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**Discussion Paper: How current  
legislative frameworks enable customary  
management & ecosystem-based  
management in Aotearoa New Zealand –  
the contemporary practice of rāhui**

April 2018



# **Discussion Paper: How current legislative frameworks enable customary management & ecosystem-based management in Aotearoa New Zealand – the contemporary practice of rāhui**

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Produced for: Sustainable Seas National Science Challenge: Cross Programme 1.1  
Enabling EBM in the current legislative framework.

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## Summary

### Client and Project

- Sustainable Seas National Science Challenge, Cross Programme 1.1
- This is an additional output, in response to the Sustainable Seas Kahui –Māori advisory group, which requested the consideration of a customary management ‘tool’ such as rāhui, a commonly used form of customary resource management, as a gauge for how customary management might fit into this theme.

### Objectives

- 1 Undertake a review and analysis of current policy and legislation to consider how customary management, based on tikanga-a-iwi and tikanga-a-hapū (the relevant practices and processes of iwi and hapū within their rohe / tribal area), and ecosystem-based management (EBM) are enabled.

Note: This is not an investigation into what rāhui was traditionally, is currently, or could be in future.

- 2 Consider how well EBM aligns with customary management by using the contemporary application of rāhui as a ‘yardstick’<sup>1</sup> for measuring potential alignment
- 3 Consider the extent to which the Tiriti o Waitangi guarantee of Māori rangatiratanga over natural resources and taonga and the principle of kaitiakitanga is enabled under New Zealand’s current resource management regime (within an EBM context)
- 4 Produce a relevant and useful paper to generate discussion about:
  - a the synergies between customary management<sup>2</sup> and EBM
  - b how customary management and EBM are currently enabled by existing policy and legislation
  - c potential policy and legislative changes required to improve our capacity to care for our environment, resources, and people into the future.

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<sup>1</sup> This use of ‘yardstick’ follows the recent use of this term by Ruru and Wheen in *Providing for rāhui in the law of Aotearoa New Zealand* (2016: 196). Ruru and Wheen suggest that ‘the extent to which resource management law in Aotearoa New Zealand accurately and sympathetically recognises, supports and affirms rāhui is a yardstick for how well environmental governance here complies with the New Zealand Crown’s Treaty of Waitangi guarantee of *Maori rangatiratanga* (self-determination) over natural resources’. This is not, therefore, an investigation into what rāhui was traditionally, is currently, or could be in the future.

<sup>2</sup> Note: Tikanga-based management, customary management, and kaitiakitanga are used interchangeably in this paper.

## Methods

- Collaborative process between Manaaki Whenua – Landcare Research and Māori practitioners working with their hapū in environmental management.
- Research and drafting included:
  - a desktop analysis of current policy and legislation affecting customary management and EBM; and
  - informal discussions amongst the researchers drawing on their knowledge and experience.
- Informal discussions with relevant whanau, researchers, and council representatives for further information where required.
- We worked with the assumption that if rāhui is not provided for, then there is no practical way for rāhui to be used as a tool for or alongside EBM. The consideration of EBM thus followed the consideration of customary management first and foremost in policy and legislation, and EBM second.
- Case studies formulated from the experiences of the Māori practitioners involved, are used to illustrate the opportunities, constraints and nuances associated with the concept and practice of rāhui, as considered within an EBM context.
- Recommendations on the significance of this review and future steps are made in relation to current policy and legislation.

## Results

General results:

- Rāhui as an example of customary management provides a useful lens to review and analyse how current policy and legislation enables kaitiakitanga and EBM in Aotearoa NZ
- EBM aligns well with customary management. Both are holistic concepts offering the potential to better care for and sustainably utilise our marine and coastal resources
- Provision for rāhui, and for EBM, varies across national and regional policy and legislation. There is no consistency. Provision is limited overall
- Where there is specific provision, rāhui is included as a 'legislative construct' divorced from the body of tikanga in which it should be based and
- Provision for rāhui appears to be included in policy and legislation as a reactive response to resource scarcity, or to Treaty settlement arrangements, rather than a proactive way of sustainably managing resources within a wider holistic management approach. There is a lack of recognition that tapu, mana, and mauri exists in all living things and thus requires relevant and appropriate sustainable management to acknowledge and respond to those components which are integral to the overall wellbeing of our environment and ourselves (refer section 2).

Results from specific policy and legislation:

- The Conservation Act 1987 is the only piece of legislation that explicitly provides for rāhui
- The Fisheries Act 1996 includes limited, and implicit, provision for rāhui



- The Resource Management Act 1991 excludes provision for rāhui per se but includes provisions that are (conceivably) flexible enough to accommodate rāhui
- Provision and direction for rāhui (and other tikanga-based governance and management) and EBM are beginning to develop through planning at the regional level, as shown by the Auckland Unitary Plan, and the non-statutory Sea Change – Tai Timu Tai Pari Marine Spatial Plan for the Hauraki Gulf; and through Special Legislation such as Fiordland (Te Moana o Atawhenua) Marine Management Act 2005; and Kaikōura (Te Tai o Marokura) Marine Management Act 2014;
- The most explicit and promising provision for rāhui, as an example of customary management, is found in recent Treaty settlement legislation, i.e. Te Urewera Act (2014), and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 respectively, neither of which is currently located in the marine and coastal environment
- Post-Treaty settlement and Marine and Coastal (Takutai Moana) Act settlement legislation is beginning to influence New Zealand's current governance and management paradigm. Iwi and hapū rights and interests are being understood and enabled from a Crown legal perspective. This offers a useful pathway to support and drive EBM approaches that are informed by and respond to Māori philosophies, values and practices.

### **Recommendations for the use of this paper and future research**

- Use this paper to shape ongoing research in the Sustainable Seas National Science Challenge e.g. workshop the discussion paper with other researchers, including Māori researchers
- Publish the paper online, making it accessible for a wide audience
- Use this paper to inform discussions with relevant ministries and other government agencies, and with wider stakeholders – consider ways forward for holistic bicultural governance and management
- Present and discuss findings and ideas to other relevant national and international forums that consider governance and management regimes for marine and coastal environments – particularly colonised nations and other island nations
- Further analysis of the effectiveness and potential for EBM of the special legislation, Treaty settlement legislation, and Marine and Coastal Area Act referred to in this paper could provide insight into the opportunities and challenges for bicultural EBM
- Facilitate further research using individual case studies of places and communities that are practising (or plan to practise) customary management (preferably rāhui, to use as a comparable 'yardstick' common across the project), to explore different scenarios and potential policy and legislative interventions
- Establish a collaborative panel or advisory group of kaitiaki (identified from the same case studies in the previous bullet point) with expertise in marine and coastal management, particularly bicultural initiatives and processes, to 'dive deep' into the challenges to enabling customary management and EBM, and considering potential policy and legislative interventions
- Produce a report that summarises the findings of the two research initiatives recommended above, making key recommendations for policy and legislative interventions at both national and regional levels.



# 1 Introduction

This discussion paper considers the contemporary application of rāhui<sup>3</sup> as a 'yardstick'<sup>4</sup> for measuring how well ecosystem-based management (EBM) aligns with customary management, and how current policy and legislation enables these two different management approaches. As a corollary to this assessment, the paper considers the extent to which Te Tiriti o Waitangi / the Treaty of Waitangi guarantees Māori rangatiratanga over natural resources and taonga and the extent to which the principle of kaitiakitanga is enabled under New Zealand's current resource management regime. The authors identify opportunities and constraints offered by current management and governance practices and processes in regard to Māori aspirations for resource management and EBM frameworks. Conclusions and recommendations for future policy and legislation are drawn in the final section for further investigation in the next phase of research.

This paper is not an in-depth investigation of rāhui per se, it does not seek to analyse what rāhui meant traditionally, is currently, or could be in future. However, it is necessary to understand that rāhui as a tikanga<sup>5</sup>-based management concept in and of itself, cannot be used as a yardstick for measuring how well EBM aligns with Māori aspirations because Māori customary philosophy in regards to the environment is underpinned by a range of core values and concepts from which rāhui cannot be isolated (refer s. II). Tiakiwai et al. (2017) note 'the importance of protecting the integrity of indigenous ecological knowledge as a system of knowledge, rather than seeing it as a commodity that can be researched separate from its foundations...from an indigenous perspective, these are inseparable' and doing so 'compromises the integrity' (p. 10). Hence, the discussion about rāhui in this paper is nested within the relevant associated body of traditional cultural beliefs, knowledge, concepts, and values. Any concluding thoughts, recommendations for legislative frameworks, or future use of recommendations (regarding the research theme) must also include this wider body of associated components in order to propose any measure of appropriateness and success.

To provide a foundation for this paper, section 2 outlines a basic understanding of customary management and the synergies between customary management and EBM, which are both holistic approaches. Section 3 briefly explains Māori systems of governance compared with Crown systems of governance, to provide the context in which customary management must be enabled in order to fulfil the guarantees of Te Tiriti o Waitangi and provide partnership between the Crown and Iwi. Land ownership and jurisdiction is characterised in section 4 which provides insight into challenges for Māori wanting to

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<sup>3</sup>The concept of rāhui has several meanings. The use of rāhui to protect and manage environmental resources is one meaning that can be understood and applied in different ways relevant to one's tikanga.

<sup>4</sup> This particular use of 'yardstick' follows the recent use of this term by Ruru and Wheen in *Providing for rāhui in the law of Aotearoa New Zealand* (2016: 196). Ruru and Wheen suggest that 'the extent to which resource management law in Aotearoa New Zealand accurately and sympathetically recognises, supports and affirms rāhui is a yardstick for how well environmental governance here complies with the New Zealand Crown's Treaty of Waitangi guarantee of *Maori rangatiratanga* (self-determination) over natural resources'.

<sup>5</sup> Tikanga is the customary system of values and practices that have developed over time and are deeply embedded in the Māori social context (further described in Section 2).

practice customary management over resources in areas that they no longer own, particularly if they are trying to protect and manage resources in areas that are highly populated and/or easily accessible.

The main review and analysis of current policy and legislation is provided in section 5. It is informed by various other pieces of research already undertaken that connect well with this broader topic of how current policy and legislation enable customary management – refer to the papers acknowledged in section 7 Acknowledgements. This review is unique though, because it focuses on the marine and coastal area, and it specifically considers EBM alongside customary management. It could be considered a bicultural review in that it does not only analyse Acts and policies for Māori provisions and empowerment, but also how that fits alongside a western management approach (i.e. EBM). This is the first review also, to consider how the Marine and Coastal (Takutai Moana) Act 2011 enables customary rights and interests, alongside EBM. However, this section is not confined to policy and legislation that only applies to marine and coastal areas – the analysis extends to recent Treaty settlement legislation that provides personal identity to natural resources enables customary management and EBM, considering what that could mean for marine and coastal areas too.

This review and analysis concludes by suggesting, in section 6, potential implications for future research on policy and legislation to better enable customary management and EBM.

## **2 Understanding customary management and synergies with ecosystem-based management**

Ecosystem-based management (EBM) is one approach to marine and coastal management being adopted and implemented in Aotearoa New Zealand and around the world. It recognises the inadequacy of single-sector or single-species management approaches and the need for holistic and equitable approaches that involve multiple sectors and address whole ecosystems. Although EBM stems from a different worldview and values system to customary management, centring on the ecological ecosystem, it also incorporates cultural, social, spiritual, economic, and political values. It is possible that mātauranga Māori principles and practices empower, or might be empowered by, EBM.<sup>6</sup> In order to appreciate the concept of rāhui and its application for marine and coastal management and how rāhui is enabled in existing legislative frameworks, this section provides an understanding of customary management, informed by tikanga (practices and principles according to different iwi and hapū) and its potential synergies with EBM. Tikanga is explained through the logical flow of the Māori creation theory and the realm of gods, right through to the application of tikanga by man for the sustainable use and protection of the environment (and of people within that system).

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<sup>6</sup> For further context, refer to the following associated report for the Sustainable Seas Challenge by Dr Greenaway et al. 2018 CP1.1: How current legislative frameworks enable Ecosystem Based Management (EBM) in Aotearoa New Zealand.

Māori customary philosophy in regard to the environment is underpinned by whanaungatanga, the principle of integrated kinship. According to Māori creation theory, Te Ao Mārama, the world of light and enlightenment within which we exist, stems from the gods. All objects within, both animate and inanimate, and including humanity and the natural environment, are descendants of the gods – their physical manifestation, brought together with particular characteristics and needs to coexist as a whole and as equal members of the ultimate social institution. In describing the world view of Māori claimants in the Wai 262, Indigenous Flora and Fauna claim the Waitangi Tribunal (2011) stated:

Often translated as 'kinship' whanaungatanga does not refer only to family ties between living people, but rather to a much broader web of relationships between people (living and dead), land, water, flora and fauna, and the spiritual world of atua (gods) – all bound together through whakapapa (p. 237).

As Harmsworth and Awatere (2013) describe:

The term 'Te Ao Marama', based on whakapapa, means 'a world of light and opening, and symbolises a rich diversity of life, resources, and biodiversity' and 'richness of life' (Harmsworth 2004). It explains the range of life forms that exist, connected through whakapapa – plants, animals, birds, fish, microorganisms, the genes they contain, and the ecosystems they form (p. 274).

As the gods themselves are the penultimate source of the principal concepts tapu, mana and mauri, all things in Te Ao Mārama descendant from the gods also inherit those characteristics. That is, sacred potential (tapu), the utmost privilege and authority and the reciprocal obligations that come with it (mana), and an essential life force (mauri).

