Te Oranga o Te Taiao: Is tikanga reflected in the resource management reform?

by

Nikorima Te Iwi Ngaro Nuttall

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Te Huatakinga

Modern-day resource management is guided by the Resource Management Act, which is due to be replaced by three new Acts, two of which were introduced by Parliament in November 2022 as part of the resource management system reforms.[1] The proposed legislation introduced the concept of Te Oranga o Te Taiao that must be recognised and upheld as part of their overarching purpose.

Previously, similar concepts have arisen in the environmental space, such as the concept of Te Mana o te Awa emerging as a result of the Waikato River Settlement, and later, the concept of Te Mana o te Wai that was included in the various iterations of the National Policy Statement for Freshwater Management. Legislative and policy recognition of tikanga may be an apparent benefit. However, it is still necessary to consider what is to be made of the newly introduced "shared environmental ethic"[2] of Te Oranga o Te Taiao that "provides better recognition of te ao Māori at the core of the [reformed resource management] system."[3]

With the reclamation of te reo Māori came the reclamation of whakaaro Māori, Māori ways of thinking, and a push to ensure that it was not just English thoughts being spoken with Māori words. Instead, in shifting to the use of our old language, our thinking shifted along with it, away from the cognitive impacts of our colonial history. Te reo and tikanga are both the result of empirically developed understandings based on perceptions and conceptions that have evolved over numerous generations and are, at their centre, intrinsically Māori.

Therefore, it is necessary to consider the authenticity of these legislative terms and whether they are merely Māori titles to Pākehā concepts; wether these are genuine tikanga concepts or mere words that will be made to conform to an "acceptable" Pākehā legislative standard; whether it is intended that the law acts as the medium which enables the authentic implementation of tikanga concepts; or whether tikanga and the law can work amicably, hand in hand for the betterment of Aotearoa New Zealand as a whole.

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[1] The Natural and Built Environment Bill and the Spatial Planning Bill.
[2] Ministry for the Environment *Supplementary Analysis Report: The new resource management system* (16th March 2022) at 9.
[3] above n 2, at 9.

These considerations can be distilled into the following key questions:

(1) What are the intentions behind including Te Oranga o Te Taiao within the proposed resource management reforms?
(2) What are the impacts of incorporating tikanga concepts in environmental legislation?

The inclusion of Te Oranga o Te Taiao in the legislative reforms follows a recent shift in Aotearoa, New Zealand, where tikanga and mātauranga Māori are becoming increasingly recognised within the legal fabric of our society.[4] In an endeavour to help contribute meaningfully to the shift, this paper will reflect on concepts such as mana, whānaungatanga, whakapapa and kaitiakitanga in relation to te taiao, while analysing the intended and potentially unintended impacts of their inclusion into the legal framework of natural resource management within Aotearoa, New Zealand.

I anticipate the research will conclude that tikanga within the law is the medium that not only provides the opportunity for, but necessitates the direction and inclusion of iwi, hapū, and whānau, to determine the best course of environmental management for themselves, based on their own tikanga and mātauranga.

[4] "There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted." See *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 per Chilwell J.

E Kore Te Uku e Piri ki Te Rino

In order to provide an appropriate exploration of the intersection between an indigenous legal system and a dominant colonial legal system, it is necessary to first establish a robust foundational understanding of the indigenous system. Thereby avoiding the risk of perpetuating historical tokenism, simplifying indigenous conceptions and worldviews, or displaying ignorance of their greater complexities.

Thus, we begin by adopting the position put forward by Ani Mikaere, that the initial legal system in Aotearoa was that of tikanga Māori. [5] His Honour, Williams J, further developed this position years later in the article "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law". Williams J initiated this development through a descriptive account of the arrival and evolution of the aforementioned legal system in Aotearoa:[6]

> Māori law is, in its distinctive aspects, entirely a product of the interaction between those old Hawaikians and this place. Te reo Māori was imagined out of the whenua, flora and fauna of this place as new words were needed to explain things newly experienced. The canoe and longhouse technology Kupe's descendants developed was possible because of the great forests and necessary because of the cooler climate in this place, and so on. The economy changed to accommodate a place with four distinct seasons and a growing period for gardens of only a few months. The system of law that emerged from the baggage Kupe's people brought and the changes demanded of his descendants by the land itself have come to be known as tikanga Māori.

The description provided by Williams J, refers to a system of law carried across the Pacific Ocean by waka with various origins throughout eastern Polynesia, and developed as a result of their interaction with a new homeland at the southern end of the Pacific. The demands of the new environment were negotiated with the traditional homeland's respective customs,

[5] Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330.
[6] Taken from his Harkness Henry Lecture and published by the Waikato Law Review: Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 WLR 1 at 2.

resulting in the complex system implemented in Aotearoa. The resulting tikanga, are what is described by Professor Sir Hirini Moko Mead as:[7]

> The set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do.
>
> Tikanga are tools of thought and understanding. They are packages of ideas which help to organise behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions…They help us to differentiate between right and wrong in everything we do and in all activities of life that we engage in.

The "sets of beliefs" and "tools of thought and understanding" are the elements of tikanga that exist in a conceptual plane which can be likened to underlying principles serving as the basis for tikanga Māori.

The Māori jurist, Eddie Durie, similarly refers to "[the] values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct".[8] Durie, makes this reference in seeking to define his interpretation of law as it applies to the customs of Māori, and thereby presenting the overlap and interaction between tikanga and the many facets of the modern legal system as "Māori customary law".

It is important to note, that this paper subscribes to the point noted by Williams J, that tikanga and Western law are not "co-extensive ideas" despite their intersection; with customs and behaviours included in tikanga that would not be considered law.[9]

For the following section, tikanga Māori will be the subject of exploration, however, due to the vast array of what is captured in such concepts and their geographical variations, the depth of their exploration will be limited in this section to those that are pertinent to the research of this paper and select branches of tikanga within them, namely:

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[7] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 12.
[8] Taken from his F W Guest Memorial Lecture and published by the Otago Law Review: Eddie T Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 OLR 449 at 452.
[9] Williams, above n 6, at 3.

- Whakapapa or the framework of generational layering;
- Whānaungatanga or the source of the rights and obligations of kinship[10];
- Kaitiakitanga or the obligation to care for one's own;[11]
- Mauri or the essence of life; and
- Mana or the source of rights and obligations of leadership.[12]

This section will further consider the various descriptions of tikanga as they exist and have existed prior to being referred to in a 'Western legal sense', with that idea being considered in later chapters.

A. Te Whare o Te Tikanga

Tikanga Māori is not a self-contained entity, but instead, is situated within a broader collection of Māori worldviews, concepts, and knowledge systems, referred to as mātauranga Māori. As Mere Roberts notes, both mātauranga and wānanga encompass more than scientific knowledge of the world; they provide spiritual, moral, as well as material explanations for the origins and workings of the world. As a result, a subjective, values-based science that is specific to place and culture, and hence distinct from Western science, is developed.[13]

This framework governs and explains the relationship between humans and their environmental kin, centred around a cultural system of principles and values.[14] These universal "tools of thought and understanding" as tikanga Māori are fundamental to the Māori worldview which is inherently holistic in nature, highlighting a primary source of conflict between and the individualism expressed in monocultural systems of law and knowledge such as those with colonial origins in the West.

