
[161] Some material in this section comes from the author's article. See, Catherine Iorns "Access to Environmental Justice for Māori" 20 Yearbook of New Zealand Jurisprudence 129 (2017).

The MV Rena disaster event is not equivalent to current decision-making on climate adaptation measures; nor it is at equivalent to a sea-level rise-induced flooding event, with the MV Rena wreck being a man-made disaster with adverse effects on nature as opposed to a natural weather event with effects on housing, for example. However, it is illustrative of how the Tribunal might consider claims of Treaty breaches about the government's handling of such a disaster. Further, it provides lessons for likely Treaty duties in relation to adaptation decision-making.

Background

On the 5th of October 2011 the MV Rena (hereinafter, Rena) was grounded on the Astrolabe reef (Otaiti) carrying over 1,733 tonnes of oil. Salvage operations began immediately after the event but a tropical storm on 7 January 2012, which caused the ship to be split in two, caused cargo and debris, including 1700 tonnes of oil, to be spilled onto the reef and nearby beaches. It caused the deaths of many marine animals including thousands of seabirds.[162] The stern section remained submerged on the reef, leaking contaminants.[163] Volunteers removed more than 1000 tonnes of oil and debris from the beaches.[164] A two nautical mile exclusion zone around the wreck was established and a clean-up plan put in place.[165] The Rena disaster is considered to be the worst marine environment disaster in New Zealand's history, and amounted to the second most expensive salvage operation ever recorded.[166]

Later in 2012, the owner of the Rena, Daina Shipping Company, was found to be criminally liable under the RMA for the discharge of harmful substances into the sea, and was fined $300,000.[167] The shipping company was also liable under the Maritime Transport Act for the removal of the

[162] A figure of 20,000 was initially reported on Newshub and 3 News as the potential amount of bird deaths. This number was later found to be unverifiable and likely hyperbolic. See the post of Michael Szabo at <www.birdingnz.net/forum/viewtopic.php?t=1766> for the text of the initial 3 News piece.
[163] *Decision of Panel on MV Rena Resource Consent Applications* (Astrolabe Community Trust, February 2016), at [35].
[164] K Smith and others, "Local volunteers respond to the Rena oil spill in Maketu, New Zealand" (2016) 11 Kotuitui: New Zealand Journal of Social Sciences Online 1, at 9.
[165] Rena Long-term Environmental Recovery Plan 2011.
[166] *MV Rena Final Report,* above n 19, at 1.3.2.
[167] *Maritime New Zealand v Daina Shipping Company* (Unreported, CRI-2012-070-001872, DC Tauranga, 26 October 2012), at [17].

wreck,[168] for remedying the hazard to navigation,[169] and senior crew-members including the master of the ship were found guilty of operating a vehicle in a manner likely to cause danger.[170]

In late 2011 the Crown had moved from the initial emergency response into a recovery phase. This consisted of two initiatives running in parallel: the first involved the creation of a comprehensive recovery plan by the Ministry of the Environment with input from key government agencies; the second involved confidential negotiations with Rena's owners and insurers, primarily in an effort to recoup some of the $47 million that the Crown had spent on clean-up activities. Both the owners of the Rena and their insurer were well-established companies in the international maritime industry.[171] A crown witness in the Waitangi Tribunal hearing subsequently stated that there was a strong public demand for the government to not bear the clean-up costs. However, they noted that liability in both New Zealand and international law was limited to $11.3 million.[172]

As a result of their negotiations, the Crown signed three deeds of settlement with the Rena's owners. However, the Crown did not consult with Māori prior to entering into these deeds. The deeds recovered $27.6 million for the Crown in exchange for indemnifying the owners for any subsequent liability, whether brought by a public or private actor, up to $38 million. However, one of the deeds known as Wreck Removal Deed contained provision wherein the Crown would receive $10.4 million from the company if a resource consent was granted to leave the stern of the ship on the reef. Additionally, this deed specified that the Crown would consider "in good faith" whether to submit in support of the application for the stern to remain.[173]

Even while the wreck remained on the reef, by 2013 the physical effects outside the reef were much improved;[174] by 2015 it was considered by many to be a matter solely for history.[175] However the impact on Māori lasted longer and, for some, continues today. For local Māori,

[168] Maritime Transport Act 1994 s 248(2)(a). See also Astrolabe Community Trust, above n 163, at [9].
[169] Maritime Transport Act 1994 s 248(4)(b)(iv); see also Astrolabe Community Trust, at [9].
[170] *MV Rena Final Report*, above n 19, at 1.3.3.
[171] *MV Rena Final Report,* above n 19, at 1.3.4.
[172] At 3.2.
[173] A similar deed was reportedly signed by the Regional Council, but this was not at issue in the subsequent urgent inquiry in the Waitangi Tribunal. *MV Rena Final Report*, above 19, at 1.3.5.
[174] Astrolabe Community Trust, above n 163, at [349].
[175] See, comments in 2015 by the Bay of Plenty Mayor that, for the average Bay of Plenty resident, the Rena disaster was "out of sight, out of mind". Jamie Morton "Rena: What to do with a shipwreck" (7 September 2015) New Zealand Herald <www.nzherald.co.nz>

both on the mainland and those based on Motiti Island near the reef, Otaiti is a tipuna and "an important tāonga and wāhi tapū; and…a significant mahinga kai (traditional food gathering place)".[176] For some, Otaiti is also a toka tapū, where the spirits of the deceased depart for Hawaiiki.[177] It is thus a site of spiritual significance and the physical damage to Otaiti thereby damages its mauri (life force). Because of this connection to Otaiti and the regard in which iwi held it, they were severely affected by the grounding of the Rena. The mana of kaitiaki suffers from an inability to protect the physical and spiritual health of the reef – their tipuna (ancestor) – and the physical and spiritual health of the Otaiti kaitiaki (guardians) suffered in turn.[178]

In May 2013 the Waitangi Tribunal received two applications for urgent inquiries into Crown conduct around the handling of the Rena. A year later, the Waitangi tribunal released a statement of issues, limiting the scope of the inquiry into the conduct of the Crown when entering into the Wreck Removal Deed, and the then pending decision of the Crown with respect to whether it would submit in support of the consent application to leave the Rena on the reef.[179] An interim report was released by the Waitangi Tribunal with recommendations for how the Crown ought to consult with Māori in order to better facilitate Māori input into the forthcoming hearings. By the time the Tribunal had released its final report in November 2014, the Crown had already made a submission partially in opposition to leaving the wreck on the reef, although the consent panel had not rendered a decision. The application to leave the wreck on the reef was subsequently approved in February 2016,[180] and later affirmed in 2017 by the Environment Court.[181]

Obligations of the Crown

Having previously identified reefs as being tāonga, the Tribunal was quick to identify Otaiti as having this status, while also noting that the Crown had only accepted this status very late in the hearing.[182] They also noted the broad impact to local Māori of the Rena's presence on the reef. This ranged from the more readily tangible, such as the fact that the exclusion zone

[176] Astrolabe Community Trust, at [536].
[177] At [637].
[178] *Ngai Te Hapū*, above n 87, at [95] and [99].
[179] *MV Rena Final Report,* above n 19, at 1.4.
[180] Astrolabe Community Trust, above n 163.
[181] *Ngai Te Hapū,* above n 87.
[182] *MV Rena Final Report*, at 2.2-2.3.

prevented fishing grounds from being accessed, to the more intangible damage to the mauri of the reef due to the presence of the wreck.[183]

The Tribunal also noted that the facts in the case were unusual, in that damage to a tāonga had been caused by a third party rather than the Crown. It was not seriously submitted by any of the Claimants that the Crown was responsible for removing the wreck rather than the Rena owners.[184] Nevertheless, the Crown was still required to undertake consultation, both to guarantee that it was adequately informed about the relationship between local hapū and iwi to Otaiti, and to preserve the relationship between local Māori and Crown, prior to entering into confidential commercial negotiations. As such, the Crown was obligated to have done the following:[185]

- recognise which hapū and iwi have interests in Otaiti;
- identify the nature of the relationship of these hapū and iwi to Otaiti and the interests that arise from that relationship, paying particular regard to the cultural and historical significance of the reef and whether the hapū or iwi say that the reef is a tāonga and that they are kaitiaki;
- understand how the Rena grounding has affected that relationship;
- consult on important issues concerning tāonga if Māori interests were likely to be affected and if it was reasonable to do so in the circumstances, having regard to the nature of the resource or tāonga and the likely effects of the policy, action, or legislation; and
- ensure that any actions, policies, or agreements were informed by, and took proper account of, Māori interests, where those interests were potentially affected.

Having identified the relevant Crown obligations, the Tribunal moved on to evaluating whether these obligations were breached during the commercial negotiations, or subsequently in its conduct surrounding the resource consent application for the wreck to remain.

[183] At 2.3.
[184] At 2.3.
[185] At 2.4.

Did the Wreck Removal Deed breach the Crown's obligations?

To answer this question, the Tribunal addressed two further issues: firstly, whether the obligations incurred under the Wreck Removal Deed affected or had the potential to affect Māori interests in the reef; and, secondly, whether the Crown discharged its obligations before entering into the Wreck Removal Deed.[186]

On the first issue, the Tribunal examined the Crown's obligations before and after the agreement was signed, paying close attention to Clause 4. That clause obligated the Crown to "in good faith consider making a submission or submissions in support of the Consent taking into account the environmental, cultural and economic interests of New Zealand and the likely cost and feasibility of complete removal of the Wreck".[187] They concluded that the Clause 4 obligations went beyond the Crown's typical response to a resource consent application.[188] Firstly, they noted that the contractual obligation to the Rena owners could not be reconciled with the Crown duty of good faith to Māori given that the interests of the two parties were starkly opposed. Secondly, they found that the clause did not represent a normal weighing of the national interest given that the "cost and feasibility" consideration was weighed towards the Rena owners, and that the reference to "cultural" interests was insufficiently precise in terms of protecting Treaty interests. Finally, and most importantly, the Tribunal noted that the possibility of receiving an additional $10.4 million was clearly a consideration in the Crown's decision-making.

On the second issue, the Tribunal found that the Wreck Removal Deed had the potential to impact on Māori interests despite not directly obliging the Crown to support the application. The Tribunal noted that an all-of-government submission, as contemplated by the Wreck Removal Deed, had the potential to be very influential on the process given the substantial resources available to it, especially when compared to the comparatively under-resourced position of local Māori. Furthermore, the potential impact of a Crown submission would have been known to the Rena owners, hence their willingness to include Clause 4 of the Wreck Removal Deed.[189] The language of Clause 4 thus put "the owners in a special position in relation

[186] *MV Rena Final Report,* above n 19, at 3.1.
[187] At 3.3.
[188] At 3.3.2(2)(a).
[189] *MV Rena Final Report,* at 3.3.2(2).

to a potential resource consent application".[190] The Tribunal therein held that Māori interests were potentially affected by the inclusion of clause 4.

The next question to be asked was whether adequate consultation was carried out given the potential for Māori interests to be affected, and the circumstances facing the Crown. The Tribunal noted that the Crown's right to govern clearly included entering into commercial agreements with third parties to recover expenditure in situations like the Rena disaster.[191] However, the Tribunal was required to investigate whether the Crown was adequately informed of Māori interests before entering into the Wreck Removal Deed, and whether consultation was necessary prior to entering into the agreement.[192]

On the first issue, the Crown was found to have adequate general knowledge of local interests to begin commercial negotiations for cost recovery, largely because of the parallel process being carried out by the Ministry of Environment to create a recovery plan. However, when the negotiations began to contemplate the possibility of leaving the Rena on the reef, additional consultation was required to make an informed decision.[193] The Tribunal did not accept the argument that from the Crown that consultation was not possible in the circumstances because the Rena owners may have walked away from negotiations and/or declared bankruptcy. This characterisation of the Rena owners and their insurer did not stand up to scrutiny. Moreover, the claim that consultation would have breached commercial confidence was dismissed.[194]

Did the Crown's consultation prior to the consent hearing breach the treaty?

The Tribunal released an interim report prior to the Crown giving submissions in the consent hearing to leave the wreck on the reef. The interim decision of the Tribunal formed part of the final decision released after the Crown had given its submissions. The interim report concluded that Crown consultation had occurred within overly tight timeframes and that, moreover, the Crown had failed to give proper assistance and/or resourcing to Māori to participate in the consultation process.[195] The interim report also held that the funding available to Māori to take

[190] At 3.3.2(3).
[191] At 3.4.2**.**
[192] At 3.4.2.
[193] *MV Rena Final Report,* at 3.4.2(1).
[194] At 3.4.2(2).
[195] At 54.

place in the consenting process was insufficient because, firstly, no funding was available to Māori for preparing for the initial consent hearing, and, secondly, the limit amounts of funding available for the inevitable hearing in the Environment Court ($40,000) would be insufficient given the complexity of the issues in the case. Moreover, the absence of funding during the initial consent hearing would prove to be a permanent setback to fully participating in the subsequent process in the Environment Court.[196] Given these findings, the Tribunal gave its initial conclusions that the Crown was not adequately informed of Māori interests and values pertaining to Otaiti as a tāonga, and that Māori were unequipped to engage in the consenting process.[197] In particular, the Tribunal highlighted the particular plight of Motiti Māori:[198]

> On the evidence before us, it is clear that they will consider themselves to have been left alone to suffer the consequences of a decision in which they played no meaningful part and through which they were rendered powerless to protect their tāonga.

The interim report of the Tribunal recommended that the Crown give particular consideration to the position of local Māori when deciding to make a submission on the consent application, and that, if the Crown was to make a make a submission, then they ought to give a degree of active protection to local Māori in the content of the submission, including that the reef was a tāonga and therefore of national significance.

The findings of the Tribunal in their eventual decision softened given that the Crown had submitted in partial opposition to the wreck remaining on the reef; because of this, the full adverse impact on Māori interests of a supportive submission had not come to pass.[199] However, the Crown was still criticised for failing to identify the reef as a tāonga, instead submitting that local Māori viewed the site as a tāonga. Moreover, the Tribunal continued to criticise the lack of additional funding available for local Māori to contribute to the consenting process. As a final note, the Tribunal also drew attention to the damage that had been done to the relationship between local Māori and the Crown.[200] It therefore recommended that the Crown take an active protection role in its submissions to the Environment Court, including making a firm statement on the tāonga status of the reef, and also make additional resourcing available for local Māori to participate in those hearings.[201]

[196] At 54-55.
[197] At 57.
[198] At 58.
[199] *MV Rena Final Report,* at 4.3.3.
[200] At 4.2.3.
[201] At 4.4.

Hearing in the Environment Court

In February 2016 the decision-making panel on the application to leave the wreck on the reef found that "the hapū of Motiti have kaitiaki responsibilities for Otaiti that outweigh others"[202] due to their direct proximity to the reef and reliance on the surrounding sea being "carefully managed and cared for so that it can sustain the people of Motiti".[203] It noted that, if the proposed conditions of consent were accepted, there would be significant effects on Māori values; the panel decided that this was a matter to "weigh in the balance" when evaluating the application and in coming to their decision.[204] However, despite being weighed in the balance, the Motiti hapū concerns were outweighed and a resource consent was granted allowing the wreck to remain on the reef. The decision-makers had considerable concerns that they did not have any authority to order removal of the wreck – merely to consent it to remain or not. They instead wanted to be able to impose conditions on that consent which would enable both procedural and substantive concerns of kaitiaki to be better upheld in the future. The only way to impose and enforce such conditions would be if they imposed them upon a grant of consent. Thus the resource consent was granted with conditions including for "the establishment and maintenance of a Kaitiakitanga Reference Group" involving kaitiaki, which would be involved with monitoring and with an Independent Technical Advisory Group.[205]

The decision was accordingly appealed to the Environment Court by Ngai Te Hapū Incorporated, Te Runanga o Ngai Te Rangi Iwi Trust, and Nga Potiki a Tamapahore Trust. The Environment Court issued the main judgement in May 2017.[206] Notably, Fox DCJ of the Māori Land Court presided in this decision. In assessing application of the provisions of the RMA to the case, the Court spent considerable time discussing the relevant Māori values, paying particular attention to the mauri of the reef.[207] Most important was the evidence of two Māori experts, one a diver and marine salvage expert, the other a marine scientist. Extensive evidence was provided about the recovery of the reef, including photographs and "video footage taken just prior to the commencement of the hearing".[208] The evidence was that "the remains of the wreck have now

[202] Astrolabe Community Trust, above n 163, at [623].
[203] At [623].
[204] At [653].
[205] Astrolabe Community Trust, above n 163, Appendix 1, at 2.
[206] *Ngāi te Hapū,* above n 178.
[207] At [94].
[208] At [19].

been covered by marine organisms, which appear similar to those on the balance of the reef", "that the wreck area has aquatic life of diversity and abundance similar to other areas of the reef," and that most of the "taonga species identified in the Regional Plan had been sighted." [209] The Court concluded "that nothing further at this stage can be done to actively protect the taonga that is Otaiti, as it would not be reasonable to require it in the circumstances."[210]

The combination of evidence "convinced Te Arawa Ki Tai and Te Patuwai to desist from requiring further removal" of the wreck.[211] As a result, five of the seven appeals were withdrawn, [212] leaving only those by Ngai Te Hapū and Nga Potiki.[213] The Court noted that "at the time the original application for these consents was filed a majority of Māori groups within the Bay of Plenty were opposed to the wreck being granted consent and wanted it removed." Yet the intervening evidence and extensive discussions about possible future conditions of consent meant that most parties "have now either withdrawn or reached a position with the Applicant where they consider their concerns are addressed".[214]

The Court was persuaded heavily by this, as well as by the evidence about recovery and the practical matters in relation to any further salvage work; it granted consent for the broken tanker to stay on the reef. The Court also noted its lack of jurisdiction to order removal of the wreck, and that the conditions offered by the applicant meant that the consent met the requirements of the RMA.[215] Notably, the Court also considered that the "granting of a consent recognises and provides for mauri better than the refusal of any consent":[216] a consent would give "an opportunity to explicitly give recognition to concerns of the various groups" and it allowed for the "provision of the Kaitiaki Reference Group".[217] Overall, the granting of consent was the best way to "positively recognise and provide for Māori" in regards to the ongoing substantive effects of the wreck.

[209] At [19].
[210] At [109] and [136].
[211] At [109].
[212] At [4].
[213] At [3].
[214] Ngāi Te Hapū, at [167].
[215] At [226] and [407].
[216] At [192].
[217] At [192].

Potential application to climate adaptation issues

The Rena saga is in some ways unique, given the enormous costs that the Crown was needing to recoup and the international dimension to the commercial negotiations. However, other aspects are likely increasingly relevant to climate adaptation initiatives, especially those involving managed retreat – i.e., circumstances in which the Crown is needing to engage in negotiations with third parties for the expensive removal of an asset now posing a risk to the coastal environment. The Rena saga is also relevant to circumstances involving major coastal flooding and disaster clean-up. Furthermore, the Rena saga also demonstrates that the power to order the removal of chattels from the coastal marine area is not always clear-cut; negotiations and commercial agreements may provide the best - or perhaps only - means of recouping the cost of cleaning up the coastal environment.

The Rena saga shows that the Treaty obligations of active protection and partnership, especially the facilitation of consultation, will apply no matter what the process is. This includes commercial negotiations with an overlay of confidentiality and urgency. In the Rena saga, there was considerable urgency to the Crown's negotiations, and yet consultation obligations were still found to exist. Therefore, it is unlikely to imagine consultation not being required in any instance of planning for climate adaptation measures, including managed retreat and/or widespread compensation/acquisition along the lines of what occurred after the Canterbury earthquakes. In other words, any current or future Crown agency, such as equivalent of the Canterbury Earthquake Recovery Authority, would need to consult with Māori with respect to the clean-up of former residential sites. The situation would be less clear if any agency carrying out climate adaptation was a creation or arm of local government; but the Crown would still be ultimately answerable for any Treaty breaches that were found to have occurred.

Moreover, the Crown will need to be careful if any negotiations for the removal of property from the coast involve undertakings with respect to future submissions in the consenting process. It is conceivable that property owners faced with the hazards of climate change may wish to leave certain structures and materials where they currently are rather than paying for a full clean up. If the Crown is to take on these obligations, then it must make sure that it does not enter into duties which conflict with its duty of good faith to Māori, and must do what it can in the submission process to actively protect Māori Treaty interests.

It is also conceivable that local government and/or the Crown could enter into commercial agreements for future removal processes significantly in advance of sea-level rise and/or climatic hazards reaching dangerous levels – for example, by entering into long term leaseback arrangements with a clean-up clause, or agreements to remove property as a precondition to allowing new coastal development to occur. In these scenarios, the Crown agency would be wise to make sure that what is agreed to will not adversely affect Māori at some future date.

Another relevant scenario concerns the erection of protection structures in the coastal area – most notably sea walls, or large structures placed in the ocean to alter sea-flow. It is not uncommon for these structures to be funded through private-public partnerships, and therefore through commercial negotiations between local government, local residents or businesses, and the Crown. In such instances, Māori will need to be consulted, and the Crown will need to be careful about any undertakings regarding submissions in future consent hearings. Furthermore, even if commercial negotiations are not at issue, the Crown is potentially still obliged to make submissions in protection of Māori interests when climate adaptation initiatives are being decided upon.

Conclusion

Treaty duties require that Māori be involved in all or most adaptation decision making, including beyond the processes provided in the RMA. These duties are placed on the Crown but, if local government are making the decisions, the duties need to be upheld in order to help avoid the creation of future Treaty breaches on the part of the Crown. This will require consultation, but also more active facilitation/resourcing to allow genuine Māori input into whatever strategies are decided upon.

V. Treaty obligations relevant to climate adaptation

There has been no Treaty claim yet brought on decisions about climate adaptation measures, and thus no determination of what the Treaty principles may require in this respect. However, it is possible to make some suggestions for what Treaty obligations might require of climate adaptation decision-making, based on previous determinations of Treaty principle requirements.

The Crown, for its part, must not create policies and laws that undermine the ability of iwi to protect the land. In the case of climate adaptation, this is hard because the duty is on the Crown, yet many – if not most – climate adaptation decisions are made by local and regional government under the RMA. Thus, under current law, even if actions of local government breach the Treaty guarantees, any claim will be made against the Crown, and thus will be defended by central government. However, councils have decision-making powers that have been delegated by the Crown and, especially as they are generally considered to be a delegated Treaty partner, they are exercising some of those functions and should do so in order to avoid creating Treaty breaches, even when acting under the RMA. Notably, it is hard for local government to comply with the Treaty when some of the procedures and standards in the RMA that it operates under have already been held to breach the Treaty of Waitangi. Thus, simple compliance with the legislation may not be enough to avoid a Treaty breach. If they are to avoid breaching Treaty guarantees, councils will need to be thinking of more than simple compliance and, instead, thinking of best practice in line with the Treaty principles.

Central government should provide guidance on how to best uphold the Treaty principles, particularly on procedural and substantive standards to protect Article 2 Treaty assets in climate adaptation decision-making. This will be most helpful for local government, but also for central government decision-makers with responsibility for decisions in coastal marine areas.

1 Applying the Treaty Principles to climate adaptation

Active protection of taonga

Active protection entails ensuring that Māori continue to have rights to and relationships with their lands, estates, forests, fisheries and other taonga; it is vital to upholding the Treaty.

Climate change calls for protection of many taonga at once. Not all property of significance will be able to be spared from coastal hazards. New Zealand should therefore begin planning ahead for adaptation measures such as managed retreat, even from sacred and fertile lands, in order to mitigate economic and cultural harm. In order to comply with Treaty principles, councils will need to be paying particular attention to the active protection of things that are protected by Article 2.

Maintaining kaitiakitanga

Active protection suggests the maintenance of Māori relationships with the coast. This entails the protection of tikanga and mātauranga Māori that underpin it. Thus perhaps the first priority of climate adaptation measures should be attempts to enable tangata whenua to live on or near the coast, in order to maintain those relationships. If that will become difficult with sea-level rise and related inundation, then the next priority is to find other ways to maintain those relationships.

This also suggests that central government funding – i.e., central government as the Treaty partner – should first be directed towards maintaining those relationships. There may be a greater duty to Māori than to the general population because of the special nature of the relationship with the environment and the coast, especially where there are marae and Māori lands. This has to be seen in the light of the history of Treaty breaches that has seen the alienation of most Māori land, therefore requiring more rigorous efforts to protect remaining lands.[218]

Resources may be needed to *protect* existing sites or infrastructure, or for modifications to be made to important Māori assets to *accommodate* climate change. For example, Māori may wish to maintain a presence in a hazardous coastal area due to an ancestral connection, but might require assistance or a special resource consent to allow a building to be made removable upon sea-level rise trigger points being reached.

The other aspect relevant to the protection of mātauranga Māori is the use of mātauranga Māori in order to assist climate adaptation, especially of Māori communities. Local knowledge

[218] *Grace v Minister for Land Information* [2014] NZEnvC 82.

can be used to amplify scientific knowledge in order to identify "options to eliminate and/or at least minimize" the worst effects as well as build capacity to adapt to future changes in/to the land and weather.[219] In one study, in conjunction with a Māori community, "[t]he maintenance of close relationships with the land and sea were acknowledged by a number of interviewees as crucial to understanding, and dealing with, local hazards and environmental risks."[220]

Prohibiting new development in the coastal environment

One of the easiest climate adaptation measures for councils is to prohibit new development in the coastal environment. All development of Māori land is subject to the same resource management regulation as other development on other kinds of land. If a hapū want to build on their land but there is science indicating that land might be susceptible to coastal inundation, it will be subject to the resource management regime which balances avoidance of the future risks of coastal hazards with the maintenance of kaitiakitanga and the protection of Māori relationships with the coastal environment. In the past, the Environment Court has held that a cultural relationship can outweigh - and justify taking some risks of - future coastal hazards.[221] However, this decision was made on the previous NZCPS and prior to the MfE and DoC *Guidance*. Because these current laws and policies prioritise the avoidance of future risks from coastal hazards, it is likely that the same situation that was approved beforehand would not be so approved today.[222] There is thus a real issue as to how far climate adaptation can affect the maintenance of cultural relationships with the coastal environment, not to mention override the Treaty principle of a right to development of Māori land and Article 2 assets.

Identifying Article 2 assets and taonga at risk

The first substantive step is arguably the identification of culturally significant coastal land, resources and other taonga that will be at risk of inundation. Only if they are identified can they be considered in any discussion of climate adaptation measures with a view to their protection in a culturally appropriate way. Some taonga can be easily identified, such as marae and Māori land, and should be clearly mapped. Currently, while maps of marae and Māori land exist, there is not easily accessible information about the position of marae regarding sea level and

[219] King, *Coastal Adaptation*, above n 16, at 6.
[220] King, *Coastal Adaptation,* above n 16, at 7.
[221] See, for example, *Hemi,* above n 15.
[222] See Case Study 5, at Part VIII.5, below, which revisits the *Hemi* case in light of the more recent developments in law and guidance.

projections of potential risks in one place.[223] For example, Māori land maps show that a significant proportion of Māori land is low lying; but, in respect of marae, they do not identify vulnerabilities to sea-level rise such as from:

- the type of ground the buildings are on;
- the height of the buildings off the ground;
- any existing protections from inundation and other coastal hazards;
- the value of the property;
- whether it is insured.

Further, regional councils each have their own mapping websites and disparate policies whereby a national dataset is not always available. This is relevant when Treaty liabilities will fall on the Crown.

Identification of any wāhi tapu may be sensitive such that it is not appropriate to simply call for a requirement of active mapping and registration by territorial authorities, such as for the purposes of district plans. However, the issue of identification should at least be considered in discussion with tangata whenua, in an appropriate manner.

It would be helpful to clearly identify who needs to undertake such identification and impose such a requirement. (E.g., this may depend on jurisdiction such as under the RMA. Around the coast, this may be fragmented between different local government authorities and the Department of Conservation, and this will presumably be varied over time as the sea-level rises.[224])

Coastal protection works

In the choice of coastal protection works, active protection of taonga requires that decision-makers consider the protection of the tapu and mauri of the place, and how that will be best facilitated and not diminished. For example, erosion of the foreshore in order to protect coastal residential housing may not accord with tikanga nor the protection of the mauri of the foreshore, nor thus of the mauri of the tangata whenua themselves. Natural measures such as dune or wetland enhancement will typically be preferred, especially if they may enhance the

[223] See, for example, Māori Maps, above n 93.
[224] See the discussion of the coastal zones in sections II.3 and II.8, above.

mauri of the area in question. Thus, involvement of Māori in decision-making will be necessary in order to determine what kinds of coastal protection works are most appropriate in an area.