Consequently, these three principles resemble a holy trinity in balancing the relationship between humanity and the natural environment. This holy trinity is critical for sustainable management and to identify priorities for decision-making and governance. Everything has sacred potential and must be respected in that sense; the greater the potential or realised potential, the greater the tapu and subsequent levels of respect and reverence. Everything has mauri to be maintained and protected. Those bestowed with the privilege of maintaining the mauri and life force of others inherit the divine authority, the mana whakahaere, from the gods (Ministry of Justice 2001)<sup>7</sup>:

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<sup>7</sup> The project on Māori Perspectives on Justice was first discussed in 1996, following the establishment of the new Ministry of Justice. It was part of the Ministry's overall plan to establish its own frameworks in developing policy advice... In 1998 this project was reactivated. The research team comprised a small group of Victoria University students and a full-time Māori graduate involved in the Ministry under its Tangata Whenua Student Work Programme. Members of the team were Ramari Paul (project coordinator), Hui Kahu, Chappie Te Kani, and Jason Ataera, under the management and guidance of John Clarke, Director, Māori, of the Ministry of Justice. In terms of the quality control of the work, Professor Wharehuia Milroy, Head of Māori Studies at Waikato University and Wiremu Kaa, a senior lecturer in te reo Māori and Māori Society at Victoria University gave expert guidance and assistance to the team throughout the project. The project team was assisted in its deliberations by members of the Māori Focus Group or Consultative Panel to the Ministry of Justice who provided helpful feedback on the document from time to time. The members of this group are Father Henare Tate, Moira Rolleston, Betty Wark, James Johnston, Judge Wilson Isaac (Māori Land Court), Iritana Tawhiwhirangi, Ani Mikaere, Merepeka Raukawa Tait and Judge John MacDonald (District Court). There were

Mana was inherited at birth, and the more senior the descent of a person, the greater the mana. Tapu invariably accompanied mana. The more prestigious the event, person or object, the more it was surrounded by the protection of tapu (p. 6).

Humanity is privileged with mana to maintain and protect the mauri of the environment, and in return the mauri of humanity is maintained by the natural environment. This is often described as the principle of kaitiakitanga which Harmsworth and Awatere (2013) describe as “the ethos of sustainable resource management [and] guardianship” (p. 284) (Harmsworth & Awatere 2013).

Living in balance, as part of one social system or ecosystem, all things have the potential to endure, and, where possible, to thrive. This is the holistic world view of traditional Māori, which has at its heart many natural synergies with EBM. As Harmsworth and Awatere state (2013):

An ecosystem is a dynamic complex system of plant, animal and micro-organism communities, and the non-living environment interacting as a functional unit. The conceptual framework for the Millennium Assessment (2005a)<sup>8</sup> assumes that people are integral parts of ecosystems. Māori also see themselves as a part of ecosystems rather than separated from ecosystems. To achieve well-being humans require basic materials, health, good social relations, security, and freedom of choice and action. Many of these basic necessities are provided directly and indirectly by ecosystems. Humans not only depend on ecosystems, they influence them directly through land use and management. The strength of this interdependency between humans and ecosystems may be conceptualised as a reciprocal relationship comprising manaaki whenua (caring for the land) and manaaki tangata (caring for the people)...

...The traditional Māori world view acknowledged a natural order to the universe, a dynamic system built around the living and the non-living. For Māori the modern use of the terms ecosystem and ecosystem services can be explained through traditional knowledge and the interwoven concepts of whakapapa, mana and kaitiakitanga, and possession of the spiritual qualities of tapu, mauri, and wairua. Traditionally Māori realised that shifts in mauri (life force, life spirit) of any part of the environment, for example through use, would cause shifts in the mauri of immediately related components. As a result, the whole system is eventually affected. All activities and relationships were bound up and governed by mythology, tapu, and an elaborate system of ritenga or rules. The process used by Māori to guide resource use reflects this belief in the interrelationship of all parts of the environment (p. 276).

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also those kaumātua whose oral accounts were recorded as case studies who wished to remain anonymous participants.

<sup>8</sup> The Millennium Ecosystem Assessment was called for by United Nations Secretary-General Kofi Annan in 2000 in his report to the UN General Assembly, *We the Peoples: The Role of the United Nations in the 21st Century*. Governments subsequently supported the establishment of the assessment through decisions taken by three international conventions, and the MA was initiated in 2001.

The rules that inform and regulate the behaviour, systems and processes of Māori toward the environment are tikanga. The behaviour, systems, and processes themselves can be described as ritenga (Harmsworth & Awatere 2013). Rāhui is a particular customary practice that is understood in contemporary times as prohibiting certain acts with respect to the environment. In traditional times, the nature and extent of any particular rāhui was determined at a localised level, by those exercising kaitiakitanga over the affected resource.

In describing the process of invoking rāhui within his rohe during the 1940s, Ūpokorehe kaumātua Toopi Wikotu explains (T Wikotu, pers. comm., 2017):

Rangatira would consult with tohunga as to the details of the rāhui. Every hapū would have a counsel of tohunga which comprised both koroua and kuia. The tohunga were the keepers of the whare maire which is the whare tapu, the sacred law of the hapū...Once the tapu was in place for rāhui, only the tohunga could uplift it...[according to kaumātua Toopi Wikotu] Rāhui in the traditional sense has been lost now.

The ability of Māori to maintain customary practices such as rāhui in their traditional form has been challenged in multiple ways by the effects of colonisation. At one end of the spectrum, urbanisation and assimilation have led to a breakdown in social cohesion and the ability to enact and enforce tikanga. In addition, loss of land has impeded access to and control over natural resources and the ability to practice kaitiakitanga (refer s. 4). At the other end of the spectrum, successive legislative and regulatory regimes have usurped tino rangatiratanga (refer s. 5), the ability of Māori to create and enforce tikanga over their customary lands, estates, forests, fisheries me ngā taonga katoa (and all things valued to Māori whether animate and inanimate) (Tribunal 2016).

Despite challenges to the exercise of customary practices such as rāhui, traditional values and philosophy still underpin the contemporary Māori world-view in regard to environmental management. Traditional practices such as rāhui continue to be observed to varying degrees in modern society, depending on the propensity and determination of Māori to do so. In effect, the modern practice of rāhui is one example of the relevance of traditional science in new contexts to inform contemporary environmental management practices. As Harmsworth (No Date) notes:

In the environmental area, the contemporary Māori world-view is still strongly based on traditional cultural beliefs, knowledge, concepts, and values. These traditional concepts and values, derived from Māori knowledge (mātauranga Māori), are still fundamentally important in the way many Māori form a perspective and approach to environmental management, planning, design, policy development and implementation, and in resolving complex resource management issues.

Many [planning] concepts...mirror indigenous thinking and have parallel goals to Māori approaches for environmental planning and resource management.

Important traditional cultural concepts and knowledge are being used and interpreted in many new situations, contexts, disciplines, and have found new and modern relevance and meaning. Key cultural concepts and values have been widely



used in contemporary legislation, planning, policy, and research, which have often widened their original traditional meaning to align with, and in many cases reinforce, modern concepts and situations. Many of the traditional concepts and terms now form a modern Māori perspective or world-view along with a range of modern expanded definitions and interpretations.

As described by Harmsworth, current legislative frameworks recognise key cultural concepts and values albeit often adapted from their traditional form. Through this recognition, integrated policy and legislation has the potential to create space for Indigenous knowledge and involvement in resource management, typically denied in post-settler nations. Unfortunately, however, as this paper shows, an inherent contradiction exists in the current policy and legislative regime in Aotearoa whereby policy and regulatory systems *recognise* Māori rights, interests, values and concepts but they are still not *provided for or given effect to* in practice. Therefore, application of legislated rāhui is not in accordance with the relevant tikanga and is unlikely to result in the restoration of mauri and a healthy ecosystem.

The continued ability for Māori to exercise kaitiakitanga over the natural environment anticipated by the Treaty of Waitangi/Te Tiriti (discussed further in s. 3) is inadequately provided for under the current legislative regime. Māori are not positioned as equal partners in decision-making and management processes. Rather, the Crown's institutions and frameworks such as the Resource Management Act (1991) position Māori as stakeholders, reinforcing the marginalisation, compromise and exclusion of tikanga and mātauranga Māori from environmental management (Matunga 2000; Memon & Kirk 2012). Effectively, the current hegemony of legislation and policy challenges the progressive potential of tikanga and indigenous resource management practices alongside EBM. This significant barrier to holistic and empowering management and governance must be addressed for future policy and legislative frameworks.

### **3 Considering the constitutional complexities of rangatiratanga and kawanatanga for bicultural, Treaty-based, management and governance**

For the context of this paper, it is important to consider the concept and meaning of rangatiratanga as it relates to spaces of engagement in which rāhui and/or EBM is applied – spaces that often include 'public territory' and 'common-pool resources' and come under the dual authority of both Māori and the Crown (and its associated institutions).

Rangatiratanga derives from 'rangatira' meaning chief, denoting paramount or chiefly authority (Maaka 2005). Definitions, scope, practices and locus of rangatiratanga are expansive. The term is often denoted as meaning Māori sovereignty, Māori nation, absolute chieftainship, self-determination, self-management, and trusteeship (MAAKA 2005). There is no succinct or definitive Pākehā equivalent of rangatiratanga. Within such spaces as described above, notions of power, control, sharing, and authority can be assumed from the common themes depicted in the various explanations and have both historical and contemporary relevance.



To understand the context in which customary management should be enabled as a Te Tiriti o Waitangi/Treaty of Waitangi (hereafter referred to as the 'Treaty') *right* we refer to the guarantee to preserve rangatiratanga under Te Tiriti o Waitangi and the cession of sovereignty to the Crown under The Treaty of Waitangi. Māori sovereign rights were guaranteed in He Whakaputanga o Nu Tireni 1835: Declaration of Independence 1835 (He Whakaputanga) and confirmed in Article 2 of Te Tiriti o Waitangi (Mikaere 2011). When rangatira signed Te Tiriti they ceded kawanatanga (government) to the Crown but retained tino rangatiratanga (chieftainship) over Māori resources and taonga (Hayward 2011). In reconciling concepts of enduring rangatiratanga with Crown governance in a modern environmental resource management context the Waitangi Tribunal asserts:

The Treaty gives the Crown the right to govern, but in return requires the Crown to protect the tino rangatiratanga (full authority) of iwi and hapū in relation to their 'taonga katoa' (all that they treasure). The courts have characterised this exchange of rights and obligations as a partnership.

In a resource management context, therefore, the Treaty allows the Crown to put in place laws and policies to control the sustainable use and development of the environment. However, in doing so the Crown must, to the greatest extent practicable, protect the authority of iwi and hapū in relation to taonga (such as lands, waters, flora and fauna and the ecosystems that support them, wahi tapu, pa and other important sites), so that they can fulfil their obligations as kaitiaki (Tribunal 2011). Thus, one of the continuing Treaty rights held by Māori is the right to exercise rangatiratanga in the management of their natural resources or taonga through their own forms of local or regional self-government or through joint-management regimes at a local or regional level.

Reputable Māori scholars reinforce the argument that the Iwi/Crown relationship should be characterised as dual sovereignty because devolving the mana of the iwi (tribe) was impossible under Māori tikanga and the Rangatira (chiefs) of the time would have refused to sign any document claiming to have that effect (Jackson 1992; Mikaere 2011). Māori rights are also protected under the United Nations Declaration of Indigenous Rights, to which Aotearoa New Zealand affirmed its support in 2010. However, the (in)convenience of multiple versions of The Treaty and Te Tiriti and the very different interpretations between the English text in which Māori 'signed away their sovereignty' and Māori texts, which ensured Tino Rangatiratanga, enabled the watering down of Māori rights.

The Treaty relationship between the Crown and Māori is now characterised by the principles of the Treaty (known as the Treaty principles); an attempt to find synergies between the Treaty and Te Tiriti in order to achieve a harmonious partnership between Māori and the Crown in the modern constitutional climate. The Crown and its respective agencies have reinforced their authority granted through the kawanatanga principle from Article 1 of the Treaty of Waitangi to make laws and govern in accordance with constitutional process, while promises from Article 2 to uphold the principle of Rangatiratanga have not been met.

Colonisation and law-making in Aotearoa New Zealand under a Westminster model (the model of British Parliament) have resulted in the marginalisation and displacement of tikanga Māori, which has been replaced by formal law made by parliament and interpreted and applied by courts (Ruru 2016). Crown sovereignty quickly became the accepted norm,

enabling both invisibility of Crown sovereignty and, effectively, the expectation and therefore the opportunities for true partnership and shared decision-making between Rangatira and the Crown (Tiakiwai et al. 2017:7).

The reality, whereby Māori rights to exercise rangatiratanga are not upheld by the Crown, is illustrated in this paper when we consider how, or if, specific authorities and pieces of current legislation and policy support rāhui and EBM. It becomes clear that the challenge for Māori to exercise rangatiratanga and practice customary management within today's society, including the use of rāhui within its appropriate body of tikanga, means that new and innovative postcolonial alternatives to resource management are required such as co-operative co-existence based on the principles and practices of rangatiratanga.

## **4 Land ownership and jurisdiction**

Jurisdiction is important for the application of any type of environmental management (Tiakiwai et al. 2017) including tikanga-based mechanisms such as rāhui. For the purpose of this paper, we conceive of land ownership and 'jurisdiction' from both westernised and traditional Māori perspectives. Successful application and enforcement of tikanga-based management and EBM require the buy-in, support, and cooperation of all vested authorities (including iwi and hapū) that have jurisdiction over the affected area and resources. If an authority with jurisdiction is excluded from, or protests to, the rāhui or a collaborative EBM model, there is a risk of conflict that could result in the failure of either rāhui or EBM (or both if rāhui were to be appropriately used within an EBM model). In addition to those with recognised authority over an area, buy-in, support and cooperation of all stakeholders with a vested interest, such as commercial and recreational fishers, are also required for effective and successful application and implementation of rāhui and/or EBM.

Aotearoa New Zealand was once entirely Māori customary land. From a Māori perspective different iwi and hapū hold mana whenua status or the mana relevant to a specific area of whenua (land), within their own relevant rohe (territory). Tikanga is specific to an iwi or hapū, and is known as kawa. Therefore tikanga (or kawa) and customary management based on tikanga is localised and varies between iwi/hapū and rohe. It is also an Indigenous prerogative to define how rangatiratanga is understood and conveyed within tribal territories. Only 6% (approximately) of land remains as Māori freehold land today; some land was wrongfully confiscated by the Crown, some legitimately sold or gifted to the Crown, and the majority became reclassified as Māori freehold land under the Native Land Court (now the Māori Land Court) and was subsequently sold or confiscated (Ruru 2016). Aside from Crown-owned land administered by the Department of Conservation, general or private land now constitutes the majority of land type.