[10] Williams, above n 6, at 3.
[11] A concept used in existing legislation, see the Resource Management Act 1991 and the use of "kaitiakitanga"; Williams, above n 6, at 3.
[12] "Mana" is a concept used in existing legislation and policy, see Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and the use of "Te mana o te awa", and see National Policy Statement for Freshwater Management 2020 and the use of "Te Mana o te Wai"; Williams, above n 6, at 3.
[13] Mere Roberts "Ways of Seeing:Whakapapa" (2013) Sites 93 at 110.
[14] Roberts, above n 13, at 106.

B. Whakapapa

Whakapapa encompasses universal order. It establishes the inherent connection between all components of the universe, as traced from our primal ancestors and descending through to humanity and the natural environment. As a foundational framework, it underpins the rights and responsibilities of kinship concerning the natural environment, that is, our whānaungatanga ki te taiao. Anne Salmond contends that the whakapapa framework served as the fundamental principle that ordered the universe, [15] a belief shared by Te Maire Tau, who posits that for Māori, the world was organised and comprehended through the lens of whakapapa. [16]

One notable example of this process is the adaptation of knowledge and understanding to new environments, as recounted by Williams J in his retelling of the first law of Aotearoa. [17] The recognition that the survival and sustainability of one's livelihood depend on their relationship with their natural surroundings, underscores the importance of various approaches taken to adopt or adapt existing knowledge to meet new challenges. This results in a body of knowledge, encompassing tikanga and mātauranga, that is recorded in diverse ways based on geographic origin; referencing distinctive accounts, relationships, and dynamics unique to their respective origins. Therefore, the principles that form the foundation of tikanga, understandably, are diversely expressed.

Variations across geographic regions offer insight into the distinct environmental and historical influences that shaped their development. As such, the relationship that a coastal hapū holds with water is likely to be anchored in principles that share similarities with, but are ultimately distinct from, those of their in-land counterparts. Generating this understanding that occurs through "experiential learning based on accurate observation, trial and error experimentation, and best practice over time." [18]

[15] Anne Salmond *Two Worlds: First Meetings Between Maori and Europeans 1642– 1772* (Viking, Auckland, 1991) at 42.
[16] Te Maire Tau "Matauranga Maori as an epistemology" (1999) 1(1) TPK 10–23 at 13.
[17] Williams, above n 6, at 2.
[18] Roberts, above n 13, at 109.

Whakapapa as it relates to an environmental framework, is where tikanga and mātauranga coexist as a philosophical construct whose origins embody the primal ancestors from which they are descended, and that all things come into being through the process of geological descent. To expand on this point, Roberts notes that:[19]

> …in Maori cosmogony [there is] only one set of primal parents or ancestors (Ranginui and Papatuanuku) from whom all things ultimately trace descent, [therefore] all things are related.

Posited in a whakapapa framework, tikanga guide the customs and practices of every generation in their engagements with each other, with other groups, with their environment and the world at large. This connection through whakapapa is referred to as whanaungatanga.

C. Whānaungatanga

In Māori culture, establishing one's connection to a group is intricately tied to genealogical descent, which is signified by the act of birth. This connection is denoted by the term "whānau" which forms the cornerstone of the Māori societal system.[20] From a linguistic perspective, the morpheme "tanga" is utilised as a suffix in order to modify and further specify the lexical item "whānau", resulting in the derivation of the term "whānaungatanga". The suffix denotes a distinct quality derived from the base noun, which in a Māori cultural context is the fundamental sense of kinship connection that is innately present within the concept of "whānau". Accordingly, “one must be born into the fundamental building block of the system in order to be a member as of right.”[21]

Whānau are situated within a whakapapa framework, which allows Māori to trace their ancestral lineage both upwards to primal ancestors (Ranginui and Papatūānuku) and downwards to their relationship with the environment as descendants of the same ancestors. The Waitangi Tribunal, in the Wai 262 Report, described this relationship in reference to the system of custom that Kupe brought with him to Aotearoa in the following terms:[22]

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[19] Roberts, above n 13, at 93.
[20] Note this is defined as meaning ‘be born’, ‘offspring’ ‘family’ and ‘family group’ in Herbert William Williams *A dictionary of the Māori Language* (1st ed, A. R. Sheerer, 1971) at 487.
[21] Mead, above n 7, at 212-213.
[22] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 5.

> Its defining principle, and its lifeblood, was kinship – the value through which the Hawaikians expressed relationships with the elements of the physical world, the spiritual world, and each other. The sea was not an impersonal thing, but an ancestor deity. The dots of land on which the people lived were a manifestation of the constant tension between the deities, or, to some, deities in their own right.
>
> Kinship was the revolving door between the human, physical, and spiritual realms. This culture had its own creation theories, its own science and technology, its own bodies of sacred and profane knowledge. These people had their own ways of producing and distributing wealth, and of maintaining social order. They emphasised individual responsibility to the collective at the expense of individual rights, yet they greatly valued individual reputation and standing. They enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) they also emphasised human responsibility to nurture and care for it (known in te ao Māori as kaitiakitanga).

An important practice that reinforces this connection is the burial of a child's placenta in the earth, which establishes a physical and spiritual link to the land. Both the placenta and the land are referred to as "whenua" as both are vital sources of nourishment and sustenance for the child.[23] This specific tikanga serves to reinforce the notion that Māori individuals are intrinsically connected to the land from birth and that the land, and environment as a whole, is connected to humanity.

D. Kaitiakitanga

Mere Roberts and Margaret Mutu both interpreted the comprehensive Māori cultural principle of kaitiakitanga in the English language as "guardianship".[24] However, this limited interpretation that was likely intended to be palatable to government organisations, does not reflect the full scope of the term.

[23] Pou Temara, Professor of Māori and Indigenous Studies "Whenua – Tuakiritanga, Land and Identity" (Lecture 2020, University of Waikato, Hamilton, 25 March 2020).
[24] Mere Roberts, Waerete Norman, Del Wihongi, Nganeko Minhinnick and Carmen Kirkwood "Kaitiakitanga: Maori perspectives on conservation."(1995) 2 PCB, 7; Margaret Mutu "*Marsden Point Terminal Proposal Cultural Assessment: Views of Tangata Whenua in Respect of the Proposed Port Development at Marsden Point. A Report Prepared for the Parliamentary Commissioner for the Environment* (Uniservice, Auckland, 1995).

Another perspective is that of Merata Kawharu who refers to two interdependent levels that reflect one another in interpreting kaitiakitanga – the philosophical and the pragmatic – which incorporate a nexus of beliefs that permeate the spiritual realms, environmental spaces, and the various frameworks of Māori society.[25]

In the same way that Māori are nourished and sustained by the resources of atua within their environmental domain, utu, or a reciprocal responsibility, is placed on the need to sustain and manage these resources. This obligation is derived from the pragmatic and philosophical levels referred to by Kawharu, with the former being tied to the intention of preserving resources for current and future generations, and the latter concerning the relationship Māori have with our environmental ancestors. As highlighted, the Māori worldview is holistic, and through whakapapa, emphasises the whānaungatanga and inter-connection between earth, water, plants, animals and human beings. As stated by Māori Marsden: [26]

> Papatuanuku's (Earth Mother) children live and function in a symbiotic relationship. From unicellular through to more complex multicellular organisms each species depends upon other species as well as its own, to provide the basic biological needs for existence. The different species contribute to the welfare of other species and together they help to sustain the biological functions of their primeval mother, herself a living organism. They also facilitate the processes of ingestion, digestion and waste disposal…they cover her, clothe her to protect her from the ravages of her fierce son, Tawhiri the Storm-bringer. She nourishes them, they nourish her.