Even if coastal protection works are funded through private-public partnerships, and therefore through commercial negotiations between local government, local residents or businesses, and the Crown, Māori will need to be involved in the decision-making. Importantly, as was demonstrated in the Rena saga, in all resource consent applications for coastal protection measures, the Crown is potentially obliged to make submissions in protection of Māori interests.

Managed retreat

The strong tie between specific groups of Māori and the land and other natural features from which their ancestors came makes replacement of that land or other features very difficult. The Waitangi Tribunal and the Courts have both determined that it is a Treaty principle that traditional territory is not fungible and should not simply be replaced by other land of comparable economic value, for example. The DoC *Guidance* notes that it is suggested that discussion of managed retreat as an option "detracts from the need for adaptation policies to allow people to 'lead the kind of lives they value in the places where they belong'".[225] Managed retreat will thus obviously be a last resort for tangata whenua.

Where managed retreat needs to be discussed, decisions will need to be made about how and whether Māori who jointly own a piece of land will move away from it even when they likely have ancestral connections to it. These decisions should be made by the affected tangata whenua, in conjunction with central government if necessary; tangata whenua will likely need to be at least an equal partner in decision making.

Where these decisions are about ancestral lands, decisions made by councils alone, and not in partnership with Māori will not be consistent with Treaty principles. If there were state-sponsored relocations there would have to be truly joint decision-making, more than just consultation, and more than significant consultation. It may be best dealt with centrally, given the Treaty partnership, but it is expected that local and/or regional government would also become involved.

[225] Department of Conservation, *NZCPS Guidance Note: Policy 2: The Treaty of Waitangi, tangata whenua and Māori heritage* (2017), at 31, quoting Neil Adger and Jon Barnett, "Compensation for climate change must meet needs" (2005) Nature 435 at 328.

Where managed retreat from coastal land is necessary, there may be opportunities to move inland, including to land that the iwi has a proven connection with. However, the right to retreat would be hindered if the inland property was privately owned.[226]

If there is to be managed retreat from the coast, relationships with traditional territories would still need to be maintained even in the absence of ownership. For that, access is needed. Access maybe easier to achieve in relation to the coastal marine environment than for some other lands near the coast, because of the public access. This should be taken into account in relation to any relocation back from the coast.

It is conceivable that property owners faced with the hazards of climate change may wish to leave certain structures and materials where they currently are rather than paying for a full clean up. If the Crown is to take on these obligations, then it must make sure that it does not enter into duties which conflict with its duty of good faith to Māori. For example, it must do what it can by way of submission in the consenting process in order to actively protect Māori Treaty interests. As with the Rena, the Treaty obligations of active protection and partnership, especially the facilitation of consultation, will apply, even in confidential, urgent and/or commercial negotiations.

It is also conceivable that local government and/or the Crown could enter into commercial agreements for future removal processes significantly in advance of sea-level rise and/or climatic hazards reaching dangerous levels – for example, by entering into long term leaseback arrangements with clean-up clauses, or agreements to remove property as a precondition to allowing new coastal development to occur. In these scenarios, the Crown agency would be wise to make sure that what is agreed to will not adversely affect Māori taonga in the future.

Insurance

The Earthquake Commission (EQC) provides a public insurance safety net for those caught up in natural disasters. While, its scheme covers a range of damage including from storms, floods, and

[226] For example, it would be a stretch to argue that a managed retreat would count as a 'public work' for the purposes of a Public Works Act compulsory purchase. Public Works Act 1981, s 2, meaning of 'public work'.

landslips, EQC coverage will not extend to gradual inundation from sea-level rise, only sudden flooding events. Nor will money for erosion and instability be able to be paid out until any risk of collapse is imminent; thus, the current scheme will not pay for any managed retreat from the coast in advance of an urgent need.[227]

In response to forecast private insurance retreat from future coastal hazard risks, there have been public calls for EQC to step in to the breach and/or for the government to provide insurance for such properties.[228] However, even if such insurance is provided, it can only form part of compensation or redress after damage from inundation such as from sea-level rise. It is hard to see how EQC-type insurance compensation would amount to actively protecting the Treaty assets such as coastal marae; active protection seems to require more substantive action rather than compensation in the event of a loss.

I note that EQC is a Crown entity thus their actions can be both judicially reviewed and claims can be made to the Tribunal about breaches of obligations under the Treaty of Waitangi.

2 Decision-making procedures: partnership and consultation

Crown

Climate change is as important to Māori as the sale of state assets, for example, because of the clear effects on Māori land and resources, and thus on iwi, hapū, and individuals. Thus, as per the *SOE* case, the Crown will need to follow the Treaty principles in relation to partnership and good faith, including consultation.[229] The *SOE* case required, as part of good faith partnership, Crown consultation with the Māori Treaty partner on "major" issues and to obtain the full, free, and informed consent of the correct rights-holders in any transaction for their land.[230] The Treaty principles suggest that there be a Māori-specific process when decisions affect Treaty-guaranteed assets. This should not vary between councils because the Crown is required to provide that partnership is carried out, such as through consultation rights.

[227] See Vanessa James, Catherine Iorns and Jesse Watts, *The extent of EQC liability for damage from sea-level rise* (Deep South National Science Challenge, 2019).
[228] Jamie Morton, "Auckland's rising seas: Insurance warning as 43,000 at risk", New Zealand Herald (24 March 2019) <www.nzherald.co.nz> Brent Edwards, "Property owners should brace themselves for higher risk profile" National Business Review, (17 May 2019) <www.nbr.co.nz>
[229] *New Zealand Māori Council v Attorney-General (Forests)* [1989] 2 NZLR 142, at 153.
[230] *SOE Case,* above n 106, at 665. See, generally, the discussion on 'good faith' at Pt IV.1.e, above.

In this area of climate adaptation policy and guidance, partnership will also include the need to use mātauranga Māori alongside science. ('Use' is deliberate, not simply 'take into account').

Sea-level rise risks and future adaptation possibilities are relatively new concerns, yet iwi and hapū will be required to make informed decisions about their preferred coastal safety measures. In order for effective partnership in decision-making on climate adaptation measures, good faith will likely require Crown assistance with capacity building to enable hapū to participate. It will likely need to be at least a tripartite exercise, between tangata whenua, the Crown and local government authorities, and involve traditional Māori knowledge alongside the relevant science. The knowledge sharing would extend beyond what to do with the required land to where people would be relocated or what adaptation might look like if people were to stay on their properties.

There is a long way to go in consultation over climate adaptation measures around Aotearoa: as noted in the Climate Change Adaptation Working Group Paper, there is currently no widespread Māori information and consultation process in relation to climate adaptation.[231]

The Waitangi Tribunal has recommended that Māori advisory bodies be appointed to be involved in environmental protection;[232] however, to date, this recommendation has been ignored by the New Zealand Government. This may need to change for the development of climate adaptation measures. Climate change requires a large, coordinated governmental and social response. Tangata whenua will need to have a genuine say in how they can mitigate and adapt to the effects of climate change.

Local government

For local government, likely the most important measure to be adopted in order to uphold the Treaty principles will be the establishment of procedures and structures for good faith cooperation in decision-making between Māori and relevant councils. Such systems need to go beyond the minimum requirements of the RMA and utilise more of the optional methods of cooperation and decision-making that implement best practice. It would be helpful for central government to develop a best practice guide, with examples related to climate adaptation

[231] MfE, *Recommendations,* above n 12.
[232] *Ko Aotearoa Tēnei,* above n 120, Vol 1.

decision-making – i.e. decision-making procedures that uphold Treaty principles and better prevent Crown liability for future Treaty breaches. As mentioned above, such guidance will be most helpful for local government, but also for any central government decision-makers with responsibility for areas within the coastal environment.

There is existing Ministry for the Environment guidance for local government on consultation that sets out the minimum requirements for consultation with iwi.[233] One requirement is that iwi authorities must receive any draft plans or draft policy statements before the time of public notification.[234] This allows adequate time for the iwi authority to provide feedback and lodge any disputes.[235] In order that the feedback is not set aside upon receipt, councils must have *particular regard* to input from Iwi Authorities before the plan or statement goes to the public.[236] Summaries of the advice received from Iwi Authorities must be made available, including responses to that feedback and explanations of decisions.[237] However, such guidance is insufficient for decisions on climate adaptation measures. Protection of coastal taonga should require collaboration on the options well before a draft plan or policy is developed, let alone drafted. Hence my suggestion that guidance be developed that is tailored specifically to climate adaptation decision-making.

To conclude, it is clear that Māori must be involved in all or most adaptation decision making. This will require at least consultation, but also more likely active roles in decision-making. This will in turn require active facilitation and resourcing so as to allow genuine Māori input into such decision-making.

[233] See, MfE *Case Law,* above n 129. See also Ministry for the Environment *Resource Legislation Amendments Fact Sheet 3* (Info 784d, April 2017).
[234] MfE, *Fact Sheet 3*.
[235] MfE, *Fact Sheet 3.*
[236] MfE, *Fact Sheet 3*.
[237] MfE, *Fact Sheet 3.*

VI. Local government and the protection of Māori interests

This Part discusses the primary legal requirements imposed upon councils for the protection of Māori interests, both substantive and procedural. It addresses those in the Local Government Act, the Resource Management Act and the New Zealand Coastal Policy Statement 2010 including, the relevant provisions of the Department of Conservation *Guidance* on the NZCPS 2010. It outlines the criticisms made – and Waitangi Tribunal findings about – RMA Treaty breaches.

1 Local Government Act 2002

The Local Government Act 2002 (LGA) contains multiple provisions to encourage consultation with contributions by Māori, as well as due consideration of Māori interests. The communities encompassed by reference to "Māori" under the LGA are deliberately broader than the RMA, with the LGA referring to all Māori, not just those representing tangata whenua as in the RMA.[238] Thus, under the LGA, decision-makers may or may not be dealing with Treaty partners; however, they may make decisions that affect the interests of Treaty partners and thus matters that are protected under Article 2, for example. Presumably because of this, the principles of the Treaty are explicitly addressed in this Act.

The centrality of the aims of due consideration of Māori interests and consultation with contributions by Māori is reflected in the inclusion of section 4. That section states that the specific provisions applying to Māori are intended to "recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes". I note that this only requires that the principles of the Treaty be "taken appropriate account of", as opposed to actually being upheld, which is a fairly weak requirement. Therefore, as with the determination in respect of delegated responsibility for upholding the Treaty principles under the RMA, under current law, local government would only be bound to comply with the statute and not to uphold the Treaty principles themselves.

[238] Dean Knight and Christopher Mitchell, *Local government law in practice* (Lexis Nexis, Wellington, 2011), at 87.

The importance of Māori having input into decision-making is further affirmed in section 14, which lists a number of principles that a "local authority must act in accordance with", including that "a local authority should provide opportunities for Māori to contribute to its decision-making processes".[239] This principle is expanded upon in section 81:

> **81 Contributions to decision-making processes by Māori**
>
> (1) A local authority must—
>
> (a) establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority; and
>
> (b) consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and
>
> (c) provide relevant information to Māori for the purposes of paragraphs (a) and (b).

However, section 81(2) also states that a local authority must give consideration to the role and purpose of the local authority when exercising judgment about how section 81(1) is to be complied with. Relatedly, section 82 also lists a set of "principles of consultation", but includes a specific provision stating that the local authority "must ensure that it has in place processes for consulting with Māori" in accordance with those principles.[240]

Beyond fostering input, section 77 of the Act requires decision-makers to consider all "reasonably practicable options" for achieving an objective. When considering a "significant decision in relation to land or a body of water" the local authority is required to "take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, wāhi tapu, valued flora and fauna, and other taonga".[241] "Take into account" is a weak standard, and does not require a decisionmaker to achieve active protection of those Article 2 assets; in this sense, the LGA does not itself mandate a standard that would necessarily uphold the Treaty principles.

While most climate adaptation decision-making will take place under the RMA, it is quite possible that councils will choose to undertake additional decision-making procedures that they can do pursuant to powers under the LGA. For example, a spatial planning exercise or similar collaborative community decision-making exercise could be undertaken under the LGA in order to address climate adaptation planning. Thus, it is quite possible that a local government

[239] Local Government Act 2002 (LGA), s 14(1)(d).
[240] LGA, s 82(2).
[241] LGA, s 77(1). This wording closely resembles section 6(e) of the RMA.

authority could adopt climate adaptation measures or a decision-making procedure that complies with the LGA yet still breaches the Treaty principles. Any best practice guidelines for upholding Treaty principles will therefore also be relevant and presumably helpful to decision-making under the LGA in order to better ensure Treaty compliance.

2 The protection of Māori interests in the Resource Management Act[242]

Most decision-making on coastal climate adaptation measures is currently undertaken by local and regional authorities pursuant to the RMA. The RMA contains a suite of provisions designed to implement the Crown's Treaty duties in respect of Māori, with substantive provisions designed to protect Article 2 assets and procedural provisions designed to reflect partnership. However, there have been many criticisms of both of these types of provisions. Importantly, the Waitangi Tribunal has held that some provisions of the RMA itself breach the Treaty. Thus, even if Councils follow the RMA, it is still possible for them to cause modern Treaty breaches, especially if they limit themselves to minimum requirements and do not avail themselves of the optional procedures designed to better protect Māori interests. This Part outlines the relevant provisions and the comments of the Waitangi Tribunal.

Active protection

The RMA includes a range of substantive provisions designed to enable decisions under the Act to protect environmental assets valued by Māori. These provisions appear in Part 2 of the Act, which sets the overarching standards and principles to guide decision-making under the Act – it has been famously described as "the engine room of the RMA".[243] Further, Williams J has noted that Part 2 is the "the first genuine attempt to import tikanga in a holistic way into any category of the general law."[244]

Part 2 contains the purpose of the Act and the overriding goal of sustainable development: to enable development while "avoiding, remedying, or mitigating any adverse effects of activities on the environment."[245] Sections 6, 7 and 8 of the Act then list factors that must guide decision-

[242] Much of the material in this section is taken from the author's article. See Iorns, above n 161.
[243] *Auckland City Council v John Woolley Trust* [2008] NZRMA 260, at [47].
[244] Joseph Williams, "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1, at 13.
[245] RMA, s 5(c).

making under the Act. Section 6 addresses matters of national importance that decision-makers must "recognise and provide for". Notably, section 6(e) includes "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga". Section 6(d) also refers to the maintenance, enhancement and access to the coastal marine area as being a priority.[246] Section 7 lists matters that decision-makers must pay particular regard to when making decisions; these include include kaitiakitanga[247] and the effects of climate change.[248] Finally, Section 8 requires decision-makers to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)".[249]

These three sections together have been referred to as the Māori Trilogy of the RMA. The Privy Council has held that, as a result of these provisions, the RMA requires a "particular sensitivity to Māori issues." The directions in Part 2:[250]

> are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi guaranteed Māori full exclusive and undisturbed possession of the lands and estates, forests, fisheries and other properties which they decided to retain. … it and the other statutory provisions quoted do mean that special regard to Māori interests and values is required in such policy decisions as determining the routes of roads.

The Privy Council noted that these provisions in Part 2 could prevail over other sections in the Act.[251] As a result, it has been commented that '[t]he RMA, and the reform process that led to it, was a beacon of hope for Māori.'[252]

Despite this importance, sections 6 and 7 contain a long list of other factors which must also be either recognised and provided for or paid particular regard to. Thus, in practice, a balancing exercise is typically required to be undertaken whereby no one factor has a right of veto, such

[246] Section 6(d).
[247] Section 7(a).
[248] Section 7(i).
[249] Section 8. For a full discussion of the legal interpretation and application of the sections, see Paul Majurey and Christian Whata, "Māori and Environmental law" in Derek Nolan (eds), *Environmental and Resource Management Law in New Zealand* (5th ed, LexisNexis, Wellington, 2014). In addition to these general requirements, the Act also contains specific requirements, such as to have regard to regulations relating to non-commercial Māori customary fishing: RMA s 74(2)(b)(iii).
[250] *McGuire v Hastings District Council* [2002] 2 NZLR 577, at [21].
[251] *McGuire v Hastings*, at [22].
[252] *Idem.*

that Māori interests can be overridden by other important factors.[253] Moreover, the reference to the principles of the Treaty in s 8 does not confer any rights on tangata whenua and is a weak incorporation of the Treaty principles; s 8 needs to be read in the context of the whole Act, including being balanced with other factors.[254] Notably, however, the High Court has suggested that the Treaty protections in ss 6 and 8 "should be the subject of 'inbuilt preference'… when considered against s 7 interests", because of the importance of upholding the Treaty principle of active protection.

The particular protections provided to Māori interests under the NZ Coastal Policy Statement are discussed below.[255]

Partnership and participation in decision-making

Māori participation in the range of RMA processes – from broad plan-making to individual consents – is an area that has been well-studied and extensively commented on. While there are several mechanisms specifically designed to accord appropriate Māori access and participation under the Act, there have been many criticisms of such access and participation, and these criticisms continue today.

There are a range of procedural provisions requiring consideration of tikanga Māori at different stages, and enabling and/or requiring consultation and/or other forms of participation with iwi and Māori in decision-making processes under the Act. For example, local authorities are required to consult with tangata whenua, typically through relevant iwi authorities, when preparing or changing policy statements or regional and district plans,[256] and "must consult tangata whenua through relevant iwi authorities" in relation to the appointment of hearings commissioners with understanding of tikanga Māori.[257] There are several duties in the Act on local authorities to provide information to "tangata whenua through relevant iwi authorities".[258]

[253] See, *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA), at 305. See also *Beadle,* above n 132, at [549].
[254] See, *Otararua Hapū v Taranaki Regional Council* [1998] NZEnvC 319: tangata whenua will not necessarily decide who is to be on a consent committee, decisions will not necessarily be made on the marae, nor would decisions be made by tangata whenua in accordance with their tikanga, values or laws.
[255] See Section 3 of this Part.
[256] See, RMA, ss 3, 66(2A), 74(2A) and Sch 1, cls 2-3, 3B.
[257] Section 34A(1A).
[258] See ss 5(4), 5A(8), 20, 47, 51.

There are also various situations where councils have a duty to include as members of the decision-making panel, at least one member who "has an understanding of tikanga Māori and the perspective of tangata whenua."[259]

An amendment in 2005 clarified that there is no duty on an applicant or a consent authority to consult in an individual resource consent application.[260] Yet consultation may still occur pursuant to other obligations,[261] and such consultation may be necessary in order to satisfy the substantive obligations to consider Māori values, relationships and perspectives.

Unfortunately, assessment of Māori input into RMA decision-making through such consultation has not been positive. While there has been judicial comment that consultation with tangata whenua is "good practice",[262] the Waitangi Tribunal noted the inconsistency of Māori influence in regards to planning instruments or consents under the RMA and that "piecemeal" results were a reality: where "relations between iwi and the local authority are good and well resourced, Māori priorities stand a fair chance of being heard; if not, the Māori voice is effectively silenced".[263] The Tribunal notes the reactionary system New Zealand currently has, where Māori "react to priorities being set by local councils and applicants", and this results in Māori "usually side-lined in the role of objectors" as opposed to being part of initial discussions for such priorities.[264] Unfortunately, where a Māori voice is not considered as part of the decision-making process, it has led to decisions contrary to their interests.[265] It has been commented that:[266]

> the main barriers to Māori effectively participating in the resource management process relate to lack of resources and limited understanding of the resource

[259] Section 65(5). The same applies to establishing collaborative decision-making groups, see ss 39 and 40(1).
[260] Section 36A(1).
[261] LGA, ss 76(5), 77(1) and 81.
[262] *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349, at [55], per Heath J.
[263] *Ko Aotearoa Tēnei*, above n 120, at 115.
[264] *Ko Aotearoa Tēnei*, at 115.
[265] See, eg, *Helmbright v Environment Court* (No 1) [2005] NZRMA 118, where a former battleground site on private property was not recognised nor set aside as being important to Māori and was included as part of a proposed subdivision. The site was developed and thus effectively destroyed. This also occurred in relation to an alleged historic pā site on private land, as reviewed in *Ngāti Maru ki Hauraki Inc v Kruithof* A008/2004 [2004] NZEnvC 11.
[266] Jenny Vince "Māori Consultation Under the Resource Management Act and the 2005 Amendments" (2006) 10 NZJEL 295 at 311.

> management process. Indeed, lack of resources is a huge impediment to participating and there appears to be an expectation amongst both local authorities and consent applicants that you will consult about an application, yet limited recognition that this can incur significant costs.

The limited recognition that significant costs can be incurred is demonstrated by the lack of a budgetary commitment to Māori or iwi (tribal) participation on the part of councils,[267] while iwi authorities in popular resource development areas can be expected to handle thousands of resource consents without compensation.[268] This was first officially identified in 1995 yet it still happens today.

A related procedure for taking into account the substantive environmental concerns of Māori is through the development by iwi of Iwi Management Plans. These must be taken into account by regional and district authorities when preparing or changing their policy statements and plans, and can even inform decision-making on resource consents.[269] However, as Kenderdine J has noted:[270]

> A Local Government New Zealand survey of council engagement with Māori published in 2004 found that only half of the 86 councils surveyed held IMPs. Only eight councils had supplied funding or other support for IMP development. Subsequent investigation by the Ministry for the Environment disclosed that five of the 10 iwi organisations that the department spoke to felt that IMPs were not being utilised as they should by councils and consultants, and that it was all too easy for iwi concerns to be ignored.

In addition to these ways in which Māori can participate in decision-making by others, the RMA contains methods for Māori to become decision-makers under the Act. The first way this can occur is through a simple transfer of powers under section 33. This section allows local authorities to transfer any of their functions, powers, or duties to a range of public authorities, including to an iwi authority. Another type of decision-making process that can be delegated is

[267] Vince, above n 266.
[268] *Marlborough Seafoods Ltd v Marlborough District Council* [1998] NZRMA 241, where the iwi in that case had 11 local bodies in their rohe and in 1995 alone received 1,330 resource consents for consultation on, without any remuneration.
[269] RMA, ss 66(2A)(a), 74(2A)(a). Note that such plans must be recognised by the relevant iwi authority, be lodged with the relevant Council, and be relevant to the resource management issues of the area covered by the plan.
[270] Shonagh Kenderdine J "Examining climate change: An Environment Court perspective" 2010 Resource Management Theory & Practice 35-92, at 66 (footnotes omitted).

the issuing of heritage orders to protect places of special significance on spiritual and cultural grounds.[271] Under these provisions, an iwi authority can apply to the Minister for the Environment to be made a heritage protection authority for such purposes. The Waitangi Tribunal notes that these are "significant" powers and can accordingly provide a useful avenue for achieving substantive protection. However, they have not yet been "invoked in favour of iwi, despite attempts to do so".[272]

A third type of decision-making process is a shared one through the creation of joint management agreements, whereby the exercise of any function, power or duty under sections 30 and 31 in relation to particular natural and physical resources can be made jointly between the iwi and local or regional authority.[273] However, this provision, too, has not lived up to its promise. It has only been used once, between Ngāti Tūwharetoa and the Taupō District Council, and the Waitangi Tribunal comments that "while a unique and laudable initiative, it remains unproven and appears to be somewhat tentative" due to the numerous restrictions the agreement contains.[274]

Overall, the Waitangi Tribunal is very critical of these decision-making delegation sections not being utilised well enough, noting that "the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business".[275] This creates an environment where political means, such as through Treaty settlements, are the primary ways in which tangata whenua can become environmental decision makers.

In 2013 Justice Joe Williams criticised the operation of the various provisions that were designed to benefit Māori and better uphold Treaty guarantees:[276]

> Despite the Act's mechanisms aimed at mediating these issues, it has not over the last two decades produced examples of any significant step change in the structural relationships between the necessary players under the Act. Neither s 33 nor the heritage protection provisions in pt 8 have been used by ministers to transfer decision-making powers to iwi or hapū. Partnership-based powers under s 36B have been used by local authorities, as far as I know, only once and then only in relation to Māori-

[271] RMA, ss 187-189.
[272] *Ko Aotearoa Tēnei,* above n 120, at 113.
[273] RMA, ss 36B-E.
[274] *Ko Aotearoa Tēnei,* at 114.
[275] *Ko Aotearoa Tēnei*, at 115.
[276] Lex Aotearoa, above n 244, at 22.

> owned land. Iwi generated planning instruments, although they are specifically provided for in the Act, have not enabled iwi and hapū to take the resource management initiative on matters of deep significance to them - that is to drive conversations with local authorities over iwi and hapū priorities. Iwi remain, for the most part, cast in the role of objectors to the initiatives of others. These structural provisions are, for Māori, a dead letter, despite Lord Cooke's obiter in the *McGuire v Hastings District Council* case that the Māori provisions in pt 2 of the RMA are "strong directions, to be borne in mind at every stage of the planning process".

It is thus perhaps not surprising that various methods of better protecting environmental assets for iwi and hapū are being negotiated through the Treaty settlement process. Procedural mechanisms are being adopted in order to ensure ongoing collaboration between iwi, hapū and councils, as opposed to the more episodic consultation on plans and consents as they arise. For example, advisory boards can be established in order to give advice to local authorities.[277] Joint committees can be established to directly assist regional councils with the development of policy statements and plans, as well as develop separate planning documents that must be recognised and provided for by local authorities in RMA planning instruments.[278] Joint Management Agreements are being negotiated with a similar goal of ongoing collaboration but in relation to all processes: plan-making, decision-making on resource consents, and monitoring.[279] While Joint Management Agreements under the RMA envisage delegating resource management decision-making roles to an iwi, the only settlement agreement to include aspects of such a role is that in relation to the Waikato River, which Waikato-Tainui has taken up. These settlement agreements fill important gaps, but the gaps still remain for those without agreements for such arrangements.

[277] See the Ngāti tama ki te tau ihu settlement at New Zealand Government "Ngāti-Tama ki te Tau Ihu" (31 October 2013) <www.govt.nz>; enacted in Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014, No 20.

[278] Examples of such joint committee planning documents include those for Te Oneroa-a-Tohe, or 90 Mile Beach (see s 77 Te Rarawa Claims Settlement Act 2015), the Rangitaiki River Forum (see s 104 Ngāti Manawa Claims Settlement Act 2012), and the Kaituna River (see Te Maru o Kaituna: s 114 Tapuika Claims Settlement Act 2014).

[279] See, for example, Tūwharetoa Māori Trust Board and Waikato Regional Council, *Joint Management Agreement* (2018), at 6. See also Joint Management Agreement over Waipa River between Ngāti Maniapoto and the Otorohanga District Council, Waikato Regional Council, Waikato District Council, Waipa District Council and Waitomo District Council: s 17 Ngaa Wai o Maniapoto (Waipa River) Act 2012.

It is notable that the Hawke's Bay Clifton to Tangoio process was undertaken by a coalition between district and regional councils and iwi Post Governance Settlement Entities, not utilising RMA processes nor the specified RMA Schedule 2 participants.[280]

3 RMA and Māori: Mana Whakahono a Rohe

In April 2017, new iwi participation processes – Mana Whakahono ā Rohe ('Mana Whakahono') – were added to the RMA, with the aim of enhancing Māori participation in resource management. Mana Whakahono a Rohe has been developed by the Ministry for the Environment and Pou Taiao to better bring Māori values into resource management law. The Ministry noted that the Resource Management Act (RMA) has let iwi down: acknowledging that "[n]early 20 years after the RMA was enacted, it is fair to say that the legislation has delivered Māori scarcely a shadow of its original promise"[281] and none of the RMA provisions making up the Maori Trilogy came to fruition in the way that was hoped.[282] The development of Mana Whakahono was "intended to help local authorities comply with their statutory duties under the RMA, including Part 2: Purpose and principles."[283]

Mana Whakahono ā Rohe are written agreements between local government and 'Iwi groups' as kaitiaki; they are intended to record how the two will work together when preparing, reviewing or changing policy statements and plans.[284] The term 'Iwi groups' includes hapū, enabling local government to work with smaller, local groups. The agreements provide a legal mechanism for a relationship between iwi authorities and local iwi including recording the process for agreement on decisions.[285] The aim is to ensure the views of tangata whenua are clear to local authorities when making decisions about the RMA.

[280] See Part VIII.4, below, for a discussion of this process.
[281] Pou Taiao and Ministry for the Environment, *Mana Whakahono ā Rohe Guidance* (ME 1348, April 2018), at 13.
[282] At 5.
[283] At 13.
[284] Resource Legislation Amendment Act 2017, s 58R.
[285] RMA, s 58M(a).