From a western perspective of jurisdiction Aotearoa New Zealand has a unitary parliamentary system, which is arguably less complex (has less layers) than a federal parliamentary system (Tiakiwai et al. 2017). Ruru (2016) provide a useful description of the various Crown agencies and their authorities over land, water and coastal marine areas in New Zealand. Generally, the Department of Conservation manages and administers approximately 30% of New Zealand's landmass for conservation purposes; the majority of

which is Crown land, but increasingly private land too. Beyond these areas, regional and local authorities and the Environment Court have management and administration responsibilities for land-use planning and for regulating access to and use of land, air and water under the Resource Management Act 1991, and the Ministry of Primary Industries (formerly the Ministry of Fisheries) manages and controls customary, recreational, and commercial fisheries under the Fisheries Act 1996. The significant authority and/or ownership held by Crown agencies over land and resources present the potential for progressive management and governance intervention via or alongside those agencies.

Following is a brief assessment of the effectiveness of voluntary<sup>9</sup> rāhui in different parts of Aotearoa New Zealand. Consideration of the remoteness, accessibility, and population of an area illustrates how land ownership and jurisdiction can influence the effectiveness of rāhui. It is assumed that there may also be a correlation between an area and the recognition, respect, and upholding of rangatiratanga, and the effectiveness of rāhui. This assessment demonstrates the jurisdiction and mana whenua status within a community and how this might influence or affect the effectiveness of rāhui.

#### **4.1 Enforcing voluntary rāhui in remote areas with a small population, predominantly Māori**

Where Māori still own the land and can control access to the resource/s affected, it can be assumed that rāhui may be effectively instated, enforced, and lifted by local iwi and hapū under their own tikanga. For example, there has been a rāhui in place at the Motu River mouth since 1904 when the flooded river claimed the lives of 18 Te Whanau-a-Apanui descendants (16 children and 2 adults) who were crossing the river by boat to attend school on the eastern side ("I Te Mate Ka Tu Ka Ora" 1968 cited in Maxwell 2007). Loss of life was the cause for this rāhui (rather than conservation) but this example demonstrates the relevance and effectiveness of rāhui where tikanga is respected and upheld. The initial rāhui was instated over all resources in the adjacent sea from Maraenui in the west to Omaio in the east (Maxwell 2007). In addition to the rāhui, Te Whanau-a-Apanui people changed their names and place names within the rohe, in remembrance of the lost loved ones (Maxwell 2007). The community also maintain the relevance of the disaster and the tapu associated with the river and broader ecosystem through their cultural practice (e.g. they recount the tragedy through waiata, korero, and kapa haka).

Local residents continue to respect this rāhui; however, it has been modernised in accordance with religious days. Colonialism brought Christianity to Aotearoa and many Māori follow one form or another (some were adapted by Māori), usually in addition to the traditional Māori atua (deities). Te Hahi Ringatu (the Ringatu faith), instigated by the prophet Te Kooti Arikirangi Te Turuki of Rongowhakaata descent, continues to have many followers today. Church services occur on Te Ra (the twelfth day of each month) when rāhui are imposed on fishing and shellfish harvesting in the homelands of the Ringatu members, including the Motu River mouth. The local community at Motu also observe rāhui on the Sabbath. The rāhui at Motu River is enforced both by the local residents who

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<sup>9</sup> 'Voluntary' rāhui are those used by the relevant community/ies based on traditional use of rāhui).

own the land adjacent to the river, and by the wider community, including local police, on an informal and voluntary basis. This example illustrates modern day voluntary rāhui, and the inherent respect the locals have for the relationship between humanity and the natural environment – in essence, the tapu, mauri, and mana associated with this site, the environment, and the people (both deceased and living) as descended from the gods.

#### **4.2 Enforcing rāhui in easily accessible but remote areas with a small population, predominantly Māori**

In remote places “with a small population that respects either the tikanga of rāhui and/or the resource” (Maxwell 2007, p. 8), voluntary rāhui may still be effective even if resources are common-pool or shared. For example, evidence (Statement 2013) in support of the Ngāti Pāhauwera Marine and Coastal (Takutai Moana) Act 2011 application, from a Pākehā woman who grew up in the predominantly Māori community, states that she and her family respected Ngāti Pāhauwera tikanga because those were the rules of the community.

Even in areas where access to a resource affected by a rāhui is relatively easy for external users such as commercial fisherman, voluntary rāhui under customary tikanga may also be effective. Maxwell (2007) cites four such voluntary rāhui instated on the Mahia Peninsula for protection of aquatic resources, two of which have existed since 1945.

However, in places where resources are easily accessible and compounded by less local control, voluntary rāhui are less effective and communities often seek legislative support to protect their resources and taonga.

#### **4.3 Enforcing voluntary rāhui in easily accessible, populated areas**

According to Maxwell (2007) “in areas of New Zealand that are readily accessible to larger population, voluntary rāhui are becoming increasingly ignored” (pp. 8–9). Failure to assert rāhui may reflect the lack of recognition, respect and upholding of rangatiratanga in today’s colonised society. In such places, innovative approaches are required to support and enable rāhui and broader tikanga-based management. What that might look like is considered in the Future Policy and Legislation section below, and will be further explored in the next research phase.

Some legislation may attempt to support the traditional association of rāhui with ownership and jurisdiction over an area and resource/s. Sections 186A and 186B (further discussed in 5.3) of the Fisheries Act 1996 somewhat reflect this customary right by providing iwi and hapū with the authority to request (of the minister) a temporary closure on a marine species in an area where they can claim and prove tino rangatiratanga and customary rights (Maxwell 2007)<sup>10</sup>.

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<sup>10</sup> Refer to Maxwell and Penitito’s case study (2007) on Kaikoura, where a voluntary rāhui was unsuccessful due to the lack of control on external users (particularly tourists). They therefore requested a temporary closure in support of the rāhui. Another example can be found in Auckland where Ngai Tai ki Umupuia requested temporary closures on their cockle bed at Umupuia (refer to the Ministry of Primary Industry’s report *The*

The following section provides a more detailed consideration of how rāhui, and therefore, holistic management that values the mana, tapu and mauri of the ecosystem itself, is supported and provided for (or not) by existing legislation and policy frameworks.

## **5 Legislation and policy**

### **5.1 Reference to and provision for Rāhui in current legislation and policy**

Rāhui is only specifically referred to several times in current New Zealand environmental legislation. According to Maxwell (2007), until recently, each case has either considered rāhui as a mechanism “to restore the productivity of land” (Mead 2003) or to “allow the mauri (life essence) of a resource or resources to replenish” (p. 197). Generally, legislation using the term ‘rāhui’ regards certain kinds of conservation land reserves: *Nga Whenua Rāhui* and *whenua rāhui*. Ruru and Wheen (2016) provide a useful discussion about Nga Whenua rāhui and Whenua rāhui in *Providing for rāhui in the law of Aotearoa New Zealand*.

Recent Treaty settlement legislation goes further than simply retrofitting conservation-based mechanisms, to include provision for the relevant iwi to practice rāhui in its traditional sense, as interpreted and implemented by and for that iwi within their rohe (refer sub-section on Treaty Settlement legislation that discusses the Te Urewera Act 2014 and Te Awa Tupua (Whanganui River Claims Settlement Act 2017)).

A number of legislation and policies include flexible provisions that could, theoretically, enable the use of rāhui (with varying degrees of tikanga application). These include national legislation such as The Fisheries Act 1996 and the Resource Management Act 1991; regional legislation and policy, including The Auckland Unitary Plan; Treaty settlement legislation such as the Te Urewera Act and Te Awa Tupua (Whanganui River Claims Settlement) Act; Marine and Coastal (Takutai Moana) Act 2011; and special legislation such as the Hauraki Gulf Marine Park Act, Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, and Kaikōura (Te Tai o Marakura) Marine Management Act. Specific pieces of legislation and policy are discussed in the following sub-sections.

### **5.2 Nga Whenua Rāhui & whenua rāhui**

Treaty Settlement legislation often includes specific provision for Nga Whenua Rāhui or whenua rāhui,<sup>11</sup> which are statutory conservation tools designed to preserve, protect, and restrict particular activities in specified areas of land in accordance with associated iwi or

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*distribution and abundance of pipis and cockles in the Northland, Auckland and Bay of Plenty regions, 2013 New Zealand Fisheries Assessment Report 2014/29).*

<sup>11</sup> e.g. Ngāi Tahu Claims Settlement Act 1998; Affiliate Te Arawa Iwi and Hapū Claims Settlement Act 2008; Ngāti Manuhiri Claims Settlement Act 2012; Te Kawerau ā Maki Claims Settlement Act 2015; Rangitāne o Manawatu Claims Settlement Act 2016; Tapuika Claims Settlement Act 2014.

hapū values.<sup>12</sup> Nga Whenua Rāhui relate to Māori land, or Crown land held under lease by Māori, that are managed by the Department of Conservation under special covenants for 25+ years, whereas whenua rāhui apply to Crown land managed by the Department of Conservation and covenanted in perpetuity (respectively). Areas under Nga Whenua Rāhui or whenua rāhui are generally more concerned with land rather than marine and coastal areas and resources but a brief discussion is useful for this analysis on how rāhui may be enabled by legislation.

The provision within Nga Whenua Rāhui for a 25-year review, at which time the rāhui can be lifted if deemed appropriate, reflects a level of flexibility and opportunity for tangata whenua and/or the Crown to use the land for other purposes if they wish. There are concerns that the Minister may prefer conservation covenants (in perpetuity) rather than Nga Whenua Rāhui due to that very reason (Ruru 2016). Conceivably, Nga Whenua Rāhui might be a strategy for land banking. Whether or not that is a negative assertion, though, depends on the intention for that land after 25 years. It could be a potential opportunity to empower Māori (and other parties) further, if the relevant resource were to be used to achieve positive environmental, socio-economic, and cultural aspirations. Another significant aspect of Nga Whenua Rāhui is that land ownership remains with Māori, but that land is leased back to the Crown and is submissive to the 1987 Conservation Act – it could be argued here that rangatiratanga also remains compromised.

The Acts that provide for Nga Whenua Rāhui and whenua rāhui may result in pockets of land reserves where activities may be restricted for restorative or conservation purposes, potentially contributing to EBM. However, the setting aside of land for either mechanism does not occur within a comprehensive management matrix reflective of holistic management (be that EBM or tikanga-based). Therefore, neither mechanism is fit for purpose with regards to contemporary use of rāhui within its traditional sense (they are covenants authorised and controlled by the Crown, albeit in accordance to some extent with iwi/hapū values, for either 25+ years or in perpetuity rather than tikanga-based rāhui), or an EBM approach.

### **5.3 Fisheries Legislation**

Mātaitai, taiāpure and temporary closures are considered to be potentially powerful mechanisms to achieve sustainability because (ideally) iwi, hapū and wider communities can utilise their mātauranga Māori and other local knowledge to adapt fishing rules, providing the ability to respond to local socio-ecological pressures (Te Runanga o Ngāi Tahu 2007). These area management tools, which are designed to empower Māori, could fit into an EBM approach. Rather than a one-size-fits all national or regional approach, they are locally-based tools, founded on local knowledge, albeit enabled by national legislation.

According to the Te Tiaki Mahinga Kai website which includes research (both mātauranga and science), community tools (to assist kaitiaki to better manage their own resources the

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<sup>12</sup> e.g. Heretaunga Tamatea Claims Settlement Bill; Ngāti Kuri Claims Settlement Act 2015; Ngāti Awa Claims Settlement Act 2005.



way they would like), and dialogue (to better inform community members about the past, present, and potential future of mahinga kai):

Temporary closures (or Section 186 Closures) impose a temporary ban on harvesting species or a temporary restriction on certain fishing methods. The goal of temporary closures is to help restore depleted stocks; these are different from Marine Reserves, which are permanent 'no-take' zones.

Taiāpure and mātaimai are permanent fishery protection areas that are established in areas, taiāpure and mātaimai are established through application by Tangata Whenua to the Minister for Primary Industries and provide a tool that can allow local management of fisheries.

Taiāpure are established "in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapū either – (a) as a source of food; or (b) for spiritual or cultural reasons" (Fisheries Act 1996). Taiāpure allow for commercial and non-commercial fishing to occur. Taiāpure management committees are made up of members from local iwi or hapū and often commercial and recreational fishers as well as other interested parties (e.g. scientists, environmental groups). The committee can recommend regulations to the Minister of Fisheries and the regulations can only be made with respect to fishing, or fishing related activities within the taiāpure. Getting a regulation (e.g. new bag or size limit, closure) in place can be a slow process with up to 18 months passing between application and establishment in some cases.

Mātaimai are established "on a traditional fishing ground for the purpose of recognising and providing for customary management practices and food gathering" (Kaimoana Customary Fishing Regulations 1998). The primary difference between mātaimai and a taiāpure is that within mātaimai commercial fishing is prohibited, mātaimai can be established in freshwater and that management committees can recommend bylaws to be approved by the Minister of Fisheries. The process of passing a bylaw is far shorter than a regulation, making the mātaimai a better model than a taiāpure for allowing a rapid response to issues that arise surrounding fishery sustainability.

For a list of taiāpure and mātaimai reserves refer to Te Tiaki Mahinga Kai website. For further guidance on these customary fisheries area management tools refer to Te Rūnanga o Ngāi Tahu (2007).

With specific reference to rāhui, the concept of rāhui is most clearly apparent in the Fisheries legislation provision for Mātaimai Reserves. From a customary perspective, one critique though (Ruru 2016) is that power and decision-making related to mātaimai reserves is held by the Crown, and all processes are at the scrutiny of the public. Only the Minister of Primary Industries has the power to establish a mātaimai reserve, and to approve nominated Tangata Tiaki or Kaitiaki. Tangata whenua have the option to nominate Tangata Tiaki or Kaitiaki who gain the legal authority if necessary to make by-laws restricting or prohibiting commercial fishing in reserves for sustainable management. Nominees must undergo a process of public consultation and confirmation by the Minister before becoming appointed. The by-laws created are not specifically called rāhui,

but Tangata Tiaki or Kaitiaki are asked to report annually to the tangata whenua on matters of interest relevant to the reserve, including any rāhui that are in place. Therefore, it is possible that the legislature envisaged the deployment of rāhui via by-laws within mātaihai reserves (Ruru 2016). Thus there is implicit provision for rāhui to be applied, as recommended by nominated Tangata Tiaki or Kaitiaki representatives, facilitated within current fisheries legislation. Please note, the extent of by-law application, effectiveness or success of this provision, from a tikanga and/or other perspective, was not included in this analysis but could be followed up in future research.

