
KO WAI TE MANA WHENUA?

Identifying Mana Whenua Under Aotearoa New Zealand's Three Laws

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Introduction

All societies have laws that govern the exercise of sovereign authority within a territory. For Māori, that authority – mana whenua – was sourced in their lands, to which they ancestrally belonged.¹ Mana whenua gave hapū, the central kinship community under Aotearoa’s first laws,² rangatiratanga.³ There were several hundred mostly independent hapū across the land with overlapping interests. The rangatira primarily exercised mana whenua as a sort-of trustee for the people’s and environment’s benefit. Individuals and whānau derived rights to the land’s resources from the hapū, making kinship relations important, which were guided by tikanga principles.

Rangatira asserted their collective sovereign authority against the world – te mana o te whenua – in the 1835 Declaration of Independence.⁴ But in 1840, the English version of the Treaty of Waitangi / Te Tiriti o Waitangi purported to transfer that sovereignty to the Crown.⁵ But in gaining sovereignty, new regimes hold power subject to pre-existing indigenous rights, because the common law protects aboriginal title until lawfully extinguished.⁶ The English Laws Act 1858 confirmed that English laws were enforceable in New Zealand from 1840 to the extent applicable to the “circumstances of the Colony”.⁷

¹ “Mana whenua” refers to authority in a location, as compared with “tangata whenua” which is a broader concept referring to the “local people”, usually by some ancestral link. But because *mana whenua* relies on continued occupation (*ahikā*), *mana whenua* can be seen as a subgroup of *tangata whenua* if some people do not exercise occupation with them.

² See generally Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) at 330.

³ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised Edition, Huia Publishers, Wellington, 2016) at 228.

⁴ Declaration of Independence of the United Tribes of New Zealand 1835. See further Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014).

⁵ Treaty of Waitangi 1840, art 1.

⁶ *R v Symonds* (1847) NZPCC 382 (SC) at 390; *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [30]-[34].

⁷ English Laws Act 1858, s 1.

The term ‘mana whenua’ likely originated in this era to assert and defend hapū and iwi land rights.⁸ But the Crown mostly extinguished the indigenous system of land tenure through its right of pre-emption, war and confiscation, and the individualisation of title through the Native Land Court. In this way, New Zealand’s ‘second laws’ dispossessed hapū of the same source of their customary authority. With only 8% of the nation’s land held by Māori, mana whenua have not been able to maintain ahikāroa as needed before 1840. Today, they rely on Parliament for procedural and substantive rights under environmental, local government and Treaty of Waitangi settlement legislation.

But identifying mana whenua presents difficulties for New Zealand’s positivistic legal culture. There are not always clear or exclusive boundaries of authority. Statutory incorporations of tikanga concepts have tended not to reflect their nuances which leaves them oversimplified. Nevertheless, where mana whenua rights are at stake, particularly those with economic or political benefits, multiple hapū and iwi may stake their claim. But if parties cannot resolve their disputed authority by negotiation or arbitration, how could New Zealand’s courts adjudicate mana whenua claims based on indigenous law?

The question entitling this dissertation, therefore, ‘ko wai te mana whenua’, gives rise to issues that go to the heart of the intersection between ‘Kupe’s laws’ and ‘Cook’s laws’. To understand the mana whenua concept, I adopt Justice Williams’ ‘first, second, and third laws’ of Aotearoa New Zealand framework.⁹

Chapter I returns to Aotearoa’s first laws to explore its core principles, and how mana whenua originated. Although it may be a contemporary concept to conceptualise Māori authority in British terms, I argue we can also conceptualise it in traditional, take whenua terms. It discusses how mana whenua rights could customarily arise, be maintained or extinguished, and what they secured. In Chapter II, I discuss the effect of British sovereignty and land tenure in mostly extinguishing the customary rights of mana whenua. I compare present statutory rights against traditional rights and some of the problems in incorporating tikanga in statute. I consider the potential consequences of proposed reforms

⁸ ‘Iwi’ is a concept that generally means ‘tribe’, made up of component ‘hapū’ as ‘sub-tribes’. Throughout this paper, I refer to ‘hapū’ instead of both for convenience, and because hapū, rather than iwi, who were the core societal unit in traditional Māori society which principally exercised mana whenua.