In this symbiotic relationship, Māori are afforded the right to utilise the resources of their environmental ancestors in reciprocation for the duty to sustain and develop those same resources; and by extension, the atua themselves. This process reflects the principle of utu, which concerns the maintenance of harmony. Anything that was given or taken would require something to be returned.[27] The term itself denotes the element of reciprocity and extends to interpretations of response, compensation, and in a more violent context, revenge.[28]

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[25] Merata Kawharu "Kaitiakitanga: A Māori Anthropological perspective of the Māori Socioenvironmental Ethic of Resource Management" (2000) 109(4) JPS 349 at 351.
[26] Māori Marsden *The natural world and natural resources. Māori value systems and perspectives. Resource Management Law Reform Working paper 29. Part A.* (Ministry for the Environment, Wellington, 1998) at 22.
[27] Durie, above n 8, at 455.
[28] Mead, above n 7, at 31.

Williams J cites the story of Rata when he felled his totara tree without proper procedure, as confirmation that good relations must be maintained with the forest itself, necessitating the use of resources in a way that acknowledges descent-based rights, to maintain the rights to use forest resources. [29] Such ritual processes are substantiated through on-going relationships evidenced by practices such as that of maintained ahi kā[30] as markers of continued occupation, demonstrating a maintained connection to the surrounding environment, their resources, and descent-based rights and responsibilities in them.

Kaitiakitanga through ahi kā relationships are substantiated further by practices of utu that sustain the physical and spiritual welfare of the resources. The application of kaitiakitanga is underpinned by the principle of reciprocity; enhancing the strength of the kin group in maintaining relations between humans, their ancestors, and the atua as elements of the natural and spiritual environment.[31]

However, the scope of kaitiakitanga extends beyond practices of using, developing, or protecting resources for Māori communities. The philosophical aspect requires contextualisation within a whakapapa framework that establishes the rights to exercise kaitiakitanga. The rights established ancestrally and inherited in the present, broaden the scope to encompass the relationships between environmental resources and humans, as well as between the past, present and future. These rights are maintained by sanctions and the careful observation of appropriate rituals ensuring that relationships with the environment and relationships within kin groups are regulated across time.[32]

E. Mauri

Mauri refers to the essence, the spark, the principle of life inherent in all things, granted through the power of the atua, enabling things to live within the bounds of their existence by

[29] Williams, above n 6, at 4.
[30] Ahi Kā can be literally translated as burning fires which are a traditional symbol of occupation and therefore connection to a certain area.
[31] Kawharu, above n 25, at 353
[32] Kawharu, above n 25, at 353.

binding mauri to the physical form until separated by death.[33] It extends to all resources such as a fishing area, a forest, sea, river or individual species which each have their own mauri.[34]

A key aspect of kaitiakitanga is the maintenance of mauri for that which one is a kaitiaki. Protecting the mauri of a natural ecosystem is an extension of the responsibilities conferred through whānaungatanga, emerging from a customary understanding of the environment through whakapapa.[35] For kaitiaki harvesting from the environment, the key is to ensure the mauri is maintained and sustained as much as possible. Maintaining mauri is akin to the sustainability of resources and critical to the survival of the group dependent on the mauri of the lands, waters, and natural resources within the area, as primary sources of sustenance.[36]

A. Mana

The likes of Mead, Williams, and Barlow define mana as having a number of meanings, including authority, control, influence, power, prestige, psychic force, and effectual binding authority.[37] Inherent in all things is an increment of mana, but it is more easily understood in reference to people. The term "rangatiratanga" now widely used, was initially introduced by colonial missionaries in the Paipera Tapu interpretation of the Lord's Prayer as "kia tae mai tou rangatiratanga" as “thy Kingdom come.” Prior to their arrival, mana was used to convey the same set of beliefs.[38]

The mana of a person is referred to as mana tangata and is at first inherited from the parents of a child, and will be determined by the corresponding mana of the parents.[39] Parents of high mana will birth children of the same, and accordingly those of lower mana will birth accordingly. However, the position of mana is not static, but instead subject to growth and decline based on how one conducts their life, and how that contributes to the overall mana of their associated whānau group.[40] The quality of one's character and accomplishments will contribute to their mana and in this way, mana tangata, is conferred by the associated group

[33] Cleve Barlow *Tikanga Whakaaro: Key concepts in Māori culture* (Oxford University Press, Oxford, 1991) at 83.
[34] Kawharu above n 25, at 357.
[35] Margaret Forster “Hei Whenua Papatipu: Kaitiakitanga and the politics of enahncing the Mauri of Wetlands” (PHD) Thesis, Massey University, 2012) at 1.
[36] Forster above n 35, at 11.
[37] Mead, above n 7, at 29-30; Williams, above n 20, at 172; Barlow above n 33, at 60-62.
[38] Ranginui Walker *Struggle Without End: Ka Whawhai Tonu Matou* (Penguin, Auckland, 1990).
[39] Mead, above n 7, at 51.
[40] Barlow, above n 33, at 61.

in recognition of their efforts. Hence, great leaders will often be the result of great achievements and great whakapapa.[41]

The importance of whakapapa in relation to mana is in the aspect of inheriting mana from birth and recognising that the mana of humanity originates from the atua. Mana atua denotes influence, authority and power as exhibited and possessed by our environmental ancestors, the atua themselves who operate between the physical and spiritual planes of their respective domains.[42] However, not all atua exist on an equal plane of rights. In recounting the story of how Tūmatauenga dominated his brothers of the forest, land, and sea, Dr Rangi Mātāmua recounts that the descendants of Tūmatauenga were then afforded the right and mana to consume the descendants of his brothers. This right was passed down to humanity, and thereby inherit elements of that mana atua to justify their consumption of resources from the forest, land and sea.[43]

Mana over the land is referred to as mana whenua and refers to the individual or group affiliation with the whenua, as justified through their specific whānaungatanga to the land they occupied, maintaining the principle of ahi kā, and the necessary rights and obligations as kaitiaki. Those with mana whenua will be acknowledged as having the authority over that area as people of that land, as tangata whenua. It is worth mentioning that the term "mana" denotes overlapping concepts and will ultimately be context dependant. It is, therefore, helpful to recognise that when concepts such as power, authority, and control are referred to, the associated prestige, status and importance of being in power are contextually relevant and may reveal a more appropriate interpretation.

[41] Pou Temara, Professor of Māori and Indigenous Studies "The Māori World View" (Lecture 2020, University of Waikato, Hamilton, 7 April 2020).
[42] Barlow, above n 33, at 61-62.
[43] Interview with Dr Rangi Mātāmua, (Raniera Rewiri, Planting Seeds Podcast Ep 4, n.d.)

He Taiwhatiwhati i Te Ara o Te Ahoroa

The expanse and depth of tikanga which has been briefly touched on in the previous chapter, acknowledged the richness of thought and philosophy associated with the values and principles that regulate Māori society. Nevertheless, as stated by Natalie Coates, "every legal system has to address the issue of the autonomy and authority of other normative orders with which it coexists". [44]

Historically speaking, the New Zealand legal system was confronted with how to recognise, supervise, or suppress the system of tikanga within Aotearoa, New Zealand. Coates makes note that in the initial stages of colonisation in Aotearoa, it was initially the route of recognition taken, citing instructions of the British Minister to Governor Hobson in 1840:[45]

> …[Māori] are not wanderers over an extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsmen; but a people among whom the arts of government have made some progress: who have established by their own customs a division and appropriation of the soil… with usages having the character and authority of law.