Temporary closures are frequently referred to by MPI as rāhui (Ruru 2016), and established rāhui sites can be seen on coasts nation-wide. Formal temporary closures of specific fisheries can only be placed by the Minister or the Chief Executive of Fisheries in accordance with The Fisheries Act 1996 (ss 186A and 186B). The principle is to close off areas to fishing to provide for the use and management practices of *tangata whenua* in the exercise of their customary, non-commercial fishing rights. According to the MPI website:

Temporary closures are designed to respond to localised depletion of fisheries resources. Note that in this context, *Tangata Whenua* means the *hapū* or *iwi* that hold *manawhenua* in the area. Anyone (not just Tangata Whenua) can request a s 186A (North Island/Chathams) and 186B (South Island) temporary closure, but the legislation is designed for customary purposes so must meet that purpose and have the support of *Tangata Whenua* if they are not the applicants.

These temporary bans are cyclical and generally occur on a 2-year basis<sup>13</sup> rather than being evidence based, and are applied in accordance with the sustainability levels of the resource. In accordance with tikanga Māori, rāhui should not be lifted until the mauri is restored through replenishment and restoration of the resource and its ecosystem on which it depends for its sustainability. At this time it may be deemed appropriate by the relevant authority/ies to lift the tapu that has been enforced by the placing of the rāhui.

The first legislated S186A Temporary Closure was placed in 2000 over the scallop bed at Tino Pai, on the Kaipara Harbour, in support of a local rāhui (Group 2003). This prohibition was sought by the Tino Pai community including local iwi, Te Uri o Hau, and wider community stakeholders, even local commercial fisherman who were outraged at unacceptable commercial fishing practices from external parties. These practices included inappropriate harvesting adjacent to a marae, within a customary fishing area. The Minister of Fisheries at the time attempted to mediate demand for immediate action through a consultative meeting, aiming to produce a workable solution. Due to public pressure, however, the Minister eventually agreed to a temporary rāhui or prohibition. While the prohibition seemed promising, the community, Ngāti Whātua, and NIWA maintained that MPI lifted the rāhui too early, and that 2 years was insufficient to restore low fish stocks to sustainable levels (Group 2003).

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<sup>13</sup> There is provision under the Fisheries Act to re-apply for a subsequent temporary closure but there is no guarantee that the minister will approve a request – it is at the minister's discretion.



The fisheries and broader ecosystem still remain degraded and Ngāti Whātua and the local fishing community continue to seek collaborative fishery management. This objective is exemplified by the iwi-led Integrated Kaipara Harbour Management Group (IKHMG), which supports the aforementioned Study Group and the provision for and implementation of tikanga and EBM. The IKHMG honours the Treaty principles and strongly commits to strategic environmental action. The IKHMG works towards a common vision of “a healthy and productive Kaipara Moana” to address issues affecting the health mauri of the Kaipara (IKHMG Strategic Plan of Action 2011). The Vision is supported by six long-term objectives:

- 1 To protect and restore native biodiversity
- 2 To restore sustainable use of fish and invertebrate stocks
- 3 To protect and restore the Mauri of Kaipara
- 4 To increase understanding of Climate Change impacts
- 5 To promote socio-economic opportunities
- 6 Integrated co-management of Kaipara ecosystems, catchment and harbour.

Long-term Objective 2, elaborated in the IKHMG strategy states:

To restore sustainable use of fish and invertebrate stocks is defined as managing use of Kaipara Harbour fisheries, including invertebrate/shellfish, within a manner that achieves local aspirations and values; manages fisheries activities for system functioning rather than as a commodity; management has a long-term perspective and is integrated.

The intention of the IKHMG is to advocate for the implementation of objectives and strategies using a bicultural EBM approach:

To restore sustainable Kaipara fisheries stock requires an ecosystem-based management approach where management recognises the natural boundaries of ecosystems rather than jurisdictional boundaries. The approach also includes moving from being species-focused to ecosystem-focused and requires a balance of spatially protected areas with general fishing areas. To support implementation the approach must be grounded in both worldviews.

The work and relationship of the IKHMG is guided by a set of four principles that clearly consider and are attentive to Māori values and concepts as well as EBM. They are:

- Kaitiakitanga
- Integrated Ecosystem-Based Management
- Manaakitanga respect
- Co-management

As illustrated, iwi and community visions, objectives, plans and strategies are proactive and cognisant of the holistic, collaborative and participatory requirements necessary to address complex ecosystems as a whole. Despite this understanding at ground level, in

cases where temporary bans are implemented through existing legislative mechanisms like the example in Tino Pai above, rāhui becomes a 'legislative construct' applied in isolation from broader ecosystem considerations and fundamental cultural considerations, enforced by Crown agencies as a statutory offence (Ruru 2016). Maxwell (2007) notes:

These temporary closures are also referred to as rāhui, possibly because they resemble voluntary rāhui. Temporary closures have been created from an anthropocentric worldview and not from a holistic worldview. Temporary closures are not designed to replenish mauri of the species in accordance with kaitiakitanga, but are designed to replenish the resource so the tangata whenua can continue to utilise the resource for the purpose of manaakitanga (providing food for their visitors). The current Minister of Fisheries is the only person who can install these temporary closures, based on anyone's recommendation, so long as they have the support of the majority of the community. Originally this was the right of only a person with mana ... So the role of the tohunga and chiefly members of a hapū (sub tribe) or iwi (tribe) effectively become the same as any other New Zealand citizen, as an advisor to the Minister of Fisheries and not an authority on the use of rāhui.

On a positive note, temporary closures are legally enforceable which brings the 'teeth' back into this type of rāhui. A Fisheries Officer [compliance officer – of which there are not enough of to adequately police the nations large marine and coastal zone] can apprehend anyone caught violating the terms of a temporary closure and if found guilty they can be financially penalised ... Tangata whenua do not have the right to arrest or penalise an offender of a temporary closure or a voluntary rāhui however they can [like any other person] assist the Fisheries Officer ... (p. 9)

As highlighted earlier, temporary bans are inconsistent with Māori philosophies, interests and values.

The example from the Kaipara conveys the desperation of the community to protect and replenish their fisheries, and the Crown's resistance to create a legal form of rāhui that adequately reflects the traditional, customary concept of rāhui. Rather than take the necessary steps to re-adjust local authority and control so that Māori could make and enforce rāhui for the community as a whole, MPI adopted and adapted the term rāhui to meet the minimum needs to appease the community and operate within a contemporary context. Temporary bans on particular fisheries are inconsistent both with EBM, which, as a key principle, focuses on whole ecosystems rather than singular species, and with the Māori concept of whanaungatanga and the intricate web of relationships between all things, bound together through whakapapa (refer section 2).

It was acknowledged that the intention of temporary bans is to replenish stocks to a level whereby Māori are able to harvest the resource for their guests and provide manaakitanga. The Kaipara example, however, demonstrates the desire for much more than that. It reinforces the argument that MPI did not make a concerted effort to respond appropriately to the Kaipara communities, and the argument that MPI's temporary bans or 'rāhui' are an inappropriate legislative construct. Further to the contention that temporary bans are not holistic and their cyclical nature is different from EBM and tikanga-based management, a temporary ban to replenish fish stocks for manaakitanga is unlikely to be satisfied through ss 186A and 186B of The Fisheries Act. Again, manaakitanga is a concept

that cannot be separated from its associated conceptual framework. From a Māori perspective, the term stems from the 'mana' and in section 2 it was explained that mana is part of a holy trinity – mana, mauri, and tapu – that balance the relationship between humans and the environment. Mana was defined as the utmost privilege and authority and the reciprocal obligations that come with it. In the context above manaakitanga is providing hospitality for guests through the harvest and provision of kaimoana (seafood resources). The understanding provided in section 2 conveys that one cannot provide manaakitanga, or act in accordance with mana, without balancing that with the associated fundamentals of tapu (sacred potential), and mauri (an essential life force). Therefore, one's mana, or act of manaakitanga, is not truly fulfilled unless the tapu and mauri are also sustained or in balance. This assertion further indicates the ineptness of the current fisheries legislative framework with regards to Māori, in that provision for a Māori concept such as rāhui has been presented as a legislative construct without appropriate understanding and provision for the full worldview and accompanying tikanga necessary for culturally appropriate rāhui application.

While the ban may have responded to public pressure and demands on the Crown, it did not address the degraded mauri and mana of the fisheries and broader ecosystem. This causes concern about the government's agenda and motivations and whether or not an appetite even exists for legal devices that actually address complex, environmental issues with particular attention to Māori and restoring Treaty-based partnership.

#### **5.4 Marine and Coastal (Takutai Moana) Act 2011**

When considering EBM for the 'Sustainable Seas national science challenge' associated catchments alongside the marine and coastal area themselves must be included in order to understand and address the cumulative effects that flow through the catchment, eventually effecting the marine and coastal environment. To ensure ecosystem health and wellbeing in the marine and coastal area, the myriad of issues both on land and in water bodies (fresh water, estuarine and marine) must be thought of in an integrated manner. A piecemeal approach that only tends to one species, resource or bioregion, will not achieve a balanced 'holy trinity' whereby the mana, tapu, and mauri of our environment are respected and upheld. Different authorities, including iwi and hapū, have mandate in different areas and need to work together to sustain not only the well-being of the ecosystems in their area but also the overall health and well-being of the environment. It is anticipated that the Marine and Coastal (Takutai Moana) Act 2011 (MACA) should provide greater impetus for appropriate management based on tikanga, and potentially incorporating EBM, once ownership and jurisdiction are returned to iwi/hapū and they can be involved on their own terms, using holistic ways of knowing and doing.

Earlier in this paper, to help us understand how involvement of tangata whenua and application of customary management could appropriately occur in EBM, we made reference to five key elements as integral to involvement of indigenous peoples in EBM (Tiakiwai et al. 2017): power dynamics, jurisdiction, adaptive management, agency, and recognition of knowledge. Given that power dynamics and jurisdiction need to be addressed, EBM is unlikely to be successful where 'ownership' and/or jurisdiction have not yet been established. This is challenging in Aotearoa, particularly in the marine and coastal

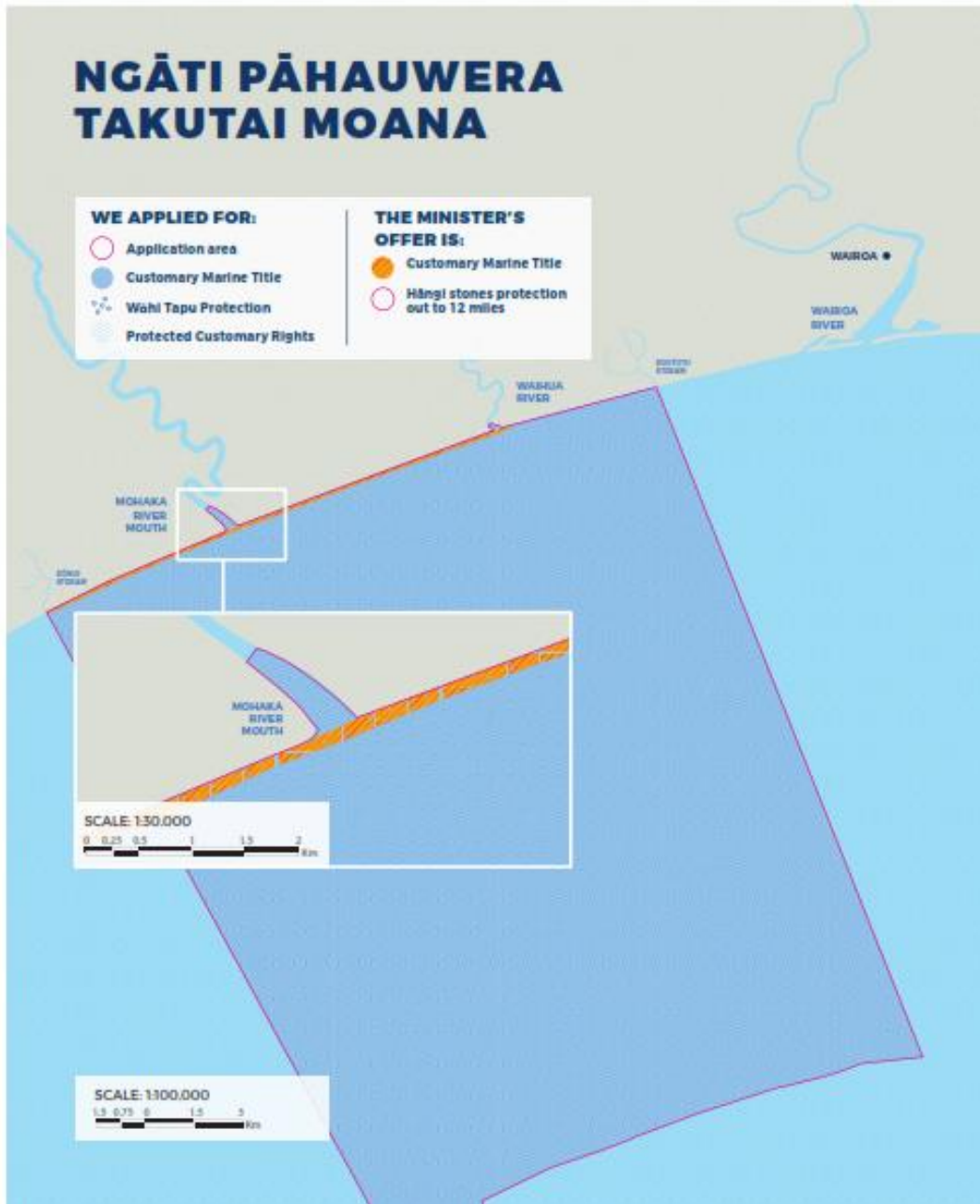
area, where hundreds of iwi, hapū, and whanau are currently negotiating with the Crown over their ownership rights and customary interests in natural resources (challenges and opportunities related to Treaty of Waitangi claims negotiations will be considered in the following section).