⁹ See further Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1.

of the Resource Management Act 1991.¹⁰ Here, I offer a tikanga-consistent statutory definition. In Chapter III, I discuss how best to balance both Māori and English legal systems in resolving current mana whenua disputes. I consider the challenges of the lack of certain boundaries and primary evidence, and the need to do justice to the layers of interests in tikanga concepts. I recommend a three-stage approach that starts from a tikanga basis in negotiations and blends across to judicial intervention. While there are difficulties in having the courts intervene in indigenous legal matters, I argue that these are not fatal given the expertise of the Māori Land and Appellate Courts.

But as a point of principle, both legal systems ought to influence each other to arrive at a unique and distinctive “third law of Aotearoa New Zealand”.¹¹ The aim should be a system that embraces the best of *both* worlds; declares rights in each; and, as Sir Eddie Durie puts it, cultural conciliation as “mutual comprehension and respect”.¹²

¹⁰ Ministry for the Environment *New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel* (June 2020).

¹¹ Williams “Lex Aotearoa”, above n 9, at 12.

¹² ET Durie “Will the Settlers Settle? Cultural Conciliation and the Law” (1996) 8 Otago L Rev 449 at 449.

I *Mana Whenua Under Aotearoa's First Laws*

Tukuna mai he kapunga oneone ki au hai tangi
Send me a handful of earth so I may weep over it

For Māori, land was not something that could be bought and sold as a unit in a market economy as it is today. The land was something to which the people *belonged*.¹³ The term ‘whenua’ means land and placenta, which is customarily returned to the Earth mother, Papatūānuku, linking the people’s ancestor to her descendants.¹⁴

Before European contact, Aotearoa New Zealand was not a single, unified state, but a collection of several hundred, mostly independent, hapū.¹⁵ Some, depending on their size and independence, were closely affiliated to their parent body, iwi.¹⁶ These societies had a communal structure,¹⁷ connected by their kinship, and collectively held property in land, analogous to radical title or ownership.¹⁸ It was “jealously guarded and exclusively maintained”.¹⁹ An individual’s primary responsibility was to their tribe, from which their rights derived, making the balance between kinship relations crucial.²⁰

A *Tikanga Māori*

Tikanga guided those relationships based on what was correct or proper.²¹ Williams defined it as “the Māori way of doing things – from the very mundane to the most sacred or important fields of human endeavour”.²² There are localised differences between hapū

¹³ Eddie Durie “The Law and the Land” in Jock Phillips (ed) *Te Whenua, Te Iwi: The Land and the People* (Allen & Unwin/Port Nicholson Press, Wellington, 1987) at 78.

¹⁴ Durie “Will the Settlers Settle?”, above n 12, at 452.

¹⁵ At 450.

¹⁶ Raymond Firth *Primitive Economics of the New Zealand Māori* (Routledge, Oxon, 2011) at 371.

¹⁷ Although individuals and whānau were allocated certain private rights of access to, and use of, the land and its resources, as discussed later.

¹⁸ Durie “Will the Settlers Settle?”, above n 12, at 452.

¹⁹ Firth *Primitive Economics*, above n 16, at 371.

²⁰ Moana Jackson “The Treaty and the Word: The Colonisation of Māori Philosophy” in G. Oddie and R. Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) at 5.

²¹ Mikaere “The Treaty of Waitangi”, above n 2, at 331.

²² Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) at 2.

because each was independent, but there are principles universal to all Māori,²³ which commonly²⁴ include whanaungatanga,²⁵ mana,²⁶ tapu,²⁷ utu,²⁸ and kaitiakitanga.²⁹

How these concepts operated is subject to debate, although many early visitors to New Zealand “had no difficulty at all in seeing Māori customs and practices as ‘law’”.³⁰ To conceptualise them through Western legal philosophies, Brookfield argues they can be understood in the Hartian sense,³¹ as rules of primary obligation enforced by social pressure and community sanctions.³² Indeed, that may sufficiently characterise more specific tikanga rules, like take whenua and muru.³³ Such ‘rules’ could be modified in a self-regulating way, or “without institutional intervention”.³⁴

But Durie conceived of the core concepts as values or principles,³⁵ and Elias CJ referred to tikanga’s “values” as being part of New Zealand’s common law.³⁶ This conception lends more towards a Dworkinian approach, which sees law not just as rules, but also standards that “do not function as rules, but operate differently as principles”.³⁷ These principles are grounded in the law and explicit in past decisions by way of justification.³⁸ Further, dimensions of consistency with past decisions and political, moral theories of the society are also engaged when determining the prevailing principles.³⁹ But when a particular

²³ There is some debate as to other core principles: see Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [124]-[166].

²⁴ Williams "Lex Aotearoa", above n 9, at 3.

²⁵ *Ibid*, the “the source of the rights and obligations of kinship”.

²⁶ *Ibid*, the “source of rights and obligations of leadership”.

²⁷ *Ibid*, as “both a social control on behaviour and evidence of the indivisibility of divine and profane”.

²⁸ *Ibid*, the “obligation to give and the right (and sometimes obligation) to receive constant reciprocity”.

²⁹ *Ibid*, the “obligation to care for one’s own”.

³⁰ Richard Boast “Māori Customary Law and Land Tenure” in Richard Boast, Andrew Erueti, Doug McPhail and Norman Smith (eds) *Māori Land Law* (2nd ed, LexisNexis NZ, 2004) at 22.

³¹ See HLA Hart *The Concept of Law* (2nd ed, Oxford University Press, Oxford, 1994) at 91-94.

³² F. M. Brookfield *Waitangi & Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) at 87.

³³ The *tikanga* system of land rights, discussed further later in this chapter.

³⁴ ET Durie *Custom Law* (unpublished paper for the Treaty of Waitangi Research Unit, 1994) at 4.

³⁵ At 3.

³⁶ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] [*Takamore* (SC)].

³⁷ R Dworkin “Is Law a System of Rules?” in *The Philosophy of Law* (Oxford University Press, Oxford, 1977) 38 at 43.

³⁸ R Dworkin *Law’s Empire* (Harvard University Press, Cambridge, 1986) at 96.

³⁹ R Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, 1977) at 143.

principle prevails in one case, the others survive intact for application to future situations.⁴⁰ Tikanga may be understood in this way because, as Moana Jackson explained, the Māori legal philosophy derived “[f]rom the kete of Tāne... through the precedent and practice of ancestors”.⁴¹ They may also take account of moral theories through tikanga’s context-dependent mode of application, with principles surviving to guide future decisions and behaviour.

B Reconceptualising the Origins of Mana Whenua

The land gave mana to those who used and belonged to it. In 1835,⁴² the United Tribes of New Zealand asserted their “Ko te Kingitanga ko te mana i te w[h]enua” of New Zealand against other foreign powers in the Declaration of Independence.⁴³ By the 1860s, the Kingitanga movement used “mana o te whenua in the novel historical context of pan-tribal unification”,⁴⁴ and land alienation.⁴⁵

However, the term “mana whenua” has been criticised for being inconsistent with the conception of mana as personal,⁴⁶ and that it negatively implies exclusivity⁴⁷ when Māori

⁴⁰ Dworkin “Is Law a System of Rules?”, above n 37, at 56.

⁴¹ Moana Jackson “The Treaty and the Word”, above n 20, at 5.

⁴² According to late tikanga-expert Waerete Norman, the term “mana whenua” was also used precolonially in the Muriwhenua District, known then as “mana rangatira” or chiefly prestige: Rāpata Wiri “Mana Whenua and the Settlement of Treaty of Waitangi Claims in the Central North Island of New Zealand” (2013) 9 *AlterNative* 1 at 4.

⁴³ Declaration of Independence of the United Tribes of New Zealand 1835, art 2.