There was a point in history when the Western legal system imported into Aotearoa acknowledged and sought to accommodate the inclusion of both mātauranga Māori and tikanga Māori. The fundamental basis for the recognition of Māori custom was the presumption of continuity established in the case of *Campbell v Hall*, where Lord Mansfield pronounced that "the laws of a conquered country continue in force, until they are altered by the conqueror".[46]

The laws that survived the repugnance of common law and replacement by statute, were recognised by colonial courts and the Privy Council, treated as analogous to English customs, or foreign law.[47] The primary avenue that gave legal effect to the presumption of continuity, and consequently Māori customs, was the common law doctrine of Aboriginal Title. This

[44] Natalie Coates "Me Mau Ngā Ringa Māori i ngā Rakau a Te Pākehā? Should Māori Customary Law Be Incorporated into Legislation?" (LLB (Hons) Dissertation, University of Otago – Te Whare Wānanga o Otākou, 2009) at 1.
[45] Coates, above n 44, at 11.
[46] *Campbell v Hall* (1774) 98 ER 848 (KB) at 895.
[47] Law Commission Māori Custom and Values in New Zealand Law (NZLC SP9, March 2011) at [8].

acknowledged the pre-existing customary system of law developed by Māori that was underpinned by values, customs, and institutions of tikanga and mātauranga Māori.[48] As described by Hon Mr Justice Douglas Lambert:[49]

> Customs, particularly long-standing and universally observed customs of a particular community or in relation to a particular piece of land, are granted the force of law under English domestic law and may be enforced in accordance with the remedies available at law and in equity.

Despite being considered a deviation from proper common law principles, [50] there was still a desire to assimilate Māori customary law into the seemingly superior systems of English institutions, leading to the discontinuation of such customs. As a result, the systems and customs of Māori were subjected to prolonged attacks that displaced Māori customary law throughout the country.[51] The attack took on many forms both through the Legislature and Judiciary, with various key examples often cited by commentators of New Zealand legal history:

- The failure to recognise Te Tiriti o Waitangi as an enforceable source of law in New Zealand,[52] and instead operating on the plane of international law.
- The courts deciding in the case of *Te Heuheu Tukukino "*that a treaty becomes enforceable only as part of the municipal law if and when it is made so; and that had not been done in the case of the Treaty of Waitangi, although the Treaty, in certain ways, had received legislative sanction."[53]
- The denial of settled customs amongst Māori despite existing legislation referencing Māori customary law, as in the 1877 case of *Wi Parata v The Bishop of Wellington* where Chief Justice Prendergast stated that Māori were 'savage barbarians', with 'no

[48] Māori Marsden, *Resource Management Law Reform: Part A, The Natural World and Natural Resources: Māori Value Systems and Perspectives*. (Ministry for the Environment, Working Paper No. 29, 1988).
[49] Douglas Lambert "Van Der Peet and Delgamuukw: Ten Unresolved Issues" (1998) 32 UBCLRev 249 at 261.
[50] Mark Walters "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L.J 711 at 721.
[51] Coates, above n 44, at 12.
[52] Te Tiriti o Waitangi and The Treaty of Waitangi were the two documents that established the foundational agreement reached in 1840 between Māori leaders and the British Crown. See Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 2011).
[53] *Te Heuheu Tukino v Aotea District Maori Land Board* [1939] NZLR 107 at 108.

settled customs', and 'no organised system of government' from which laws could emanate.[54]

- The Tohunga Suppression Act 1907 which criminalised tohunga practices.[55]

Primarily, the colonists sought to acquire land from Māori, severing the ties with their whenua and the associated practices, customs, and principles of Māori society. The rapid alienation of Māori from their land held in customary title was done through direct Crown purchase prior to 1860, confiscation authorised by Parliament following the land wars, and the workings of the Native Land Court. The latter entity being described as:[56]

> Far from a neutral agency called into being to recognise Māori customary law. It was established to continue the process of land acquisition stalled by Māori resistance in the late 1850s at a time when the colonial government had with military force successfully contained the primary challenges to its native policy.

The Court would initially investigate the land holdings of Māori customary owners, extinguishing their collectively held customary title and converting the land's status into a new form of statutory "Māori land" title; and eventually divide the land between some of the customary owners while individualising the titles, thereby enabling the sale of the land into European hands. The land's status would then transition to private, freehold land. The cumulative effect of these measures was the separation of Māori from the majority of their lands by the year 1900.[57] Devasted by an onslaught of attacks for many generations, Māori society, culture, and the legal system, became concerned with survival in an effort to deal with the many years of colonial barriers ahead on the path to cultural renaissance.

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[54] (1877) 3 NZ Jur NS (SC) 72.
[55] Joan Metge explains that the word tohunga is formed from the term "tohu", meaning "sign", and a tohunga can be interpreted as "one who is or has been marked out by signs". The word is used to refer to "specialists in a field or branch of knowledge and practice". See Joan Metge "Commentary on Judge Durie's Custom Law" (unpublished paper for the Law Commission, 1996) at [6.8.1] – [6.8.2]; Law Commission, above n 49, at [107].
[56] Michael Belgrave "Māori Customary Law: from Extinguishment to Enduring Recognition" (unpublished paper for the Law Commission, Massey University, Albany, 1996) 34 at 34.
[57] See Alan Ward *A Show of Justice: racial 'amalgamation' in nineteenth century New Zealand* (Auckland University Press, Auckland, 1995); David Williams *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999).

A. Te Hīnātore ki Te Ao Māori

The previous section briefly discussed the perilous environment that tikanga encountered during the early stages of New Zealand's legal history, acknowledging the challenges faced by such institutions of law and societal order when confronted with the initial impacts of colonisation. Despite the historically extensive impacts on Māori that would continue to permeate throughout legislative advancements, the legal system in Aotearoa, New Zealand would eventually begin to recognise Māori interests and customary law. Denying the validity of Māori customary law as a source of law operative in its own right, [58] and instead nestling "a bit of Māori into particular laws."[59]

Although the existing dynamics of tikanga are far less vibrant than the once-thriving system that guided Māori society, significant developments have occurred both in common law and legislation. The nestled fragments of tikanga, the seeds that survived colonial assimilation, nurtured by significant moments in Aotearoa, New Zealand's legal history, have set the stage for current debates on how to integrate tikanga into law rather than just whether there is a place for it. Not to diminish the significance of these developments, however, the following section will consider more current developments on the position of tikanga in law today.

B. Nō onamata, ki inamata

To begin, it is notable that a significant number of advancements in tikanga within the domain of environmental law and the legal field as a whole, have been instigated by the evolution of treaty[60] jurisprudence and the recognition of Māori rangatiratanga and the significance of taonga.[61] Despite the historically contentious legal status of Te Tiriti, key precedents have confirmed its indispensability within the legal system of Aotearoa, New Zealand. As stated in *Huakina Development Trust* by Chilwell J: [62]

[58] Coates, above n 44, at 1.
[59] Eddie Durie cited in John Dawson "The Resistance of the New Zealand Legal System to Recognition of Māori Customary Law" (2008) 12(1) JSPL 56 at 58.
[60] The same capitalisation conventions used by the Waitangi Tribunal in the Report on Stage 1 of the Te Paparahi o Te Raki (WAI 1040) Inquiry will be employed in this paper. Where 'te Tiriti o Waitangi' or 'te Tiriti' is used, this refers to the text in te reo Māori. Where 'the Treaty of Waitangi' or 'the Treaty' is used, this refers to the text in English. Where both texts are being referenced, or to the event as a whole without specifying either text, the term 'the treaty' in lower case is used.
[61] Te Tiriti o Waitangi 1840, article 2.
[62] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, per Chilwell J at 210.