> It is a deliberate policy shift from the status quo, because it requires any local authority invited by an iwi authority to enter a Mana Whakahono ā Rohe to conclude an agreement with that iwi authority.[286]

Mandatory elements of a Mana Whakahono agreement include: the powers of each party; the boundaries of the relationship; and a dispute resolution mechanism.[287] Other provisions could be an agreed process for notification and consultation, that may differ from that provided to the general public.[288]

The process of formalising the relationship between the two groups can be initiated by either the council or the iwi authority.[289] One iwi can be connected to many local councils and one local council can be connected to as many iwi authorities as is relevant. Working collectively inside a formalised agreement is a benefit for the local authority because they have more access to iwi knowledge and are less likely to come up against opposition in later stages. The process means that Councils have control over how they communicate with iwi. It is beneficial for iwi authorities because they get earlier access to council decision makers. In some situations, this might "be an optimal way for an iwi authority to achieve its resource management goals." [290]

As the aim is to provide a clearer process for local authorities to meet their obligations in ss 6(e), 7(a) and 8 of the Act[291] - ie the Maori Trilogy – it aligns well with the principles of the Treaty of Waitangi. The principle of partnership is expressed well in Mana Whakahono. It empowers mana whenua to be heard and actively take part in decision making and planning processes. "Mana Whakahono ā Rohe is a tool that tangata whenua and local authorities can use to discuss and agree on how they will work together under the RMA, in a way best suiting their local circumstances."[292] The statutory instrument, once established, creates a relationship where the parties to work through resource management issues in the region. It is called a joint initiation and is said to bring benefits such as "sharing of costs and resources (including expertise and experience), assisting with advocacy with the local authority, and achieving consistency and efficiency of process."[293] The relationship between the Crown and iwi is key to the Treaty

[286] *Mana Whakahono ā Rohe Guidance*, at 5.
[287] RMA, s 58R.
[288] RMA, s 58R.
[289] RMA, s 58O.
[290] *McGuire v Hastings,* above n 250, at 21.
[291] RMA, s 58M(b).
[292] *Mana Whakahono ā Rohe Guidance,* above n 281, at 5.
[293] At 24.

principles, especially reciprocity and good faith. The Mana Whakahono process can strengthen the relationship because it requires communication and mutual respect to create positive outcomes for both groups. It must be noted that the process does not provide for complete equality between the parties because this is only a process for feedback and information rather than for decision-making; but the procedural requirements of the relationship must be fulfilled in good faith.

An illustration of the value of the agreement is in the requirement that all proposed policy statements must be made in accordance with any relevant Mana Whakahono.[294] If they are not, local iwi authorities will have a right to dispute the process and ensure that their views are incorporated.

Acknowledging iwi and mana whenua as guardians of their ancestral land and giving them a role in decision-making over it is an example of the Crown acknowledging their right to govern. The ability to participate in decisions that control and protect the land means traditional practices of land management can continue and, more generally, means Māori are more likely to continue to be able to live on the land.

There is specific recognition of kaitiakitanga in the guiding principles of Mana Whakahono.[295] Recognising iwi as kaitiaki and providing them with an opportunity to protect the natural environment is implicit in Mana Whakahono. As outlined above, the principle of kaitiakitanga in the RMA is weak because of the need to weigh it against so many other considerations. However, the Mana Whakahono process may strengthen such principles through the Mana Whakahono agreements, particularly through recognising iwi as kaitiaki. Thus, there is a greater likelihood of principles that protect Māori interests informing the final decision rather than them being outweighed by other considerations.

While these provisions are still relatively new, it is likely that the Mana Whakahono ā Rohe provisions will enable more certainty for iwi participation in local government decision making and will incentivise early involvement of iwi by the local governments. They do not shift policy

[294] RMA, sch 1, pt. 1(1A): "A proposed policy statement or plan must be prepared in accordance with any applicable Mana Whakahono a Rohe".
[295] *Mana Whakahono ā Rohe Guidance,* above n 281, at 5.

making power to iwi, as this still remains ultimately with the relevant council, but they do provide a better forum for collaboration by requiring the voices of iwi to be heard and understood.[296] While it is too early to evaluate the operation of these provisions, Deputy Chief Judge Fox of the Māori Land Court has commented that they "are subject to local authority discretions, internal dispute resolution procedures and a default process back to the Minister, rather than the Court."[297] Further, she noted that:[298]

> While the Environment Court may be asked to have regard to these agreements at some time in the future, it is hard to see how the failure to transfer power will be progressed any time soon in the Environment Court.

They are thus to be included as a means for councils to progress discussions with Iwi groups over council decisions, which will include decisions on climate adaptation measures. Whether a council takes any more notice of these consultation processes than others remains to be seen.[299]

Conclusion on Local Government, the RMA and Māori interests

Both the LGA and the RMA contain provisions requiring local government authorities to implement both procedural and substantive protections for Māori and tangata whenua. However, these statutory provisions do not go as far as requiring Treaty principles to be upheld. Local government authorities have duties to mitigate damage from climate change and natural disasters, but in making decisions on climate adaptation measures, for example, it is possible that a local authority could follow the relevant legislation yet still be in breach of Treaty principles. Without better provision for upholding Treaty principles it is quite possible – if not likely – that Māori Treaty guarantees could be breached by climate adaptation decisions made by local government authorities, and thereby give rise to claims against the Crown in the Waitangi Tribunal. Authorities will likely need to adopt best practices in at least partnership and consultation procedures that go beyond the LGA and RMA requirements. A case study on such an alternative procedure as adopted in the Hawke's Bay Clifton to Tangoio Strategy process is

[296] The Māori Party suggests that this arrangement "goes beyond anything that currently exists for Māori outside of a Treaty Settlement" and that addition of Mana Whakahono ā Rohe agreements "gives iwi a chance to engage like they haven't been able to do before". Māori Party "RMA Strengthens Kaitiakitanga" (9 November 2016) <www.maoriparty.org>

[297] Caren Fox, "Taking into account spiritual and cultural values and Te Tiriti o Waitangi in the Environment Court" (Paper delivered at Symposium "*Huakina*: "The Fabric of New Zealand Society," Hopuhopu, 26 June 2017).

[298] Fox, above n 297.

[299] Adam Tapsell "Mana Whakahono-a-Rohe: Iwi participation requirements" (April 2017) Kensington Swan <www.kensingtonswan.com>.

provided toward the end of this Working Paper.[300] It would be best if standard advice on upholding Treaty principles in this manner were published by the Crown as the Treaty partner, particularly advice that is tailored to climate adaptation decision-making. Examples of Crown Guidance are discussed below, such as the Department of Conservation Guidance Notes on the New Zealand Coastal Policy Statement 2010,[301] and the Ministry for the Environment 2017 *Guidance* for local government on adapting to climate change.[302]

I note also that tikanga and mātauranga Māori are key to achieving the protection of the other Article 2 assets. Thus, key to decision-making that protects Māori interests will be the ability for decision-makers to deal with evidence of tikanga and mātauranga Māori. This is relevant to all decision-making under the LGA and RMA, including that by courts. Thus, for example, it has been noted that a key cultural issue of access to justice for Māori in any court proceedings is the way that evidence of Māori tikanga, values and interests are presented to and dealt with by the court.[303] This can be both a procedural and substantive issue. For example, if the court misunderstands tikanga or mātauranga Māori, then it is likely to also misunderstand the appropriate way for them to be used to resolve a particular case. Full and appropriate consideration of tikanga and mātauranga Māori (where it is relevant) will ensure that important matters are not left unaddressed and that, when addressed properly, will better justify whatever substantive result is ultimately reached. Overall, this suggests that Councils need to make sure that they have a good process for taking into account mātauranga Māori in decision-making, as a matter of best practice pursuant to the principle of Treaty Partnership, even where it is not required by the RMA. It also suggests that the Crown needs to ensure that relevant courts have the expertise for ensuring that it can appropriately handle tikanga and mātauranga Māori in their decision-making. The issue of kaupapa Māori expertise on the Environment Court is summarised in Appendix 3.

[300] See Part VIII.4, below.
[301] See Part VI.4, below.
[302] MfE, *Guidance,* above n 11. Discussed below at Part VII.4.
[303] Lex Aotearoa, above n 244.

4 NZ Coastal Policy Statement and Treaty obligations

As outlined above, the Resource Management Act 1991 requires government to create policies that guide the interpretation and use of land and resources. The New Zealand Coastal Policy Statement (NZCPS) guides how Regional Councils regulate and respond to development of the coastal area in their jurisdiction. It starts with a Preamble[304] and a guide to Interpretation, provides seven Objectives and then 29 Policies. While it is labelled as merely a policy statement, local and regional plans and policy statements must be consistent with it. Moreover, as mentioned above (in relation to the findings of the *King Salmon* case), where a Policy is worded in an obligatory manner then it must be complied with.

The Coastal Policy Statement makes recommendations about how to carry out Treaty of Waitangi obligations.[305] As early as 1994, the very first NZCPS acknowledged the relationship Māori have with the natural environment:[306]

> All the elements of the natural world… are often referred to as taonga, that is, items which are greatly treasured and respected. In Māori cultural terms, all natural, and physical elements of the world are related to each other, and each is controlled and directed by the numerous spiritual assistants of the gods.

Objective 3 of the current NZCPS 2010 is:

> To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:
>
> - recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
> - promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;
> - incorporating mātauranga Māori into sustainable management practices; and

[304] The Preamble lists 11 factors to be balanced when deciding how to manage and prepare for coastal hazards with the goal of meeting sustainable development. One of these points acknowledges Māori as kaitiaki: "the coast has particular importance to tangata whenua, including as kaitiaki." NZCPS 2010, at 5.
[305] NZCPS 2010, at Policy 2.
[306] Department of Conservation, *Report and Recommendations of the Board of Inquiry into the New Zealand Coastal Policy Statement* (February 1994), cited in, D Nolan (ed), *Environmental and Resource Management Law* (4th ed, LexisNexis New Zealand, 2011), at 14.2.

- recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.

Policy 2 The Treaty of Waitangi, tangata whenua and Māori

Policy 2 of the NZCPS is extensive but worth quoting in full:

Policy 2 The Treaty of Waitangi, tangata whenua and Māori heritage

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

(a) recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;

(b) involve iwi authorities or hapū on behalf of tangata whenua in the preparation of regional policy statements, and plans, by undertaking effective consultation with tangata whenua; with such consultation to be early, meaningful, and as far as practicable in accordance with tikanga Māori;

(c) with the consent of tangata whenua and as far as practicable in accordance with tikanga Māori, incorporate mātauranga Māori[307] in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;

(d) provide opportunities in appropriate circumstances for Māori involvement in decision making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga,[308] may have knowledge not otherwise available;

(e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and

(i) where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; and

(ii) consider providing practical assistance to iwi or hapū who have indicated a wish to develop iwi resource management plans;

[307] Mātauranga Māori, as defined in the Glossary, NZCPS 2010, at 11.
[308] Pūkenga, as defined in the Glossary, NZCPS 2010, at 11.

(f) provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:

(i) bringing cultural understanding to monitoring of natural resources;

(ii) providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;

(iii) having regard to regulations, rules or bylaws relating to ensuring sustainability of fisheries resources such as taiāpure, mahinga mātaitai or other non-commercial Māori customary fishing; and

(g) in consultation and collaboration with tangata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tangata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:

(i) recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and

(ii) provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori, including by historic analysis and archaeological survey and the development of methods such as alert layers and predictive methodologies for identifying areas of high potential for undiscovered Māori heritage, for example coastal pā or fishing villages.

Policy 2 acknowledges that all persons making decisions under the RMA that need to be guided by the NZCPS, must take into account the principles of the Treaty. While "take into account" is not a high standard,[309] Policy 2 helpfully elaborates on what that requires. Policy 2 recognises Māori cultural ties in the following ways: recognition, consultation, and kaitiakitanga.

Policy 2 within the NZCPS acknowledges the role of Māori as kaitiaki and provides ways for knowledge of the Māori world (mātauranga Māori) to be incorporated into plans, policy

[309] 'Taking into account' does not mean that a decision is necessarily swayed one way or another, it contributes to the overall decision but cannot itself be a deciding factor. In public law, decisions made weighing up various factors but using the right process cannot be appealed. As long as the decision maker shows that the factors were considered, there is no recourse to say that the factors were not taken into account enough. *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544.

statements and decisions.[310] The same is true for tikanga Māori and Māori resource management plans (where they exist).[311] By bringing Māori concepts into the resource management process, the focus will shift slightly towards those outcomes that align with those views.

In terms of upholding the Treaty principles of partnership and good faith, the decision-making capability doesn't go much further than consultation and collaboration; but it does provide good practice within the RMA framework. (It has already been acknowledged that the RMA framework is not Treaty compliant in all respects.)

Policy 3: A precautionary approach

The precautionary approach in policy 3 requires councils to be cautious where the impacts on the coastal environment are unknown or might be significant.[312] While the precautionary approach is normally thought of as being related to uncertainty about environmental (ecological) effects, it is applicable to other effects such as those on taonga. For example, it refers to the need to adopt precaution so as to avoid social and economic loss and harm to communities. An application of the precautionary approach in order to protect Māori cultural and heritage values, for example, would certainly be consistent with the duty of active protection under the Treaty principles.

Policy 26: Natural defences against coastal hazards

Policy 26 acknowledges the role that natural features have as natural defences from coastal hazards. The protection and preservation of such features - for example sand dunes - is vital to the endurance of many New Zealand beaches. As with Policy 3, Policy 26 is also a principle of

[310] NZCPS 2010, at Policy 2 (c).
[311] NZCPS 2010, at Policy 2 b, 2 (e).
[312] NZCPS 2010, at Policy 3:

Precautionary approach

(1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
(2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:
  (a) avoidable social and economic loss and harm to communities does not occur;
  (b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and
  (c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

general application that can be emphasised in order to better uphold Treaty principles. For example, when deciding on appropriate coastal protection works, the reinforcement and possibly even reestablishment of natural features will be preferable to hard coastal protection structures. These will be more likely to provide better active protection of tangata relationships with the coastal environment.

Policy 27: Protecting existing developments

Policy 27 identifies a range of options for dealing with hazards in coastal communities in the long term.[313] It is not specific to Māori but is another general provision that can be utilised to better uphold Treaty interests.

Where there is existing development, the first priority is reducing risk. It is notable that it first calls for sustainable risk reduction which may include "relocation or removal of existing development".[314] Policy 27(1) should be read in light of (2) which notes that assessments should use knowledge of how climate change will affect such hazards and what the hazard might be in 100 years' time.

Policy 27(4) is relevant in that private assets will not be publicly protected unless there is a "significant public benefit or environmental benefit."[315] There will be a need to prioritise more viable land and not protect some land that is at high risk of significant damage, due to the cost of protecting coastal land. It notes that seawalls and other engineering structures are expensive and not a long-term answer to coastal hazards, and should not be placed on public land for private benefit.[316]

There is value in exploring whether there should be more specific guidelines for how best to protect Māori coastal land and taonga when making climate adaptation decisions. For example, given the Treaty duty of active protection, there may be more justification for protection measures being placed on public land for the benefit of Article 2 assets and thus of tangata whenua. The ability of Māori to be kaitiaki of their land is diminished when the Crown does not support them in this.

[313] NZCPS 2010, at Policy 27.
[314] At Policy 27.
[315] At Policy 27.
[316] At Policy 27.

5 Department of Conservation Guidance Notes on the NZCPS[317]

The Department of Conservation (DOC) have prepared guidance notes ('DoC Guidance') as an online resource to support the implementation of the New Zealand Coastal Policy Statement 2010 (NZCPS). The DoC Guidance also discuss the relationship between the NZCPS and other national policy statements prepared under the Resource Management Act 1991 (RMA).[318] In keeping with the purpose of supporting the implementation of the NZCPS, the DoC Guidance notes are targeted at those who have responsibilities that involve coastal management and planning under the RMA, with a key focus on local authorities. The DoC Guidance has been prepared with contributions from local government, which has played a large part in their construction.

Guidance notes are provided for 25 of the 28 Policies with 3 still in development. The contents of each individual guidance note include:

- An overview of the policy
- Rationale
- Related NZCPS objectives, policies and relevant legislative provisions
- Origins of the policy
- Implementing the policy
- Resources and related and ongoing work

A key difference between the current (2010) NZCPS and its 1994 predecessor is “the greater emphasis on upfront planning”.[319] Integrated and strategic planning lie at the forefront of the current NZCPS and its effect on the management of natural and physical resources. With differing and distinctive contexts and situations within the New Zealand coastal environment, not all policies are relevant in all situations. The individualised DoC Guidance notes enables the applicable guidance to be found separately. Individual policies should generally be considered alongside the other objectives and policies of the NZCPS. This DoC Guidance supports decision

[317] This section was researched and drafted by assistant Matthew Dicken (BSc and LLB student, VUW).
[318] Department of Conservation, *NZCPS 2010 Implementation guidance: Introductory note* (May 2018), at 1.
[319] At 3.

makers to consider which objectives and policies of the NZCPS should be considered together. For example, when dealing with a plan change relating to the coastal environment, decision-makers must first identify the policies and objectives of the NZCPS that are relevant before considering how they are expressed.[320]

The DoC Guidance places great emphasis on the importance of understanding the way in which NZCPS policies are expressed.[321] The wording of a policy indicates the deliberate intent to differentiate levels of flexibility and direction. This view has been expressed in *King Salmon*, a case that the DoC Guidance summarises at length, and a case which plays a key role and influence on the Guidance generally.[322]

DoC Guidance and Māori interests

The NZCPS itself has several provisions that relate to Māori and their relationship with the coastal environment. These include, but are not limited to, Objective 3 and Policies 2, 17, and 23 (discussed in more detail below. The role of the Guidance here is to not only provide direction on the use of these provisions individually, but to give decision makers the information and direction on how these policies work together, and how they tie in with the other provisions in the NZCPS. Direction and examples are provided on how and when to involve Māori in coastal planning, management, and decision-making processes. Further, it indicates that the importance of the relationship Māori have with the coastal environment can be expressed through recognition of the Māori cultural and heritage values. Tangata whenua involvement in attaining the value of sites is vital for this recognition as well as vital for the protection and preservation of such sites. The Treaty of Waitangi principles are therefore brought to life through the guidance notes provided by DOC. The links between the Treaty of Waitangi principles, tangata whenua and Māori heritage are most prominent in Policy 2.

[320] *NZCPS Introductory Note,* above n 318, at 4. *King Salmon,* above n 30, at [129].
[321] At 4.
[322] Helen Atkins *Review of implications for planning practice of the Supreme Court King Salmon decision and its impact on the interpretation of the New Zealand Coastal Policy Statement* (Atkins Holm Majuery, January 2019).

Policy 2 DoC Guidance Note

"Policy 2: The Treaty of Waitangi, tangata whenua, and Māori heritage".[323] This Policy is the focal point of Treaty of Waitangi recognition, Māori involvement and the recognition and protection of Māori interests and values. The importance of this Policy is exemplified through the Guidance notes. Particularly, the DoC Guidance indicates that, when implementing any of the provisions of the NZCPS, Policy 2 will always "need" to be a consideration.[324] Therefore, regardless of whether the policy relevant mentions the need to consider the principles of the Treaty of Waitangi, the DoC Guidance helpfully identifies that it shall be at the forefront of any decision that relates to any part of the NZCPS.

The DoC Guidance provides a rationale for the Policy to put it into context. The "strong traditional and continuing cultural associations with the coast" that Māori have is the rationale of Policy 2.[325] The focus of the Policy is described as the "ways in which local authorities can actively involve tangata whenua in their planning processes and decision-making to enable tangata whenua to be active participants in coastal planning and management".[326] The DoC Guidance also indicates the role s 8 of the RMA plays on the rationale of Policy 2. Under s 8, decision makers are required to account for the principles of the Treaty of Waitangi. Therefore, Policy 2 upholds and reinforces the importance of the Treaty principles required under the RMA.

This is not the only section of the RMA that ought to be considered. According to the DoC Guidance there is an array of RMA provisions that apply to Policy 2, of which they have noted is not an exhaustive list, directing readers to refer to the Act itself.[327] Of note, the provisions mentioned include s 5(2) relating to the purpose of the RMA and the fact that those performing functions under the Act shall recognise and provide for 'the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga' (s 6(e)); 'the protection of historic heritage from inappropriate subdivision, use and development' (s 6(f)); the protection of protected customary rights' (s 6(g); whilst also having particular regard to: 'kaitiakitanga' (s (7(a)).[328]

[323] NZCPS 2010, Policy 2.
[324] Department of Conservation, *NZCPS 2010 Guidance Note Policy 2: The Treaty of Waitangi, tangata whenua, and Māori heritage* (2017), at 4.
[325] At 3.
[326] At 3.
[327] At 7.
[328] At 5-7.

Other relevant legislation is noted as including the Marine and Coastal Areas (Takutai Moana) Act 2011 (MACA Act), Fisheries Act 1996, Historic Places Act 1993, and The Local Government Act 2002. The DoC Guidance notes the importance of these Acts and puts emphasis on the provisions of each that are important to the implementation of Policy 2 and the Treaty Principles more generally. An example can be seen through the way in which the DoC Guidance indicates the importance of the MACA Act through the way in which it "provides for the recognition of customary interests and rights in the common marine and coastal areas".[329] A form of active protection, the MACA Act itself is described as needing to be referred to by readers of Policy 2.[330] The importance of this Act stems from the way it takes "takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and their mana-based relationship to the marine and coastal area".[331]

It is also important to note that the DoC Guidance acknowledges that local authorities need to be aware of any relevant Treaty of Waitangi settlements and legislation arising from them. This is because the Treaty of Waitangi settlements, background claims under the Treaty, and deeds of settlement may concern matters relevant to the RMA and therefore relevant to the application of Policy 2 of the NZCPS.[332] This reinforces the recognition of the close connection Māori have to the coastal environment and provides support and preservation of this relationship through reminding decision makers to remain aware of and enhance the protection, consultation and good faith that has occurred through prior alternative means.

Origins of Policy 2

Placing Policy 2 in context, the DoC Guidance provides an overview of the origins and development of this Policy since the 1994 edition of the NZCPS. There were four overarching policies that dealt with the relationship of Māori to the coastal area and the Treaty of Waitangi Principles. These have since been succinctly placed into the one Policy 2 in the latest 2010 NZCPS. This creates greater clarity, simplification and efficiency for decision makers as the related policies are in one place, and their relevance to one another has been exemplified. Previously, one policy covered principles including topics such as taking account of the Treaty of

[329] *NZCPS Guidance Note Policy 2*, above n 324, At 8.
[330] At 8.
[331] At 8.
[332] At 9.

Waitangi, consultation, involvement of tangata whenua and taking account of iwi resource management instruments. The other three policies covered characteristics of special value to Māori, transfer and delegation of local authority functions to tangata whenua in relation to those special characteristics, and finally historic heritage of significance to Māori. These are now all integrated into Policy 2.

As the DoC Guidance identifies, there are a number of benefits from this integration. For example, it gives decision makers "more specific direction on the identification and protection of coastal sites and resources of particular significance, importance or value to Māori".[333] Lack of direction from central Government is an issue that plagues all areas of local government; however, this may be a positive step forward for Māori in regard to their values and interests in sustainable management being catered for.

In creating this NZCPS Policy, the comments made by the Board of Inquiry are important, particularly regarding Policy 2. The Board specified the importance of the relationship of tangata whenua over their lands, territories and resources and their spiritual and cultural connections,[334] and the need to recognise this in the NZCPS. Recognition of this relationship helps decision makers understand the potential adverse effects that disturbances to coastal areas can have on Māori cultural well-being.[335]

An area of concern for the Board was the inconsistent implementation of the RMA requirements for recognising Māori values in coastal management around New Zealand. One result has been that tangata whenua participation in decision making processes is extremely low even where it would be expected that they would have a strong interest.[336] In order to curb this inconsistency, the DoC Guidance notes that the NZCPS ought to encourage councils to support Māori participation and "engage with tangata whenua to identify ways to manage culturally important places and resources".[337] The importance of consultation and collaboration, and thus upholding core principles of the Treaty, is pushed by the NZCPS and acknowledged and reinforced in the Guidance notes.

[333] *NZCPS Guidance Note Policy 2,* above n 324, at 10.
[334] At 10.
[335] At 10.
[336] At 10.
[337] At 10.

Implementing Policy 2

The DoC Guidance Note on Policy 2 also seeks to identify the key issues in implementing Policy 2. It considers a broad range of issues that it categorises under 5 broad headings:[338]

- Consultation
- Māori involvement in resource management plans and decision-making
- Taking account of planning documents recognised by iwi and hapū
- Kaitiakitanga
- Māori cultural and heritage values, sites and places.

The DoC Guidance explores each of these headings and offers guidance and clarity as to what the issues are, how they ought to be recognised and resolved.

Consultation

The importance of consultation is stressed in the DoC Guidance notes. Consultation becomes important as it is a central to the implementation of Treaty principles such as cooperation, partnership and rights to govern. To this end, the DoC Guidance provides an overview of the issues related to consultation, but also gives guidance on how to implement Policy 2 in a way that gives effect to the Treaty principles more generally. It helpfully goes beyond the legal requirements in the RMA.

The key idea behind consultation is that it can "aid understanding",[339] the value of which is not understated in the DoC Guidance. The DoC Guidance notes that consultation is vital to implementing policy 2(a), further, indicating the role it plays in recognising the cultural relationship that Māori have with areas of the coastal environment.

Due to the way in which consultation can improve decision making processes, 'consultation' as a process itself has been improved by policy 2(b) according to the DoC Guidance.[340] Further direction is provided for policy makers and decision makers, which the requires that consultation be:[341]

[338] At 12.
[339] *NZCPS Guidance Note Policy 2*, above n 324, At 13.
[340] At 13.
[341] At 13.

Early, meaningful and far as practicable, in accordance with tikanga Māori.

The DoC Guidance further directs decision makers to the RMA which sets out the requirements for consultation (schedule 1, 2-3C). These make clear that iwi authorities and customary marine titles are actively protected and recognised through such consultation processes. It helpfully notes the key principles for consultation in *Wellington International Airport Ltd. v Air New Zealand* [1993] 1NZLR 671.[342] As quoted, these are:

(a) Notification is not consultation.
(b) Consultation must be allowed sufficient time, and genuine effort must be made.
(c) Consultation is not merely to 'tell' or 'present'.
(d) Consultation requires the statement of a proposal not yet finally decided upon; listening to what others have to say and considering their responses; and then finally deciding.
(e) Consultation is not negotiation, for that involves two persons, which has as its object arriving at an agreement (although consultation may well lead to negotiation and agreement).[343]

It also specifically identifies the key outcome of consultation as the fostering of relationships and establishment of partnerships with tangata whenua.[344] These relationships would thus be based on "open trust, openness, reasonableness, neutral cooperation and active protection of the values of tangata whenua"[345] - ie values that uphold the Treaty of Waitangi principles. The DoC Guidance helpfully indicates that even where consultation is not legally required, such as by the RMA, it is still good practice to consult with tangata whenua as it may enhance, facilitate and advance the relationship between Council, tangata whenua and the proposer.

Māori involvement

Policy 2(c) provides guidance on how to support Māori involvement in planning and decision-making processes. The DoC Guidance outlines 2(c) by noting the requirements of effective consultation, collaboration in line with tikanga and inclusion of mātauranga Māori.[346] The development of a partnership is important here. Capacity building would be required by councils

[342] Interestingly, it does not discuss other case law application in the RMA context.
[343] *NZCPS Guidance Note Policy 2,* at 13.
[344] At 14; as identified by Ngai Tahu kaumātua.
[345] At 14.
[346] At 15.

of which the DoC Guidance indicates Māori can play a role in articulating mātauranga Māori to enable understanding among councils.[347]

The DoC Guidance, in noting the importance of working with Māori, gives examples of such to help direct and guide decision makers. One example of Māori involvement is in regard to consent conditions: instead of waiting for Māori to make submissions on consent applications, the guidance encourages councils to discuss with Māori the kinds of matters likely to arise that may be of interest to tangata whenua.[348] In upholding the Treaty principle of partnership, the guidance explains that taking initiative is vital.

Policy 2(d) also provides opportunities for Māori participation in decision making processes, an example of this is involving Pukenga (Māori knowledge experts). The traditional and customary knowledge that Pukenga hold are of particular importance when recognising and dealing with sites with cultural significance.[349] Their utilisation and respect helps uphold Treaty principles such as partnership and good faith while facilitating the potential for achieving active protection.

Finally, the DoC Guidance recognises the ability to transfer or delegate functions under the RMA to tangata whenua. The aim of such transfers is said to be to increase efficiencies in "processing, administration, monitoring and enforcement",[350] also indicating a way in which councils can uphold the Treaty of Waitangi principles of cooperation, partnership and active protection.