⁴⁴ Jean E. Rosenfeld *The Island Broken in Two Halves: Land and Renewal Movements Among the Māori of New Zealand* (Pennsylvania State University Press, 1999) at 98.

⁴⁵ Linda Te Aho “Contemporary Issues in Māori Law And Society: Mana Motuhake, Mana Whenua” (2006) 14 *Waikato L Rev* 102 at 103.

⁴⁶ Waitangi Tribunal *Rekohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (Wai 64, 2001) at 12, 27.

⁴⁷ Catherine Iorns Magallanes, “The Use of Tangata Whenua and Mana Whenua in New Zealand Legislation: Attempts at Cultural Recognition” (2010) *NZACL Yearbook* 83 at 92. Durie did not think in peaceful contexts like legislation because it was used to assert control and exclusion, particularly at the start of a war or dispute.

shared pockets of interests with no Western boundaries.⁴⁸ The Waitangi Tribunal has expressed its disagreement with using the term:⁴⁹

The term ‘mana whenua’ appears to have come from a nineteenth-century Maori endeavour to conceptualise Maori authority in terms of the English legal concepts of imperium and dominium. It links mana or authority with ownership of the whenua (soil). But the linking of mana with land does not fit comfortably with Maori concepts... [T]he term ‘mana’ was personal and was used in regard to the influence or authority of chiefs.

[...]

We are inclined to think that the term ‘mana whenua’ is an unhelpful nineteenth-century innovation that does violence to cultural integrity.

Assuming mana whenua is not a ‘traditional’ tikanga concept, how problematic is it to use it? Does it lack cultural authenticity? The starting point is that tikanga is flexible and adapts “without institutional intervention”.⁵⁰ Given its Kingitanga connections, “mana whenua” may be seen as part of an adaption to engage in the reality of Crown sovereignty to protect Māori land and authority from alienation. As Jones argues, there are three core tensions in Māori legal history: “*adaption* (self-determined versus reactive change); *relationship to the Crown* (engagement versus disengagement with the state legal system; and, *renewal* (reinvigorating tikanga versus losing relevance)”.⁵¹ These tensions are apparent in the mana whenua context – the need to protect the whenua and assert land rights against the Crown.

In this scenario, an analysis of the term’s consistency with the core tikanga values is engaged since they inform all its more specific rules and precepts. As Barlow explains,

⁴⁸ Waitangi Tribunal *Rekohu*, above n 46, at 27.

⁴⁹ At 28-29. The Environment Court has adopted that criticism, considering it inappropriate to use the term “Mana whenua Iwi” in a District Plan: see *Golden Bay Marine Farmers v Tasman District Council* EC Wellington W19/2003, 27 March 2003 at [255]. See also Moana Jackson, Tahu Potiki and Wayne Ngata *The Findings of the Adjudication Panel in the Mana Whenua Process* (convened by the Central North Island iwi for Te Kāingaroa a Haungaroa Crown Forest Licences, 2014) at 24 (“The Adjudication Panel”).

⁵⁰ Durie *Custom Law*, above n 34, at 4.

⁵¹ Carwyn Jones “Whakaeke i ngā ngaru – riding the waves: Māori Legal Traditions in New Zealand Public Life” in Lisa Ford and Tim Rowse (eds) *Between Indigenous and Settler Governance* (Oxon, Routledge, 2013) at 175-176.

there are different types of mana:⁵² mana atua,⁵³ mana tupuna,⁵⁴ mana tangata,⁵⁵ and mana whenua.⁵⁶ It is “the central concept that underlies Māori leadership and accountability”.⁵⁷ As the Tribunal noted, mana has more of a personal focus. However, humans possess mana only as ‘agents’ or ‘channels’ from those sources; they are never the source themselves.⁵⁸

Furthermore, the land is all three of those sources. In Māori creation theory, it is an atua – Papatūānuku – a tupuna, and the people.⁵⁹ It sustains the natural world, giving it mauri and mana. In that sense, “mana whenua” might be an implied traditional source. Perhaps given the centrality of the land in Māori society, “mana whenua” was only a term an ‘official bystander’ would have raised in traditional culture. Then, it would have been obvious since, despite hapū independence, Māori had a common understanding of the land’s significance to them. When it stopped becoming evident in the face of the new sovereign, the term encapsulated their worldview, rights and authority and asserted it against others.