> The authorities also show that the Treaty was essential to the foundation of New Zealand…There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted.

A very recent decision touching on Te Tiriti is found in the legal proceeding of *Trans-Tasman Resource Ltd*, where in the Court of Appeal, Goddard J focused on the "guarantees" under Te Tiriti of rangatiratanga and Māori rights to their lands, resources and taonga in support of the Court finding that "rangatiratanga" and "full exclusive and undisturbed possession of lands, estates, forests, fisheries and 'taonga katoa'" are a "lawfully established existing activity."[63] In confirming that the sustained exercise of Māori customary title was, and is pre-existing under Te Tiriti, in the case of *Ngati Apa*, the courts also reaffirmed the validity of tikanga, specifically that of rangatiratanga, at common law.

Rangatiratanga is further affirmed by the courts in the case of *Ngati Apa*, [64] with Māori customary title as a sustained activity being acknowledged as pre-existing prior to and under Te Tiriti. This is done by way of the implicit incorporation into law referred to by Natalie Coates[65]. The helpful guidance provided by the Te Ture Whenua Māori Act, defines Māori customary land as land that is held in accordance with tikanga,[66] thereby inferring that the ongoing activity of exercising the tikanga of rangatiratanga over land, as a practice of affirming Māori customary land, serves to include the concept of rangatiratanga as a component of tikanga into the common law system of New Zealand.

This is reaffirmed in *Trans-Tasman* where particular emphasis was placed on the fact that customary property rights and interests are contingent upon the customs and practices of the Māori people, which gave rise to said rights and interests. Goddard J noted that:[67]

> The continued existence of those rights and interests necessarily implies the continued existence and operation of the tikanga Māori which defines their nature and extent. As

[63] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86; [2020] NZRMA 248 at [166].
[64] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [13]–[47] per Elias CJ, at [133]–[149] per Keith and Anderson JJ and at [183]–[185] per Tipping J.
[65] Coates, n 44, at 14.
[66] Te Ture Whenua Maori Act 1993, section 129(2)(a).
[67] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020], above n 63, at [177].

> Tipping J said in *Attorney-General v Ngati Apa*, "Maori customary land is an ingredient of the common law of New Zealand". The same can be said of the tikanga that defines the nature and extent of all customary rights and interests in taonga protected by the Treaty.

Thus "it is (or should be) axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand."[68] Progressing to the Supreme Court, it was held unanimously that tikanga "as law" needed to be taken into account as other "applicable law" as appropriate to the circumstances of the case. William J explains: [69]

> What is meant by "existing interests" and "other applicable law" …must not only be viewed through a Pākehā lens…the interests of iwi with mana moana in the consent area are the longest-standing human-related interests in that place. As with all interests, they reflect the relevant values of the interest-holder. Those values — mana, whanaungatanga and kaitiakitanga — are relational.
>
> They are also principles of law that predate the arrival of the common law in 1840. And they manifest in practical ways. There would have to be a very good reason to read them out of the plain words of s 59(2)(a), (b) and (l). There is no such reason apparent.

While qualified, it is recognition nonetheless, of the validity of tikanga at the highest level of common law, exemplifying the potential future where tikanga and the law work in collaboration. However, what effect would this achieve for Māori? Acknowledgement and recognition have been the key themes discussed in this paper so far, yet the consequences require examination.

[68] Above n 63, at [177].
[69] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [297].

Te Huinga o Ngā Wai

The resource management system reforms are underway at a time when there have recently been significant changes already in the environmental space of law and policy, particularly in freshwater. Post-settlement legislation resulting from treaty negotiations have paved the way for recognising and providing space for Māori at the decision-making tables, such as the Waikato Raupatu Claims Settlement Act 1995 and the Ngāi Tahu Claims Settlement Act 1998.

The Waikato–Tainui Raupatu Claims (Waikato River) Settlement Act 2010 recognises the river as an ancestor with its own life force.[70] The acknowledgement of Te Mana o Te Awa is a crucial aspect of the settlement, confirming the right of the Waikato River to be healthy and well as conferred unto itself.[71] Viewed in this isolated way, the recognition of mana is consistent with notions of whakapapa, which in turn provides for the rights of those as kaitiaki to exercise kaitiakitanga. Providing the backdrop for co-management of the Waikato River.

Developing the concept further, The National Policy Statement for Freshwater Management (NPSFM) progressed through various iterations from 2014 through to 2020. In response to a 2019 report from Te Kāhui Wai Māori to Hon Minister David Parker[72], the NPSFM now includes reference to the concept of Te Mana o Te Wai, which regional councils must give effect to under the policy statement.[73] This concept is embedded in a framework that is informed by principles which ultimately impose a hierarchy of obligations in the concept that priorities:[74]

> (a) first, the health and well-being of water bodies and freshwater ecosystems
> (b) second, the health needs of people (such as drinking water)

[70] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Preamble (1).
[71] Linda Te Aho "Te Mana o te Wai: An indigenous perspective on rivers and river management" (2018) Wiley 1 at 5.
[72] Kāhui Wai Māori. *Te Mana o te Wai: The Health of Our Wai, the Health of Our Nation: Kāhui Wai Māori Report to Hon Minister David Parker*. (Ministry for the Environment, Wellington, April 2019) at 5.
[73] National Policy Statement for Freshwater Management at [3.2(2)].
[74] Above n 73, at [1.3(5)].

(c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

This hierarchy, considered in isolation, does appear to do justice to the concept of mana, by prioritising the health of water first and foremost, with the following priority being the pragmatic need of the people as the reciprocal approach of kaitiakitanga. Without further consideration of the wider policy, the Te Mana o Te Wai principle appears on the surface to reflect tikanga.

However, a deficit in key nuances present obstacles in implementing the principles correctly where non-Māori are unfamiliar with the gaps created in their absence. For instance, the significance of whakapapa, absent in the principle of Te Mana o Te Wai, but central to Te Mana o Te Awa acknowledges the ancestral ties to the Waikato River. In turn, it reaffirms kaitiaki rights established through whakapapa and maintained by whānaungatanga with the river as an ancestor, reflecting a unique connection that is not universal across the country. Ultimately, it is understood that non-Māori who do not share the same relationship cannot truly give effect to the principle, in the way that Māori of the area can.

Three principles inform Te Mana o Te Wai that are specific to tangata whenua, while three additional principles are intended to encompass all New Zealanders. It seems that, the principle of Te Mana o Te Wai is an attempt at tikanga inclusion at the national policy level; providing a medium whereby tikanga Māori may unify both Māori and non-Māori in seeking to better the waters of Aotearoa, New Zealand. The term "mana" is used in both Te Mana o Te Awa and Te Mana o Te Wai. The former emphasises the essential part played by tangata whenua in recognition of the significance embodied in a natural environmental feature, whereas the latter combines tangata whenua obligations with those of the general public and government. Both express mana in the context of freshwater management and development, and both necessitate Māori for their fufillment.