Taking account of iwi resource management plans

The DoC Guidance notes that, as per policy 2(e), decision makers must "take into account any relevant iwi resource management plans or other planning documents".[351] It notes that the obligation to take account is not limited to RMA documents but includes statutory obligations under MACA.[352]

[347] At 15.
[348] *NZCPS Guidance Note Policy 2*, at 15.
[349] At 15.
[350] At 16.
[351] At 17.
[352] At 17.

The relevance of these planning documents is that they are one way of recognising matters of environmental significances for tangata whenua.[353] By providing insight to cultural values, taking account of them is a step toward active protection as a Treaty principle. Such values can be discovered also through cultural impact assessments (CIAs), which are another tool that the DoC Guidance suggests will not only increase "meaningful and effective participation of Māori" but also seek to understand places and values of significance that decision makers can look to recognise and actively protect.[354]

Kaitiakitanga

Section 7(a) of the RMA requires councils to have regard to kaitiakitanga.[355] This duty is given effect through Policy 2(f) where tangata whenua are provided opportunity to "exercise kaitiakitanga over water, forest, land and fisheries".[356] The DoC Guidance provides examples of how tangata whenua may choose to exercise kaitiakitanga. These include: [357]

> ...karakia (prayers), returning first fish caught in reciprocity for gifts of the seas, and limiting catches where necessary. Such allows the recognition of Treaty principles such as active protection and reciprocity to be adhered to.

It is stressed that particular emphasis ought to be placed on the need for kaitiakitanga to be done in accordance with tikanga Māori.[358] The Guidance gives further examples of how this may look for territorial authorities. One example given is involvement of tangata whenua with natural resources whereby consultation would establish the parameters of such involvement.

A final means of having regard to the role of tangata whenua as kaitiaki mentioned in the DoC Guidance, is the observance of rāhui (tapu access restriction). Such would greatly emphasise the role of councils and tangata whenua together in recognising and providing for active protection as a Treaty principle.

[353] At 17.
[354] At 17.
[355] RMA, s 7(a)
[356] *NZCPS Guidance Note Policy 2*, above n 324, at 18.
[357] At 18.
[358] At 18.

Māori historic heritage

The final part of Policy 2 reflected on in the DoC Guidance note is Policy 2(g). Policy 2(g) addresses the recognition of "places, landscapes or values of historic, cultural or spiritual significance".[359] The DoC Guidance notes that such recognition can only be achieved through consultation and collaboration with tangata whenua. Further, in accordance with the Treaty principle of the Māori right to govern, the DoC Guidance instructs that tangata whenua reserve the right to keep such information on sites of value as private.[360]

Policy 17 of the NZCPS becomes a relevant consideration at this point of Policy 2. Policy 17 provides further identification and protection of historic heritage sites of which include those prescribed above. To better actively protect sites with value to Māori, the DoC Guidance notes the need for greater recognition of that historic heritage, as defined in the RMA, including landscapes and not just sites.[361] While the RMA definition of 'historic heritage' refrains from use of the word landscape, the NZCPS, through Policy 17, includes it to widen protection and clarity.[362]

To provide further help and guidance on what is included as, "historic heritage", the DoC Guidance lists known examples. With historic heritage including places of value and significance to Māori, the Guidance again references the need for Māori involvement in identifying such places, and that this ought to be in accordance with tikanga Māori.[363]

Other information

The DoC Guidance note on Policy 2 ends with a series of further information provided to supplement and support those working with Policy 2 and the NZCPS generally. This further information includes related and ongoing work and examples in this area. This includes policy work, recent relevant case law, iwi management plans, and the most relevant reports and websites. This leaves decision makers with not only greater levels of guidance, but a series of pathways through which they can seek further information.

[359] At 19.
[360] At 19.
[361] *NZCPS Guidance Note Policy 2,* above n 324, at 19.
[362] At 19.
[363] At 19.

Māori in other Guidance Notes

Although Policy 2 and its supplementary DoC Guidance is the main source of applying and recognising Treaty of Waitangi principles and Māori values more generally, there are other relevant notes on other policies provided in the DoC Guidance As mentioned earlier, Policy 2, and thus its Guidance, need be considered by those using the NZCPS regardless of which Policy they are working with.[364] However, it is worth mentioning a few of the key themes that fall throughout the different Policies and their DoC Guidance notes more generally.

Māori participation is a key theme through the series of Guidance notes. Policy 1 encourages Māori participation when gathering information on sites of significance to Māori and understanding coastal environments more generally.[365] The Policy 10 Guidance note indicates the need for consultation with Māori to occur in the design process for reclamation and declamation,[366] plus, it encourages potential effects that include loss of cultural landscape. This DoC Guidance note helps uphold the Treaty principles of both partnership and active protection of such landscapes.

Recommendations of Māori involvement in identifying sites of significance, and consultation with Māori when those sites are in question, are found throughout the DoC Guidance. Policy 2 provides the greatest guidance on how these ought to be implemented, but each DoC Guidance note brings such principles themselves to surface through recognition. An example of a DoC Guidance Note that mentions both is in respect of Policy 15, whereby sites of significant to tangata whenua are to be identified by working with them and in accordance with tikanga Māori[367] and tangata whenua are to be recognized as needing to be consulted.[368]

Policy 4 provides for the integrated management of natural and physical resources. The policy itself states that coordinated management is needed when administrative boundaries are crossed including those "where hapū or iwi boundaries or rohe cross local authority

[364] At 4.
[365] Department of Conservation, *NZCPS 2010 Guidance note Policy 1: Extent and Characteristics of the Coastal Environment* (May 2013), at 3 & 10.
[366] Department of Conservation, *NZCPS 2010 Guidance note Policy 10: Reclamation and Declamation* (May 2013), at 11 and 16.
[367] Department of Conservation *NZCPS 2010 Guidance note Policy 15: Natural features and landscapes* (September 2013), at 2.
[368] At 2

boundaries".[369] The focus of this Policy is on how the coastal environment is managed. The Guidance stresses that collaboration with Māori is particularly important in the coastal environment context.[370] This recognises the special relationship Māori have with the coastal environment as well as the need to consult tangata whenua and protect their interests. The significance of this relationship ensures that the natural and physical resources of the coastal environment are also recognised for their cultural value as indicated under the Policy 7 Guidance note.[371]

It is important to note that these are just a few examples of the DoC Guidance notes that mention Treaty principles and the protection of Māori interests. Policy 2 and its guidance remains the most informative on the matter and thus should always be considered, even if just to help understand the certain themes found in other DoC Guidance notes, such as Māori participation and involvement, consultation, and recognition and active protection of Māori sites and values of significance. The DoC Guidance notes overall provide a breadth of information and guidance to councils and decision makers more generally. They help these groups better understand and provide for the relationship Māori have with the coastal environment. They are an excellent resource for how to uphold Treaty principles and if followed by councils in discussing and accepting climate adaptation measures, such measures are much more likely to be compliant with these principles.

[369] NZCPS 2010, Policy 4(a)(iii).
[370] Department of Conservation *NZCPS 2010 Guidance note Policy 4: Integrated Management* (2013), at 9.
[371] Department of Conservation *NZCPS 2010 Guidance note Policy 7: Strategic Planning* (2013), at 8.

VII. Upholding the Treaty in climate adaptation decision-making

Two significant New Zealand reports were released in December 2017 addressing how New Zealand might best prepare for the future effects of climate change, including sea-level rise. One was guidance for local government for addressing coastal hazards and climate change from the Ministry for the Environment (the MfE *Guidance*).[372] The other was a report and set of recommendations to the government by the independent Climate Change Adaptation Technical Working Group (CCATWG).[373] Both of these reports helpfully address issues such as the impact of climate change on Māori coastal communities and government's obligations for addressing them, including within a Treaty framework. They both identify that council decision making should be done with iwi partners and recognise that this partnership approach to decision making derives from an obligation under the Treaty of Waitangi.[374] This Part summarises the relevant aspects of these reports and comments on how well they can enable decision-makers who follow the guidance and recommendations to uphold the Treaty in their decisions on climate adaptation measures.

1 Ministry for the Environment 2017 Guidance for local government on climate adaptation[375]

After a series of controversial delays, the Ministry for the Environment released new guidance for local government for addressing coastal hazards and climate change in December 2017.[376] Unlike the 2008 *Guidance*, the 2017 update goes beyond the provision of specific estimations of sea-level rise to guide policy and decision making. Specifically, the 2017 MfE *Guidance* also provides a detailed "adaptive planning" framework for managing the uncertainties around the timing and impact of future sea-level rise. This involves elaborate 10-step process for fostering "dynamic adaptive pathways planning" (DAPP), which is described as:[377]

> [A] risk-based approach which avoids the need to have firm 'predictions' or to use only one scenario as a basis for decision-making. It accommodates uncertainty, and can

[372] MfE, *Guidance*, above n 11. See also MfE, *Summary*, above n 27.
[373] MfE, *Recommendations,* above n 27.
[374] At 52.
[375] I acknowledge and thank research assistant Jesse Watts (LLB, Auckland) for drafting this section.
[376] Eloise Gibson, "Officials' long struggle to publish new sea level guidance" (21 December 2017) Newsroom <www.newsroom.co.nz>.
[377] MfE, *Summary,* above n 27, at 26.

enable active community and stakeholder engagement and community capacity building.

In summary, the DAPP process aims to foster greater levels of consultation and community involvement, whilst giving greater recognition to non-economic factors when making decisions about how to manage climatic risk. To this extent, the 10-step DAPP process has the potential to better honour the Treaty principles of partnership and active protection. However, while Māori may benefit from many of the general processes proposed, there is a lack of specific provision for Māori within the 2017 MfE *Guidance*. Thus, while the *Guidance* could mark the beginning of climate adaptation planning that is Treaty compliant, it will not be sufficient on its own to achieve this goal.

Overview of 'Adaptive Pathways Planning'

This 10-step DAPP process is organised according to five questions to be answered sequentially:

- What is happening?
- What matters most?
- What can we do about it?
- How can we implement the strategy?
- How is it working?

The DAPP process entails the establishment of a multidisciplinary team to gradually develop, implement and continually revise a comprehensive climate adaptation plan for the area.[378] This team is initially tasked with closely analysing the existing information for estimating the consequences of future sea-level rise in the area. While the new MfE *Guidance* still provides planners and decision makers with an authoritative and up to date account of current sea-level rise projections, these projections are formulated as four separate sea-level rise scenarios of greater or lesser severity rather than a single range of estimates. Those 4 scenarios for 2120 are as follows:[379]

1. A low emissions, effective mitigation scenario (0.55 metres);
2. An intermediate-low emissions scenario (0.67 metres);
3. A high emissions scenario, no mitigation scenario (1.06 metres);

[378] MfE, *Summary,* above n 27, at 9.
[379] At 18.

4. A higher, more extreme H+ scenario (1.36 meters).[380]

The *Guidance* further advises that decisions about risk should calibrate the severity of the forecast (e.g., a "high emissions" scenario) with the value or importance of an asset or activity. For example, coastal subdivision, greenfield developments and major new infrastructure should be assessed using the most severe sea-level rise estimates (i.e., looking at sea-level rise beyond 100 years according to the extreme H+ scenario). By contrast, "[n]on-habitable short-lived assets with a functional need to be at the coast, and either low-consequences or readily adaptable" can be assessed according to an assumed height of 0.55 m during the next 100 years.[381]

Once the team has established *what is happening* to an area, it can move to the question of determining *what matters most* to the community. This requires the team to identify: what is of value that is potentially effected by sea-level rise, who it is of value to, and where it is located. What physical objects or activities have "value" is to be determined by investigating community perspectives rather than narrowly focusing on economic measures.[382] To ascertain community perspectives the team needs to conduct extensive consultation with "communities, iwi/hapū and stakeholders". This step will be thoroughly discussed in the next section. Once values and objectives have been identified, the team needs to undertake a formal 'vulnerability assessment'. This involves looking both at the *sensitivity* of the object effected (ie, the extent to which an item will be directly or indirecty effected by sea-level rise), and the *adaptive capacity* of the object (ie, the ability of an object to adapt to climatic changes with minimal impact or cost).

The next stage of the inquiry concerns *what can be done* to protect the identified interests and objects of value to the community. This requires different climate adaptation strategies to be evaluated with respect to the identified hazards. These strategies include *avoiding* and/or *retreating* from the hazard, *accommodating* the hazard, or *protecting* the object or asset.[383] The MfE *Guidance* also identifies a number of "decision support tools" for evaluating various

[380] The summary guidance notes that this is "included primarily for the purpose of stress-testing adaptation plans or pathways and major new development at the coast". See MfE, *Summary*, at 18.
[381] At 21.
[382] MfE, *Summary*, above n 27, at 23.
[383] At 25.

options.[384] The implicit objective of listing a variety of tools to guarantee that a comprehensive range of analytic techniques and other considerations are deployed, and that economic analysis or general uncertainty is neither over-emphasised, nor overvalued.

Once a strategy is formulated, the inquiry then moves to the implementation stage. This step consists of two smaller steps. The first step involves specifying "signals and triggers" which can communicate that a risk has risen to a level which requires action to be taken. The second step involves deciding upon the planning mechanisms best suited to implementing an adaption plan. For example, the summary of the MfE *Guidance* suggests adding a coastal adaptation plan to the appendix of a district or regional plan.[385] Finally, the team must also assess how well the plan is working, through reliable monitoring of the area in question, then reviewing and adjusting the plan in order to avoid getting locked into a maladaptive pathway.

Specific references to Māori

From the outset, the MfE *Guidance* recommends the inclusion of persons with "indigenous knowledge", "strong iwi/hapū relationships and links" and/or persons able to laise with iwi/hapū groups when establishing the multi-disciplinary team.[386]

With respect to community engagement, the *Guidance* notes that the term "communities, iwi/hapū and stakeholders" is "intended to be inclusive, describing the groups of people who should be included in adaptation decisions".[387] As a result, this shorthand is used throughout the *Guidance* when addressing community engagement issues. Nevertheless, some effort is made to distinguish the status of iwi, hapū and whānau from other stakeholders or community members.

Firstly, iwi, hapū and whānau are identified as having "partnership status through the Treaty of Waitangi, and may live in the local community or further away".[388] In this way, iwi, hapū and/or whānau are not as limited in their capacity to have input by, for instance, needing establishing that their members are resident in the area, or possess a legal interest in local land or activities.

[384] MfE, *Guidance,* above n 11, at 11.
[385] MfE, *Summary,* at 30.
[386] MfE, *Guidance*, above n 11, at Box 2.
[387] At 3.1.
[388] At 3.1.

Secondly, iwi/hapū are also identified, along with local government and NGO's, as being capable of giving voice to future generations.[389] Thirdly, in determining which sections of the community need to be engaged with, the *Guidance* directs the team to look into the social context of the area, including the resources and capacity of iwi/hapū, and whether they are in a pre or post-settlement phase with the Crown.[390]

Fourthly, the *Guidance* notes that consultation with iwi/hapū could proceed with a separate parallel process, or iwi/hapū could participate through a combined process.[391] Notably, it does not identify any other group for the purpose of contemplating a parallel consultation process. Finally, the *Guidance* stresses the importance of having "adequate support and resources" in order to have "the ability to enable active iwi/hapū and Māori business participation through existing relationships and jointly agreed mechanisms".[392]

In determining how iwi/hapū participation should proceed, the *Guidance* contains the following advice:[393]

> Iwi and hapū should be included in a way that reflects Treaty of Waitangi partnership and in line with how local iwi/hapū, whānau and Māori business wish to be engaged with. This may be different from location to location, because each area or region will have different structures and organisations representing iwi/hapū and whānau. Relationships should already be well established as part of the ongoing interaction between individual local government agencies and iwi/hapū for other resource management activities (e.g., water management, Local Government Act 2002 (LGA) and Resource Management Act 1991 (RMA) processes).

Most importantly, the *Guidance* highlights that the engagement with iwi/hapū is of such importance to proper climate adaptation planning that a member/members of the multi-disciplinary team needs to have competency in fostering and managing these relationships:[394]

[389] At 3.1.
[390] At 3.2.2
[391] At Table 1
[392] At 59.
[393] At 3.2.3
[394] At 3.2.3

> New relationships will likely be needed, consequently a person(s) who is able to guide and strengthen relationships and facilitate the inclusion of iwi/hapū is an essential member of the adaptation team.

The *Guidance* goes on to suggest that "[l]essons on iwi and hapū engagement can be drawn from experiences in freshwater management".[395] However, depending on the perpsective of a given iwi or hapū, a potential reliance on prior models of (some failed) consultation such as freshwater management may be open to criticism.

The *Guidance* also contains other (albeit limited) provisions for Māori input on evidential matters. Firstly, in addition to scientific knowledge, the *Guidance* stress the importance of local knowledge and "mātauranga Māori".[396] Secondly, the *Guidance* envisages iwi/hapū involvement in the monitoring of climate change impacts.[397] Māori could thereby take on a greater co-management role over areas affected by climate change.

In establishing "values and objectives" for guiding an adaption plan, the *Guidance* makes some effort to identify matters of significance to Māori that will be affected by sea-level rise:[398]

> These 'things or objects' may include physical items like land and buildings, roads, services and utilities and their level of performance (eg, 'three waters', drainage), parks and reserves, retail and commercial centres, recreational services, community assets, and more intangible elements like the ability to practice tikanga, community cohesion and spirit, occupational identities, culture and historical sites.

The *Guidance* also identifies "cultural assets" such as "marae, urupā" and "kura kaupapa" as important local infrastructure, and important "community lifeways and recreation" such as "sacred places and sites" which may be at risk of "degradation resulting in loss of identity, whakapapa and well-being".[399] It also identifies existing "iwi/hapū management plans" and "iwi/hapū natural resource management plans" as a means of understanding community values. The section on "community values" cites existing NIWA research into "place-based Māori coastal adaptation", and notes that:[400]

[395] MfE, *Guidance*, above n 11, at 3.2.3
[396] At 58.
[397] At 11.3.
[398] At 7.3 (citations removed).
[399] At Box 15.
[400] At 171.

> It is evident from this work how intertwined adaptation is with other socio-ecological challenges and cultural knowledge and practices. Consequently, conversations with iwi/hapū and whānau regarding adaptation and values will touch on many subjects, all of which will be necessary for understanding what is important for enabling adaptation.

This makes explicit that the range of issues at play for Māori in climate adaptation planning is extensive, and therefore also that the range of topics for input ought not to be unduly restrained by, for instance, planners or facilitators. For example, this research into "place-based Māori coastal adaptation" identifies: the "role of social-cultural networks" for "coping with impacts and adaptation"; "the importance of Māori knowledge (eg, traditional activities and practices) in knowing about environmental change and risk" while also providing an opporntunity for "gaining new knowledge and skills through traditional education to facilitate the ability to draw on multiple forms of knowledge"; and the importance of Māori being able to have input into environmental plan making and decision-making on matters of climate adaptation. Finally, the research draws attention to the more tangible impacts of climate change upon Māori by also emphasising:[401]

> [T]he unreliable state of lifeline infrastructure and housing and the insufficient finance and resourcing to adequately reduce exposure and sensitivities associated with climate affected hazards and stresses

This research therefore touches upon matters that are relevant to the Crown fulfilling its Treaty obligation to actively protect Māori. The specific inclusion of this NIWA case study on "place-based Māori coastal adaptation" to inform the approach to ascertain what is of value of the community is notable for the fact that no other case studies are included in the chapter. However, the case study also tends to identify matters of concern to Māori which are not, by and large, explicitly addressed in the MfE *Guidance* in any greater detail. The authors of the *Guidance* note that additional case studies into the impact of climate adaptation on Māori coastal communities are currently underway.[402] This suggests that more guidance on how to engage with Māori and protect Māori interests will emerge at some future date.

[401] MfE, *Guidance,* above n 11, at 170.
[402] At 171.

General features of the recommended process likely to benefit Māori

Although Māori are not singled out in the recommended approach for community engagement, a number of features of the 10-step DAPP approach make it likely that Māori will benefit, if the *Guidance* is followed.

The *Guidance* identifies the usual benefits that are presumed to accrue from consultation – namely, better decision-making and greater legitimacy. It also notes the importance of consultation and/or community input into climate adaptation decisions.[403] As mentioned above, the *Guidance* contains more specific - albeit brief - provisions for identifying iwi/hapū representatives,[404] and for identifying appropriate ways of engaging with Māori.[405] However, the most radical feature of the *Guidance* is the endorsement and application of the spectrum approach recommended by the International Association of Public Participation (IAP). The IAP spectrum lists a range of approaches to participation according to the level of impact on the decision:[406] [see Figure next page]

[403] MfE, *Guidance,* above n 11, at 3.2.
[404] At Table 1.
[405] At 3.2.3.
[406] At Figure 7.

INCREASING IMPACT ON THE DECISION

	INFORM	CONSULT	INVOLVE	COLLABORATE	EMPOWER
PUBLIC PARTICIPATION GOAL	To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	To obtain public feedback on analysis, alternatives and/or decisions.	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	To place final decision making in the hands of the public.
PROMISE TO THE PUBLIC	We will keep you informed.	We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision. We will seek your feedback on drafts and proposals.	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	We will work together with you to formulate solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	We will implement what you decide.

The MfE *Guidance* truncates this spectrum into three quadrants for the purpose of deciding upon the appropriate level of impact for the public to have on a decision: "inform or consult"; "involve or consult"; and "collaborate or empower".[407] As is noted in the figure above, "collaborate" or "empower" both entail participants having a significant influence over the final decision. "Collaborate" involves a partnering between government and the public (or a section of the public), with the input from the public being given considerable weight throughout the process of deciding on a course of action. "Empower" means to implement what the public (or a section of the public) decides. A decision to genuinely "collaborate or empower" iwi or hapū when making climate adaptation decisions would presumably meet the partnership obligations

[407] MfE, *Guidance,* above n 11, at Table 4, 5 and 6.

of the Crown under the Treaty of Waitangi, and certainly better than has been practised to date pursuant to RMA processes. The key questions are therefore: firstly, whether iwi or hapū can be defined as a specific group to "collaborate" with and/or "empower"; and secondly, whether the circumstances surrounding climate adaptation are deemed to warrant a transfer of decision making power to iwi or hapū.

On the first question of whether iwi or hapū can be defined as a specific group, it is not entirely clear whether the MfE *Guidance* envisages different levels of input for different parts of the community. On the one hand, the *Guidance* certainly does envisage the possibility of iwi/hapū engagement occuring through a parallel process to that used for other participants.[408] However, once iwi/ hapū input is received, the *Guidance* does not expressly address how it should be weighed against other community input or considerations. Importantly, the *Guidance* notes that the IAP spectrum can be envisaged at two levels: firstly, "at the whole engagement process level, for example, how to go about making a decision regarding coastal adaptation in a particular place"; and secondy, "how best to undertake a particular event or activity as part of a larger process".[409] This suggests that climate adaptation issues can be broken into smaller decisions, which implicitly suggests that some decisions which primarily effect iwi/hapū could be addressed through direct "collaboration or empowerment" with iwi/hapū rather than with the entire community.

On the second question of whether the circumstances surrounding climate adaptation warrant a transfer of decision making power, the MfE *Guidance* provides a list of questions for deciding on the appropriate level of participation/input. These questions address: the level of agreement on the science, the complexity of the problem, the level of trust in the current goverance arrangements, the level of agreement on values and norms, the level of trust between participants, the severity and timing of the likely impacts, and the levels of behavioral change required.[410] The answers to many of these questions about how they pertain to Māori - particularly trust towards existing governance arrangements and/or other participants – is likely to indicate that local government should collaborate with or empower iwi and hapū. Again, it is not clear whether this aspect of the *Guidance* could be used to transfer decision making power to iwi or hapū as a separate group. However, nothing appears to foreclose asking these

[408] MfE, Guidance, above n 11, at Table 1.
[409] At 3.3
[410] At Table 4, 5 and 6.

aforementioned questions about iwi or hapū separately from the views of the wider community or stakeholders.

The MfE *Guidance* also recommends that "collaborative processes" for policy and plan formation ought to be initiated "as soon as practicable" if the community in question is already experiencing the impacts of climate change, even at a low level.[411] This increases the urgency for developing additional guidance specifically tailored to engaging with Māori on climate adaptation.

Finally, the MfE *Guidance* also includes 6 principles for "encouraging effective dialogue". Two of these principles are likely to benefit Māori considerably even though Māori are not specifically identified. Firstly, the third principle - "be inclusive, empathetic and ensure representative participation" – is intended to guarantee representation of diverse interests (including future generations and eco-systems) and the voices of "[v]ulnerable or marginalised individuals and communities" because these voices are "under-represented in decision-making and disproportionally affected".[412] Secondly, and most perhaps importantly, the 6th principle – "secure committed resources and institutional support" – requires "adequate support and resources" to "enable active iwi/hapū and Māori business participation".[413] This acknowledges that enhanced participation "requires significant resourcing", and therefore implicitly addresses the problem of participation and/or decision making powers being transferred without the adequate resourcing.

Evaluation

The *Guidance* recommends a process that has the potential to enable Māori to have significant input into climate adaptation decisions, with factors to protect their substantive interests. It is a welcome development and significant step forward for decision-making in this area, as discussed above.

There are also some shortcomings that mean that following the *Guidance* will not be sufficient in and of itself to meet the Crown's Treaty obligations. Many of the reasons for the shortcomings are largely the same reasons for why the *Guidance* may not be adequate for fostering climate

[411] MfE, *Guidance,* above n 11, at Figure 8.
[412] At 57.
[413] At 59.

adaptation: namely that the *Guidance* is already likely to be inadequate to reliably compel a reluctant district and regional councils to take action. The most obvious reason for this is that the flexible non-binding guidance for local government is exactly that: *flexible non-binding guidance*. This therefore risks non-compliance from some councils, and/or inconsistent application across different councils.

Being guidance intended for local government, it also does not explicitly deal with the highly contentious issue of what aspects ought to be addressed by central government. Relatedly, local government is likely to be concerned about the on-going administrative costs of a truly adaptive scheme of constant planning, consulting, monitoring, and revising. Therefore, it may also be difficult to persuade an already cash-strapped council to venture down such an ambitious decision-making path without the assurances of assistance from central government. Furthermore, the issue of managed retreat and/or compensation is not addressed in any detail, even though the problem of what to do about existing assets/property is likely to be the most intracticable problem going forward, including for Māori.

Many of these same concerns about fostering local government action on climate adaptation equally apply to fostering an approach to adaptation that is compliant with the Treaty. On the one hand, the *Guidance* may spur action on climate adaptation, which in turn may be interpreted through existing legislative requirements to give effect to the principles of the Treaty under the Resource Management Act 1991 and the Local Government Act 2002. However, there is no guarantee that local government will give adequate effect to these legislative requirements. Being non-binding, the *Guidance* is also obviously unable to address a number of existing legislative shortcomings.

The current *Guidance* also lacks detail on how Māori ought to be engaged with territorial authorities as partners with the Crown, and how local government ought to carry out its obligation of active protection. More guidance on upholding the Treaty principles is therefore necessary, even if much of the *Guidance* has the potential to meet these key Treaty obligations. Leaving aside the lack of binding force, the lack of content specifically addressing matters affecting Māori means that too much is left up to the discretion of local government, even though the general guidance does not foreclose action which is Treaty compliant. This is most likely to be an issue in parts of the country where Māori interests are already routinely neglected by local government, and other groups with opposed interests already have ample

representation or influence. In particular, the *Guidance* is largely silent on how conflicts between Māori and other interests are to be resolved. Furthermore, the *Guidance* does not provide much detail on matters of significance to Māori, such as whether marae or infrastructure connecting Māori to ancestral sites are to be imbued with special significance for purposes of risk assessment. Instead, these questions are left to the process of identifying what is of value to the community. But, if the process of identifying community values breaks down, then key matters of value to Māori may be inadequately protected.

Finally, the *Guidance* does not address the fact that the duty of active protection may require significant investments to be made to protect existing Māori interests. This may be more appropriately fulfilled by central government as Treaty partner, especially given the potential sums involved. In turn, fulfilment of the duty of active protection may affect the adaptation strategies that are pursued to protect Māori interests. Resources may be needed to *protect* existing sites or lifeline infrastruction, or for modifications to be made to important Māori assets to *accommodate* climate change. For example, Māori may wish to maintain a presence in a hazardous coastal area due to an ancestral connection, but might require assistance or a special resource consent to allow a building to be made removable upon sea-level rise trigger points being reached. As a final note, Māori may also require some form of assistance if they are to relocate away from sites of ancestral significance.[414] Some efforts may in turn be needed to reestablish a presence in the same area, especially where there is limited public land available for resettlement, for example.