There is currently no 'yardstick' under the MACA because to date no claims have been completely settled nor their provisions implemented. The practical implications of the Act in terms of active protection of the moana and coast remain uncertain. In this section we consider the case of Ngāti Pāhauwera in Hawke's Bay who recently became the first iwi to sign a deed of agreement and receive partial settlement – Customary Marine Title (CMT) – under MACA. A good test case for the Act, this application had no customary overlap, no marine structures, and minimal opposition. We consider whether the Marine and Coastal Area (Takutai Moana) Act 2011 has the potential to enable Māori engagement in EBM by addressing iwi and hapū grievances and to re-establish ownership and interest rights.

Three redress instruments are available under MACA (Pāhauwera 2017):

- CUSTOMARY MARINE TITLE – the right to say no to resource consents, marine reserves, conservation areas and DOC concessions (with some exceptions) + ownership of minerals (except petroleum, gold, silver and uranium) + interim custody of newly found taonga tūturu + consultation on some government and council decisions
- WĀHI TAPU PROTECTION – legally binding prohibitions/restrictions on access
- PROTECTED CUSTOMARY RIGHTS – No need for consent, charges or royalties + councils must not give resource consent that adversely affects the right.

If iwi receive the relevant full redress, this could provide a necessary first step to enable Māori involvement and agency in EBM, by appropriately addressing power dynamics and jurisdiction. A consideration of the redress offered to Ngāti Pāhauwera under the MACA indicates that partial redress, which was limited to less than 1% of the CMT area applied for and did not include any of the wāhi tapu or protected customary rights applied for, is inadequate and inappropriate.



**Figure 1: Ngāti Pāhauwera Takutai Moana Application Area and The Minister's Offer.**

Ngāti Pāhauwera applied for CMT over the whole application area : for Wāhi Tapu Protection over the whole application area (Fig, 1) with Ngāti Pāhauwera rāhui after drowning, death or a body or koiwi found and prohibitions on polluting, littering, gutting fish on the beach or into the water, and over-exploitation or wasting of resources and prohibition on defecating in the river mouths; and for Protected Customary Rights over the whole application area to take, utilise, gather, manage and/or preserve all natural and physical resources including sand, stones, gravel, pumice, driftwood, kokowai, wai tapu,

inanga, kokopu and tauranga waka. Ngāti Pāhauwera started engagement under the ACA act in 2012; it has taken 5 years to get to this point.<sup>14</sup>

Ngāti Pāhauwera is the first iwi to be granted CMT, and while this acknowledgement of their rights regarding mana moana, mana whenua, and tino rangatiratanga is a positive first step, the offer is minimal and does not include any of the marine extent applied for. The CMT offer includes neither the Mohaka River mouth nor a southern area from the Waihua River mouth to Poututu. The Crown also withheld granting of wāhi tapu protection, and protected customary rights, which are the redress instruments that could provide the relevant control to Ngāti Pāhauwera to practise customary management, including rāhui, based on their tikanga (Pāhauwera 2017):

- I. The Trustees of the Ngāti Pāhauwera Development Trust strongly disagree with the Minister's view of the application and they consider the evidence demonstrates that Ngāti Pāhauwera meet the tests for customary marine title, wāhi tapu protection and protected customary rights throughout the application area.
- II. The Trustees of the Ngāti Pāhauwera Development Trust maintain Ngāti Pāhauwera do not and in fact cannot concede their rights and obligations in respect of the application area; and...

Ngāti Pāhauwera also consider that the Minister's interpretation of the Takutai Moana Act is wrong. These claims have been elevated to the High Court for further deliberation and decision-making.

The reason for applying under the MACA was to give the Ngāti Pāhauwera takutai moana a higher level of protection. There have been incidences that included non-Pāhauwera people taking and selling hāngi stones, trawlers in close to shore, overfishing, and a drift wood fire that spread over four kilometres along the beach, endangering the public. Full redress, including wāhi tapu protection and protected customary rights, would offer Ngāti Pāhauwera more opportunities to be resourced, for example, the provision for wāhi tapu wardens and the ability to develop a marine management planning document that needs to be taken into account by local, regional and national government or legislation.<sup>15</sup>

A management document, if appropriately utilised by relevant agencies, would help resource EBM, which would benefit not only the iwi but the entire community. If the Pāhauwera rohe moana was recognised to its full landward extent and out to the 12-nautical mile limit the iwi would be in a stronger position to monitor and enforce the management plan.<sup>16</sup>

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<sup>14</sup> Excluding the Māori Land Court hearing and journey under the pre-existing Act, the Foreshore and Seabed Act (surpassed by the Coastal and Marine (Takutai Moana) Act).

<sup>15</sup> CMT allows a CMT group to prepare a marine management plan "in accordance with its tikanga".

<sup>16</sup> Local authorities are only required to take marine management planning documents into account when making any decision under the Local Government Act 2002 in relation to the CMT area.



As well as protecting the interests of all New Zealanders (S4.1a), the purpose of the act is to:

- (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and
- (c) provide for the exercise of customary interests in the common marine and coastal area; and
- (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).

Partial redress means that rangatiratanga has not been fully recognised, acknowledged or empowered. The management and governance rights of the iwi have been severely limited and/or ignored. The idea that an isolated strip of the wet part of the beach accurately reflects Ngāti Pāhauwera mana moana and mana whenua and is appropriate CMT redress is the antithesis of Māori worldview and resource management. While this construct may be rationalised or understood in multiple ways, this offer may indicate either a lack of understanding by the courts and legislators of mana moana and mana whenua and what appropriate CMT might look like or a simple unwillingness to create a legal form of CMT that accurately replicates the traditional form (perhaps because this would require acknowledging and enabling the authority of Māori to manage and govern marine and coastal resources for and with the community as a whole). It could be presumed that, by making a minimal offer, with the knowledge that this would result in Ngāti Pāhauwera taking the remainder to the High Court, the Government is abdicating its responsibility to make a decision and using the MACA engagement process and the courts as a default means of developing public policy.

Under the MACA there is no actual requirement to 'give effect to' or even 'recognise and provide for' a marine management plan. Therefore, the extent to which a marine management plan (like other iwi management plans) influences the relevant local government agencies decisions in relation to their CMT area remains at the discretion of that agency. Decision-making in this area by rangatira and kaitiaki, and the exercise of customary management, including appropriate use of rāhui, will still be controlled and limited by the Crown and its agencies. Unless those agencies are willing to engage in innovative governance and management processes with Ngāti Pāhauwera to go over and above the status quo, then the five critical components identified by Tiakiwai et al. (2017) will not be met and attempts at EBM are unlikely to be appropriate or successful.

As indicated by the excerpt above, the MACA process is incomplete for Ngāti Pāhauwera, but thus far it can be concluded that the partial redress that the iwi have been offered by the Crown (which excludes protected customary rights and wāhi tapu redress) is unlikely to result in the Treaty of Waitangi guarantee of rangatiratanga, or even co-governance, over natural resources and taonga, in this case their takutai moana. For all of the restorative justice and progressive tenets of MACA and other claims negotiations, this specific arrangement does not mediate the intention of Ngāti Pāhauwera and rights enshrined by mana whenua and mana moana. The elevation of this claim to the High Court effectively draws out this claims process further and distracts (Hingangaroa Smith 2000) Ngāti Pāhauwera from settling their grievances with the Crown and moving into a more transformative space of engagement as Treaty partners and customary rights-holders.

## 5.5 Treaty Settlement Legislation

Treaty settlements, rather than the Resource Management Act (RMA) are proving to be the major catalyst for recognising and protecting kaitiaki interests in mātauranga Māori and taonga Māori. The settlements are realising new partnerships, and Memoranda of Understandings and other formal and informal relationships are also proving effective (Memon 2012). Tribunal (1993) characterises the RMA as 'fatally flawed' due to its inability to require decision-makers to actually act in conformity with the Treaty/te Tiriti. In contrast, Treaty settlement legislation can (although does not necessarily) impose specific requirements on local government to work with or enable tribal and sub-tribal entities in resource management, recognising traditional, historic, cultural, and spiritual associations of specific entities to the environment, and potentially provide for the exercise of rangatiratanga and kaitiakitanga within their rohe. Thus, Treaty settlements currently offer more opportunities for Māori to work within their own tikanga and exercise customary management mechanisms such as rāhui where necessary.

New co-governance frameworks for environmental management represent a new era in Treaty of Waitangi settlements (White 2012). Under these arrangements, responsibilities for duties, functions, and powers under the RMA are vested (to varying degrees) in tribal entities. These arrangements provide opportunities for Māori involvement in EBM. For example, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act (2010) established the Waikato River Authority, a statutory body that brings together tribal entities with authority over the Waikato River. The Authority is the sole Trustee of the Trust whose role is to fund projects that meet the purpose of the Authority. There are 10 Board Members on the Authority, appointed by the river iwi and Ministers of the Crown. The Act grants functions and powers to the Waikato River Authority, and provides for co-management through the development, implementation, and ongoing review of an integrated river management plan for the Waikato River and a Waikato-Tainui environmental plan (Te Aho 2010). This plan has the same legal weight as a Regional Policy Statement, which is the overarching piece of legislation within each region, included in each Regional Plan, as regulated by regional councils. Such weighting for an iwi-developed management plan (albeit in alliance with the community) is unprecedented in New Zealand. There is also provision for joint management agreements between local authorities and the Trust to work together to carry out certain duties, functions, and powers under the RMA related to the Waikato River and its catchment. Such an arrangement offers possibilities for integrated EBM approaches that share the responsibility, power, and agency that are necessary for successful involvement of Māori (Tiakiwai et al. 2017).

Although the Crown will not acknowledge or declare full ownership over resources by tribes or sub-tribes, recent Treaty settlements have resulted in several natural areas being designated as legal entities that effectively own themselves but, like the Waikato River, are governed and managed by a Board comprised of Crown and iwi representatives (in one case, Te Urewera, the ratio of board members will change from Tūhoe:Crown 4:4 to 6:3 after 3 years). The Te Urewera Act (2014) acknowledges Tūhoe as kaitiaki and Tangata Whenua of Te Urewera. The Act removed the status of Te Urewera as a National Park vested in the Crown, and the land became "a legal entity" with "all the rights, powers, duties, and liabilities of a legal person" (section 11(1)). Similarly, the Te Awa Tupua



(Whanganui River Claims Settlement) Act 2017 recognises the intrinsic mana of the environment itself and empowers iwi to share management responsibilities. The legislation provides the River its own legal status – Te Awa Tupua as a legal person, recognising “Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements” (Part 2, subpart 2 (12)). This description in itself reflects the understanding of Whanganui iwi of the ecosystem as a whole and of its connectedness and complexity. The legal effect of the Te Awa Tupua status must be “recognised and provided for” by persons exercising or performing a function, power, or duty under an Act if the exercise or performance of that function, power, or duty relates to the Whanganui River; or an activity within the Whanganui River catchment that affects the Whanganui River; and if, and to the extent that, the Te Awa Tupua status or Tupua te Kawa relates to that function, duty, or power. Given that this applies not only to the river but also to the broader ecosystem in terms of the catchment itself, and that the intrinsic values that represent the essence of Te Awa Tupua (Part 2, subpart 2(13)) must also be considered, there is clear potential, and in fact incentive, for EBM to be applied within this rohe (tribal area) in a manner that is consistent with the tikanga (kawa) of the Whanganui iwi and hapū.

The Te Urewera Act and the Whanganui River Deed of Settlement are claimed to be “a new dawn for conservation management in Aotearoa New Zealand” (Ruru 2014). These Acts recognise the mana of the natural resource itself, the rangatiratanga (and mana) of the iwi involved, and also reflect the movement towards collaborative approaches to natural resource governance and management. These arrangements anticipate positive changes to resource management in New Zealand from partnerships underpinned by tikanga and capable of enabling rangatiratanga and kaitiakitanga. Both Te Awa Tupua Act 2017 and the Te Urewera Act 2014 have specific provisions built in to enable customary use and management, including rāhui. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 includes in Schedule 7 Further provisions relating to authorised customary activities, a specific section regarding arrangements with relevant authorities and that they must consider developing protocols for the customary practice of placing rāhui (restrictions) on or in relation to any part of the Whanganui River. The Te Urewera co-governance boards functions include consideration and expression of Tūhoe concepts of management such as (i) rāhui which sits alongside associated fundamental concepts tapu me noa, mana me mauri, and tohu (s18, 2b (i–iv)). The Board may establish committees to deal with rāhui and the taking of cultural materials (s9, 1a). Given the inherent principles and values associated with these entities, which should underpin management and governance decisions made by the representatives on the relevant boards, the way our society views natural resources may dramatically shift. Cultural, social and environmental values might not be outweighed by neoliberalist economic values and there should be opportunity for enduring and sustained reverence and respect for the special qualities of the ecosystem as a whole in accordance with EBM.

Māori values do not exclude economic values. Tribal business and governance pride themselves on taking a long-term, intergenerational view of their place in the traditional tribal area. Iwi involvement will be increasingly sophisticated, proactive, and well resourced, utilising iwi management planning strategies and promoting their own proposals – many opportunities having stemmed from Treaty and other claims settlements. Strategic alliances with Crown agencies are expected to flourish and for some

entities “they will see the local government authority as a junior partner for the first time” (Environmental Defence Society 2007, p. 65). This change in socio-economic power and authority potentially offers a very useful pathway to support and drive EBM approaches that are informed by and respond to Māori philosophies, values, and practices.

## **5.6 Local Government Policy and Legislation**

The purpose of the Resource Management Act 1991 (RMA) is to promote the sustainable management of natural and physical resources. However, the main political intent of the RMA has been to reduce regulation of land and water resources in order to expand agricultural exports and increase competitive value in the global economy (Swaffield 2013). This contradiction has weakened the interpretation of the legislation, enabling primary production without sufficiently protecting the ecosystems, or associated cultural values, on which it depends (Memon 2012).