This is highlighted in the *Ngati Hokopu* case, where the Environment Court was tasked with determining whether a proposed development site was a wāhi tapu, by virtue of being an urupā or burial ground. [75] The Court acknowledged that Māori should primarily determine the

[75] *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (NZEnvC).

meaning and sense of Māori values, and that the best approach is to understand how a concept is used by Māori and how disputes over its application are resolved according to tikanga. In cases where a wāhi tapu is alleged, the Court can accept a Māori definition of the term, unless there is disagreement amongst Māori witnesses or records. To assess conflicting evidence from within the Māori "system," the Court identified several appropriate metrics, including whether the values correlate with physical features of the world, people's explanations of their values and traditions, external evidence such as Māori Land Court Minutes or corroborating information like waiata or whakatauki, the internal consistency of people's explanations, the coherence of those values with others, and how widely the beliefs are expressed and held.[76] The Court in *Ngati Hokopu* emphasised that the key to making an accurate assessment is to do so within the world from which the system originated.

To effectively implement Māori concepts without being part of their origin, knowledge is needed from those who have inherited it organically through lived experiences and whakapapa. Western education developed from objective view point, ignorant to the nuances and complexities at work is not sufficient. To give effect to Māori concepts, having Māori lead the way is not only essential, it is natural.

[76] Above, n 75, at [53].

The Resource Management Act

Identifying an obvious overlap between environmental law and tikanga, s 7(a) of the Resource Management Act requires those exercising functions and powers under it, to have particular regard to kaitiakitanga. [77] In addition, there are concepts imported from te ao Māori that are integral to tikanga, with s 6(e) essentially mandating those with discretions under the Act to "recognise and provide for . . . the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga". As Māori relationships are underpinned by whakapapa and whānaungatanga, understanding tikanga becomes essential for these relationships to be recognised and provided for in terms of both people and the taiao. Moreover, the reference advanced the previously lacking consideration of kaitiakitanga by, and between Māori and non-Māori, with it now finding presence in government and council policy, the Environment Court, and other legislative resources.[78]

The Act also provides strong avenues to develop relationships and share functions and powers between local authorities and iwi groups, either by transfer under s 33, by joint management agreement under s 36B, or by Mana Whakahono ā Rohe agreements under s 58L to 58U. Consents are generally subject to their effect on customary rights, areas of cultural significance, or require consideration of tikanga Māori.[79] "It is the first genuine attempt to import tikanga in a holistic way into any category of the general law."[80] A description provided in recognition of the numerous mechanisms available to deal with the array of issues facing Māori. So, it begs the question, why then is the Act and system being reformed?

A. Misinterpretation

Issues of tikanga arise in application, where courts are impeded by the barrier of interpretation, has led to deviation from the traditional understandings of such concepts. The ethic of kaitiakitanga will be used as an example. The current definition of the 1997 amendment to the Resource Management Act is "the exercise of guardianship by the tangata

[77] Resource Management Act 1991, section 7(a).
[78] Kawharu, above n 25, at 351.
[79] Above n 77, Part 6, section 149K, section 154, Schedule 4.
[80] Williams, above n 6, at 18.

whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship."[81] However, as discussed in a previous chapter, this limited interpretation of "guardianship" does not reflect the expanse and depth encompassed by the tikanga of kaitiakitanga that permeate the spiritual realms, environmental spaces, and the various frameworks of Māori society. It fails to rectify past failures, such as denying adequate recognition of the spiritual relationship Māori have with the sea, in the case of *Rural Management Ltd*.[82] The court further misinterpreted kaitiakitanga, where the case went on to state that kaitiakitanga was applicable beyond Māori, to consent authorities and applicants. The statutory definition amended in 1997 does correctly clarify that kaitiakitanga can only be exercised by Māori.[83] A helpful clarification, lest it be believed that the expansive understandings of kaitiakitanga and tikanga generally can be encompassed in a singular legislative term, as seen in *Haddon v Auckland Regional Council*.[84] Overall, this highlights a vital issue in legislative tikanga incorporation. That is, the need for accurate and appropriate interpretations to be understood for their effective application at law and in practice.

B. Competing Interest

Issues arise when the interest of the wider population are in competition with that of Māori which are left to be decided by discretionary powers. The case of *Watercare Services Ltd* considered the offensiveness of a sewer pipe through a wāhi tapu.[85] The Environment Court determined that the standard for determining whether a proposal was offensive was based on a reasonable member of the wider community. At the same time, the High Court believed that it should only be measured from the perspective of a reasonable member of the Māori community. The Court of Appeal later reversed the High Court's decision, preferring the approach of the Environment Court. The Court seemed concerned that majority communities could be under the whim of minority sensibilities, preferring that actions considered offensive to Māori would only breach the standard if the majority non-Māori community agreed.[86]

[81] Resource Management Act 1991, section 2(1).
[82] *Rural Management Ltd v Banks Peninsula District* Council [1994] NZRMA 412.
[83] The Law Commission, above n 47, at [226].
[84] *Haddon v Auckland Regional Council* [1994] NZRMA 49.
[85] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA).
[86] Williams, above n 6, at 17.

The interest of a larger population at the expense of Māori interest seems inevitable where Māori interest are secondary. In the case of *Haddon v Auckland*, a hapū were asserting themselves as tangata whenua and kaitiaki over Pakiri Beach, in opposition of possible sand extraction from the seabed off the coast.[87] The Planning Tribunal acknowledged kaitiakitanga merited consideration, yet ultimately, they allowed the proposed sand extraction to proceed, as it fell within the principles of sustainable management, which is the primary objective of the Resource Management Act.[88]

C. Law Over Tikanga

Incorporating tikanga into law, has the effect of confirming the supremacy of the colonial legal system, as ultimately tikanga will then draw its mana within a legal context, from the source of its incorporation in either common law or legislation rather than as a source of law in its own right. The late Pā Moana Jackson made reference to this idea, viewing tikanga incorporation as something that "captures, redefines, and uses Māori concepts to freeze Māori cultural and political expression within parameters acceptable to the state", denying its validity outside of the legal system.[89]

D. Conflicts of Tikanga in Law

Many cases deciding on matters of tikanga are testing the legal capacity of the Courts, not only with their own internal conflicts in attempting to reconcile tikanga and the law, but also with additional conflicting tikanga as well.

In *Friends and Community of Ngawha Inc,* some of the hapū believed that the land to be used in developing the Ngawha Prison was the territory of a taniwha named Takauere; other hapū members disagreed.[90] The Environment Court acknowledged the Māori belief in the taniwha but did not acknowledge the competing arguments within the community as justiciable. The Environment Court instead found that the prison development did not affect the taniwha or belief in it, as a matter of fact, relying on evidence from within the community to reach that

[87] *Haddon v Auckland Regional Council* [1994] NZRMA 49.
[88] At 50.
[89] Moana Jackson "Justice and Political Power: Reasserting Māori Legal Processes" KM Hazelhurst (ed) Legal Pluralism and the Colonial Legacy (Ashbury Publishing Ltd, 1995) 244 at 254.
[90] *Friends and Community of Ngawha Inc v Minister of Corrections* (2002) [2003] NZRMA 272 (CA).

conclusion. However, after two decades of jurisprudence in these matters, the Courts still demonstrate a limited understanding of the techniques and metrics from within Māori custom to assess conflicting evidence on spiritual matters objectively.[91]

Environmental Reform

The issues in the previous chapter relate to the specifics of how tikanga is affected when judicially considered in the context of environmental law. However, the broader reasons that the entirety of the system is being reformed are primarily considered to be the inadequacy of the Resource Management Act, explained in the 2020 report of the Resource Management Review Panel; called the Randerson Report after the chair of the Panel, retired Court of Appeal Judge, Hon Tony Randerson, QC.[92] The Randerson Report was to:[93]

> …improve environmental outcomes and better enable urban and other development within environmental limits. The review must design a system for land use regulation and environmental protection that is fit to address current and future challenges and should support the development of a system that delivers cultural and environmental outcomes for all New Zealanders, including Māori, and improves their wellbeing.