To conclude, the *Guidance* provides welcome developments and attention to the issue of Māori participation in climate adaptation decision-making. It makes a positive contribution toward the recognition and protection of Māori interests, and one which will help uphold the principles of the Treaty. Yet there are still some unresolved issues around how the Crown is to discharge its obligations to Māori in respect of climate adaptation. As a result, more detailed guidance is needed that is specifically tailored to addressing these issues.

[414] Especially if a Treaty claim against the Crown is upheld in relation to emissions mitigation efforts.

2 Climate Change Adaptation Technical Working Group Report 2017

Introduction

The Climate Change Adaptation Technical Working Group (CCATWG) provides recommendations to the Government about possible pathways for dealing with climate change.[415] In 2018, a *Stocktake Report* and *Recommendations* were released providing information about the predicted impacts of climate change into the future.[416] Based on the assessment that was made about current policies and scientific and other knowledge, the group has made recommendations for how the Crown should handle the increasing climate threat to the coasts.

The CCATWG describes the likely effects of climate change as "significant."[417] Coastal areas and floodplains, where "the majority of our population are located" will be at risk of flooding, sea-level rise, storm surge and inundation from rising waters.[418] Furthermore, with changes in the climate and rising sea levels the coast will increasingly be eroded, surface and ground water quality will be degraded.[419] The hearts of communities will be affected: homes, commercial assets and our vital infrastructure are in harm's way.[420]

Climate change will have broad economic implications. With an increase in the number and extremity of severe weather events, insurers will be paying out more. This will "inevitably be reflected in the premiums charged".[421] For some, insurance will become unavailable due to price or due to the risky nature of their property which may "reshape the distribution of vulnerable groups."[422] For banks, this could result in the offer of shorter term mortgages which may make buying a home less affordable.[423] Economic and social disruption could lead to conflict when

[415] MfE, *Recommendations,* above n 12.
[416] MfE, *Stocktake Report,* above n 14.
[417] At 10.
[418] At 10.
[419] At 25.
[420] At 10.
[421] At 37.
[422] At 11.
[423] At 38.

access to resources are limited.[424] When some groups in society are already receiving access to resources unequally, this will only be exacerbated by conflict and disruption.[425]

The CCATWG identifies that effects on Māori are explicitly predicted to be felt keenly because the effects are more than purely economic: [426]

> Different iwi face different risks, and some are more vulnerable than others. There are numerous marae, cultural heritage and food gathering sites in coastal, low lying areas that are at risk of being lost at sea by sea erosion and inundation.

The connection to the land means that its degradation or loss will affect the people who live there.

Assessing cultural, economic and the natural environment's vulnerability to the risks associated with climate change is one of the best ways to prepare long term. By understanding that things will change and how they will change, the government can target its work to "the most effective actions or the most critical needs."[427] Moreover, understanding that culture is at risk because of climate change is important because it draws the decision-makers closer to the understanding that protecting Māori land is really important. However, it may still be the case that Māori land will only be properly protected if the Crown indicates to local authorities that this land is particularly vulnerable and in need of protection.[428]

Principles to guide action

A set of principles have been produced by the Working Group to frame their recommendations for action. The principles most relevant to Māori coastal property are:

i. Look long term when acting on change.[429]

Looking long term is a way to ensure that future generations are protected such as by insisting that present generations leave the land in a way that is good for future generations. This principle is not unique to Māori, but it is important in Te Ao Māori and can be used to assist an

[424] MfE, *Stocktake Report*, above n 14, at 38.
[425] MfE, *Recommendations*, above n 12, at 38.
[426] MfE, *Stocktake Report*, at 11.
[427] MfE, *Recommendations*, at 24.
[428] See, part VIII.2 below, on Māori freehold land in Waitara, where the local council did not place any extra value on the fact that it was Māori freehold land.
[429] MfE*, Recommendations,* at 7.

acknowledgement of whakapapa, including humans' relationship with and as part of the natural world.

ii. Look for co-benefit solutions and minimise actions that hinder adaptation.[430]

Upholding Māori interests will create co-benefits through upholding kaitiaki relationships, prioritising the health of the natural world as an intrinsic part of the health of the people. Natural solutions to coastal strengthening are more likely to be favoured, thereby enhancing the local ecosystems. Economic and spiritual wellbeing are more likely to be maintained if property loss is mitigated and the natural environment is not degraded.

iii. Act in partnership, as whakamua, in a way that is based on the Treaty principles.[431]

It is helpful that the principle of acting in partnership is explicitly identified. It can entail involvement of Māori at a range of levels, from those collecting information (acknowledging the value of non-western science) through to including iwi leaders in decision-making. It goes almost without saying that complying with this will assist decision-makers to uphold the principles of the Treaty.

iv. Prioritise action to the most vulnerable communities and sectors.[432]

This principle acknowledges that those who do not have economic resilience (such as through insurance and property ownership) will be worst affected by coastal hazards that are realised. Māori are overrepresented in negative income and home ownership statistics, not to mention also those in relation to health and education. Attention to this principle will assist Māori.

v. Make decisions based on the best available evidence, including science, data, knowledge and mātauranga Māori.[433]

Making decisions based on science and mātauranga Māori is a way of protecting both the traditional knowledge itself and the taonga that is the subject of the knowledge. Following this principle will help uphold Treaty principles and likely enable the adoption of more appropriate climate adaptation measures through the utilization of more types of knowledge.

[430] MfE*, Recommendations,* above n 12, at 7.
[431] At 7.
[432] At 7.
[433] At 7.

Actions recommended by CCATWG

i. Foundational actions

The Crown should create policies to assess and plan where best to allocate resources to prevent damage from coastal hazards.[434] Those recommended policies are: adopt a planned approach to adaptation; establish a framework for assessing climate vulnerabilities; establish governance arrangements that support long-term adaptation action;[435] and build adaptive capacity for decision making in local and central government.[436]

ii. Immediate actions

Immediate actions are smaller tasks that should be achieved as soon as possible in order to reduce risk to coastal property.[437] They include actions such as continual reinforcement by government of the importance of prioritizing action on climate adaptation;[438] and paying particular regard to the effects of climate change when implementing the National Policy Statement for Freshwater Management.[439] While the concerns and interests or special position of Māori are not explicitly addressed in these recommended actions, they are addressed elsewhere, as mentioned above and below.

Creation of an adaptation plan

Local government has the ultimate responsibility for implementing central government plans and managing the risks of climate change.[440] However, councils often struggle to take ambitious adaptation steps due to "a lack of leadership and support from central government; community buy-in; and resourcing constraints."[441] The CCATWG recommends that a planned approach is undertaken through the provision of adequate information to all levels of government and to iwi, the community and businesses, and creation of a national adaptation plan.[442] The

[434] MfE, *Recommendations,* above n 12, at 8.
[435] At 9.
[436] At 10.
[437] At 8.
[438] At 11.
[439] At 11.
[440] MfE, *Stocktake Report*, above n 14, at 13.
[441] At 13.
[442] At 21.

recommended adaptation plan should "define a common set of outcomes," provide transparency and increase consistency between policies and their implementation.[443] Frequent monitoring and updating of the policies as more knowledge becomes available will further legitimize the process.[444]

The CCATWG helpfully identifies that local government decision making should be undertaken with iwi partners.[445] It recognises that this partnership approach to decision making derives from an obligation under the Treaty of Waitangi[446] and that "[p]artnership is also essential for effective decision-making on the action that needs to be taken to adapt to climate change."[447] Further, it recognises that Iwi/hapū are the source of mātauranga Māori, meaning that they have knowledge of the natural environment which is vital to New Zealand's adaptation policy.[448] The CCATWG also recognises that Māori communities are particularly affected by climate change because they rely on the environment for cultural, social and economic wellbeing. Without good wellbeing, which creates some resilience, negative impacts such as a significant weather event will be felt more strongly among Māori. Furthermore, "significant changes in natural cultural indicators affect mātauranga Māori."[449]

The CCATWG notes that iwi and hapū organisations have taken action on climate change because they recognize the negative effects will be greater for future generations. "Considerable work has been undertaken by Māori authorities and governance structures in generating iwi and hapū plans that identify climate change issues and implications."[450] The CCATWG highlights the need for information about the social and economic implications available to the community as vital to making robust decisions. This includes providing information to hapū, although information about hapū connections to the land are not emphasized.[451]

[443] MfE, *Recommendations*, above n 12, at 22.
[444] At 21.
[445]At 52.
[446] At 52.
[447] At 52.
[448] At 52.
[449] At 52.
[450] MfE, *Stocktake Report*, above n 14, at 85.
[451] MfE, *Recommendations*, at 36.

The CCATWG also recommends creation of a mātauranga Māori measure that reflects the cultural impacts of climate change, developed and managed by iwi/hapū.[452] This is a new and possibly significant means for partnership between iwi and the Crown. It is noted that the Crown has an obligation to act in good faith and use the information they receive in order to inform wider decision making, and that there is a significant degree of ownership held by those involved.[453] Building adaptive capacity iwi engagement is one vital part of a much wider process of involving the whole community in decision making. This recommendation is helpful in assisting Mātauranga Māori to be woven through the process.

It is finally noted that the CCATWG also makes recommendations about the reform of the RMA as a whole, as part of a better provision by central government of the frameworks necessary for local government to make better climate adaptation decisions. The CCATWG recommends that a review of the RMA be undertaken to identify inconsistencies and misalignment across legislation and policies that affect local government's ability to undertake climate change adaptation. While the particular issues identified for review do not include those addressing Maori interests in particular, these could also be considered. [454]

Conclusion

In conclusion, the CCATWG *Stocktake Report* and *Recommendations* provide information about the predicted future impacts of climate change and recommendations as to how such impacts should be addressed. In doing so, the CCATWG includes specific references to Māori interests, with four key benefits standing out. Firstly, the reports specifically identify that the effects of climate change on Māori need more attention, as do the consequent adaptation needs. Another positive contribution is the reiteration of the need for partnership between councils and tangata whenua in decision-making on climate adaptation issues. In addition, the consultation requirements recommended explicitly note the importance of consultation with iwi and hapū. Finally, the recommendations in relation to mātauranga Māori are a helpful way of ensuring

[452] At 38.
[453] MfE, *Recommendations,* above n 12, at 38.
[454] They include: giving local government a robust mandate to act on climate change under the Act; ensure that legislation puts climate adaptation ahead of other needs such as housing availability; align hazard and disaster risk reduction and climate adaptation policies; align land use, freshwater use and consents for subdivisions under the RMA and the Building Code. CCATWG. See MfE, *Recommendations,* at 33-34.

Treaty compliance, such as by showing the integration of partnership between the Crown and iwi, who have much knowledge about protecting the coastal environment.

There are some minor drawbacks of the CCATWG *Stocktake Report* and *Recommendations*. Firstly, the Recommendations were made without widespread consultation with Māori communities on the ground.[455] This contradicts the recommended requirements and importance of consultation discussed by CCATWG. The consultation requirements do explicitly note the importance of consultation with iwi and hapū, but it is not clear what overall weight that consultation is recommended to have in decision-making. Finally, the concept of kaitiakitanga is rarely mentioned in the reports; instead, protection of the land is based on risk assessment and the costs of the effects of climate change.[456] There is one reference to the role of Māori in climate change adaptation as kaitiaki over their land, but no suggested process for how that is supported by the Crown.[457] It thus has some of the drawbacks similar to those identified in respect of the MfE *Guidance,* and more detailed guidance is needed that is specifically tailored to addressing these issues. Despite these drawbacks, overall, the CCATWG provides a positive contribution toward the recognition and protection of Māori interests, and one which will help uphold the principles of the Treaty, even if not enough in its own right.

[455] MfE, *Stocktake Report*, above n 14, at 103-105.
[456] MfE, *Recommendations,* above n 12, at 24.
[457] At 35.

VIII. Case Studies

This Part contains five case studies to illustrate a range of issues of climate adaptation and the protection of Māori interests. The case studies discussed cover case law, council decision-making procedure, and coastal wāhi tapu under threat from sea-level rise and inundation. These studies are of a lack of protection for an urupā at the Mōkau River mouth, a lack of protection for Māori freehold land at Waitara, the proposed plan change to implement a managed retreat at Matatā, the Clifton to Tangoio decision-making procedure undertaken in the Hawke's Bay, and a re-examination of the 2010 Environment Court case of *Hemi v Waikato District Council*.[458]

At the Mōkau River mouth, an important urupā is facing the risk of erosion; yet there have been years of inaction by the local council, even in the face of illegal private land protections for an inappropriate coastal subdivision. I suggest that there is a failure of active protection of an Article 2 taonga.

In respect of the Māori freehold land at Waitara, the New Plymouth District Council rejected the community's calls for coastal protection works for their land. However, I suggest that the reason that was publicly given was wrong.

In respect of the situation in Matatā, the climate adaptation decision-making process has not paid sufficient heed to the significant interests of local Māori nor of Treaty of Waitangi obligations. This paper discusses some of the issues and deficiencies that have arisen.

The Hawkes Bay community decision-making procedure helpfully upheld both procedural and substantive interests of mana whenua in a recent community decision-making process on preferred options for future climate adaptation measures. However, the results of that community decision-making process only amount to recommendations to the local and regional councils, which still have to make their own decisions; the councils will of course make their decisions in accordance with the RMA and Local Government Act processes. I suggest that the overall process and eventual resulting outcomes should be evaluated for how well they uphold Māori and Treaty interests.

[458] *Hemi,* above n 15.

In 2010, the Environment Court case of *Hemi* was decided on the basis of valuing Māori ancestral links to land over the avoidance of risk. This case study finds that it would most likely been decided very differently today with the more recent guidance, law and policies available. Particularly with the assistance of the MfE *Guidance* and the directive policies of the NZCPS, it is likely that the Court would decline such an application on the basis that the risk of coastal inundation was unacceptable. This needs to be considered from the perspective of valuing Māori ancestral ties and finding alternative ways to uphold and exercise kaitiakitanga.

Note that these studies result from enquiries limited to published materials; no interviews or consultations were able to be undertaken. Case studies were identified from searches for news about relevant issues and chosen on the basis of how well they illustrate a range of such issues. Their comparative lengths are solely as a result of the amounts of published information found; there is no implication of comparative importance. Interviews may provide additional and even different information; I recommend further, more targeted study of such issues by Māori researchers.

1 Case Study 1: Mōkau River[459]

The Mōkau River mouth has long been under the guardianship of Māori who have looked after the environment with the view of protecting the mauri or life force of the environmental taonga in the area.[460] However, years of Crown occupation have threatened this. In 1956 the government went ahead with a coastal subdivision on a spit that was advised against by the local authority, on the basis of risk of future erosion. Since the subdivision, there have indeed been multiple erosion events in a decadal cycle.[461] A large erosion event in the 1960s caused the loss of several sections; the government provided compensation to the affected parties, but no long-term strategy that would prevent future events was implemented.[462] Indeed, development

[459] I acknowledge and thank Nicolaas Platje, VUW Law student and research assistant, for researching and providing a draft for this case study.
[460] Waitangi Tribunal, *The Environmental Management of the Mōkau River Mouth* (Wai 898, A149, 2014), at 11.
[461] Paula Blackett and Terry Hume, "Exploring the social context of coastal erosion management in New Zealand: What factors drive particular environmental outcomes?" *The Australasian Journal of Disaster and Trauma Studies* (2010/1), at [12].
[462] Blackett and Hume, at [12].

through subdivision increased, with more holiday homes being built "close to the edge of the dune".[463]

In the 1990s a proposed seawall was rejected by the wider community because of the cost and its potential to ruin the natural aesthetics of the beach.[464] This led to the illegal sandbagging of the beach and construction of makeshift seawalls by private owners trying to protect their property in desperation.[465] As a result of inaction by the governing bodies of Mōkau the retreating land has left some houses teetering above waves that crash upon their doorstep.[466]

This 'do nothing' approach is reportedly the consequence of a council with a high turnover of staff, and non-permanent residential population that has been happy to continue to get use out of their properties in their foreseeable future.[467] In order to manage the erosion a long-term strategy is needed. However, a shifting population has meant that, as time goes on, individual erosion events are forgotten about and nothing has been done.

The one constant in the area has been the local Māori population who have long demanded action by the council and yet their cultural and environmental expertise have been ignored as thoroughly as their customary rights.[468] The wider Mōkau area contains several sites of customary importance and the sand spit itself is the location of an important Māori urupā known as Te Naunau. One researcher, reporting to the Waitangi Tribunal, concluded that:[469]

> local Māori have expressed continued dissatisfaction with the environmental management of the Mōkau River mouth, particularly as it relates to wāhi tapu. Te Naunau remains a major site of contention, and the unilateral actions of Mōkau residents to combat erosion on the spit, the reluctance of Waitomo District Council to confront them, and the general confusion over which local or central government agency is responsible for addressing the problem remains an issue to this day. Māori concerns regarding their urupā seem to have been side-lined in this debate.

[463] Blackett and Hume, above n 461, at [12].
[464] At [12].
[465] Waikato District Council "Illegal Seawalls being Constructed at Mōkau" (Media release, 27 Jun 2006) <www.waikatodistrict.govt.nz>.
[466] Rachel Thomas "Coastal Erosion Eats Away at Mōkau" (07 July 2015) Stuff <www.stuff.co.nz>
[467] Blackett and Hume, at [12].
[468] Wai 898, above n 460, at 11.
[469] Wai 898, at 103. It is most likely that the 'local Maori' referred to in this quote are hapū Mōkau Ki Runga, of Waikato-Tainui. See Wai 898, at [21].

The case of the Mōkau sand spit illustrates a number of issues discussed in this report. First, in relation to the important taonga of tangata whenua, there appears to be no active protection being undertaken by the local council, and that the important urupā, Te Naunau, appears likely to be lost to future sea-level rise and related inundation and erosion. The reported "dissatisfaction of environmental management… as it relates to wāhi tapu" (in the quote above) suggests that leaving the urupā to be taken by the sea is not the preferred option of tangata whenua. There is thus a duty on the Crown to ensure that measures of active protection of such a taonga are taken, in partnership and good faith with tangata whenua. In terms of council involvement, this may have to go beyond minimum requirements in the RMA that the council is adhering to. In the context of climate change adaptation, active protection should require examining accommodation and protection measures before undertaking managed retreat. In the case of the Mōkau sand spit urupā Te Naunau, because of the importance of ensuring that it is not lost in any upcoming flood event, it may be that discussions about relocation of the urupā – ie managed retreat -- need to take place sooner rather than later.

Acting in good faith requires general consultation and collaboration with tangata whenua on solutions before they are proposed, including basing it on both mātauranga Māori and Western science about the environment, the risks and the best measures for protection. This may require Crown intervention and collaboration with local government. It may require Crown funding of protection measures. If the taonga was lost due to Crown inaction, it would likely be a breach of Treaty duties and thus liable for redress. Given that the loss of an urupā is particularly hard to provide appropriate redress for, it would be better to prevent its loss (assuming that was the wishes of mana whenua).

In terms of dealing with existing developments, the longer-term, historical view shows that the government compensation for those individual landowners in the 1960s is not a long-term solution. Indeed, that early compensation has become irrelevant in the long-term, particularly to current landowners in the area. It is also not a solution that can be widespread. The political pressure to compensate at the time was strong; and no doubt it was felt doable because there were only a small number of people affected at the time. Yet it would not be doable if hundreds or thousands of homes within a jurisdiction were to be affected. While the erosion itself likely cannot be prevented, there must be wider efforts to implement long term strategies to prevent unexpected suffering from such events and increasing community preparedness and resilience. This case study also shows that councils need to utilise the existing knowledge of the

community, specifically the Māori community, in order to evaluate the best way of dealing with long-term environmental effects in achieving such preparedness and resilience.

2 Case Study 2: Māori freehold land in Waitara

In 2016, residents of a Māori settlement in Waitara, Taranaki, pleaded with their local council for the construction of a sea wall as they feared that their homes would be swept into the sea.[470] The settlement included the Rohotu Block, which lies at the mouth of the Waitara River, with the river on one side of the Block and the Tasman Sea on another; it was the subject of a Waitangi Tribunal claim by iwi Te Ati Awa and has the status of Māori freehold land.[471] Residents were particularly worried about the elderly who were living on this Block. Yet the requests for a sea wall were denied by the New Plymouth District Council.

The New Plymouth District Council's response was that the council was working with the trustees of the Māori freehold land. The Council strategy manager also stated that:[472]

> Māori freehold land is the same as private land holdings and council's policy at the moment is only to protect strategic and significant assets, and [the Roho tu Block] it's not considered to be one in that sense because it's not a public asset, it's freehold private land.

I suggest that this statement is misguided. Māori freehold land does not have the same legal status as private land holdings because Māori freehold land is both legislatively protected and is a Treaty asset; it thus has extra protection from that afforded by private freehold land. Te Ture Whenua Māori Act gives legislative protection to Māori freehold land, especially through the notion of retention.[473] Extra protection would thus need to be given to ancestral lands. Further, the Crown needs to uphold the principle of keeping land that is currently owned by Māori in that Māori ownership, whether freehold or not.[474] It may not be considered a

[470] Robin Martin, "Waitara Locals plead for sea wall" (3 June 2016) Radio New Zealand (Online Edition), <www.radionz.co.nz>.
[471] See, for example, Suzanne Woodley, *A Report Commissioned by the Waitangi Tribunal for the Taranaki Claim concerning Rohutu* (Wai 143, 1995). I note that there are seven hapū which comprise Te Āti Awa: Manukorihi, Ngāti Rahiri, Ngāti Tawhirikura, Otaraura, Pukerangiora, and Puke tapu. However, the news report does not say which hapū are involved.
[472] Liam Hodgetts quoted in Martin, above n 470.
[473] See Te Ture Whenua Māori Act 1993, preamble and s 2.
[474] See, eg, the Environment Court decision applying this principle to Patricia Grace's Māori freehold land, thereby denying its compulsory purchase for the purposes of a national highway, even under the Public Works Act. *Grace,* above n 218.

'significant' or 'strategic asset' by the Council, but should be by at least Central government, if not also the Council. A Council that does not take into account the need for these extra protections could be opening up the Crown to at least a claim of a Treaty breach if not also other actions based on the principle of retention.

This does not mean that a sea wall is necessarily the right solution for that land; there can be other reasons to reject that as a solution, such as significant adverse effects of a wall on land on the seaward side of the wall. It is noted that the erosion complained of in this article may have occurred because of another sea-wall previously built;[475] if so, then the Council would be required to do something to remedy the damage caused, irrespective of the status of the land. However, for the purposes of this report, the most important point is that the reason for denying a sea wall cannot simply be because the land is 'merely' privately-owned Māori freehold land; more needs to be done to protect such land. This is something that all of local government needs to be aware of, as Māori freehold land is found throughout the country.

3 Case Study 3*:* Matatā and Māori[476]

Matatā is a small coastal community struck by flooding in 2005. In response to this event, a natural hazard management process began, led by the Matatā community, the Whakatāne District Council (WDC) and the Bay of Plenty Regional Council (BPRC). However, local tangata whenua have rejected some of the suggested adaptation methods, complained about the decision-making process, and are concerned about protection of their wāhi tapu in the area.

Matatā is a historical treasure chest;[477] a place of significant wāhi tapu in the form of battlegrounds and burial caves. It is also a converging point of various iwi, home to three Marae and a predominantly Māori population. The paper will explore how, and to what extent the climate adaptation decision-making process has paid heed to the significant interests of local

[475] See Martin, above n 470.
[476] I acknowledge and thank Danica Soich, VUW Law student and research assistant, for researching and providing a draft for this case study.
[477] Keri Brown, "Upsetting Geographies: Sacred Spaces of Matatā" (MSocSc Thesis, University of Waikato, 2008), at 4.

Māori and Treaty of Waitangi obligations. This paper seeks to make visible the issues and deficiencies that have arisen.

Matatā is a rural coastal community in the Bay of Plenty with a population of 645.[478] The town has two schools and two preschools, a Department of Conservation camping ground, a few shops and three marae.[479] According to Māori legend, a taniwha in the form of a ngārara (lizard) resides in the local Awatarariki Stream. Its head sits in the headwaters, with the tail snaking down the waters entering into the town. When it rains, the lizard is said to flick its great tail from side to side, flooding the Rangitaiki plane where Matatā is located. [480]

On the 18th of May, 2005, more than 300mm of rain fell in 24 hours and Matatā was inundated.[481] However, what followed was no ordinary flood: highly charged with sand and silt the torrents moved faster and more densely than normal water in what is known as a debris flow down the Awatarariki Stream.[482] Boulders up to seven meters in diameter were unburied from their stream beds and rushed along at up to 30 km per hour.[483] Trees were uprooted. An estimated 300,000+m3 of rock, wood debris, silt, and slurry slid onto Matatā.[484] The debris flow cut major transport links and caused drastic damage to properties. The most affected part of the community that was located on the Awatarariki stream fanhead. This area has 45 properties, 34 being in private ownership and 16 homes being permanently occupied.[485]

Risk assessment modelling has indicated a likelihood of five fatalities for the same scale event.[486] Yet by incredible luck, there was no loss of life in Matatā. There was however,

[478] Statistics New Zealand, "2013 Census QuickStats about a place: Matata" <archive.stats.govt.nz>.
[479] C Hanna, I White and B Glavovic, "Managed retreat governance: Insights from Matatā, New Zealand" (Report of the National Science Challenge: Resilience to Natures Challenges, University of Waikato, 2018).
[480] Daniel Hikuroa "Mātaurangi Māori – "The Ūkaipō of Knowledge in New Zealand" (Policy Briefing, University of Auckland, June 2018).
[481] Boffa Miskell, *Planning provisions for debris flow risk management on the Awatarariki fanhead, Matatā* (Section 32 Evaluation Report Prepared for Whakatāne District Council, June 2018).
[482] Boffa Miskell, Section 32 Report.
[483] Boffa Miskell, Section 32 Report.
[484] Whakatāne District Council, *Indicative Business Case - Debris Flow Risk: A way forward for the Awatarariki Fanhead* (A1128434, August 2017).
[485] Boffa Miskell, Section 32 Report.
[486] MJ McSaveney and TRH Davies, *Peer Review: Awatarariki debris-flow-fan risk to life and retreat-zone extent* (Whakatāne District Council, 17 November 2015).

a community left with silt, rubble, and an uncertain future. Today, in 2019, the recovery process for Matatā continues.

Key governance decisions and Proposed Plan Changes

Following the flood, the Whakatāne District Council engaged the community, engineers and specialist agencies, to develop a debris flow risk management plan.[487] In August 2005, a number of engineering and planning options were offered to manage the risks from future debris flows. It was decided in 2009 that there would be a Debris Flow Control System installed in the catchment to protect houses on the fanhead.[488] Meanwhile, in 2007, the council allowed residents to rebuild their homes and return.[489]

In 2012 the Whakatāne District Council commissioned a review of the project. The review concluded that there were inherent risks in applying an engineering solution that had not been physically proven in field application before.[490] The engineering solution was unsustainable, as it carried ongoing maintenance costs. Further, the financial demands in managing the risk were beyond the financial capacity of the council, with construction costs being more than double the initial estimate.

In 2013, the Whakatāne District Council completed a new hazard and risk assessment for debris flows on the Awatarariki fanhead.[491] The assessment identified the risks to life and property on parts of the fanhead as being high and posing an intolerable risk to life.[492]

In 2017, the discussion turned finally to retreat options. This was prompted by infeasible engineering options, a need to protect the lives of people within the high-risk area, and the yearning for certainty. It was decided that the best way forward was a managed retreat of the

[487] Alan Bickers, *Review of Awatarariki Catchment Debris Control Project* (Whakatāne District Council, June 2012).
[488] Boffa Miskell, Section 32 Report, above n 481.
[489] See, Joanna Wane, "Safe as Houses?" *North & South* (Auckland, January 2019), at 36; and, Nikki Macdonald, "Mismanaged Retreat? The life-limiting limbo of Matatā's red zone" New Zealand Herald <www.nzherald.co.nz>.
[490] Hanna, White and Glavovic, above n 479, at 8.
[491] Tonkin and Taylor, *Quantitative Landslide and Debris Flow Hazard Assessment Matatā Escarpment* (T&T Ref. 29115, November 2013).
[492] Boffa Miskell, Section 32 Report.

34 privately-owned properties on the Awatarariki Stream fanhead that have a high loss-of-life risk exposure to future debris flow.[493]

In May 2017, the Council proposed a number of changes to the district plan in a bid to remove current residential zoning, prevent any further development, and compel residents to leave the area. The rezoning of the land will occur at the district level. In an unprecedented move, the activity status for existing residential properties will be made 'prohibited' through a change in the regional plan. This has the effect of extinguishing existing property rights, forcing residents to relocate from the area.