Regional and territorial councils also have legislated responsibilities under the Local Government Act (LGA) (2002) to provide for democratic and effective local government that recognises the diversity of New Zealand communities. A ‘quadruple bottom line’ approach to local resource management is supposed to ensure attention to cultural wellbeing alongside economic, social and environmental well-being (Dalziel 2006). This approach reflects policy responses to Māori protests during the mid-1970s against the historical exclusion of Māori from central and local planning and legislation (Rikys 2004).

A hierarchy of tools under the RMA for land use and water management has implications for implementing EBM. National policy and legislation commands the highest regard, applicable in all areas. The National Policy Statement for Freshwater Management (NPSFM) applies to all freshwater in New Zealand and is particularly important for EBM. Local government agencies are obliged to implement national policy and legislation. Regional councils have management responsibilities across both land and coastal-marine areas, while district/city councils have responsibility only landward of mean high water springs.

Both the RMA and LGA are potentially enabling statutes for Māori, requiring decision-makers to “consider” the Treaty principles of partnership, participation and protection (Forster 2014, p. 72). The RMA provided specific recognition of Māori rights and interests, including special regard to Māori in Part 2. Section 6, for the first time, enabled explicit recognition for cultural values in statutory planning processes, not only the tangible aspects but also “the relationship of Māori and their cultures and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga” [section 6(e)]. Section 7 provides for “the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori...” emphasising the need to consider Māori worldviews (Tipa 2008, pp. 317–318).

Effectively, though, Part 2 is a balancing exercise that is subordinate to the RMA’s purpose. The weak incorporation of Māori values to fit the Crown’s agenda to expand agricultural exports and increase the nation’s competitive value in the global economy means Māori perspectives are a consideration to be weighed alongside other considerations, rather than a fundamental institution of the planning system (White 2012). Further limitations to

providing for Māori involvement include: limits to the application of ss 6(e), 7(a) and 8, absence of compulsion to accord weight to Māori rights and interests and provide meaningful outcomes for Māori; lack of incentives to use section 33 Transfer of Powers (never been used for Māori authorities); section 36B joint management agreements (seldom used); and section 188 (enables iwi as heritage management authorities but never been used for Māori authorities); lack of capacity building and funding initiatives (current reforms such as the National Policy Statement for Freshwater Management 2014 direct capacity building and funding but only limited, competitive funding options have been offered aimed at biophysical restoration projects rather than strategic options available to increase capacity and capability building of both Māori and non-Māori practitioners); and lack of central government direction (there is currently no consistent direction for Māori to engage in marine and coastal, or across all environmental, management using Māori systems and frameworks). Accordingly, critics argue that current legislation cannot provide for a shared, bicultural approach to natural resource management, or even an opportunity for Māori to manage resources in a manner consistent with their own cultural practices and beliefs (White 2012).

Parliament's passing of the Resource Legislation Amendment Bill 2015 on 6 April 2017 may offer the potential to improve partnerships and enable kaitiakitanga with new provisions such as Mana Whakahono a Rohe: Iwi Participation Arrangements between regional councils and iwi/hapū. Stronger direction is also provided by the National Policy Statement for Freshwater Management 2014,<sup>17</sup> which requires regional councils to work with iwi/hapū and communities to agree on water quality standards for certain contaminants (this does not yet include sediment) and minimum flows/levels for the rivers, streams, lakes, wetlands, and ground water in their areas, and the actions that need to be taken to achieve and maintain those standards and flows/levels. The standards and flows, as well as any actions that involve regulation, need to be incorporated into councils' planning documents by 2025.

Some local government authorities (or at least one<sup>18</sup>) are incorporating specific provisions to enable rangatiratanga and kaitiakitanga, including provisions that promote customary management such as rāhui. For example, the Auckland Unitary Plan (Operative in Part last updated August 2017) section B6 recognises the following issues of significance to Māori and iwi authorities in the region:

- (1) recognising the Treaty of Waitangi/Te Tiriti o Waitangi and enabling the outcomes that Treaty settlement redress is intended to achieve
- (2) protecting Mana Whenua culture, landscapes, and historic heritage
- (3) enabling Mana Whenua economic, social, and cultural development on Māori Land and Treaty Settlement Land

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<sup>17</sup> <http://www.mfe.govt.nz/publications/fresh-water/national-policy-statement-freshwater-management-2014>

<sup>18</sup> This approach does not reflect the norm but a review of how many councils might be taking a similar approach has not been undertaken for this paper.

- (4) recognising the interests, values, and customary rights of Mana Whenua in the sustainable management of natural and physical resources, including integration of mātauranga and tikanga in resource management processes
- (5) increasing opportunities for Mana Whenua to play a role in environmental decision-making, governance, and partnerships; and
- (6) enhancing the relationship between Mana Whenua and Auckland's natural environment, including customary uses.

The Plan seeks to address these issues through objectives and policies that are mana whenua specific (refer s. B6), as well as through integration of mana whenua rights, interests and values throughout the plan. An example of the specific provisions follows:

### B6.3. Recognising Mana Whenua values

#### B6.3.1. Objectives

- (1) Mana Whenua values, mātauranga and tikanga are properly reflected and accorded sufficient weight in resource management decision-making.
- (2) The mauri of, and the relationship of Mana Whenua with, natural and physical resources including freshwater, geothermal resources, land, air and coastal resources are enhanced overall.

#### B6.3.2. Policies

- (2) Integrate Mana Whenua values, mātauranga and tikanga:
  - (a) in the management of natural and physical resources within the ancestral rohe of Mana Whenua, including:
    - (i) ancestral lands, water, sites, wāhi tapu and other taonga;
    - (ii) biodiversity; and
    - (iii) historic heritage places and areas.
  - (b) in the management of freshwater and coastal resources, such as the use of rāhui to enhance ecosystem health;**
  - (c) in the development of innovative solutions to remedy the long-term adverse effects on historical, cultural and spiritual values from discharges to freshwater and coastal water; and
  - (d) in resource management processes and decisions relating to freshwater, geothermal, land, air and coastal resources

The Auckland Unitary Plan's strategic legislative framework ensures that objectives and policies are supported by rules that direct and enable engagement with Māori and iwi authorities, in order to achieve those relevant objectives and policies.

A final consideration is the changing authorities and jurisdiction over coastal areas. The Department of Conservation is responsible for the New Zealand Coastal Policy Statement, and responsibility for administration and protection of fisheries rests with the Ministry for

Primary Industries. However a recent High Court decision has afforded regional councils and the Minister of Conservation authority to:<sup>19</sup>

...exercise functions in respect of the coastal marine area to manage the effects of fishing not directly related to the biological sustainability of the aquatic environment as a resource for fishing needs, but only to the extent strictly necessary to manage those effects...a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for Māori interests under the Fisheries Act 1996.

This devolution in powers to regional authorities may indicate the government's recognition that local authorities may be better placed to address complex, ecosystem-based issues such as poor terrestrial management that results in loss of biodiversity and poor ecosystem health across land, freshwater and coastal boundaries. Legally, it seems there is also opportunity here for the government and its agencies to transfer and/or share its power with local Māori authorities where relevant and appropriate (refer discussion above on power-sharing capability under the RMA; there is also provision under the RMA to delegate power to an iwi authority, or transfer powers to a statutory committee which could include iwi representatives).

As an example an approach that envisioned catchment-based EBM was suggested 10 years ago in a report for the former Auckland Regional Council (Kirschberg 2007). The report was a review of coastal policies for the Kaipara Harbour conducted by the Auckland Regional Council. The proposed medium-term option was a non-statutory joint harbour plan (which the iwi-led Integrated Kaipara Harbour Management has effectively completed), and the proposed long-term option was a statutory joint harbour plan. Legislative provisions for councils with jurisdiction over the harbour to align and develop a single integrated plan are outlined in the report (Kirschberg 2007). Potentially, iwi/hapū could be incorporated into this arrangement through delegation of power to the iwi authority, or a transfer of powers to a statutory committee. Such sharing of authority and power would better enable involvement of tangata whenua in EBM, and provide opportunities for customary tools such as rāhui to play an appropriate role in restoring the mauri of the relevant ecosystem.

Currently, iwi planning documents (IPDs) are a key reference for government authorities when planning or policy writing. IPDs including future CMT planning documents are an expression of rangatiratanga that are written by iwi and hapū to articulate their values, interests, issues and aspirations. IPDs are prepared and recognised by an iwi authority and lodged with relevant councils. Regional and unitary authorities have a responsibility to take IPDs into account when preparing or changing regional policy statements and regional and district plans (RMA sections 61(2A)(a), 66(2A)(a), and 74(2A)). There is also a requirement for consultation with iwi during preparation of plans. However, there is no duty to consult on resource consent applications. Although IPDs are potentially very useful and powerful tools, they are currently under-utilised. A similar case can be made for plans developed by or with iwi and hapū under Treaty settlement and MACA legislation that

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19 Attorney-General v The Trustees of the Motiti Rohe Moana Trust and NZMC [2017] NZHC 1429.

tend to come with the requirement for councils to 'take into account' or 'have regard for' these plans. The only time when there is a real need for councils to realise the potential of plans is if the requirement is to 'give effect to' those plans, in which case they are elevated to the status of a National Policy Statement, as has been the case with the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act (2010) and the integrated river management plan for the Waikato River and a Waikato-Tainui environmental plan (Te Aho 2010).

The recent changes to the legislative regime – both at high levels such as National Policy Statements and at regional levels, including Unitary Plans – increase the direction and motivation of local authorities to consider Māori aspirations for environmental management, and this includes the use of rāhui in a tikanga framework. It is important to note, however., that the regime remains ambiguous and flexible, with ultimate authority and decision-making lying with the Crown and its agencies. This can be perceived as a barrier or an opportunity and is explored further in the Ahiaua case study where a non-statutory prohibition was placed by the District Health Board in partnership with the regional council (but in isolation of local iwi) over a customary pipi bed. The Ahiaua case study is attached to this discussion paper (Appendix 2). The case study is in depth, considering how prohibitions such as rāhui are valuable mechanisms often used to prevent further or irreparable harm to the ecosystem arising from long-term, sustained degradation, and demonstrating that when tikanga is limited to use in retrospect of harm the value of mātauranga Māori is restricted to an "ambulance at the bottom of the cliff" measure. The Ahiaua case study reinforces the claim that prioritising mātauranga Māori and tikanga from the outset could proactively help prevent current ecological issues and maintain the enduring health or mauri of the ecosystem.

## **5.7 Special Legislation**

Special legislation (though only limited examples exist) is enabling the development and implementation of integrated management that empowers tangata whenua and kaitiakitanga and is simultaneously reflective of, if not distinctively, EBM. Three such examples are the Hauraki Gulf Marine Park Act 2000; Fiordland (Te Moana o Atawhenua) Marine Management Act 2005; and Kaikōura (Te Tai o Marokura) Marine Management Act 2014.

Each example reflects the EBM principles used to guide the Sustainable Seas National Science Challenge (refer Appendix 1). Each example refers to special legislation that is place-specific and recognises and understands both the values of the associated ecosystem as a whole and the need to address cumulative and multiple stressors. Acknowledgement of humans as ecosystem components with multiple values has resulted in the establishment of collaborative and participatory stakeholder working groups that recognise the Māori constitutional relationship, based on the Treaty / Te Tiriti o Waitangi and mana whenua and mana moana at all levels, mindful of the guiding concepts of mauri, whakapapa, kaitiakitanga, mātauranga-a-iwi, and mātauranga-a-hapū. Long-term sustainability is a fundamental value, with a clear intent to maintain values and uses for future generations. The strategies and plans that have been enabled by these special Acts include clear goals and objectives based on knowledge (both Māori and non-Māori) and



are mindful of the need for adaptive management, appropriate monitoring, and acknowledgement of uncertainty.

The effectiveness of these Acts, and the associated strategies and plans, in enabling successful integrated management that empowers Māori and improves the mauri of the relevant ecosystem/s has not been analysed in this paper but such a review and analysis could be valuable. Researchers may be able to identify trends and make recommendations for future policy and legislation. However, what follows is an initial review of Sea Change – Tai Timu Tai Pari, which is a marine spatial plan for the Hauraki Gulf. The Hauraki Gulf Marine Park Act 2000 is the instrumental piece of legislation drawn on for this plan, including the holistic and integrated direction of the provisions and recommendations in the plan, and the partnership structure taken to develop it. This structure reflects that of the Hauraki Gulf Forum, the statutory body responsible for the integrated management of the Hauraki Gulf established under the Act. The Forum is chiefly responsible for driving the implementation of Tai Timu Tai Pari.

**Sea Change – Tai Timu Tai Pari: An example of an aspirational, non-statutory plan that, if implemented, has the potential to achieve culturally appropriate EBM**

Sea Change – Tai Timu Tai Pari is an aspirational spatial plan that advocates EBM and Māori resource management and governance. It is the result of a marine spatial planning exercise led by a co-governance partnership between Hauraki tangata whenua and local government, in collaboration with various agencies and stakeholders. The plan was co-designed, resulting in holistic concepts that include the four overarching concepts that underpin the Plan – Kaitiakitanga (guardianship), Mahinga Kai Pātaka Kai (replenishing the food basket), Ki Uta Kia Tai (ridge to reef or mountains to sea), and Kotahitanga (prosperous communities) – that are innovative and seek to disrupt the status quo of resource management.

Tai Timu Tai Pari was a structured and meaningful collaborative process that enabled and empowered Mana Whenua, and mātauranga Māori, allowing for a holistic design that respects and advocates for both EBM and kaitiakitanga. There is specific provision for rāhui among other Māori resource management tools. Rāhui is recognised as a tool that supports EBM. The plan documents where current rāhui (temporary closures) are located, reasons for rāhui, and how rāhui can be implemented under current legislation, but goes further to suggest better ways in which rāhui and other tools could be supported by improved marine protection, conservation, and management.

Part 1 of the Plan is Kaitiakitanga and guardianship / Wahanga Tuatahi: Kaitiakitanga. It includes a section on Tikanga Māori and Kaitiakitanga: Values, Practices and Stewardship. This section includes discussion of mana, mauri, tapu, and noa, as well as discussion of customary knowledge, rights, and practices in law. The Plan reflects a strong sense of te ao Māori, and advocates for strategies and initiatives that enable and empower mana whenua to lead tikanga-based resource management within a broader, nested EBM approach. This includes specific provisions for tikanga-based tools such as rāhui.