With the aim of improving environmental outcomes, the Panel drafted an extensive 531-page report, Chapter 3 of which highlights significant issues for Māori within the resource management system.

As part of its recommendations, the report suggests specific recognition of te ao Māori should be reflected in the purpose of new legislation, and taking a page from the Kahui Wai Māori report, the Review Panel proposed the inclusion of Te Mana o Te Taiao in the purpose statement of the Natural and Built Environments Act, to better align te ao Māori with the

[91] Williams, above n 6, at 21.
[92] Tompkins Wake "Randerson Report released: New Direction for Resource Management" (5 August 2020) <https://www.tompkinswake.com/insights/knowledge/randerson-report-released-new-direction-for-resource-management/>.
[93] Resource Management Review Panel *New Directions for Resource Management in New Zealand, Report of the Resource Management Review Panel June 2020* (June 2020) at 8.

resource management system.[94] There are additional key intentions scattered throughout the report provided in summary in the following sections.

Te Mana o Te Taiao expresses the concept of safeguarding the life-supporting capacity of natural resources, aligning the resource management system with te ao Māori.[95] The inclusion of this concept in the purpose statement recognises the importance of maintaining the mana or integrity, sustainability and health of te taiao, the air, water, soil, and ecosystems for sustaining life.[96] The underlying philosophy of Te Mana o Te Taiao is sufficiently recognised by its inclusion in the purpose statement, acknowledging the mana of natural resources and their essential relationship to health and wellbeing. [97]

A. Interim Regulatory Impact Assessment

A year after the Randerson report, the Ministry for the Environment (MfE) provided an interim regulatory impact statement that assessed key policy areas of the proposed Natural and Built Environments Act (NBA).[98] This impact assessment proposed an alternative to the recommendations of the Randerson Report, it instead proposed the inclusion of Te Oranga o Te Taiao as a concept to be included in the purpose of the NBA, these intentions are summarised below.

Te Oranga o Te Taiao is a proposed alternative that builds upon the intent of Te Mana o Te Taiao in order to better reflect mātauranga Māori perspectives in the resource management system in New Zealand. [99] The proposal aims to encapsulate the intergenerational importance of the health and wellbeing of the natural environment and is intended to be a common environmental ethic for the country.[100] The incorporation of Te Oranga o Te Taiao into the purpose of the new Act would provide greater recognition of te ao Māori, including mātauranga Māori. The proposal also includes strengthened Treaty clauses and provisions for kaitiakitanga, tikanga Māori, and the use of mātauranga Māori to ensure decisions reflect

[94] Above n 93, at 97-99.
[95] Above n 93, at 75.
[96] At 98 and 99.
[97] At 99.
[98] Ministry for the Environment *Interim regulatory impact statement: Reforming the resource management system* (15 June 2021) at 1.
[99] At 3.
[100] At 67.

treaty partnership.[101] The definition and application of the concept is still being worked on through engagement with Māori.[102] Officials have collaborated with the Freshwater Iwi Leaders Group and Te Wai Māori Trust technicians to refine the Te Oranga o te Taiao proposal to align with Ministerial Oversight Group decisions and maintain its integrity.[103] The proposal intends to prioritise environmental protection within ecological limits while allowing trade-offs between other well-beings.[104]

The policy's implementation aims to improve environmental outcomes and is being developed through engagement with Māori. [105] The effectiveness of the proposal will depend on how it is incorporated in the Natural and Built Environment Act and the role of iwi/Māori in the process and substance of the National Planning Framework.[106]

B. Supplementary Analysis Report

In September of the following year, the Ministry for the Environment presented a supplementary analysis report to the Minister for the Environment, focused on key policy shifts affecting the Resource Management system as a whole and the Government's overall objectives for the new Resource Management system.[107] With regard to the inclusion of an ao Māori related concept, the analysis report outlines the decision to accept the proposed changes in the impact statement and adopt the concept of Te Oranga o Te Taiao,[108] the intentions are reproduced in summary.

The new Resource Management legislation in New Zealand aims to uphold the Te Oranga o Te Taiao concept,[109] which recognises the importance of Māori in the natural environment. It provides better recognition of Māori at the core of the system. [110] The objective of the reform is to protect and restore the natural environment and ensure its capacity to provide for the

[101] At 67 and 72.
[102] At 67 and 73.
[103] At 64.
[104] At 67.
[105] At 73.
[106] At 73 and 85.
[107] Ministry for the Environment *Supplementary Analysis Report: The new resource management system* (21 September 22) at 1.
[108] At 4.
[109] At 54.
[110] At 9.

wellbeing of present and future generations – The intergenerational concept of Te Oranga o Te Taiao is central to this.[111]

The legislation will require decision-makers to give effect to the principles of Te Tiriti.[112] The Natural and Built Environments Act will protect and enhance the environment in line with Te Oranga o Te Taiao.[113] The system will consider all aspects of Te Oranga o Te Taiao, including place-based targets and a kaupapa Māori approach.[114] Alignment between the Treaty clause and Te Oranga o Te Taiao is important,[115] and mātauranga Māori will be reflected in the National Planning Framework for greater clarity for decision-makers.[116] Limits and targets need to be designed and reconciled in a way that properly embeds Te Oranga o Te Taiao. [117]

Māori participation will be involved at all levels of the system. There will be funding from central/local government to ensure effective and adequate participation.[118] The Mana Whakahono ā Rohe arrangements and Joint Management Agreements will provide mechanisms for local partnerships that could involve better enabling kaitiakitanga to protect and restore the natural environment. The preferred option for Māori participation in the new Resource Management System would have minor-moderate improvements for the natural environment objective, and membership on regional planning committees would provide for an iwi/hapū/Māori voice to protect and enhance the environment.[119]

Requiring decision-makers to give effect to the principles of Te Tiriti will be a major advancement from the previous 'have regard to' provisions and will likely result in a significant development in treaty and environmental jurisprudence over subsequent years. As an exercise in translation, it seems that the intentions as outlined in the assessment and report above, are indeed captured with the phrase "Te Oranga o Te Taiao", but how this informs the

[111] At 126.
[112] At 39.
[113] At 174.
[114] At 73.
[115] At 183.
[116] At 188.
[117] At 195.
[118] At 221.
[119] At 175.

application of "enhancing the environment in line with Te Oranga o Te Taiao" will likely not be settled until many years after the Act is passed.

Ultimately, this will be dependent on judicial interpretation, but there is some promise there for a tikanga prevalent future where tikanga and Government concepts align – Specifically in respect of the objective of the resource management system reform, to protect and restore the natural environment and ensure its capacity to provide for the wellbeing of present and future generations. Striving to enable the prosperity of the environment across generations, if genuine, reflects the implicit incorporation of Māori customary law discussed by Natalie Coates in her thesis.[120]

Admittedly, it is presumed that this is a result of being developed alongside Freshwater Iwi Leaders Group and Te Wai Māori Trust technicians. Regardless, as a concept that has been developed within a Ministerial organisation, it remains unclear the extent to which tikanga may be enforceable under this new and shared 'environmental ethic.'