That mana was sourced from the land but could be vested in people – not just in the chiefs, but in the hapū collective – to act as kaitiaki, use its resources carefully, and provide for the people to maintain whanaungatanga and mauri. Indeed, these boundaries were not always exclusive, implying that the concept may also contemplate shared possession, perhaps even cooperation. Meredith described it this way:⁶⁰

⁵² Clive Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Melbourne, 1991) at 61. There are others too, including *mana moana* (the equivalent of *mana whenua* but over the oceans and its resources), and *mana motuhake* (the power of Māori sovereignty or self-determination).

⁵³ *Ibid*, power derived from 'God' to those "who conform to sacred ritual and principles"

⁵⁴ *Ibid*, power passed down from generation to generation through chiefly lineage;

⁵⁵ *Ibid*, power acquired by a person by their abilities, skills or knowledge

⁵⁶ *Ibid*, power associated with the possession of the land.

⁵⁷ Carwyn Jones “A Māori Constitutional Tradition” (2014) 11 NZJPIL 187 at 194.

⁵⁸ Suzanne Duncan and Poia Rewi “Tikanga: How Not to Get Told Off!” in Michael Reilly, Suzanne Duncan, Gianna Leoni, Lachy Paterson, Lyn Carter, Matiu Rātima and Poia Rewi *Te Kōparapara: An Introduction To The Māori World* (Auckland University Press, Auckland, 2018) at 38.

⁵⁹ See generally Michael Reilly “Te Tīmatanga Mai o Ngā Atua: Creation Narratives” in Michael Reilly, Suzanne Duncan, Gianna Leoni, Lachy Paterson, Lyn Carter, Matiu Rātima and Poia Rewi *Te Kōparapara: An Introduction To The Māori World* (Auckland University Press, Auckland, 2018).

⁶⁰ Paul Meredith *Mana Whenua, Mana Moana Ki Te Rarawa* (paper commissioned by Dr Aroha Harris of Te Uira Associates for the Te Rarawa claim, 2010) at 17-18 as cited in Mead *Tikanga Māori*, above n 3, at 230.

Historically claims to mana over land and sea were indeed about the exercise of some sort of jurisdictional dimension. That territorial jurisdiction was on many instances to the exclusion of others, and that aspect of exclusivity has rendered it problematic in modern times wherein there are competing and overlapping claims. But there are plenty of cases where groups shared land and resources and hence shared the mana whenua, mana moana in common.

Ultimately, when confronting novel situations, all societies may adapt their laws. As new rules develop, past practices may be reconceptualised and understood in a new way. We can look back at traditional exercises, assertions and defences of authority over land and say, “that is mana whenua, too”. It expresses the same power they possessed according to take whenua that they could collectively assert it against the Crown. The critical point here is that its legitimacy as an indigenous legal concept is not any lesser just because it is newer. It just means it had not been ‘discovered’ yet.⁶¹

For most tribes, if not all, mana whenua forms a vital part of their identity. Outside of the legal sphere, hapū and iwi have been asserting mana whenua at Ihumatao despite having no cognisable legal rights there.⁶² Northern iwi have also imposed ‘checkpoints’ to protect its members from the risk of COVID-19.⁶³ So the Waitangi Tribunal’s characterisation of the mana whenua term as an “unhelpful nineteenth century innovation that does violence to cultural integrity” may have been misguided. It may have arisen then, but it described the same authority and sovereignty they had traditionally exercised over their sacred lands.