As of late-2018, the managed retreat process is on hold.494 The residents of the 17 parcels of high-risk land have not been granted a certain future. This intermission in the process offers an important window in which the following analysis may be considered by the district and regional council. I hope that the WDC and BOPRC will ensure stronger protections for Māori interests.

Māori interests in Matatā

Sixty percent of the population in Matatā identify themselves as Māori. The area is a meeting point of a number of iwi: Ngāti Rangitihi, Ngāti Awa and Ngāti Tūwharetoa ki Kawerau and their respective hapū.[495] The Mataatua District Māori Council also has ties to the area.

There are three marae in the area, all of which were left unscathed in the 2005 flood. The marae themselves fall outside the 'high risk' area where a managed retreat is proposed. However, members of the marae reside in the 'high-risk areas' and fall within the group that will need to relocate. An issue arises of how a connection will be maintained between members who relocate from Matatā and their marae.

Matatā is home to significant wāhi tapu. Wāhi tapu are sacred places associated with important persons, death, learning, religious ceremonies, sickness, burial, birth or baptism ceremonies etc.[496] These spaces form a part of the spiritual, cultural and historical inheritance of Māori in

[493] *Indicative Business Case*, above n 484.
[494] Katee Shanks, "Awatarariki 'Managed Retreat' Process Advances" (12 December 2018) News Whakatāne <www.newswhakatane.nz>.
[495] *Indicative Business Case,* above n 484.
[496] Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2016), at 70.

the area.[497] Battlefields and urupā (burial sites) are present in Matatā, and the land retains memories of important historical events.

The battle of Kaokaoroa took place in 1864, in an area which encompasses the eastern end of the Matatā township, and along the coastline to Maketu. The battle originated as a response by Crown soldiers to the presence of iwi, such as Tairawhiti, Ngāti Awa and Tuhoe, who were forging up the coastline towards Waikato to aid in the attempt to prevent further land confiscation.[498] A bloody battle ensued and many Māori men were killed.[499] The human bones (koiwi) of the fallen are buried within the hillside adjacent to Matatā and along the coastline.

This battle has become "synonymous with the identity of Matatā and the wider Eastern Bay of Plenty."[500] The Crown has acknowledged the site as being of particular spiritual, cultural and traditional importance to Māori of Matatā. In the Ngāti Awa Claims settlement, the Crown acknowledges that “the mauri of Te Kaokaoroa reserve represents the essence that binds the physical and spiritual elements of all things together, generating and upholding life”.[501]

The Awatarariki valley that the risky fanhead flows through is more generally an area of historical burial and ritual. Many ancestral burial caves are present in the area. The area has been described as “one large Ngati Rangitihi Urupā, with burial areas in the gully floor, high on ledges, in cliffs, ana (caves) in the gully walls and in a large burial cave.”[502]

The 2005 flood dislodged and unearthed a number of ancestral bones in and around Matatā. The media has reported the discovery of 17 koiwi in the flood area, including three human skulls found amongst the rubble.[503] This was a highly distressing experience for local residents, particularly kaumatua.[504]

[497] Heritage New Zealand Pouhere Taonga Act 2014.
[498] Ngāti Awa Settlement Act 2005.
[499] Brown, above n 477, at 5.
[500] At 5.
[501] Ngati Awa Claims 7 Settlement Act 2005.
[502] Brown, at 69.
[503] Katee Shanks, “More Skulls found in Matatā” (8 September 2005) New Zealand Herald <www.nzherald.co.nz>.
[504] Daily Post (Rotorua), “Skull found in flood clean up” (10 June 2005) New Zealand Herald <www.nzherald.co.nz>

Measures to protect Māori interest

The WDC and BOPRC must recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga.505 This is both a matter of national importance under the RMA and a Treaty guarantee. Helpfully, some substantive and procedural measures to protect Māori interests have been taken by the WDC.

In 2005, the Council established Te Kaokaoroa Historic Reserve for the purposes of re-interment of koiwi discovered in the area.[506] This followed the statutory acknowledge for Te Kaokaoroa Historic Reserve, a product of the Ngāti Awa treaty settlement.

In 2006, a 17m high debris dam was proposed to mitigate debris flow effects from the Awatarariki Stream on the township. Whakatāne District Council approved the dam late as the best way of protecting the 57 properties in the worst-hit area of town from another disaster. The damn proposal was formally objected to by Te Rangatiratanga O Ngāti Rangitihi iwi.[507] Grounds for opposition were the sacred nature of the site and the damage to wāhi tapu by the damn. This written objection also claimed that the council had ignored its obligations under the Resource Management Act to consult Ngāti Rangitihi.

In response, a pan-tribal Cultural Impact Assessment was completed in 2007for the full suite of regeneration works for Matatā that followed the debris flow events, including in relation to the proposed debris dam originally proposed as a mitigation option.[508] This was a joint assessment prepared by Ngāti Awa, Ngāti Rangitihi, and Ngāti Tūwharetoa. This cultural assessment identified sites and areas with significant cultural values in this area. The assessment found that structures built within the catchment to hold back debris had the potential to destroy burial caves. The overall preference, as an outcome of those pan-tribal cultural assessments, was for dwellings on the fanhead to retreat from the flow path of future debris and flood flows, thereby avoiding the need for any works in the stream catchment and risk to the burial caves in the sides of the stream valley.

[505] RMA, s 6.
[506] Ngāti Awa Claims 7 Settlement Act 2005.
[507] Juliet Rowan "Iwi says no to flood defence" (16 January 2006) New Zealand Herald <www.nzherald.co.nz>.
[508] Boffa Miskell, Section 32 Report, above n 481.

In March 2012, due to poor ground conditions and the escalating cost of building such a structure, the project was reviewed. Rather than a solid damn, a net ring was proposed, so as to let the water flow but catch any future debris. However, later in 2012, an engineering report recommended that the net ring be abandoned.[509] A conclusion in this report was there was no possibility of constructing any debris retention structure upstream, particularly because of objections from tangata whenua.[510]

In April 2018, the proposed plan changes were publicly notified for submissions. WDC invited Ngāti Awa to comment on the proposed plan change. The iwi recommended that, if there was a likelihood of more events like that which occurred on 18 May 2005, a sarcophagus or robust structure should be built at the Kaokaoroa reserve or the koiwi might be moved to Otaramuturangi Urupā.[511] The submission also noted that the ongoing management of that reserve area will be required of Council. It also asked that appropriate wording be incorporated into the proposed plan change and a discussion be had about this. In December, Te Mana o Ngāti Rangitihi Trust made a submission in support of Ngāti Awa.

In 2018 proposed new rules in the District Plan addressed the protection of koiwi. The district plan permitted activities operating in accordance with Section 18(2) of the Reserves Act 1977 on the Te Kaokaoroa Historic Reserve.[512] In certain areas, earthworks is a restricted discretionary activity.[513] In assessing an application for a restricted discretionary activity for earthworks in the high-risk area, the council must restrict its discretion to "whether the activity will appropriately address the accidental discovery of koiwi or other taonga, including giving effect to any protocols agreed with tangata whenua." [514]

Treaty evaluation

The Treaty of Waitangi principles provide a lens through which we may critically assess the protection of Māori interests in Matatā in the context of undertaking climate adaptation. The principles offer benchmarks for procedural and substantive action which decision makers should seek to meet. Treaty principles play more than a normative role; there is a statutory

[509] Boffa Miskell, Section 32 Report.
[510] Boffa Miskell, Section 32 Report, above n 481.
[511] Email from Bev Hughes (Ngāti Awa) to Marie Radford (18 June 2018).
[512] Boffa Miskell, Section 32 Report.
[513] Boffa Miskell, Section 32 Report.
[514] Boffa Miskell, Section 32 Report.

requirement under the Resource Management Act that decision makers take into account the principles of the Treaty, as well as protect certain interests as matters of national importance.

The section 32 Evaluation Report Prepared for Whakatāne District Council contains a general statement that the Whakatāne District Council has taken into account the Treaty of Waitangi and discharged their statutory obligation under the RMA.

> Consultation with Tangata Whenua has occurred at all critical stages of WDC's management response to the debris flow risk. Active steps have been taken to protect sites of significance identified through a pan-tribal cultural impact assessment. From this, it is understood that managed retreat of dwellings from the fanhead is the preferred risk management strategy as it will mitigate adverse effects on those sites of significance.[515]

Active protection.

The Marae is a focal point of Māori communities. It provides people with the tenets of wellbeing, such as cultural and spiritual connection and social support. Managed retreat involves removing members from the community and relocating them elsewhere, although where to has not been addressed. To avoid fragmentation of the local Māori community, relocated residents should have continued and preferably nearby access to the Marae. No suggestions have been made as to how this interest might be protected.

As tangata whenua, the identity of Māori is inextricably linked to the natural world. The relationship with the land is crucial to identity, sense of culture and the continuation of traditional processes. Loss of land corresponds with the loss of mana, and a severance of connection with ancestors and community. It hinders the practical expression of 'ahi ka' – a notion which means to 'keep the home fires burning' through occupancy of a place. No positive steps been have taken to ensure the continuation of 'ahi ka' and the unique status as tangata whenua protected.

From the existence of wāhi tapu and the connection with land stems a kaitiakitanga relationship. This is a relationship of reciprocal obligations between kaitiaki (caregivers) and the wāhi tapu, in which kaitiaki are responsible for the protection and careful management of these culturally important spaces. Section 7(a) of the Resource Management Act provides that decision makers

[515] Boffa Miskell, Section 32 Report, above n 481.

shall have particular regard to kaitiakitanga, as well as it being an interest to be protected under the principle of active protection. In terms of substantively protecting this relationship, the establishment of the Kaokaoroa Reserve has allowed the reinterment of discovered bones, creating a protective space for the koiwi and thus the kaitiaki relationship. Plan changes have also protected the wāhi tapu to some extent, by zoning earthworks as a restricted discretionary activity in certain areas. No recommendations have been made as to how the general area, which still holds human remains, might be preserved from future floods. It would be expected that attention will be paid not only to the koiwi and wāhi tapu, but to maintenance of the relationship with the area itself. It needs to be addressed how those who are forced to relocate can maintain a kaitiaki connection without being present. Looking to the future and the occurrence of another flood, thought might need to be given as to how a kaitiaki relationship might be maintained with the land if that land becomes submerged beneath rubble and debris.

Overall, it appears that the principle of active protection of Māori interests as required by Article 2 has not been upheld. It is not even clear that the s 6(e) standard of recognising and providing for all of the interests concerned has been met, nor that particular regard has been paid to enabling mana whenua to exercise kaitiakitanga under s 7. Even taking into account the fact that these interests can be outweighed by other factors in Part 2, including the need to make better provision for natural hazards, these Māori interests need to be included as part of the provision for natural hazards.

Partnership

Early consultation undertaken by the WDC was deficient. The WDC failed to make contact with Ngāti Rangitihi prior to deciding upon the construction of a damn. This was far from a genuine, meaningful consultation that the partnership relationship demands, and undermines the statement made by the WDC that consultation had occurred at all critical stages of the process.

The formal objection lodged by Ngāti Rangitihi objected to the construction of the damn on the basis of desecration to wāhi tapu. Notably, this did not act as a veto. It was not until later in the saga, when all feasible engineering options had been exhausted, that a reroute to managed retreat was made and the plans for the damn abandoned. This suggests that, at the early stages, WDC was not fully informed of the significance of the wāhi tapu due to insufficient consultation with Māori.

A more complex question of whether there was 'full, free and informed consent' also arises. The principle of partnership calls on the WDC to equip local Māori with the tools to participate in a constructive way in the climate adaptation process. There is no clear evidence that this has occurred.

An additional indicator of the partnership principle in action is the attention paid to settlement Acts in the s 32 report.[516] Statutory acknowledgements are statements in Treaty of Waitangi settlements between the Crown and iwi partners that are intended to recognise the mana of iwi partners in relation to identified sites and areas. Three Settlement Acts relating to iwi within the Whakatāne District have been enacted, which include Matatā within the area of interest. These are the Ngāti Awa Settlement Act (2005), the Ngāti Tūwharetoa Settlement Act (2005) and the Ngāti Mākino Claims Settlement Act (2012). Within the s 32 report the WDC states that the proposed plan changes do not conflict with the identified outcomes in the Settlement Acts. Thus, to some extent, these existing Treaty partnership provisions are maintained.[517]

Overall, while we have been able unable to obtain the necessary information in order to determine whether the Treaty principle of partnership has been met, it appears that it might not have been. In relation to the duty of partnership, some consultation has been undertaken but it has been insufficient. In the early stages of the Matatā recovery process, an evident lack of consultation with iwi has been identified. There is no record of other affected Māori, such as Mataatua District Māori Council, having been properly consulted.

Good faith

The degree and quality of consultation is an indicator of whether the principle of good faith has been adhered too. As discussed, consultation with Māori was absent at some stages and certainly inadequate overall. The lack of appropriate consultation described above suggests that there was a lack of good faith. What consultation measures are appropriate in the future needs to be considered more carefully, and in light of the need to protect Article 2 assets.

[516] Boffa Miskell, Section 32 Report, above n 481.
[517] Boffa Miskell, Section 32 Report.

Right to Govern

This right entitles Māori to maintain rights to territories and resources. By definition, managed retreat forces the abandonment of territory. The sensitivity of this interest is heightened by the significant loss of Māori land already due to historical seizures by the Crown. Managed retreat as a notion may amplify the historic trauma suffered by the community from past Treaty breaches and land seizures. No explicit recognition of this trauma has been made, nor the right to govern or maintain kaitiakitanga protected.

Conclusion on Matatā

The lessons learned in Matatā are relevant to the adoption of climate adaptation measures elsewhere and the protection of Māori interests. Although mainstream media coverage of Matatā and the proposed plan changes has been significant, reporting has been largely silent on Māori interests in the area. Documents that record incidents of consultation between Council and iwi have been difficult to obtain, making it difficult to undertake a comprehensive case study of Māori interests and Matatā. However, this lack of transparency in itself is a shortcoming in its own right, as well as making it difficult to hold the WDC to account and assess their behaviour against Treaty standards.

Despite not having full information, the information outlined in this paper suggests that Treaty interests have been insufficiently protected. It is not clear that the active protection of marae access, the status of tangata whenua, ahi ka and kaitiakitanga were even properly taken into account, as required by the weak obligations of s 8 of the RMA. The relationship of partnership between Crown and iwi was certainly not honoured, as seen primarily in the failure to adequately consult with iwi on major decisions. This case study illustrates how, without careful attention to Treaty obligations and how these play out in a climate adaptation context, actions by the local and regional authorities could give rise to Treaty breaches that the Crown may have to answer for in the future.

4 Case Study 4: The 'Clifton to Tangoio' Coastal Hazards Strategy

The Ministry for the Environment's 2017 *Guidance* recommended that a new method of collaborative community decision-making be employed in order to decide on how a community should adapt to future climate change. As described above, the decision-making process uses alternative scenarios for possible sea-level rise and proposes a method for a community to decide on the best mix of adaptation measures in the short, medium and long terms. Importantly, the interests of tangata whenua are recognised as needing special procedural and substantive protections. If done correctly, such decision-making processes could contribute positively to upholding Treaty guarantees. However, if sufficient protections are not in place, for both procedural and substantive interests, then such alternative decision-making frameworks could result in Treaty breaches, even while they implemented climate adaptation measures that were agreed on by the community as a whole.

The Hawkes Bay Clifton to Tangoio Coastal Hazards Strategy 2120 was recently developed using a similar decision-making process to that provided in the Ministry for the Environment *Guidance*.[518] There was some special provision for Māori interests, both procedurally and substantively, and it was overseen by a steering group that included three iwi post-settlement governance entities on equal footing with the local and regional councils. This went beyond the protections provided under the RMA. This case study summarises the process and some indicators of the upholding of Māori interests. It suggests that further study be undertaken in order to assess the results of the procedure from the perspective of upholding Treaty guarantees, both procedural and substantive.

The process taken to create the Strategy 2120

Hawkes Bay was divided into two different areas: north and south of the Port of Napier.[519] Communities in each area assessed the most appropriate climate adaptation measures in the future for their area, in the short, medium and long-term.[520] These decisions made by the

[518] Simon Bendall, Mitchell Daysh, *Report of the Northern and Southern Cell Assessment Panels* (Clifton to Tangoio Coastal Hazards Strategy 2120, February 2018).
[519] At 33.
[520] At 33.

community groups were recommendations to the joint steering group and thereby to the councils for the development of their policies and plans.

The first stage was the identification by experts of both current and future risks of coastal erosion and coastal inundation hazards.[521] The next step was the development of the decision-making framework.[522] The framework adopted included three separate aspects: a Dynamic Adaptive Planning Pathways approach, as recommended in the MfE *Guidance*, in order to develop future options for adaptation measures under different scenarios;[523] a Multi-Criteria Decision Analysis process (MCDA) to weigh up the alternative options presented; and a Real Options Analysis whereby economic information was added – i.e. the cost of the different options – in order to see which options were most worth pursuing.

The third stage was where community assessment panels were convened in order to carry out the decision-making framework. There was one assessment panel one for each area: the Northern Cell and the Southern Cell. Both assessment panels undertook the decision-making frameworks, as devised, and recommended how best to respond to coastal hazard risks in their area during the 100-year strategy period. These recommendations for short, medium and long-term actions were finalised in early 2018.[524] The fourth stage will involve creating an implementation plan, then monitoring and reviewing progress over the next 100 years.[525]

Membership of the assessment panels was decided by local stakeholders and community groups, which appointed representatives to sit on the two panels. The aim was to ensure that certain stakeholders were included, and that representatives who were chosen would act as conduits between the panel and their communities.

The panels were first educated by the technical advisory group about the risks identified at stage I; they then used the DAPP process in order to create alternative pathways that combined short, medium and long-term response actions.[526] They used the MCDA process to weigh up alternative options, incorporating technical and impact assessments that were weighted by

[521] Bendall, above n 518, at 5.
[522] At 5.
[523] At 204.
[524] At 12.
[525] At 6.
[526] At 40. All possible pathways were identified, with no options omitted.

importance.[527] The panels then held public meetings to receive feedback on the pathways and confirm the criteria by which to assess the different options.[528]

Importantly, a cultural values assessment and a social impact valuation were also undertaken. Mana whenua made recommendations on "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" and devised scores that could be applied to the different pathways and options.[529] The technical advisory group similarly devised recommended scores in relation to the technical criteria for the different options.

The panels then applied the criteria to the various pathways, scored them according to the weight granted to each factor, and applied the Real Options Analysis using information about the costs of each option.[530] Wider community sessions reviewed the MCDA scoring, the economic analysis and the panels' preliminary recommendations.[531] Independent analysis of the process confirmed that the process was robust and the pathways identified were sound. The panels' final reports and recommendations were endorsed by the joint steering committee and were presented to the regional and district councils who are currently considering them and their implementation.[532]

The protection of Māori interests

Mana whenua interests were respected through the procedures adopted as well as the substantive considerations. As already mentioned above, in the top steering group level, three iwi post-settlement governance entities were included alongside the councils involved. This involvement at the highest, decision-making level was significant in that it respected the Treaty partnership at that level and went beyond the RMA provisions for participation.

Mana whenua representatives were also included as voting members on both assessment panels: three representatives out of 18 members on the Northern Cell panel and three mana

[527] Bendall, above n 518, at 48.
[528] At 37–38.
[529] At 64.
[530] At 65.
[531] At 44.
[532] Victoria White, "Call for action to protect Hawke's Bay against sea level rise" (20 February 2018) New Zealand Herald <www.nzherald.co.nz>

whenua representatives out of 20 members on the Southern Cell panel.[533] This participation in decision-making follows the MfE *Guidance* in this respect.

Important substantive protections for Māori interests were also included in the decision-making process. As mentioned above, a cultural values assessment was undertaken, identifying interests to be protected.[534] The Cultural Values Report acknowledged that the Treaty of Waitangi guaranteed the protection of tangata whenua's land, forests and natural resources, and identified relevant Treaty principles.[535] It identified the principle of partnership between the Crown and tangata whenua, and an undertaking to act collaboratively and in good faith regarding issues of common concern.[536] It identified that the Crown must actively protect Māori interests in natural resources, species, places and other taonga, and that this requires more than passive recognition and consultation.[537] The Report also identified key values and areas of significance from local iwi and hapū management plans.[538]

Another substantive protection was that one of the MCDA assessment criteria addressed the "relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga".[539] Helpfully, mana whenua devised recommended scores for its application. Thus, iwi and hapū separately evaluated the different pathways and options according to their own values and priorities. Unsurprisingly, their recommendations were based on a desire to retain and enhance the natural coastal environment as much as possible, while protecting historic values and taonga.[540]

Before the panels deliberated, they participated in a wānanga and a hikoi in order to be made more aware of the Māori values and interests. They were taken on a bus tour of the area to see some of the sites of significance, which reportedly was essential to their subsequent decision-making.[541] Indeed, when assessing the different adaptation options, both panels assigned the

[533] Bendall, above n 518, at 35.
[534] Aramanu Ropiha, *Assessment of Cultural Values Report* (Clifton to Tangoio Coastal Hazards Strategy 2120, Hawkes Bay Regional Council, June 2017).
[535] At 7.
[536] At 7.
[537] At 7.
[538] At 14.
[539] This reiterates the wording of s6(e) of the RMA.
[540] Bendall, above n 518, at 64.
[541] At 41.

highest weighting to the criterion protecting these Māori interests. Both panels recognised the significance of the coast for mana whenua, including to live, to gather food, for heritage values, as well as for cultural values.[542] The Southern panel also acknowledged the Treaty obligations owed to Māori and the Māori interests protected in ss 6-8 of the RMA.[543]

Comment on the protection of Māori interests

There were significant procedural and substantive protections of mana whenua interests in this process, explicitly adopted from the perspective of upholding the Treaty relationship and protecting those interests. This went beyond the required procedures of the RMA and is unusual in Council-run community decision-making processes in Aotearoa. It started with the inclusion of the three iwi post-settlement governance entities alongside the councils on the steering group, in a partnership model, and continued with guaranteed mana whenua representation on the assessment panels.

Even on its face, the assessment procedure treats Māori as more than simply another community group. I do not know whether the three representatives on the assessment panels were sufficient to represent all hapū in each assessment panel area; but the explicit inclusion of mana whenua representatives, as well as the particular guidance in respect of the protection of their interests, shows healthy attention to the protection of the Treaty guarantees, both procedural and substantive. The fact that the protection of substantive Article 2 interests was reflected in the substance of the decisions made reinforces the positive attention that this process paid.

The measures taken to actively pay attention to Māori interests are excellent examples of what is needed in order to undertake active protection of Article 2 assets: the cultural values report, the wananga, hikoi and bus tour of relevant sites. The cultural values report in particular emphasised the relevant Treaty duties and the need to enable Māori to manage their taonga in accordance with tikanga Māori.[544] The panels reported that the processes allowed information to be provided through interaction with experts over a long timeframe to ensure that sound decisions were being made, both in relation to science and Māori cultural values.[545]

[542] Bendall, above n 518, at 50. In respect of the Northern Cell.
[543] At 51.
[544] Ropiha, above n 534, at 7.
[545] Bendall, above n 518, at 39.

A drawback of the process adopted is that the decision-making process was still one where the majority of each panel could have decided not to recommend the adoption of options to protect mana whenua interests, whether on financial grounds or simply not weighting them highly enough. A Treaty-compliant process should ensure that they were prioritised rather than leaving them to be potentially outweighed by a majority vote. A second drawback is that the final reports and conclusions reached are merely recommendations to the relevant councils. It is up to the councils what they will actually adopt, according to their standard RMA and Local Government Act decision-making procedures.

It is arguable that there needs to be a better mechanism to ensure that the Article 2 guarantees are not overridden so as to create another Treaty breach in the future. The decision-making at the community assessment panel level could be assessed differently in this light, although I do not have any information to suggest whether and how that should have been done differently. But it is more likely that the sticking point will be at the final, council decision-making level: Treaty principles require a different type of partnership and collaboration in the decision-making over Article 2 assets. The problem lies primarily with the provisions of the RMA which the councils operate under; but it also lies with councils that rely on utilising only these minimum provisions and not best practice. For example, utilising the Landcare best practice guidelines for working with tangata whenua, it can be argued that direct collaboration between mana whenua and the councils should have existed independently of, and in addition to, the wider community engagement and assessment processes.[546]

The decision-making process was observed throughout and evaluated. It has already been acknowledged that there were some missing voices, such as those of young people, for example.[547] I suggest that attention continues to be paid to the rest of the process from the perspective of how well it upholds Māori and Treaty interests. The excellent substantive attention paid to date bodes well, and it might indicate that this is a helpful way for communities to make climate adaptation decisions – to better achieve consensus effectively through bottom-up education rather than through a high-level partnership model. However, it could also be a

[546] See Appendix 1, below.

[547] Bendall, above n 518, at 45. It was suggested that there will only be a certain range of types of participant due to the voluntary nature of the project. See also, Bendall, at 9.

way for minority Māori voices and interests to be outweighed by a majority. It therefore needs to continue to be monitored and evaluated from this perspective.

5 Case Study 5: *Hemi v Waikato District Council* (2010)

Māori culture and climate adaptation in the Environment Court[548]

As discussed in earlier sections in this paper, the 2010 New Zealand Coastal Policy Statement (NZCPS) contains policies redirecting decision makers to avoid likely coastal hazards arising from climate change.[549] Until then, the NZCPS that was being relied upon until then was from 1994; since then, the science relating to likely coastal hazards arising from climate change has advanced considerably. The better understanding of the likely effects of climate change that has emerged since NZCPS 1994 is important as it relates to the size and urgency of the responses now required.

Perhaps unsurprisingly, the 2010 NZCPS policy on coastal hazards represents a significant change in direction from the 1994 NZCPS in this respect, with new policies on coastal hazards containing a focus on avoidance of risk for new and existing developments. The Environment Court itself has stated that the NZCPS has altered the field with respect to residential development in hazardous coastal areas, making Environment Court decisions before the passing of the 2010 NZCPS of "little assistance" for current appeals.[550] Since this Environment Court comment, the Department of Conservation has produced its helpful *Guidance* notes on the 2010 NZCPS.[551]

Also since 2010, the scientific information and guidance available to decision-makers on future possible coastal climate-related hazards has increased and advanced. For example, in relation to climate science, before 2010 the foundation documents for assessments of climate change effects used by the Environment Court were those contained in the IPCC's Fourth Assessment

[548] I thank research assistant Matthew Dicken (BSc and LLB student, VUW) for researching and providing the draft for this case study.
[549] See NZCPS 2010, Policy 25; discussed in more detail above Pt VI.4. See also Pt VI.5.
[550] *Gallagher,* above n 41.
[551] Department of Conservation, *NZCPS 2010 guidance note: Coastal Hazards* (December 2017); discussed above Pt VI.5.

Report,[552] together with Ministry for the Environment *Guidance* from 2008.[553] Whereas since then, the IPCC has produced a more recent comprehensive assessment report[554] as well as a *Special Report on Global Warming of 1.5°C*,[555] and the Ministry for the Environment has produced the new MfE *Guidance* discussed above.[556] Finally, also post-2010 have been the significant decisions of the Supreme Court in *King Salmon*, on the effect of national policy statements under the RMA in relation to local government planning documents, plus the most recent decision of the Court of Appeal relating to resource consents in *RJ Davidson Family Trust v Marlborough District Council*.[557] These developments indicate that all judicial decisions made beforehand will need to be examined closely for their precedential value in relation to climate adaptation.

This case study examines one of the decisions made prior to the release of the NZCPS 2010 and the MfE *Guidance*: *Hemi v Waikato District Council*.[558] This case is unique in that the Environment Court allowed a resource consent to build a house close to the sea, justifying taking the coastal hazard risks that were identified on the basis of upholding kaitiakitanga. This case study reviews the outcome of the case and the reasoning adopted by the Court. The purpose of this case study is to assess whether the outcome of the case would be the same had the case been decided with the relevant law and guidance available to the Court today. It takes the original facts (a resource consent application) and examines it in light of the current standards, including the current operative District Plan. If it arose today, such an application would likely not be decided in the same way. The importance of re-visiting such a case is to show how the law, policy and guidance to decision makers has developed and how such developments may alter the Court's approach toward effects associated with climate change and coastal hazards.

[552] Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, Geneva, Switzerland, 2007) (AR4).
[553] Ministry for the Environment, *Climate change effects and impacts assessment: A guidance manual for local government in New Zealand* (ME 870, May 2008).
[554] Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, Geneva, Switzerland, 2014) (AR5).
[555] Intergovernmental Panel on Climate Change, *Special Report: Global Warming of 1.5°c* (IPCC, Geneva, Switzerland, October 2018) (IPCC, *Global Warming of 1.5°c*).
[556] MfE, *Guidance,* above n 11, and *Summary*, above n 27. See discussion above Pt VII.1.
[557] *RJ Davidson v Marlborough District Council* [2018] NZCA 316.
[558] *Hemi,* above n 15.