It is hoped that any gaps identified will be accommodated by the intended 'Māori participation at all levels of the system' without being a purely participatory exercise. The different mechanisms, discussed in the analysis report, to ensure Māori participation is helpful. Yet, the availability of mechanisms such as Mana Whakahono ā Rohe arrangements and Joint Management Agreements does not guaranteed their fulfilment, and may only echo the initial 20 years after the Resource Management Act as lamented by Williams J.[121]

The motivators for local authorities will likely lie in the newfound obligations to uphold Te Oranga o Te Taiao and give effect to Te Tiriti o Waitangi, as reconciling limits and targets in a way that properly embeds Te Oranga o Te Taiao without Māori may prove difficult. While naturally a sceptic, it does instil some confidence to see that over the course of a year the proposed alternative concept and need to incorporate Māori perspectives evolved into an exploration of how the new legislation would uphold the concept and involve Māori at all levels of the system.

[120] Coates, above n 44, at 14.
[121] Williams, above n 6, at 22-23.

C. The Proposed Legislation

These papers, and reports resulted in the two new pieces of legislation introduced to Parliament in October of 2023. The Natural and Built Environment Bill and the Spatial Planning Bill, both of which have passed the first reading and now sit with the select committee for deliberation.[122]

The proposed purpose of the Natural and Built Environment Bill includes supporting "the well-being of present generations without compromising the wellbeing of future generations" and to "recognise and uphold te Oranga o te Taiao" amongst other purposes. The explanatory note expresses that "The purpose is an intergenerational environmental test for all New Zealanders. It draws on 'te Oranga o te Taiao, a te ao Māori concept that speaks to the health of the natural environment, the essential relationship between the health of the natural environment and its capacity to sustain life, and the interconnectedness of all parts of the environment."[123] The proposed Spatial Planning Bill is intended to work in tandem with the Natural and Built Environment Bill as an integrated system, and assist in achieving the purpose of the proposed Natural and Built Environment Act by upholding Te Oranga o Te Taiao.[124]

Conceptually the intentions outlined above and refined in both the Bill's purposes reflect core conceptions within tikanga Māori. Whakapapa, whanaungatanga, mana, and kaitakitanga are implicitly evident, not only in the objectives but in the worldview that is captured within the terms that are used.

The concept as a whole, accords with the responsibility to maintain the mauri of the taiao, in a manner the provides for the right of environmental use while maintaining the obligations of environmental care and support. Viewed through this lens, Te Oranga o Te Taiao would indeed place a great "emphasis on understanding the interconnections between different parts of the environment, including people," and would further "recognise the essential relationship

[122] New Zealand Parliament *Natural and Built Environment Bill* (26 February 2023) <https://bills.parliament.nz/v/Bill/267f6032-6ceb-482a-ac45-0c02dd1edc60?Tab=history>; New Zealand Parliament (26 February 2023) < https://bills.parliament.nz/v/Bill/5e622cec-50a3-427b-be27-6282d64e6c71?Tab=history>.
[123] Natural and Nuilt Environment Bill, Purpose, Explanatory Note.
[124] Spatial Planning Bill, Purpose, Explanatory Note.

between the ecological integrity of the natural environment and its capacity to sustain all life and the economy."[125]

[125] Hon David Parker, Minister for the Environment "How the future RM Reform system will better protect the environment" (Chateau on the Park, Christchurch, 17 August 2022).

Hei Whakatepe Ake

The progression this paper took was in recognition of the very subject it discussed, starting with tikanga, the system which was first utilised by Māori as the indigenous people of Aotearoa. This served as a foundation to inform the intended standard that the realms of legislation and common law needed to accommodate tikanga. Initially, it was presumed that a failure to meet the standard would be a failure on the part of the law, and clear indication of standard satisfaction would identify the successful existence of purely established tikanga in law. The author has since reconsidered his position in light of that information presented in the development of the newly introduced concept, Te Oranga o Te Taiao.

Two questions were posed at the outset:

(1) What are the intentions behind including Te Oranga o Te Taiao within the proposed resource management reforms?
(2) What are the impacts of incorporating tikanga concepts in environmental legislation?

In response to the former, it should be understood that conceptually the intentions behind Te Oranga o Te Taiao that have been discussed, share significant parallels with tikanga Māori. The concept incorporates core principles of tikanga Māori. It accords with the responsibility to maintain the mauri of the taiao, in a manner that provides for the right of environmental use while adhering to the obligations of environmental care and support as kaitiaki.

The concept emphasises the interconnectedness of the environment and the essential relationship normally established through whakapapa and whānaungatanga. It appears to be a genuine attempt to consolidate Western and Māori environmental understandings, with the concept's development aimed to create a shared environmental ethic drawn from key Māori understandings, rather seeking to replicate a tikanga concept. Something that can be championed by everyone in New Zealand, inspired by the invaluable knowledge held by Aotearoa’s indigenous people.

However, this does not preclude its application from being absent of Māori involvement. Drawing heavily on core tenets of tikanga Māori necessitate those familiar and experienced with its background at an intimate level to provide for those elements within the concept. Working in tandem is the understanding that there is more needed to give effect to the concept which will likely need to be balanced between tangata whenua and tangata tiriti alike.

Turning to the latter question, the inclusion of tikanga in environmental legislation and law has both positive and negative impacts, including issues of misinterpretation and competing interests. Despite the lack of significant advantages outlined in this paper, it is important to acknowledge the progression of Māori customary rights and interests in New Zealand's legal history. This point should be qualified, however, with the scepticism that is natural to the author, in that Te Oranga o Te Taiao in this paper has mostly been considered in isolation of the greater system reforms.

Upon reflecting on Aotearoa, New Zealand's legal history, concerns remain about potential misapplication and exploitation of Te Oranga o Te Taiao by those who do not fully understand its significance. Understanding the context of Māori culture, mātauranga, and tikanga Māori is crucial for mainstream New Zealand to comprehend their credibility, legitimacy, authority, and efficacy in the legal system. Context is necessary to fully comprehend the significance of both tikanga and mātauranga Māori, that cannot be sourced by way of sterile definitions found in dictionaries. "Legal concepts cannot be defined, but only described by reference to illustrative cases. … two judges have overlooked that lesson, by trying to define Māori culture with the help of conventional dictionary definitions."[126] Māori inclusion and direction is necessary and should be supported to determine the best course of environmental management for themselves, based on their own tikanga and mātauranga. However, the reality of how both New Zealand's legal system and society is progressing predicts a likely future where tikanga and the law may be able to work amicably, hand in hand, for the betterment of Aotearoa, New Zealand as a whole.

[126] Jeremy Bentham and Herbert Hart cited in Robert Joseph and others *"Tūhonohono: Tikanga Māori me te Ture Pākehā ki Takutai Moana"* (November 2016, Sustainable Seas) <https://www.sustainableseaschallenge.co.nz/assets/dms/Proposals/Tuhonohono-tikanga-Maori-me-te-Ture-Pakeha-ki-Takutai-Moana/Project-proposal-Tunohonoho-Dynamic-between-Maori-lore-and-law.pdf> at 4.

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