⁶¹ This process of reconceptualisation is inherent in the common law method too. For example, in *Stilk v Myrick* [1809] EWHC KB J58, a ship captain agreed, following two seaman deserting before heading to the Baltics, to pay the remaining seamen the pay which would have been due to the two deserters. When the captain refused to pay on return to London, the plaintiff’s action to recover the further amount was dismissed. This was because the remaining sailors did not provide further consideration for the extra promise. But some commentators argue that had the case been decided today, the doctrine of economic duress would likely have vitiated the further promise: see Jill Poole *Textbook on Contract Law* (7th ed, Oxford University Press, Oxford, 2004) at 125. Economic duress was not developed until 1976, in *Occidental Worldwide Investment Corp v Skibs* [1976] 1 Lloyd’s Rep 293. See also *North Ocean Shipping Co Ltd v Hyundai Corporation Co* [1979] QB 705.

⁶² Kendall Hutt and Melanie Earley “Ihumātao: Māori King says mana whenua want land back” *Stuff* (online ed, Auckland, 18 September 2019).

⁶³ David Fisher “The lockdown roadblocks – just how legal were they?” *New Zealand Herald* (online ed, Auckland, 12 July 2020); “Iwi say they will reopen Northland checkpoints near Kawakawa” *Radio New Zealand* (online ed, Auckland, 12 August 2020).

C Take Whenua: Māori Land Tenure

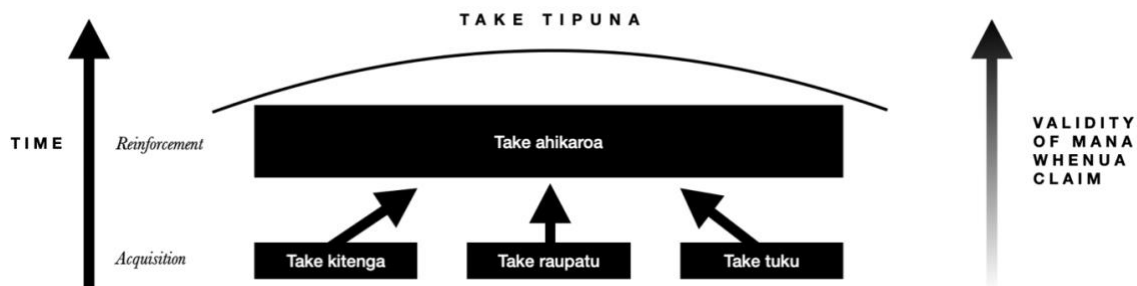


Figure 1: Model of the Validity of Mana Whenua Claims Based on Take Whenua

Under tikanga, hapū could gain land in the ways shown in *Figure 1*, that I have created;⁶⁴ by take kitenga (right of prior discovery), take raupatu (right of conquest),⁶⁵ or take tuku (right of gift).⁶⁶ But those rights alone were not sufficient for mana whenua. To do that, the people had to sustain occupation of the land through take ahikāroa for at least three generations,⁶⁷ which refers to “long-burning fires”.⁶⁸ Over time, a hapū’s claim to land

⁶⁴ There are approximately 28 more specific *take whenua*, or claims to land, according to Ngāti Porou chief Rapata Wahawaha (as recorded by ethnographer Elsdon Best in 1893): see Wiri “Mana Whenua and the Settlement”, above n 42, at 6. These will be recorded below because they are usually of more individual concern: Firth *Primitive Economics*, above n 16, at 380.

⁶⁵ Including *take raupatu tangata mate* (land confiscation for killing another); *take raupatu kurī mate* (confiscation for killing a dog); *take raupatu wahine tangohia* (confiscation for taking another’s wife); *take raupatu whānako* (confiscation for stealing food resources); *take raupatu kanga upoko* (confiscation for cursing another’s head); *take raupatu hakere kai* (confiscation for not sharing food); *take makutu* (confiscation for witchcraft); *take tūpāpāku* (confiscation for cannibalism); *take tango whenua* (right to take land); *take muru kai* (right to plunder and confiscate food).