***Hemi v Waikato District Council* [2010] NZEnvC 216**

The *Hemi* case involved the granting of a resource consent under the Resource Management Act 1991 (RMA) to build a house in a coastal inundation zone. Mr Hemi applied to the Waikato District Council to construct the home on ancestral land owned by his family trust at Raglan. The site was described as "on the landward side of an in-filled boulder spit. The crest of the spit lowers towards the east where a lagoon occurs, into which waves enter".[559] The proposed activity was located in the Coastal Zone within the Whaanga Coast Policy Area per the Operative District Plan. Rule 26.49A required buildings to be setback 100m from Mean High Water Springs (MHWS).[560] Any activity that does not comply with this is 'non-complying'.[561] The proposal saw the building set back only 70m from MHWS, meaning the application needed to meet the requirements of s104D(1) of the RMA.[562]

Mr Hemi had originally applied for resource consent in 2005, and the Council declined his application on the basis that the risk of coastal inundation was unacceptable. Mr Hemi appealed, and Waikato District Council then supported his application; however, it was opposed by one of the neighbouring landowners and was thus heard by the Environment Court. The Environment Court in its decision on the consent notes that the actual and potential effects of the proposed construction of the house are the effects associated with coastal hazards, the existing ecology of the site and the impact on natural character, landscape and amenity values.[563] The Court further notes that, due to the unique nature of the case, cultural effects ought to also be considered.[564]

This case study will focus on two of these effects: the effects associated with coastal hazards, and the cultural effects of the proposal. These are the two effects most significant to the court's reasoning, plus they are the two effects most significantly altered by the most recent law, central government guidance and policy changes available to the court today.

[559] *Hemi,* above n 15, at [1] and [2].
[560] Waikato District Council, Operative District Plan 2011, Rule 26.49A – Coastal Building Setbacks: "Construction of a building is a controlled activity if the building is set back at least: 100m from mean high water springs. Any activity that does not comply… is a non-complying activity".
[561] RMA s 77A.
[562] RMA, s 104D(1): (a) the adverse effects of the activity on the environment will be minor; or (b) the application is for an activity that will not be contrary to the objectives and policies.
[563] *Hemi,* above n 15, at [4].
[564] At [4].

Coastal Hazards

The Court identified that there were two areas of coastal hazard which arose in the case: the risk of coastal inundation from the ocean and the lagoon, and the risk of lagoon edge erosion.[565] It noted that these could result in the house being damaged, becoming unusable and that personal safety could be compromised during an exceptional storm.[566]

The coastal inundation risk was assessed by four experts who worked together to advise the court. They concluded that "sea-level rise values between 1.5m and 2m could not be ruled out, but that an estimate of between 0.5m and 1.5m should be adopted for the timeframe out to the decade 2090-2100".[567] From this, they suggested that the lower estimate "should apply to investments of limited value where personal safety is not an issue and viable adaptation options are available".[568] Mr Hemi's house was assessed as being on the lower end and the sea-level rise figures accepted were 0.6 to 0.9m over 100 years. This meant that the potential water level during that time period, even after sea-level rise, would be below the floor level of the basement, such that the risk was therefore only minor. Similarly, the potential effect of lagoon edge erosion was determined to be of low probability and impact.[569] Overall, the Court found that, with the low to moderate risk to the dwelling and minimal personal risk from sea-level rise, the appellant would have several decades of use before removal of the dwelling would be required even under a worst-case sea-level rise scenario.[570]

In assessing the overall risk of coastal hazard, the court followed the decision in a previous case, *Waterfront Watch Inc v Wellington Regional Council* (2009),[571] stating "that there is an element of 'voluntary assumption of risk' by people who choose to live near the coast in situations such as this" and the court must decide if the risk is acceptable, rather than requiring the avoidance of risk.[572] In this case the risk was considered acceptable.

[565] *Hemi*, above n 15, at [44].
[566] At [45].
[567] At [57].
[568] At [57].
[569] At [71].
[570] At [60].
[571] *Waterfront Watch Inc v Wellington Regional Council* [2009] NZEnvC W043/09.
[572] *Hemi*, at [77].

Cultural Effects

The Court considered a number of matters in relation to Māori relationships with the land. The Court considered the significance of the site under section 6(e) of the RMA, assessing whether there was any Māori ancestral links, wāhi tapu sites or taonga. The hapū concerned were Ngati Koata and Ngati Ikaunahi.[573] Despite the conflicting evidence given by various hapū members, evidence given by those who had "special status within their hapū as the holders of knowledge"[574] lead the Court to conclude that there was insufficient evidence to establish the existence of wāhi tapu or other taonga on, or in respect of, the land in question.[575]

In terms of the ancestral links, the Court placed emphasis on the fact that the land had been in private ownership for some time and, in reality, the continued access to the land for those with ancestral links was "legally at the whim of the owner".[576] The building of a house would not severe those links as they would continue to be recognised by allowing others with ancestral camping on the site as part of the proposal.[577]

Following section 7 of the RMA, the Court also considered whether enabling Hemi to build a house and live on the land would better allow kaitiakitanga to be exercised.[578] The Court found "the presence of people living at the site who have ancestral links to the land … will enable not only them, but others who exercise kaitiakitanga to be able to do so more easily".[579]

Finally, as a non-complying activity, the court could only grant consent if it found that the application "represent[ed] unusual qualities or [was] a true exception".[580] The Court decided that, because of Mr Hemi's cultural links to the land, strong support from hapū members, and the provision of a camping area to allow continued use to others with ancestral links, the proposal had special characteristics to meet the test, and consent was granted subject to conditions.[581]

[573] *Hemi,* above n 15, at [6].
[574] At [168].
[575] At [168].
[576] At [170].
[577] At [170].
[578] RMA, s 7.
[579] *Hemi,* at [185].
[580] At [96]. This is the test originally set out in *Foster v Rodney District Council* [2010] NZRMA 159.
[581] At [198].

New Guidance, Law and Planning Instruments

What is particularly striking about this case is the greater weight the Court placed on Māori ancestral connections over the risk involved with building in a coastal hazard zone. However, with the most recent MfE *Guidance* and provisions of the NZCPS 2010, the balance between recognising the ancestral connections to land and avoiding building in coastal hazard zones may be approached differently by the Court today.

Planning Documents

In *Hemi,* the case involved both an Operative District Plan and a Proposed District Plan. Now, 8 years later, the once Proposed Plan has since become the current Operative Plan (ODP). However, a new Proposed Plan (PDP) was recently notified in July 2018. This first stage of the District Plan Review did not include the review of issues relating to natural hazard risk and climate change.[582] Despite this, there are a few changes in the PDP that could influence the outcome of *Hemi* should it be decided today.

The key difference between now and then is the zoning of the Hemi land and the activity status given to such a proposal. When *Hemi* was decided, the proposed activity was located in the Coastal Zone within the Whaanga Coast Policy Area per the ODP. Rule 26.49A required buildings to be setback 100m from Mean High Water Springs (MHWS).[583] As mentioned above, the proposal saw the building set back only 70m from MHWS, meaning the application was non-complying and needed to meet the requirements of s104D(1) of the RMA.[584]

The recent PDP places the land in question in the Rural Zone, subjecting it to Rules specific to the Whaanga Coast Development Area. Rule 22.7.1.6(a)(iii) states that buildings within a development area must be set back a minimum of 100m from MHWS. A building that does not comply gains discretionary activity status.[585] A discretionary activity also requires a resource

[582] Waikato District Council, Proposed District Plan 2018. Chapter 11 is entitled "natural hazards and Climate Change (placeholder stage 2)". The council notes: "It is anticipated that the review of the Operative Plan relating to Natural Hazards and Climate Change will be notified as Stage 2 of the Proposed Plan in 2019". <www.waikatodistrict.govt.nz>

[583] Waikato District Council, Operative District Plan 2011, Rule 26.49A – Coastal Building Setbacks: "Construction of a building is a controlled activity if the building is set back at least: 100m from mean high water springs. Any activity that does not comply… is a non-complying activity".

[584] RMA, s 104D(1): (a) the adverse effects of the activity on the environment will be minor; or (b) the application is for an activity that will not be contrary to the objectives and policies.

[585] Waikato District Council, Proposed District Plan, Rule 22.7.1.6.

consent before it can be carried out. The consent authority can exercise full discretion as to whether to grant consent and as to what conditions to impose on the consent if granted. This change in status would affect the Court's process in considering the application: the Court would no longer have to go through the s 104D(1) requirements; rather, their determination would be based solely on the outcomes found when applying the matters that they ought to have regard to under s 104(1).[586]

With the Chapters on Natural Hazards and Climate Change not yet added to the first stage of the PDP, the relevant ODP policies outlined in *Hemi* currently remain. However, the 2010 NZCPS impacts their application. The ODP prefers avoidance of development in hazard prone areas over mitigation of effects,[587] so as to minimise the risks of natural hazards resulting from use, development and protection of land.[588]

Policy 5.3.4 deals specifically with Coastal erosion and storm events, and recognises that "the effects can be extreme and unpredictable and that building in areas prone to these hazards is dangerous. This policy requires avoidance of these hazards", whilst noting the need to refer to the NZCPS.[589] The application of avoidance has strengthened with the NZCPS 2010 as its policies are strong and directive and need to be implemented as such.[590]

The impact of recent case law

The Court in *RJ Davidson* decided that a consent authority need only have regard to the provisions of Part 2 of the RMA when it is appropriate to do so.[591] The Court of Appeal confirmed that Part 2 remains highly relevant to the determination of resource consent applications. Authorities must have regard to Part 2 where careful scrutiny reveals that the plan has not been prepared in accordance with the provisions of Part 2. Conversely, the authority may choose not to refer to Part 2 when it adds nothing to the evaluative exercise.

[586] RMA, s 104.
[587] Waikato District Council Operative District Plan, Policy 5.2.2 and 5.3.2.
[588] NZCPS 2010, Objective 5.2.1.
[589] NZCPS 2010, Policy 5.3.4.
[590] See NZCPS 2010, Policies 24 and 25.
[591] *RJ Davidson,* above n 557, at [47].

The Court in *Hemi* turned its mind to the application of relevant Part 2 sections of the RMA, most notably those in relation to Māori interests.[592] The effect of the outcome of *RJ Davidson* is such that there is a need to consider whether the relevant planning instruments provide policies directive enough to prevent an analysis of Part 2. The Court of Appeal notes that, where the NZCPS 2010 is engaged, any resource consent application would be assessed having regard to the NZCPS provisions and not need to have recourse to Part 2. It is suggested that this is the case in respect of the planning instruments in relation to coastal adaptation, and the proposal to build a dwelling on a coastal inundation area demonstrably breaches the directive policy of the NZCPS 2010.[593]

In this *Hemi* consent, the applicable NZCPS policies and the WDC planning documents implement Part 2, so recourse to Part 2 would not be required.[594] Due to the directive policies and hierarchy of planning documents, even if a consent authority resorted to application of Part 2, it would be unlikely to get any further guidance from it, at least in relation to the coastal hazards. These documents and issues will now be examined more closely.

New Zealand Coastal Policy Statement 2010

The NZCPS 2010 policy on coastal hazards represents a significant change in direction from the NZCPS 1994. The NZCPS 2010 contains new policies on coastal hazards with a focus on avoidance of risk for new and existing developments. Most important to the re-decision of *Hemi* would be Policy 25: it contains strong directive guidance to encourage the location of infrastructure away from areas of hazard risk where practicable and discourage the use of hard protection structures.[595]

It also added a requirement to undertake coastal hazard risk assessments for a timeframe of 'at least the next 100 years' and consider the effects of climate change.[596] If *Hemi* was decided today, the risk assessment will need to be conducted out to 2120 as opposed to 2090-2100, as was used.

[592] At [136]-[192].
[593] See NZCPS 2010, Policies 24 and 25.
[594] *RJ Davidson,* above n 557, at [77]-[82].
[595] NZCPS 2010, Policy 25.
[596] NZCPS 2010, Policy 25.

Implementation of the NZCPS places an onus on councils to acquire hazard risk data as well as address uncertainty when identifying at risk locations.[597] Policy 3 promotes the continued application of a precautionary approach to managing activities in the coastal environment when their effects are uncertain but potentially significantly adverse and are vulnerable to effects of climate change.[598] It contains additional reference to what precaution might mean. This becomes helpful due to the uncertainty around longer term projections needed to satisfy the planning horizon of 100 years, and around the hazard risk data required. As the MfE Guidance notes, greater uncertainty about climate change implies a greater probability of adverse consequences which require precautionary, flexible and adaptable responses.[599]

Sea-level rise predictions for coastal hazards assessment

Sea-level rise is a major focus of the *Hemi* case and element of the court's reasoning. Due to the non-linear and delayed responses of ocean and ice environments to ongoing climate change, it is not currently possible to predict the expected sea-level rise for any particular area.[600] However, the MfE *Guidance* identifies – and promotes the use of – climate change scenarios as projections of how the future might unfold.

The MfE *Guidance* uses the IPCC (2014) AR5 base projections of global temperature rise and sea-level rise shown as the four representative concentration pathway scenarios (RCP).[601] An additional "upper 83rd percentile RCP8.5 scenario (H^+)" has been added to represent a higher rate of rise which may be experienced beyond 2100.[602] The NZ RCP 8.5 H^+ is the upper end of the "likely range" according to the MfE *Guidance*.[603] It reflects the possibility of "future surprises" toward the upper range of projections and represents a situation where more rapid rates of sea-level rise could occur due to dynamic ice sheet processes and instability thresholds.[604] The IPCC argues (with *medium confidence*) that the instability thresholds could be

[597] NZCPS 2010, Policy 24.
[598] NZCPS 2010, Policy 3.
[599] MfE, *Summary,* above n 27, Box 11, at 71.
[600] MfE, *Guidance*, above n 11, at 86.
[601] At 87.
[602] At 90.
[603] At 105.
[604] At 105 & 111.

triggered with global warming from 1.5°C to 2°C.[605] Further, if no attempt is made to reduce emissions, we could reach 1.5°C by 2030.[606]

The IPCC *1.5°C Report* notes that the likely range in sea-level rise is of around 0.26-0.77 metres by 2100 with 1.5°C warming, and up to 0.93 metres for 2°C.[607] The MfE *Guidance* also indicates the need to add offsets to represent the local environment here in Aotearoa – an addition of 0.02-0.3 metres by 2100.[608] The *Guidance* shows that, using these higher scenarios, sea level could reach 1.0 metres by 2100.[609] In comparison, the range of 0.6-0.9 metres was relied on by the experts and thus by the Court in *Hemi.*

An additional factor is the extended timeframe: the base set of global sea-level rise projections needs to be extended to 2120 to align with the planning timeframe of "at least 100 years" stipulated in the NZCPS.[610] Even if warming is limited to 1.5°C, the IPCC have stated that it is *virtually certain*,[611] and can conclude with *high confidence*,[612] that sea levels will continue to rise post-2100.[613] RCP 8.5°C H^+ predicts sea-level rise to be ~1.4 metres by 2120.[614]

The MfE *Guidance* recommends that the sea-level rise scenarios be used when assessing each of the four categories of activities mentioned.[615] Category A catches the *Hemi* proposal as it relates to new developments. The *Guidance* recommends that only the highest (RCP 8.5 $^{H+}$) scenario be used when assessing such proposals and effects.[616] The rationale behind this recommendation stems from the long-life of new developments, coupled with the requirement in the NZCPS to avoid future risk over a 100-year time frame.[617]

[605] IPCC, *Global Warming of 1.5°c*, above n 555, at [B2.2].
[606] At [A.1].
[607] At [B2.1].
[608] MfE, *Guidance,* above n 11, at 99.
[609] Table 11, at 107.
[610] At 97.
[611] At 94.
[612] IPCC, *Global Warming of 1.5°c*, above n 555, at [B2.2].
[613] IPCC, *Global Warming of 1.5°c,* id.
[614] MfE, *Guidance*, at 105.
[615] At 101.
[616] At 107.
[617] At 107.

Had such information and guidance been available to the Court when assessing *Hemi*, a different outcome of the case would have been likely. Had the Court known the potential effects from coastal inundation by 2120, along with the directive policy to avoid risk of such hazards, the Court would most likely have found the effects to be unacceptable. With RCP 8.5°C H^+ predicting sea-level rise to be ~1.4 metres by 2120,[618] according to the analysis of the Court in 2010,[619] this would have caused damage to the property and increased risk to life and health, which are the very types of risks that ought to be avoided. The risks of coastal inundation and lagoon erosion as mentioned by the Court are unacceptable and dangerous, and the MfE *Guidance* indicates that coastal inundation will outweigh any other effect on its own 100 years from now. Therefore, in re-deciding *Hemi*, a much larger emphasis would need to be put on sea-level rise and inundation.

Following the Policy 25 of the NZCPS, the Court would be urged to decline the resource consent. A precautionary approach should be adopted per Policy 3 in light of the uncertainties surrounding ice sheet instability and the reaction of other climatic processes to climate change. Managing the risk of social, environmental and economic harm from coastal hazards under Policy 25 is the most directive Policy in the NZCPS. National policy that requires proactive, well-informed, precautionary and risk-based management of coastal hazards is provided and such an approach should be taken on the facts of the case.[620]

Māori Cultural Connection

There is still a need to uphold Māori relationships with the coastal environment. The original Environment Court decision approved the consent on the basis that it would better enable the exercise of kaitiakitanga: "the presence of people living at the site who have ancestral links to the land … will enable not only them, but others who exercise kaitiakitanga to be able to do so more easily".[621] And the provision of a camping area to allow continued use to others with ancestral links meant that the proposal had special characteristics to meet the test for granting of consent (subject to conditions).[622]

[618] At 105.
[619] *Hemi*, above n 15, at [59].
[620] *NZCPS 2010, Coastal Hazard,* above n 551, at 9.
[621] *Hemi,* above n 15, at [185].
[622] At [198].

As discussed above, Policy 2 of the NZCPS 2010 acknowledges that all persons making decisions under the RMA that need to be guided by the NZCPS must take into account the principles of the Treaty. Policy 2 recognises Māori cultural ties in a range of ways, including through enabling the exercise of kaitiakitanga. The issue for any re-decision of *Hemi* would be whether kaitiakitanga could be exercised well enough without the granting of the building consent, given that the policies on coastal hazards militate against consent.

The DOC *Guidance* states that, where there is an apparent conflict between NZCPS policies, a careful analysis should be taken to see how each is expressed.[623] In this case, the NZCPS provisions relating to Māori and their relationship with the coastal environment,[624] and those relating to coastal hazards, do not necessarily have to conflict.[625] The DOC *Guidance* on implementing Policy 2 states that it is necessary to consider the NZCPS 2010 as a whole when implementing each policy.[626] Therefore, while the directive wording of Policy 25 would indicate that the courts need to decline the proposal to avoid risk, this does not prevent the court taking into account principles of the Treaty of Waitangi and kaitiakitanga under Policy 2.

Notably, Policy 2 of the NZCPS 2010 builds on the previous NZCPS by introducing more specific requirements by which the principles of the Treaty of Waitangi and kaitiakitanga are to be had regard to. This could be a step forward in recognition of the strong traditional and continuing cultural associations Māori have with the coast. Arguments made in *Hemi* by the applicants are strengthened by this policy. The use of the land for camping by those with ancestral links would allow maintenance of the links with the land, while providing tangata whenua the opportunity to exercise kaitiakitanga which the DOC *Guidance* indicates is a necessity.[627] This would enable kaitiakitanga to continually operate without the need to increase the risk of coastal hazards. Kaitiakitanga could also be expressed though other forms such as monitoring and management of the coastal environment.[628]

The NZCPS policies also foster principles of consultation, participation and collaboration.[629] Policy 2 focuses on ways in which local authorities can actively involve tangata whenua in their

[623] *NZCPS 2010 Implementation guidance: Introductory note,* above n 318, at 11.
[624] See NZCPS 2010, Objective 3 and Policies 2, 17, and 23.
[625] See NZCPS 2010, Objective 5 and Policies 24, 25, 26, and 27.
[626] *NZCPS 2010 Guidance note Policy 2,* above n 324, at 12.
[627] *NZCPS 2010 Guidance note Policy 2*, at 18.
[628] At 18.
[629] At 10. See also NZCPS 2010, Objective 3 and Policy 2.

planning processes and decision-making to enable tangata whenua to be active participants in coastal planning and management.

It is quite possible that an attempt may be made to revert to Part 2 in relation to matters associated with Māori relationships; this is because of the stronger directive to recognize and provide for s 6(e) relationships, for example. However, due to the extremely direct wording of the NZCPS policies on the avoidance of increasing risk associated with coastal hazards, [630] Part 2 is likely to be displaced, as per *Davidson*. Moreover, in *Hemi*, the key aspect was the maintenance of kaitiakitanga, which is already provided for in NZCPS Policy 2. It is thus much more likely that the Court will need to approve other ways for tangata whenua to maintain kaitiakitanga than building the Hemi house.

Conclusion

In 2010, *Hemi* was decided on the basis of valuing Māori ancestral links to land over the avoidance of coastal hazard risk. It may in fact have been found differently had it been decided today with the guidance, law and policies available to the Court and decision makers. It illustrates how existing case law, upon which lawyers may depend when advising their clients, may not be good law. It also shows how fast this can change when we are dealing with rapidly advancing climate science, which is particularly pronounced in respect of the science on sea-level rise. Vast improvements have occurred since 2010, not only on the science and knowledge of the possible effects related to coastal hazards, but there has been a major improvement in the policy and guidance to decision-makers through the implementation of more directive policies.

The key differences between then and now are the changed sea-level rise predictions, the directives to consider such risks out to 100 years, and the guidance that decision-makers should take the most extreme figures for new residential developments within 100m of MHWS. With the assistance of the MfE *Guidance* and the directive policies of the NZCPS, it is likely that the Court would decline such an application on the basis that the risks from future coastal inundation were unacceptable.

[630] See NZCPS 2010, Policy 25: "*Avoid increasing risk of social, environmental and economic harm from coastal hazards*", discussed above Pt VI.5 & VI.5.

There is the potential that such policies that favour avoidance of risk will have an adverse effect on the relationship of Māori with their land. However, by introducing more specific requirements by which the principles of the Treaty of Waitangi, and kaitiakitanga, are to be taken into account, it is hoped that Māori will be able to better participate in decision making processes about the coastal environment and their relationships with it. The resulting decisions should in turn better enable their relationships to be maintained in the future, even in the face of the impending sea-level rise. It remains to be seen how well all levels of government can actively protect Māori Article 2 Treaty interests in the face of increasing coastal hazards.

Overall, the greater direction from central government allows the Court to be better prepared to analyse cases that involve complex issues such as coastal hazard. It may be that there needs to be further consideration given to the production of more specific guidance for how decision-makers can best uphold the Treaty principles in such situations. But whatever happens at a wider level, it is clear that *Hemi* cannot be relied upon as a precedent today.

IX. Conclusion

Sea-level rise is already locked in, and we will need to adapt differently to our coastal environment. This paper has suggested how the Treaty principles might apply to adaptation decision-making. It is only a preliminary enquiry that was limited to published materials; no interviews or consultations were able to be undertaken. But even this preliminary enquiry has shown that it is the duty of the Crown to ensure that taonga belonging to Māori are protected that the Treaty partnership is upheld. Such duties may extend to increasing efforts to mitigate climate emissions, while at the same time doing more to protect specific areas of significance through adaptation. All decision-making, even including any retreat from coastal lands, must be undertaken in a manner that genuinely attempts to ensure that Māori do not lose ties to ancestral lands and can maintain their relationships with the coastal environment

The case studies illustrate that some councils have found it difficult to protect Māori interests in their climate adaptation decision-making. However, this paper has also shown that there is already a lot of knowledge and guidance available to local authorities and to central government that can assist them to make good decisions in this area, both in respect of procedure and substance. While the existing framework of laws and policies can be used to uphold the Treaty principles, on their own they do not require that the Treaty be upheld. However, the various guidance, reports and recommendations go further, and they address Treaty principles and protections explicitly; this is particularly case for the MfE *Guidance* and the CCATWG recommendations that are even more helpfully tailored to climate adaptation decision-making. As an illustration, the results of the community collaborative process in developing the Clifton to Tangoio Strategy have been positive. It is hoped that this continues once the RMA decision-making processes are employed to adopt and/or implement it.

Despite the existence of such guidance available to local government – guidance that makes a positive contribution toward the recognition and protection of Māori interests, and which will help uphold the principles of the Treaty -- there are still unresolved issues around how the Crown is to discharge its obligations to Māori in respect of climate adaptation. As a result, more detailed guidance is needed that is specifically tailored to addressing these issues.

There may also be a need for more than guidance from central to local government. Flexible, non-binding guidance risks non-compliance from some councils, and/or inconsistent application

across different councils. The existing guidance intended for local government also does not explicitly deal with what aspects ought to be addressed by central government. The duty of active protection may require significant investments to be made to protect existing Māori interests. This may be more appropriately fulfilled by central government as Treaty partner, especially given the potential sums involved. In turn, fulfilment of the duty of active protection may affect the adaptation strategies that are pursued to protect Māori interests. Resources may be needed to *protect* existing sites or infrastructure, or for modifications to be made to important Māori assets to *accommodate* climate change. For example, Māori may wish to maintain a presence in a hazardous coastal area due to an ancestral connection, but might require assistance or a special resource consent to allow a building to be made removable upon sea-level rise trigger points being reached. Māori may also require some form of assistance if they are to relocate away from sites of ancestral significance. Some efforts may in turn be needed to reestablish a presence in the same area, especially where there is limited public land available for resettlement, for example.

The broader perspective of achieving environmental justice requires the respect of iwi and hapū as Treaty partners to substantive active protection of their coastal environmental assets, as well as achieving recognition of their authority to preferably control but at least share in making decisions over those assets. Central and local government thus need to be keeping in mind the wider picture of upholding the Treaty principles rather than solely the minimum conditions in the RMA. The climate adaptation measures that will be needed both now and in the future will likely have significant implications for the protection of Article 2 assets; this means that this wider picture must be taken in order to avoid modern Treaty breaches in relation to these assets. It also means that more attention will need to be paid to factual and legal issues in this area to ensure that justice is done.

APPENDICES

Four appendices contain additional information that is relevant to the overall topic of this report but is not necessary for inclusion alongside the precise issues discussed above:

1. Appendix 1 summarises the Manaaki Whenua: Landcare Research Guidance on consultation with Iwi Groups for research.
2. Appendix 2 summarises additional case studies on Māori coastal adaptation.
3. Appendix 3 contains information on kaupapa Māori expertise in the Environment Court, relevant to achieving resource management decisions that better provide for Māori interests, through better understanding the issues involved.
4. Appendix 4 identifies some legal issues for further research.

Appendix 1:

1 Manaaki Whenua: Landcare, Research Guidance on consultation with iwi[631]

> Collaborative research needs to be founded and established on a solid relationship. It is important the relationship with iwi and hapū is not taken for granted and is maintained by ongoing dialogue, communication, reciprocal visits and networking.[632]

Introduction

In order to avoid Treaty breaches in the area of climate adaptation there needs to be a focus on the right procedure to uphold the requirements of a Treaty partnership as well as substantive results upholding the active protection of Article 2 assets. It is not possible nor within scope of this main report to provide a comprehensive guide to Treaty compliance for all levels of government. Indeed, there has been much work already done on Treaty compliant decision-making, and appropriate consultation procedures for local and regional councils.[633] This Appendix merely summarises one of these that will be relevant for councils who have to work

[631] Garth Harmsworth, *Good Practice Guidelines for Working with Tangata Whenua and Māori Organisations: consolidating our learning* (Landcare Research, LC0405/091, March 2005). Since 2005, additional material includes: Nick Cradock-Henry, Natasha Berkett and Margaret Kilvington, *Setting up a Collaborative Process: Stakeholder Participation* (Landcare Research, Policy Brief No. 4, October 2013).
[632] R Kirikiri, G Harmsworth and H Pene, "Indigenous Knowledge: Summary" (2001, Manaaki Whenua) <www.landcareresearch.co.nz>.
[633] See, MfE, *Case Law,* above n 129.

with local communities in order to determine appropriate adaptation measures as well as implement them.