Provision for kaitiakitanga, and tikanga-based tools is most clearly illustrated in Initiative Four – Ahu Moana – Mana Whenua and Community Coastal Co-Management Areas (Forum 2017)

The Ahu Moana – mana whenua and community co-management areas ('Ahu Moana') are a mechanism designed to allow mana whenua and local communities to work together in the future to manage their coastal areas. Ahu Moana will be initiated and jointly managed by coastal hapū/ iwi and local communities, but will not affect their ability to use other statutory management tools, including MPAs [Mātaitai, Taiapure and other Marine Protected Areas] in the future.

There are further provisions for rāhui throughout the Plan too, including in the recommendations for Fisheries Decision Making (Forum 2017):

25. Develop and begin implementing a mana whenua fisheries management strategy that accommodates current and future Treaty settlements (both individual iwi and collectives) by 2018 to ensure that future fisheries management in the Hauraki Gulf Marine Park:
  - a) Supports customary fishing rights and traditional fisheries resources and habitats,
  - b) Supports active mana whenua involvement in fisheries management including provision for mātaitai, taiapure and rāhui,
  - c) Provides for mana whenua economic and social well-being aspirations,

and in Implementation Recommendations that are relevant to the Ministry of Primary Industries and encourage more influence from Māori decision makers, "this includes working with the Minister for Primary Industries and local mana whenua groups in establishing customary fisheries tools such as mātaitai, taiapure, and rāhui" (Forum 2017):

- Supporting mana whenua and local communities in the establishment of Ahu Moana.
- Assisting iwi to realise their goal of greater participation in the governance, management and kaitiakitanga of the marine space.
- Working closely with DOC, iwi/hapū, and local stakeholder groups and communities to help establish the network of MPAs identified in the Plan and providing support to iwi/hapū and local communities to ensure MPAs are successfully managed in the long term.

While this plan is aspirational, it is not unachievable. EBM itself is 'aspirational' too. While the term 'aspirational' is often associated with notions of lofty and perhaps unachievable ideals, aspirational is conceived here as being a necessary departure from the 'norm' of ad hoc, disparate and inadequate management approaches that currently typify New Zealand environmental management. EBM is an opportunity to disrupt what isn't working and innovate for improved environmental and cultural outcomes. It is also important to remember that what seemed 'impossible' a decade or two ago may well be happening and assumed 'normal' now, for example, collaborative management and decision-making in many diverse fields including environmental management; or legislating natural



resources such as Te Urewera and the Whanganui River to be legal persons to be holistically cared for by co-governance boards. Dreaming the 'impossible' is what arguably leads to transformational change. The Plan is also well-founded, being the product of significant consultation, hui, and meetings with relevant industries and resource management agencies/agents. An iterative planning process was used in which all the initiatives, and many iterations of the proposed approaches, have been arduously debated. The final versions accepted and included in this Plan are the ones that were agreed upon and supported at the time by the various stakeholders (including primary industries) as implementable.

The EBM approach advocated for in this plan agrees with the International World Wildlife Fund's six principles of EBM:

- Focus on maintaining the natural structure and function of ecosystems and their productivity
- Incorporate human use and values of ecosystems in managing the resource
- Recognise that ecosystems are dynamic and constantly changing
- Are based on shared vision of all key stakeholders
- Are based on scientific knowledge, adopted by continual learning and monitoring.

The plan also agrees with the principles of EBM contextualised and agreed on for this Sustainable Seas National Science Challenge (refer Appendix 1 for principles in full):

- Collective decision-making
- Sustainable
- Human activities
- Adaptive
- Knowledge-based
- Tailored

The significant amount of effort and time put into these initiatives and recommendations, in order that they meet the principles of EBM and have the potential to achieve EBM and enable kaitiakitanga, and tikanga-based tools such as rāhui, make this plan an excellent example of how legislation and policy could be enhanced to support the shared aims of EBM and kaitiakitanga. It is important to recognise that this is a non-statutory plan and implementation is not a legal requirement. Thus, it is recommended that further research explores the subsequent implementation of this plan to understand what challenges and / or opportunities might exist via non-statutory pathways.

## 6 Future policy and legislation

This discussion paper has demonstrated the inadequacies of current environmental policy and legislation for both customary management, including appropriate use of rāhui for environmental management, and EBM within the marine and coastal environment. Legislation and policy is generally ad hoc and not fit for purpose for either management approach. The Crown's agencies and their relevant jurisdictions are unclear and uncoordinated. And, although mechanisms and tools for devolution of power and enabling of mātauranga and tikanga Māori exist within current legislation, institutional arrangements still fail to position Māori appropriately, so that they can have the relevant influence they need in order to achieve those things. Therefore, the Crown agencies that maintain authority within marine and coastal areas are failing to achieve governance and management that recognises and empowers tangata whenua as rightful Treaty partners.

This review supports current calls (e.g. Papa Pounamu & Nga Aho 2016; Ruru et al. 2017; Tiakiwai et al. 2017) for a rejuvenation and refocus of New Zealand environmental policy and legislation. It finds similar conclusions to the review of conservation legislation by Ruru et al. (2017), that is, Treaty settlement legislation – and also in this case special legislation – begins to provide Aotearoa with a model for more appropriate ecosystem-based, culturally appropriate management and governance. To develop a regime that is suitable for customary management and EBM, the much-needed overhaul of resource management practice and policy in Aotearoa New Zealand must be informed by Treaty settlement and special legislation models. In the meantime, or perhaps simultaneously, concerted effort is urgently needed to develop pragmatic tools and approaches of a holistic and bicultural nature that are useful for councils, practitioners, Māori, and other communities. It is also critical that our institutions, and society as a whole, develop a national understanding about the need for Treaty-based bicultural governance and management of shared natural resources; the reasons underpinning this need i.e we are a bicultural nation with a socio-political foundation underpinned by Te Tiriti o Waitangi / Treaty of Waitangi and subsequent legislation; ways to understand and work within a bicultural paradigm, including capability and capacity growth for both Māori and non-Māori practitioners; and the benefits this will bring to Aotearoa New Zealand and its people overall.

In section 2 we conceptualised rāhui and EBM from a tikanga perspective, as we assume that it is only possible to consider rāhui within an EBM framework, from such a perspective. This assumption is made because rāhui, in its traditional sense and as described in section 2 which includes contemporary planning and management, can only be used within the appropriate body of te ao Māori philosophy, concepts, and values and practised under the appropriate tikanga and mātauranga pertinent to the rohe. It became clear in section 2 that there are synergies between the te ao Māori worldview – and in particular customary management – and EBM. Rāhui is a customary resource management mechanism that prohibits harvesting of a particular resource in accordance with tikanga. It is used to help humans balance the relationship between humanity and the natural environment. As such, the three principles of tapu, mana and mauri are critical to holistic management that considers the ecosystem as a whole. The mauri of a resource can only be maintained and protected if the mauri of the interconnected ecosystem components is also maintained and protected.

Theoretically, we suggest that rāhui could be used within an EBM approach if that approach is attentive to the customary rights, interests, and values of Māori. Tiakiwai et al. (2017) provide a useful guide for involvement of indigenous peoples in EBM in their discussion of *Indigenous perspectives of ecosystem-based management and co-governance in the Pacific Northwest: lessons for Aotearoa*. The authors suggest that the five critical elements integral to appropriate involvement of indigenous peoples are: power dynamics, jurisdiction, adaptive management, agency, and recognition of indigenous knowledge. We go further and suggest that the last element should be recognition *and empowerment* of indigenous knowledge. If these elements were appropriately addressed to enable and empower Māori as Treaty partners then it can be envisioned that appropriate use of rāhui could be used to support EBM. Some of the complications and challenges were discussed in sections 3–5.

In section 5 we analysed key pieces of environmental legislation and planning to consider whether rāhui in the traditional sense is enabled and therefore whether customary management within a holistic framework that is complimentary to EBM is possible. Section 5 demonstrated that legislated rāhui in accordance with conservation, fisheries and resource management legislation and policy is generally applied as a legislative construct in isolation from the associated body of cultural knowledge and values fundamental to the concept and as a tool to address social and environmental crises rather than as a proactive approach that considers broader ecological complexities and connectedness. Rāhui is also commonly applied through legislative mechanisms without addressing power dynamics, jurisdiction, and agency, which Tiakiwai et al. (2017) suggest, in an EBM context, would only end in failure. This is also a concern for iwi and hapū settling their marine and coastal claims under the MACA Act, because the first settlement to be offered by the Crown to an iwi (Ngāti Pāhauwera) does not adequately address customary marine title nor sufficiently provide for those customary rights and interests that are required to enable customary practices, including rāhui.

The Te Ahiaua case study demonstrated that the use of rāhui as a retrospective measure is not in and of itself sufficient to maintain the long-term mauri of the environment. Instead, what is necessary is prospective planning that considers the integration of mātauranga Māori and the body of tikanga regulations (including but not limited to rāhui) from the outset. This may mean dramatic changes in the way we view natural resources, including a shift from perceiving tapu as a temporary to a permanent measure. This enduring and sustained reverence and respect for the special qualities of the ecosystem as a whole accords with EBM.

A test case for this approach may be seen in the ground-breaking legal personification of Te Urewera and the Whanganui River as part of the respective Treaty settlements. In section 5 we discussed the transformative potential of both settlements, in which co-governance and management boards have been established to manage the resource in accordance with a set of agreed values grounded in iwi aspirations for environmental management. Both Acts expressly allow for the use of tikanga mechanisms in management of the resource including rāhui. We also discussed the progressive nature of approaches, plans and strategies that are emerging from Special Legislation, with reference to the Hauraki Gulf Marine Park Act, Fiordland Marine Management Act, and

Kaikōura Marine Management Act (other examples may exist but were not considered for this discussion paper).

An analysis of the effectiveness of the special legislation referred to in this paper could provide insight into the opportunities and challenges for bicultural EBM. Further consideration of the potential opportunities and challenges of the Marine and Coastal Act could also prove useful. And research relating to the Te Urewera and Whanganui settlements might help inform a model of what more appropriate environmental legislation and policy could look like in terms of customary resource management and EBM.

In summary, to be effective EBM requires a coherent and coordinated policy and legislative overhaul, from national through to regional and local level. An appropriate framework must be co-developed with Māori experts to incorporate Māori environmental ethic – philosophy, interests, values, knowledge, and solutions – for thriving ecosystems that are critical for an appropriate regime. While EBM is sympathetic to these factors, it does not in and of itself conceive of the spiritual linkage of iwi with indigenous resources (a concern related to all approaches conceptualised by non-Indigenous). The Crown is unfavourable of more special legislation (Te Korowai o Te Tai o Marokura 2012), and Treaty legislation is hugely diverse both in place and time, and in types and extent of redress mechanisms. Reliance on Treaty settlement and special legislation will not address the institutional and systemic failures of the current environmental management regime, nor will it provide appropriate EBM nationwide. Furthermore, while Treaty settlement and special legislation provide the *space* to consider much needed reform of environmental policy and legislation, truly effective EBM requires a significant policy shift that empowers those policies and legislations, and provides a platform for broader co-governance and co-design structures and EBM.

## **7 Acknowledgements**

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Several key papers authored by Māori scholars and agencies inform this review – we acknowledge those authors and their whakaaro (ideas and perspectives):

- Harmsworth GR, Awatere S 2013. Indigenous Māori knowledge and perspectives of ecosystems. In Dymond JR ed. Ecosystem services in New Zealand – conditions and trends. Lincoln: Manaaki Whenua Press;

- Ruru J, Wheen N 2016. Providing for rāhui in the law of Aotearoa New Zealand. In: Bambridge T ed. The Rāhui: legal pluralism in Polynesian traditional management of resources and territories. Canberra: ANU Press;
- Ruru J, Lyver P, Scott N, Edmunds D 2017. Reversing the decline in New Zealand's biodiversity: empowering Māori within reformed conservation law. *Policy Quarterly* 13(2): 265–271;
- Tiakiwai S-J, Kilgour JT, Whetu A 2017. Indigenous perspectives of ecosystem-based management and co-governance in the Pacific Northwest: lessons for Aotearoa. *AlterNative* 13(2):69-79; and
- Waitangi Tribunal 2011. Wai262: Ko Aotearoa Tēnei, Vol 1: Chapter 3.

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## **Appendix 1 – EBM principles conceptualised for the Sustainable Seas National Science Challenge**

Major overarching principles generally stated in the international literature and used in the original Sustainable Seas proposal:

- 7 A co-governance and co-design structure that recognises the Māori (Maaori) constitutional relationship and mana whenua at all levels (whānau, hapū, iwi), together with the guiding principles of mauri, whakapapa, kaitiakitanga, mātauranga-a-iwi, and mātauranga-a-hapū.
- 8 Place and time-specific, recognising/understanding the ecosystem as a whole in all its ecological complexities and connectedness and addressing cumulative and multiple stressors.
- 9 Acknowledgement of humans as ecosystem components with multiple values.
- 10 Long-term sustainability as a fundamental value, in particular maintaining values and uses for future generations.
- 11 Collaborative and participatory management throughout the whole process, considering all values and involving all interested parties from agencies and iwi to industries, whānau, hapū and local communities.
- 12 Clear goals and objectives based on knowledge.
- 13 Adaptive management, appropriate monitoring, and acknowledgement of uncertainty.