⁶⁶ Including *take pare whenua* (right to gift to a relative); *take kākahu* (right to gift in return for a cloak or garment); *take tahā wai, kai, kākahu* (right to gift in return for nurturing a sick person); *take pākūha* (right to give dowry for marriage); *take tautau mōtai* (right to gift in return for ear pendants); *take rakau patu tangata* (right to gift in return for weapons); *take waka* (right to gift in return for a waka); *take aroha* (right to gift out of love or compassion); *take whare tono* (right to gift in return for acquiring another’s house); *take hoko whenua* (right to trade land); *take tā moko, ngutu, rape* (right to gift in return for tattooing); *take tahā inu* (right to gift in return for preserved food in calabash).

⁶⁷ Including *Take iwi kāinga* (the right to build a home); *Take ahikāroa* (1): right of continuous occupation by ancestry; (2) right of continuous occupation to build a pā; (3) right of continuous occupation to cultivate land; and (4) right of continuous occupation for bird and rat hunting.

⁶⁸ Peter Buck *The Coming of the Māori* (Māori Purposes Fund Board, Wellington, 1929) at 31 as cited in Wiri “Mana Whenua and the Settlement”, above n 37, at 6.

would be reinforced and elevated to the highest source of claim, take tupuna (right of ancestry). Without ahikāroa, however, a group's claim to land would expire over time, becoming ahi mātaotao, which refers to “fires that become cold”.⁶⁹ As shown, the strength of a group's claim to mana whenua increased as time passed and their relationship with the land graduated from mere acquisition to occupation, to ancestral connection.

1 *Take Kitenga – Discovery*

The take kitenga principle gave hapū rights in undiscovered or unoccupied lands, which would have formed the basis for many of the early waka arrivals and further exploration of Aotearoa. It is analogous to the English doctrine of discovery.⁷⁰ Straightforward acts, such as naming landscape features, or tatahi (‘treading’ those lands) were sufficient.⁷¹ For example, Kupe arrived on the Matahourua waka, taking “possession of New Zealand” by naming the mountains and rivers from Whanganui to Patea.⁷² Further, Māori personify landmarks. When the Arawa waka arrived in the 14th century, Tama-Te-Kapua declared “That point there [Maketu Point] is the bridge of my nose”.⁷³ This personification links hapū to their ancestral landmarks, as expressed in one's pepehā, making landmarks a key factor in understanding a group's claim to mana whenua.

2 *Take Raupatu – Conquest*

Following the initial settlement of areas by discovery and amalgamation among existing groups, Walker records that wars “spanned a period of almost 500 years” which defined inter-tribal political relations and territorial boundaries.⁷⁴ These wars were frequent and resulted in extensive areas of land changing hands.⁷⁵

⁶⁹ Mead, *Tikanga Māori*, above n 3, at 226.

⁷⁰ See generally Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, New York, 2010).

⁷¹ Firth *Primitive Economics*, above n 16, at 380.

⁷² John White *Māori Customs and Superstitions* (Kiwi Publishers, Christchurch, 1999) at 185.

⁷³ Firth *Primitive Economics*, above n 16, at 377.

⁷⁴ Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, Auckland, 1990) at 55.

⁷⁵ Firth *Primitive Economics*, above n 16, at 377.

Brookfield describes raupatu as a “revolution” where its conqueror supersedes the “legal order of the conquered hapū”.⁷⁶ Over time, this would have been the case. Still, it is essential to note that a defeated group did not automatically transfer mana whenua because raupatu was “usually not sufficient to extinguish all rights to the land”.⁷⁷ Ancestral rights are more “valid” than raupatu claims, surviving in latent form, capable of revival or extinguishment.⁷⁸ A conquering group might go to “extraordinary lengths to try and extinguish tangata whenua rights”.⁷⁹ They could then develop their ancestral rights by constructive possession for three or more generations.⁸⁰ Ngāti Mutanga o Wharekauri, for example, could not establish take tipuna rights in the Chatham Islands since they only maintained ahikā for around 20 years.⁸¹ But as Durie explained, a conquering group’s rights were more regularly gained by marriage with women of the conquered group (take moe whenua).⁸² Women possess hau,⁸³ meaning their offspring would carry ancestral rights in both groups’ land.⁸⁴ Also, the victorious tribe would benefit from new people with valued skills or whanaungatanga links.⁸⁵ The land had to “meet the basic needs of the new group of occupiers as well as those former citizens who were allowed to remain”.⁸⁶

Therefore, it is too simplistic to view raupatu as a straightforward transfer of rights in land.⁸⁷ Many tribes would have been ‘literally absorbed’ into each other. Raupatu may identify the overall hapū in de facto control, but it did not mean that all those on the land belonged to that hapū, nor that they had mana whenua. In those circumstances, the tangata whenua and mana whenua were not necessarily the same people, at least until ancestral links intertwined.