In 2001, a consultation process was created by Manaaki Whenua: Landcare regarding environmental decision making.[634] It is not specific to climate adaptation but it shows why building and maintaining good relationships is vital for the successful making of decisions. Following protocols (kawa) and setting standards at the beginning of relationship is important because it shows respect for the other party. Showing genuine interest in building capacity for the other party where it is missing is invaluable: it shows that the decision maker has a stake in the ongoing success of the relationship between them and the iwi group. It also acknowledges the value of the iwi's knowledge that goes beyond the purely scientific or political aims. Further, a key substantive benefit of working collaboratively is that it produces better research outcomes, encompassing not only western science but also historical and indigenous knowledge.

Aims of the research

This Guidance aims to discuss successful collaborations between Manaaki Whenua: Landcare Research and iwi around New Zealand. The findings are based on the centrality of relationships, capacity building and the importance of analysis beyond scientific outcomes.[635] Key issues identified as priorities at hui have been about capacity building. While there are specific environmental aims, the financial and knowledge aspects of partaking in such research are also highly valuable in improving some societal outcomes.[636]

Case study

Manaaki Whenua worked with Ngati Porou on improving the water quality of the Waiapu catchment in the mid-1990s. The aim of the collaborative work was to develop a process of sustainable catchment rehabilitation drawing on a wide variety of values: environmental,

[634] Kirikiri, Harmsworth and Pene, above n 632.
[635] Garth R Harmsworth "A collaborative research model for working with iwi: discussion paper" (LandCare Research, LC2001/119 2001), at 6. See also Harmsworth, *Good Practice*, and Cradock-Henry, *Stakeholder Participation*, above n 631.
[636] Harmsworth, *Discussion Paper,* at 20. For example, improved research skills also improve earning capacity.

economic, social and cultural.[637] Through collaborative discussion, it was found that the "mauri of the Waiapu River was of huge concern to Ngati Porou."[638] The benefits ran much deeper than just improving water quality. Ngati Porou improved their capabilities around consultation and created an archive of the knowledge which varied from environmental and economic knowledge through to whakatauki and documentation of Ngati Porou te reo. Further, those researchers working on this project also gained an understanding of Māori scientific knowledge. They further realised the effects of land losses and development of land on the environment and on Ngati Porou well-being. It has had an:[639]

> enormous impact on cultural values and Māori well-being through loss of flora and fauna, decreased access to traditional resources, increased flooding, and the continuing decline in the mauri (life force or health) of the river and the quality of its resources through deposition of enormous quantities of sediment.

In Te Ao Māori, the centrality of relationships informs all of life, so it follows that making decsions about such an important taonga, such as the water, would require strong relationships. It also makes sense to work with the relevant iwi rather than all Māori for the water quality of the relevant area, because the relationship that specific iwi (Ngāti Porou in this case) has with its awa is regionally unique and cannot necessarily be applied to all other water quality situations.

Process

A six-page memorandum of understanding between Ngati Porou and Manaaki Whenua set out the agreed kawa (protocol) and arbitration, intellectual property as well as a schedule of work.[640] The planning stages were vital in creating the trust and respect of the Ngati Porou rangatira. Once there was a strong relationship, and an understanding of the issues that could be researched, a plan was created. The whole process, from management to researching, involved both Manaaki Whenua and Ngati Porou people.

The research itself came from the need to enfranchise the community, which was dealing with societal deprivation in many ways, and improve their connection with the land. Understanding

[637] See, Ministry of Primary Industries, *Waiapu River Catchment Study: Final Report* (MPI Technical Paper No: 2012/32, November 2012), at i.
[638] Harmsworth, *Discussion Paper,* above n 635, at 10.
[639] Landcare Research, "Case Study – Māori Community Goals for Enhancing Ecosystem Health" <www.landcareresearch.co.nz>.
[640] Harmsworth, *Discussion Paper,* at 12.

the effects of deforestation on highly erodible land has caused significant environmental change, including negative impacts on the Waiapu River. The land that had been lost during colonisation had been deforested and replaced with dairy cows which were compounding the poor water quality and soil stability issues.

The aims of the project were thus to:

- establish communication strategies within the Waiapu catchment community and with the community and those interested in "sustainable catchment management."[641]
- Understand the value of the area to locals using their traditional and local knowledge, particularly over time from land use change. This was to understand changes in environmental health as well as the way the community valued the catchment.
- Attain western scientific understanding of the environmental state of the Waiapu catchment.

Findings

i. Procedural

> Cultural benefits accruing from such a knowledge base include the formation of a Ngati Porou archive on environmental, cultural, social and economic knowledge, and from interviews, the recording and documentation of Ngati Porou te reo, including pepeha or whakatauki. Information from the project will ultimately be used to target and prioritise catchment rehabilitation and to develop sustainable catchment management scenarios, using a balance of environmental, economic, social and cultural factors.[642]

In working collaboratively, Ngati Porou can obtain valuable research about their region, while also contributing to the research, ensuring that it is useful for them. Learning and working alongside the Crown is a way of the Crown showing partnership. It was found to be successful when both groups felt they had ownership over the project. That Ngati Porou were able to use the work in their community, plus give some of their people valuable work experience and income, are all benefits of the partnership. The acknowledgement of local and indigenous knowledge in the work is a positive outcome from working with the Crown, too.

[641] Harmsworth, *Discussion Paper*, above n 635, at 7.
[642] At 8.

I suggest that centrality of relationships in collaborative research is vital to living out the Treaty partnership. For example, when setting up a relationship, following cultural protocols is one way of acknowledging Māori have retained governance over their land. By respecting their way of doing things, Manaaki Whenua showed that they could similarly carry out the research following relevant protocols.[643]

> It is important at this point to have some understandings of whakapapa, Māori values, and to enter discussion with an open mind.[644]

ii. Substantive findings

> Results indicate that the deforestation and land development of the last 100 years has had enormous impact on cultural values and Māori well-being through loss of flora and fauna, decreased access to traditional resources, increased flooding, and the continuing decline in the mauri (life force or health) of the river and the quality of its resources through deposition of enormous quantities of sediment.[645]

Understanding the damage to the taonga in the Ngati Porou rohe and its effects on the mana of the communities within Ngati Porou is a useful exercise for the Crown to support. As the project received Crown funding and was started by Manaaki Whenua, it is a helpful way for the Crown to support tangata whenua to protect their taonga.

Tools for being a good Treaty partner

The report recommended a range of ways to better enable and thereby increase iwi and hapū participation in collaborative research:[646]

These include:

- sub-contracting iwi and hapū personnel for existing or new research;
- helping iwi and hapū write project proposals;
- developing new iwi-led research projects;
- developing participatory research projects;
- building relationships between Government science organisations and iwi/hapū;
- donating equipment and resources;
- improving access (including more 'equitable access') to Government funding.

[643] Harmsworth, *Discussion Paper*, above n 635, at 17.
[644] At 12.
[645] At 8.
[646] Kirikiri, Harmsworth and Pene, above n 632, in 'increasing resources to iwi and hapu'.

> However, achievement requires funding agencies to recognise the substantial time involved, and the processes necessary, to establish successful collaborative research relationships with iwi and hapū, and to make provision for these in funds provided to either iwi/hapū or to their collaborators.

These recommendations apply to all research that occurs in collaboration between the Crown and Māori. The creation of strong relationships between the two groups is fundamental to successful research.[647] Success requires the aims of the relevant iwi, hapū or whanau to inform the research. If there is a lack of reciprocity, it will not be a successful collaboration. Clear aims, a forward-focused attitude and a willingness to build capacity of tangata whenua is what active protection looks like in the environmental research space.[648] Living out the principles of partnership and active protection is the best way to ensure that the interests of the local Māori group are truly met. It requires a long-term relationship with that group in order to grasp the nuances of the local group, their wants and needs, and coming to some consensus between that group and the relevant Crown entity.

In terms of protecting Māori coastal property, this process is vital. The economic, social and spiritual elements of understanding coastal climate hazards should not be underestimated. They are as valuable as the physical science of climate change in terms of making decisions about protection and adaptation.

In terms of collaboration between decision-makers such as councils iwi and hapū, best practice suggests that such collaboration should exist independently of, and in addition to, wider community engagement.[649]

[647] Harmsworth, *Discussion Paper,* above n 635, at 6.
[648] At 6.
[649] See, for example, Harmsworth, *Good Practice*, above n 631, at 34. Cradock-Henry, *Stakeholder Participation*, above n 631, at 4.

Appendix 2:

2 Additional case study research on coastal adaptation by Māori[650]

NIWA's Māori Environmental Research Centre and the National Climate Centre have developed a research program on Climate and Māori Society: https://www.niwa.co.nz/climate/information-and-resources/climate-and-m%C4%81ori-society. Pursuant to this program, NIWA has funded some projects examining issues relating to climate adaptation by Māori communities vulnerable to future sea-level rise.

A summary of the findings in relation to Mitimiti, Hokianga, Manaia Settlement, Hauraki-Waikato, and Arowhenua Pā, Te-umu-kaha (Temuka), are below. Further future research could focus on how the lessons from these case studies could be incorporated as part of best practice relevant to Treaty duties in this area of government policies and measures for climate adaptation.

(1) King, D., Dalton, W., Bind, J., Srinivasan, M., Hicks, D., Iti, W., Skipper, A., Horne, M., & Ashford-Hosking, D. (2013). Coastal adaptation to climate variability and change: Examining community risk, vulnerability and endurance at Mitimiti, Hokianga, Aotearoa-New Zealand. *NIWA Report No: AKL2013-22*. 3-109.

This article examines the climate vulnerability and resilience to climate change risks and change facing the hapū of *Te Tao Mauī* from Mitimiti, northern Hokianga, Aotearoa/New Zealand. Interview participants shared their experiences of climate and coastal hazards at Mitimiti, including knowledge of coastal change, areas susceptible to flooding, and 'those 'things' or 'matters' that enable as well as obstruct whānau from effectively 'dealing with' climate related impacts, risks and stresses'.

The article revealed four key determinants that influence the sensitivity and adaptive capacity of the community to deal with climate risks (97-109):

[650] Extracts from Laurette Siemonek, "Literature Discussing Māori Participation in Local Government Processes In Aotearoa New Zealand" (VUW, February 2017), unpublished paper written as research assistance for Catherine Iorns, Kellie Archie and Polly Stupples.

1. Social-cultural networks and community change ("Recognised by the community as being fundamental to being able to 'deal with' climate and coastal related hazards and risks at Mitimiti" (p.6 and 97-109)).
2. Resourcing, self-reliance and innovation ("Limited employment opportunities' and associated resourcing constraints to adequately reduce risk and exposure to potential impacts dominated many conversations – particularly limited funds to upgrade and future-proof Mātihetihe Marae. Such constraints were recognised as making it harder for whānau to realise "healthier" living arrangements, and thereby were seen to exacerbate the sensitivity of different whānau to climate-related hazards and associated stresses when they arose" (p. 6 and 97-109);
3. Knowledge, skills and expertise ("Māori knowledge and the maintenance of close relationships with the land and sea were acknowledged by a number of interviewees as crucial to understanding, and dealing with local hazards and environmental risks at Mitimiti" (p.6 and 97-109)); and
4. Community structures and decision-making ("Rapid changes in community structure were commonly identified as having affected the transfer of hapū–specific knowledge. Examples typically ranged from the loss of understanding about the reasons behind traditional practices to interpreting environmental signals about local hazards and risks (among other forms of knowing" (p.6 and 97-109).

Māori values are crucial to climate change response, for example,

> "adaptive capacity is rooted in the collective strength of whānau and hapū relationships, as well as more elemental cultural principles defined by whakapapa and tikanga, and thereafter actioned through practical values of whanaungatanga, manākitanga, kotahitanga and aroha. However, major changes in the composition of the community, in combination with low levels of economic development and the appearance of new values and behaviours, were regularly identified as constraints to 'getting things done'" (p.6).

The article also mapped projected sea-level rise and flooding impacts along the Mitimiti coastline for 2040 and 2090, which indicated an increase in sea level of 0.4 metres by 2040 (consistent with broader areas of coastal land being inundated by ocean and streams more frequently) and 0.8 metre by 2090 (more extensive areas of coastline and streams inundated 'with present low-lying farm-land and dune-field surrounding the streams at Moetangi and Taikarawa in the future tidal zone, among other associated impacts) (p.43-54).

(2) King, D., Dalton, W., Bind, J., Srinivasan, M., Duncan, M., Skipper, A., Ashford-Hosking, D., Williams, B., Renanta, H., & Baker, M. (2012). Coastal adaptation to climate variability and change: Examining community risk, vulnerability and endurance at Manaia Settlement, Hauraki-Waikato, Aotearoa-New Zealand. *NIWA Report No: AKL2012-029*. 3-109.

This article examines the climate vulnerability and resilience to climate change risks and adaptation to climate-included coastal change at Manaia Settlement, Hauraki-Waikato, Aotearoa/New Zealand. The study involved interviews with community members from Manaia Settlement, representatives from the tribal body of Ngāti Whanaunga Incorporated Society and NIWA's Māori Environmental Research and National Climate Centres.

Similarly to the previous article, this article also mapped projected sea-level rise impacts along the Manaia coastline for 2040 and 2090, which similarly indicated an increase in sea level of 0.4 metres by 2040 ("a 0.4 metre increase will result in broader areas of coastal marsh and pasture land being inundated by the high-tides on a regular basis"(p.6 and 46-55)) and 0.8 metre by 2090 ("large expanse of currently stable, dry land - both south and north of the river mouth - would be in the future tidal zone (i.e. it would be inundated twice daily on the high tide"(p.6 and 46-55)).

Interviews with the participants were also conducted and explored experiences of climate and coastal hazards (and associated environmental changes) in and around the settlement of Manaia. It addressed specific knowledge of local hydrology, areas susceptible to flooding, impacts on whānau, and importantly those matters or 'things' that enable as well as obstruct whānau from effectively 'dealing with' climate related impacts, risks and stresses. Consideration of how whānau and different iwi/hapū activities deal with, and/or are affected by, climate hazards and related socio-ecological changes resulted in the identification of four key determinants that influence the sensitivity and adaptive capacity of the community to deal with climatic risks

The article revealed four key determinants that influence the sensitivity and adaptive capacity of the community to deal with climate risks:

1. Infrastructure and resourcing (Recognised by the community as being fundamental to being able to 'deal with' climate and coastal related hazards and risks at Manaia, "as well as insufficient finance and resourcing to adequately reduce exposures and sensitivities associated with climate hazards and stress" (p.7 and 67-71));
2. Social-cultural networks and conventions ("the social networks of *whānau* and perhaps more importantly elemental cultural values and approaches centred on *tikanga* [conventions, culture, custom, correct procedure, lore], *whanaungatanga* [relationships, connections]*, kotahitanga* [solidarity, unity, collective action] and *aroha* [sincerity, mutual respect, love] were often referred to as the *Māori way* of dealing with hazards, risk and human-environment well-being" (p.7 and 67-71));
3. Knowledge, information and education ("the loss (and significance) of Māori knowledge and the importance of knowing about environmental change and risk was also regularly raised – including the importance of traditional as well as non-traditional educational opportunities that allow young people to draw from more than one intellectual tradition and thereby realise new knowledge and skills. In addition to these challenges, institutional and legislative influences were also recognised as having a determining impact on *iwi/hapūu/whaanau* well-being and development" (p.7 and 67-71)); and
4. Planning, governance and competing values ("The value of quality external relationships (formal and informal) with other *iwi*, wider community groups and government organisations/authorities was also emphasised as important for helping to meet the emerging demands of increasingly complex social, economic, political and bio-physical system changes facing the community. These include questions over equitable representation in local planning and resource management arrangements, the nature of participation afforded to the community in social as well as environmental policy development and decision-making, and the even deeper challenge of competing human-environment values, beliefs and behaviour which are inseparably linked to ethics surrounding the integrity of life and the responsibility to future generations" (p.7 and 67-71)).

> "Such points of entry are deeply connected with existing social-economic-political and environmental conditions at Manaia; and therein the capacity of the community to deal with future climate risks largely rests upon responding to existing issues linked to resourcing, political participation, governance, *whānau* health and education, cultural capital and management of risk associated with natural hazards" (p.7-8).

(3) King, D., Dalton, W., Horne, M., Duncan, M., Srinivasan, M., Bind, J., Zammit, C., McKerchar, D., Ashford-Hosking, D., & Skipper, A. (2012). Māori community adaptation to climate variability and change: Examining risk, vulnerability and adaptive strategies with Ngāti Huirapa at Arowhenua Pā, Te-umu-kaha (Temuka), New Zealand. *NIWA Report No: AKL2011-015*. 3-109.

This article examines risk, vulnerability and adaptive strategies with Ngāti Huirapa at Arowhenua Pā, Te Umu Kaha (Temuka), Aotearoa/New Zealand. Interview participants (Ngāti Huirapa, community members from Arowhenua Pā and the hapū representative body of Te Rūnanga o Arowhenua Society Incorporated) shared their values, experiences and concerns surrounding past and present climate vulnerability, resilience and adaptation to climate variability and change (including on "local flooding and impacts on whānau, historical changes in river courses, flows and mahinga kai, causes and amplification of flood risks due to human modification of the environment, as well as the important role of local planning in setting regulations and managing natural hazards and risks"(p.7)).

The article revealed four key determinants that influence the sensitivity and adaptive capacity of the community to deal with climate risks:

1. Social networks, conventions and transformation
2. Knowledge skills and expertise;
3. Resourcing and finance; and
4. Institutions, governance and policy.

> The importance of social networks and conventions, knowledge of place and closer human-environment relationships through mahinga kai is were expressed as fundamental to community strengths and well-being. However, such capabilities are not uniform across the community and come individuals are better equipped to cope and adapt than others. Rapid transformations in local community structure, decreases in Māori owned land holdings, lack of financing for infrastructural maintenance and insurance, a growing reliance on modern services, land use change, resource management regimes, and whānau spending more time away from traditional areas for employment and education (among other social and institutional changes) (p.8 and p.44-50))

The article also mapped projected flooding impacts along the Arowhenua Pā for 2040 and 2090.

> The most extreme modelled estimate for future peak flood levels was more than 30% greater than those recorded from the 1986 flood event, but the relatively steep elevation of local terrain resulted in little additional surface area being flooded. While these results are favourable in terms of higher ground occupied by the Marae, school buildings and many whānau homes, they also demonstrated that lower lying properties and infrastructure are likely to be at greater risk of flood and damage (p.8 and p.47-59))".

The community at Arowhenua Pā possess considerable capacity to deal with climate hazards and related stresses. Much of this adaptive capacity is rooted in elemental cultural values and approaches, such as tikanga, kawa (rituals), whanaungatanga, manākitanga and kotahitanga.

Appendix 3:

3 Kaupapa Māori Expertise in the Environment Court[651]

Tikanga and mātauranga Māori are taonga protected by article 2. They are also key to achieving the protection of the other Article 2 assets. Thus, for example, a key cultural issue of access to justice for Māori in any court proceedings is the way that evidence of Māori tikanga, values and interests are presented to and dealt with by the court.[652] This can be both a procedural and substantive issue. For example, if the court misunderstands tikanga or mātauranga Māori, then it is likely to also misunderstand the appropriate way for them to be used to resolve a particular case.

The Environment Court is required to "recognise tikanga Māori where appropriate".[653] However, there is no requirement to have any member of the Court with expertise in tikanga Māori on any particular hearing panel. The appointment of special advisors in order to assist the Court in a proceeding is possible.[654] Knowledge and experience of "matters relating to the Treaty of Waitangi and kaupapa Māori" are one of the six areas of knowledge that the court is expected to possess in order to ensure an appropriate "mix of knowledge and experience in matters coming before the court".[655] While it may in practice happen that judges and commissioners with expertise in kaupapa Māori are appointed to cases that require it, it is not a requirement; it is instead a matter of good management and best practice and, if it does not happen, there is no recourse.

Since 2009, Māori Land Court judges have presided over thirteen Environment Court cases involving Māori issues.[656] Deputy Chief Judge Fox and Judge Clark were first appointed and, while they have not been able to accept all invitations to join the Environment Court hearings,

[651] This Appendix material is taken from the author's article, see Iorns, above n 161.
[652] Lex Aotearoa, above n 244.
[653] RMA, s 269(3).
[654] RMA, s 259.
[655] RMA, s 259.
[656] Fox, above n 297, at 7.

by June 2017 they had presided over at least seven and six cases respectively.[657] Deputy Chief Judge Fox comments that it helps that they can assess evidence related to tikanga Māori: "Although we are not experts in tikanga, we work with Māori communities, te reo Māori and tikanga Māori experts on a daily basis."[658]

Fox DCJ notes that, while good substantive results can be and have been achieved even without such expertise on the Court, where it does exist there is less room for avoiding such evidence and issues. She observes that, where a Māori Land Court judge "has presided with an Environment Court judge":[659]

> Exploration of the relationships of parties to their ancestral lands and waters have been comprehensively analysed; Mana whenua issues have not been avoided where there are competing parties; Kaitiakitanga [stewardship] values have been tested to ascertain how kaitiaki principles have been applied; and the principles of the Treaty of Waitangi have also been taken into account.

Full and appropriate consideration of tikanga and mātauranga Māori (where it is relevant) will ensure that important matters are not left unaddressed and that, when addressed properly, will better justify whatever substantive result is ultimately reached. This suggests that Councils need to make sure that they have a good process for taking into account mātauranga Māori in decision-making, as a matter of best practice pursuant to the principle of Treaty Partnership, even where it is not required by the RMA. It also suggests that the Crown needs to ensure that relevant courts have the expertise for ensuring that it can appropriately handle tikanga and mātauranga Māori in their decision-making.

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[657] See the lists of these cases made in June 2017 by Fox DCJ, above n 297, at 7. Those involving Fox J are: *Ngāi te Hapū Inc v Bay of Plenty Regional Council* [2017] NZENvc 73; *Sustainable Matatā v Bay of Plenty Regional Council* [2015] NZEnvC 90; *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 269; *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195; *Te Puna Matauranga o Whanganui v Whanganui District Council* [2013] NZEnvC 110; *Te Rūnanga o Ngäi Te Rangi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402; *Te Rangatiratanga o Ngāti Rangitihi Inc v Bay of Plenty Regional Council* [2010] NZEnvC 26; and *Te Rangatiratanga o Ngāti Rangitihi Inc v Bay of Plenty Regional Council* EnvC Auckland A092/2009, 6 October 2009.
Those involving Clark J are:
Ngāti Mākino Heritage Trust v Bay of Plenty Regional Council [2017] NZEnvC 72; *Purewa Ancestral Land Unincorporated Group v Whangarei District Council* [2016] NZEnvC 94; *Mahanga E Tu Inc v Hawkes Bay Regional Council* [2014] NZEnv C 83; *Mahanga E Tu Inc v Hawkes Bay Regional Council* [2014] NZEnv C 248; *Te Rakato Marae Trustees v Hawkes Bay Regional Council* [2011] NZEnvC 231; *Wairoa District Council v Hawkes Bay Regional Council* [2011] NZEnvC 97; and *Wairoa District Council v Hawkes Bay Regional Council* [2010] NZEnvC 420.

[658] Fox, above n 297, at 7.

[659] At 8.

Appendix 4:

4 Further research work needed

There are a number of interesting legal issues involved that deserve more attention through further study, that are not the focus of this preliminary report. These range from the general movement of the common law over time – such as could happen to alter the imposition of Treaty principles in the future – to several more specific issues. For example: how legal jurisdiction might change as sea levels rise and alter the line of mean high-water springs; what changes might mean for coastal Māori land or customary rights; and what laws might need altering in order to address any losses of Māori land or customary rights.

There are also additional factual matters that could be researched, such as risk assessments of Māori property, particularly property of cultural significance. A minimum start to this would be some sort of mapping exercise, to identify coastal taonga at risk due to sea-level-rise (and conducted through a Treaty-compliant process).

Guidance for dealing with the adaptation necessary for coastal lands and environment that is Treaty compliant could be developed, through a Treaty-compliant process. Specific advice for dealing with different types of taonga could be identified, such as for processes and considerations relevant to marae, Māori freehold land, urupā, etc.

Selected legal issues for further work

1. Movement of the common law over time

The common law may move over time so as to require greater compliance by local government with Treaty duties. This may be imposed by courts on local government as Crown agents with delegated powers. The current judicial decision that they do not have to uphold the Treaty when working under the RMA -- because they are merely following legislation which has specific Treaty clauses -- is at the Environment Court level; it could be changed one day as judges' opinions change on what is appropriate. Such duties could also be imposed by legislation; whether and how this should occur could be investigated.

2. MHWS movement and jurisdiction

One issue that is likely to arise is whether the movement of a practical jurisdictional boundary based on MHWS would be determined by agreement between the relevant government bodies, or whether it would likely be moved by a court (and thus effectively determine the rules governing a particular situation in retrospect). Perhaps of greater concern in terms of certainty is that the more precise approach may be required for some determinations relevant to climate adaptation. While it may not be a matter of criminal penalties, there could be financial liability such as to remove structures that have become located within the coastal marine area due to the landward movement of mean high-water springs. Of course, this has already happened in some areas around New Zealand, including where beaches have eroded and undermined the land beneath existing housing. With sea-level rise, this is expected to happen a lot more around the whole country. It would be sensible to anticipate such changes and provide for them in advance rather than to leave disputes -- such as those about climate adaptation measures and any attendant liabilities -- to be settled ad hoc through the courts.

I note that the Marine and Coastal Area (Takutai Moana) Act 2011 already provides for a change in title via erosion or other natural occurrence (s.11[660], s 13[661] and s 17[662]).

3. Laws about Māori freehold land

If Māori freehold land in coastal regions is lost to sea-level rise, should the Māori owners be able to acquire new general land and transfer the status? Current laws do not allow that as there would be no personal and cultural association with the new land as required by s 133 of the Act. It could be investigated whether it is appropriate to amend the laws in order to allow a swap, and thereby change the status from ordinary freehold land into Māori freehold land, should the Māori owners prefer that.

[660] **11 Special status of common marine and coastal area**

(1) The common marine and coastal area is accorded a special status by this section.
(2) Neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of this Act.
(3) On the commencement of this Act, the Crown and every local authority are divested of every title as owner, whether under any enactment or otherwise, of any part of the common marine and coastal area.
(4) Whenever, after the commencement of this Act, whether as a result of erosion or other natural occurrence, any land owned by the Crown or a local authority becomes part of the common marine and coastal area, the title of the Crown or the local authority as owner of that land is, by this section, divested.

[661] **13 Boundary changes of marine and coastal area**

(1) This Act (other than section 11(4)) does not affect any enactment or the common law that governs accretions or erosions.
(2) However, if, because of a change caused by a natural occurrence or process, any land, other than a road, that is owned by the Crown or a local authority becomes part of the marine and coastal area, then that land becomes part of the common marine and coastal area (even if that land consists of or is included in a piece of land defined by fixed boundaries).
(3) If land has, because of a change caused by a natural occurrence or process, ceased to be part of the common marine and coastal area, and the title to that land is not determined by an enactment or the common law, then the land vests in the Crown as Crown land and is subject to the Land Act 1948.

[662] **17 Additions to common marine and coastal area**

(1) If, at any time after the commencement of this Act, the Crown or a local authority acquires, whether by purchase, gift, exchange, or by operation of law, any specified freehold land that is wholly or partly within the marine and coastal area, then that land, to the extent that it is within the marine and coastal area, becomes on that acquisition part of the common marine and coastal area.
(2) Subsection (1) does not apply to any specified freehold land that is accorded a status under an enactment other than this Act

4. How to maintain access to the coast in face of the loss of coastal lands

It should be investigated whether new rules should be developed related to public access to be exercised by Māori for the purposes of maintaining the relationships and exercising kaitiakitanga.

5. Customary rights in the marine and coastal area

The law on customary rights in the marine and coastal area needs to be examined to see if there might be any difficulties with the tests for recognising any of the customary interests provided in the Marine and Coastal Area (Takutai Moana) Act 2011 should the position of the foreshore change, for example. The legislative test is:

> **51 Meaning of protected customary rights**
>
> (1) A protected customary right is a right that—
> (a) has been exercised since 1840; and
> (b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
> (c) is not extinguished as a matter of law

For example, in relation to the requirement of historical exercise 'in a particular part', how 'particular' does it have to be? If the foreshore moves, presumably you can exercise it generally on the foreshore in that district, even if not in that precise, geo-located place. The evolution of the exercise appears to be referring to the tikanga, not the place itself. A purposive approach to interpretation would likely allow such an evolution of place under (b). However, it would be good to examine this properly; I have not looked at what case law applies nor what it might say.

What is the position of a claimant group have had to move and thereby have difficulty of access before they even manage to make a marine customary title claim or get it recognised? It is not continuing to be exercised; yet there is no test for whether or not non-exercise is your fault. It would be good to see what case-law or parliamentary history material says about this kind of situation.

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