## Appendix 2 – Te Ahiaua Case Study

### Introduction

A recent permanent health warning placed on the taking of shellfish from Te Ahiaua, the Waiotaha pipi bed, is an example of the utility of prohibitions like rāhui in the current environmental management regime. In this case, however, the warning is not one issued by local Māori but instead by Toi Te Ora Public Health exercising delegated authority of the Bay of Plenty District Health Board. The health warning was necessary to protect human users from the adverse effects of consuming shellfish due to high levels of faecal contamination in surrounding waters that accumulate in the shellfish flesh. On the one hand, this example demonstrates the relevance of rāhui as a modern environmental management tool used in this case to protect human priorities which are valued alongside conservation priorities in ecosystem based management. On the other hand, however, the placing of the warning without first engaging with tangata whenua has been perceived as a challenge to kaitiakitanga by some local Māori who consider the pipi bed a taonga and who have extensive engagement protocols in place with local authorities such as the Bay of Plenty Regional Council in regard to environmental management.<sup>20</sup> The omission highlights the complex and fragmented nature of the current environmental management framework whereby some local authorities such as the regional council have extensive protocols in place for engaging with Māori, while for others, such as Toi Te Ora Public Health, this is not necessarily the case. Ecosystem-based management aims to address fragmentation by promoting integrated and collaborative decision making and management practices. In the case of Te Ahiaua, an integrated management approach has the potential to alleviate the perceived challenge to kaitiakitanga in unilaterally issuing an advised restriction on harvesting pipi. Moreover, collaborating more closely with tangata whenua to prioritise kaitiaki practices and tikanga Māori from the outset may have helped avoid the root issue of water pollution altogether. Māori science has developed and evolved over centuries of engagement with Te Ahiaua and the conservational knowledge, policies, and practices it produces are intimate to that engagement. Although more research is required to establish how EBM might work in practice within a New Zealand context, it appears that the practice has the following synergies with Māori environmental philosophy.<sup>21</sup>

- maintaining the natural structure and function of ecosystems and their productivity;
- incorporation of human use and values of ecosystems in managing the resource;
- recognising that ecosystems are dynamic and constantly changing;
- based on scientific knowledge, adapted by continual learning and monitoring.

### Te Ahiaua Ecosystem and Interest Groups

Situated at the Waiotaha estuary and spit, Te Ahiaua is prized by a number of key stakeholders in distinct ways. From a conservation perspective, Te Ahiaua is a natural taonga

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<sup>20</sup> See Bay of Plenty Regional Council *Māori Engagement Guide* 2011.

<sup>21</sup> Grieve C, Short K 2007. Implementation of ecosystem based management in marine capture fisheries. Switzerland: World Wildlife Fund for Nature at 5.



of the Opotiki Coastline with the highest Department of Conservation ranking. The estuarine mudflats are a habitat for wading birds, several fish species and numerous invertebrates, including shellfish. At the seawater/freshwater wedge where the river and streams enter the estuary whitebait spawn and the remnants of the former mangrove forests can be found. Together with the mangroves located at the Waiaua Estuary, these form the south eastern extreme of the range of mangroves in New Zealand.<sup>22</sup> Responsibility for administration and protection of the fisheries rests with the Ministry for Primary Industries although a recent High Court decision has afforded regional councils and the Minister of Conservation authority to:<sup>23</sup>

“exercise functions in respect of the coastal marine area to manage the effects of fishing not directly related to the biological sustainability of the aquatic environment as a resource for fishing needs, but only to the extent strictly necessary to manage those effects...a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for Māori interests under the Fisheries Act 1996.”

Within the central and eastern Bay of Plenty, local Māori established Mai i Ngā Kuri a Whareki Tihirau, a customary fisheries forum in November 2001. The interests of the forum are primarily to work collaboratively with the Ministry for Primary Industries to “improve the management of the fisheries resources in the region and to recognise and provide for the use and management practices of tangata whenua in those fisheries as required by the 1992 Fisheries Settlement.”<sup>24</sup>

From a leisure perspective, Te Ahiaua is a recreational reserve and the first major Opotiki District destination for visitors travelling between Whakatane and Opotiki. The reserve boasts the highest recorded visitor numbers for the use of coastal reserves in the district and is a popular spot for swimming, fishing and shell fish gathering.<sup>25</sup> More recently, the reserve became a freedom camper destination, hosting six camp sites for a stay of up to 4 nights each. The reserves are administered by the Opotiki District Council.

The estuary is fed by the Waioatahe River, which itself has six main tributaries, including the Paititutu and Ohiao Stream, and the Oruamanganui and Ruakaka Rivers. In all there are 147 km of major waterways in the catchment.<sup>26</sup> Pastoral areas in the catchment make up 24% of land use or 3,650 ha, with the largest proportion of this occurring adjacent to the Waioatahe River on the low lying plains of the Waioatahe Valley. These pastoral areas are predominantly used as dairy farms.<sup>27</sup> There is 15% or 2,523 ha of exotic forestry (*pinus radiata*) in the catchment, much of which is located on steep hill country that drains directly into the Waioatahe River.<sup>28</sup> Although, in the long term, exotic forests are able to provide soil

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<sup>22</sup> Department of Conservation 2002. Super sites for Education at Waioatahi Spit Scenic and Historic Reserves.

<sup>23</sup> Attorney-General v The Trustees of the Motiti Rohe Moana Trust and NZMC [2017] NZHC 1429.

<sup>24</sup> Ponter D Report on Mai i ngā kuri o Whareki Tihirau Ministry of Fisheries 2010 at 3.

<sup>25</sup> Ōpōtiki District Council Coastal Reserves Management Plan 2012 at 34.

<sup>26</sup> Bay of Plenty Regional Council Waioatahi Catchment Management Plan Operations publication 2011/02 at 29.

<sup>27</sup> Bay of Plenty Regional Council Waioatahi Catchment Management Plan Operations publication 2011/02 at 18.

<sup>28</sup> Bay of Plenty Regional Council Waioatahi Catchment Management Plan Operations publication 2011/02 at 18.

and water benefits, in recent years harvesting has put stress on downstream sedimentation. Responsibility for setting and maintaining water quality standards rests dually with the Bay of Plenty Regional Council and Toi Te Ora Public Health. The standards themselves are set by the Ministry for the Environment together with the Ministry for Health.

### **Primary Environmental Issues**

The primary environmental issue for the Waiotaha estuary is increased levels of sediments, nutrients and bacteria which enter primarily through the main tributary.<sup>29</sup> The restriction on taking pipi was issued in January 2017 as levels of E.coli monitored within the waterways exceeded a hazardous level in accordance with national microbiological water quality guidelines.<sup>30</sup> Measuring water quality can be elusive as stark variations are prevalent depending on a number of independent variables, including rainfall, the location of stock on farmland at the time of testing, and the distance of any particular contributor from the point of measurement. The material source of contamination therefore becomes difficult for authorities to detect and almost impossible to police. The national microbiological water quality guidelines base risk assessment on the 95<sup>th</sup> percentile of sample results taken over the previous 3-year period. Testing must be done over a long period of time in order to isolate averages, and accordingly an authority's ability both to detect and respond to water quality issues can be a relatively slow process.

### **Tangata Whenua Perspective**

Te Ahiaua is considered a taonga to tangata whenua, celebrated as a source of great mana and pride for its bounty of pipi. According to local kaumātua, Toopi Wikotu, Te Ahiaua was considered a protected food resource, subject to tapu at all times. The mixing of human sewerage with Te Ahiaua waterways is repugnant to Māori values and belief systems and is therefore strictly prohibited from a tangata whenua perspective. In this instance, Toopi suggests it is appropriate that the tikanga restriction on sewerage be extended to cover animal waste. Harvesting of pipi was also prohibited year-round, except for 3 months of the year where the tapu was lifted and harvesting was allowed. Whānau fulfilled the role of kaitiaki and lived onsite ensuring that the tikanga was both publicly known and practically enforced. A kaitiaki shark also lived in the waterways offering dual protection and enforcement alongside his human counterparts.<sup>31</sup>

Through retention of the surrounding lands, local Māori were able to exercise kaitiakitanga over Te Ahiaua until around the 1950s when kaitiaki whānau were ejected from their papakainga to make way for construction of the main highway that opened Te Ahiaua to the public. From around the same time, successive legislative provisions vested administration of the estuary and neighbouring Ohiwa Harbour firmly with local authorities, including the Harbours Act 1950, Wildlife Act 1953, Wildlife Regulations 1955, the Town and Country Planning Act 1977, Fisheries Regulations, Water Recreation Regulations 1979, the Opotiki

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<sup>29</sup> Bay of Plenty Regional Council Waiotahi Catchment Management Plan Operations publication 2011/02 at 1.

<sup>30</sup> Ministry for the Environment 2003. Microbiological water quality guidelines for marine and freshwater recreational areas.

<sup>31</sup> Interview with Toopi Wikotu, 8 July 2017.

County Council Water Control and Foreshore Control Bylaws, the Whakatane District Council Foreshore and Seabed Control Order 1983, and the Whakatane District Council Foreshore Control Bylaws 1984, and the Ohiwa Harbour Water Control Bylaws in 1989 culminating in the Resource Management Act 1991.<sup>32</sup>

The tapu of the resource once widely revered became generally ignored and impossible for tangata whenua to enforce. Effluent waste from surrounding dairy farms has since leached into the waterways and degraded the ecosystem to such an extent that the kaitiaki shark is no longer thought to reside there. Harvesting of pipi became an unrestricted free-for-all. As Kaumātua Toopi Wikotu states, “Nobody was allowed to go in and harvest pipi whenever they wanted to. It was only allowed once a year. Now people go every tide.”<sup>33</sup> As a result, in the 70 years since kaitiaki were removed, local Māori have observed that pipi stocks are depleting and decreasing in size, while the floor of the estuary is firming and becoming less inhabitable.<sup>34</sup> The estuarine water quality issue is the latest in this string of issues.

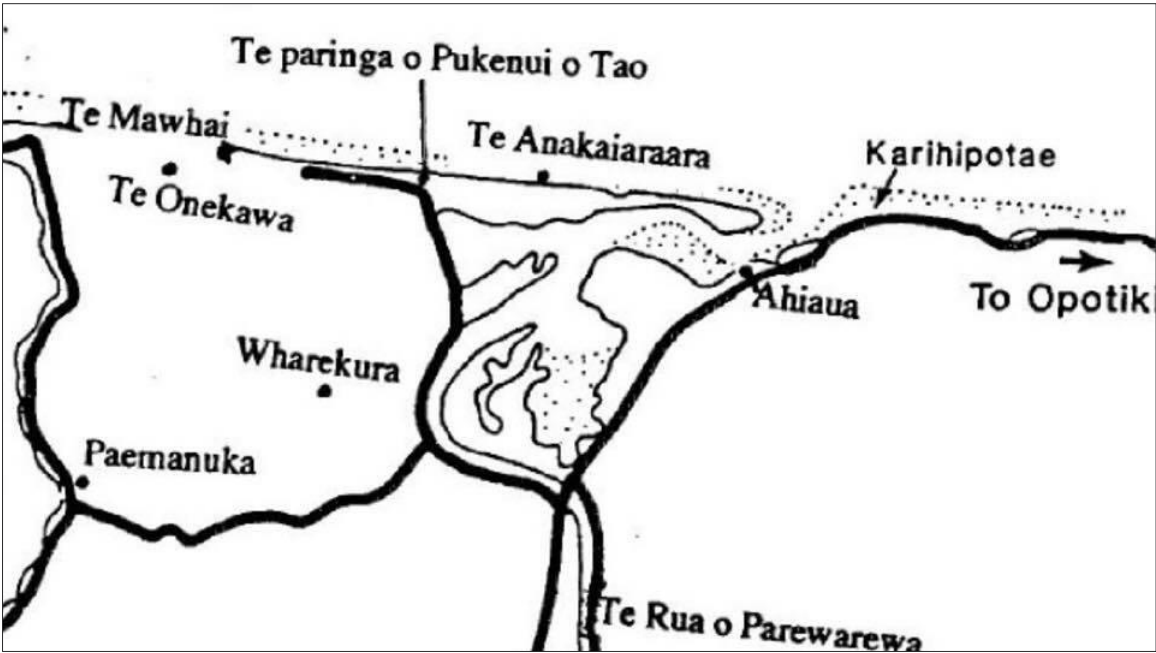


Figure One: Sites of Cultural Significance at Waiotaha Spit and Estuary

**The Future of Rāhui and Ecosystem Based Management**

Prohibitions such as rāhui are valuable mechanisms often used to prevent further or irreparable harm to the ecosystem arising from long-term, sustained degradation. However, when the use of tikanga is limited, the value of mātauranga Māori is restricted to an “ambulance at the bottom of the cliff” measure. The Ahiaua case study demonstrates that prioritising mātauranga Māori and tikanga from the outset could have helped in proactively avoiding the current ecological issues and maintaining the enduring health or mauri of the

<sup>32</sup> Johnston E 2003. Wai 894, A116 Ohiwa Harbour, A report commissioned by the Waitangi Tribunal, at 249.

<sup>33</sup> Interview with Toopi Wikotu, 8 July 2017.

<sup>34</sup> Interview with Toopi Wikotu, 21 July 2017.

ecosystem. For example, sustained observance of tapu or respect for the special qualities of the ecosystem from the outset had the potential to:

- regulate the frequency of harvesting pipi
- regulate the size and quantity of pipi available for harvest
- closely monitor and police activity within the catchment that would lead to sedimentation and effluent leaching into waterways, thereby improving water quality.

Furthermore, an approach that involves meaningful collaboration with key stakeholders (including Māori) and integration of diverse philosophy in environmental management planning that considers the holistic well-being of the natural resource alongside the diverse priorities of all users has many synergies with ecosystem-based management.

In moving forward, a group of key stakeholders including representatives from local hapū and dairy farmers are working closely with the Bay of Plenty Regional Council in an attempt to address the water quality issues at Te Ahiaua.<sup>35</sup> Although the approach can be commended for integrating tangata whenua views, there is no legislative incentive to prioritise them, and even less ability to enforce them, given monitoring water quality is a haphazard affair that makes the policing of standards impracticable. There is therefore no guarantee that agreed steps will be taken over a long term – or even at all – and this method of environmental reparation relies largely on the good faith of those involved.

This suggests that the use of rāhui as a retrospective measure is not in and of itself sufficient to maintain the long-term mauri of the environment. Instead, what is necessary is prospective planning that considers the integration of mātauranga Māori and the body of tikanga regulations (including but not limited to rāhui) from the outset. This may mean dramatic changes in the way we view natural resources, including a shift from perceiving tapu as a temporary to a permanent measure. This enduring and sustained reverence and respect for the special qualities of the ecosystem as a whole accords with ecosystem-based management.

A test case for this approach may be seen in the ground breaking legal personification of Te Urewera as part of the 2014 Tūhoe Treaty of Waitangi Settlement.

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<sup>35</sup> Bay of Plenty Regional Council 2017. Ohiwa Harbour Community Newsletter June 2017. Issue 25 at 1.