⁷⁶ Brookfield *Waitangi & Indigenous Rights*, above n 32, at 89.

⁷⁷ Mead *Tikanga Māori*, above n 3, at 223.

⁷⁸ At 224.

⁷⁹ At 223.

⁸⁰ Wiri “Mana Whenua and the Settlement”, above n 42, at 9.

⁸¹ *Kamo v Minister of Conservation* [2018] NZHC 1983, [2018] NZAR 1334 at [14].

⁸² Durie “Will the Settlers Settle?”, above n 12, at 452.

⁸³ ‘The land’s spiritual essence’: Mead *Tikanga Māori*, above n 3, at 223.

⁸⁴ Andrew Erueti “Māori Customary Law and Land Tenure: An Analysis” in Richard Boast, Andrew Erueti, Doug McPhail and Norman Smith (eds) *Māori Land Law* (2nd ed, LexisNexis NZ, 2004) at 54.

⁸⁵ Mead *Tikanga Māori*, above n 3, at 223.

⁸⁶ *Ibid.*

⁸⁷ As the Native Land Court would mistakenly put too much emphasis on, see Chapter III.

3 *Take Tuku – Voluntary Transfers*

Land could be gifted under tikanga, although this was relatively uncommon because hapū were reluctant to part with land, especially those with urupā⁸⁸ or ancestral links.⁸⁹ When they occurred, it was usually on some utu basis; to restore balance if somebody had committed a wrong or breached tapu. For example, gifting occurred to atone for adultery, or after raupatu to compensate for deaths.⁹⁰ Wahawaha also mentioned more specific take for transfers on more of a contractual rather than gratuitous basis, such as land in return for waka, cloaks, ear pendants or weapons, again reflecting the cycle of reciprocity.⁹¹ Certain conditions would have attached to the gift of land, such as compliance with hapū norms and residence in their territory.⁹² It was more common to see gifting of use rights rather than the land, but this depended on the “demands of the moment”.⁹³

4 *Take Ahikāroa – Maintaining Occupation*

Those three significant take categories gave a group an entry point to the land, but mana whenua required a permanent and sustained occupation of the land. ‘Ahikāroa’ refers to ‘long-burning fires’, and as Buck explained, “[s]o long as a people occupied their land, they kept their fires going to cook their food”.⁹⁴

The responsibility for maintaining ahikā rested with the hapū, although the broader iwi alliance was carried by all the component hapū together.⁹⁵ In primary areas of residence, hapū constructed kāinga, marae and pā, and formed leadership structures to organise collective tasks, like fishing, military, crop-growing and flax-weaving operations.⁹⁶ In these areas, there can hardly be a dispute about the hapū’s sustained occupation of the land (or perhaps even their exclusivity). But in more unsettled or uncultivated areas, the group would show their occupation by hunting, fishing, and gathering resources like eels, timber,

⁸⁸ ‘Cemeteries’.

⁸⁹ Firth *Primitive Economics*, above n 16, at 381.

⁹⁰ *Ibid.*

⁹¹ Wiri “Mana Whenua and the Settlement”, above n 42, at 380.

⁹² Erueti “Māori Customary Law”, above n 83, at 53.

⁹³ At 44.

⁹⁴ Buck *The Coming of the Māori*, above n 68, at 380.

⁹⁵ Mead *Tikanga Māori*, above n 3, at 224.

⁹⁶ At 223-224.

berries, flax and stone.⁹⁷ It also depended on the land's productivity. For some groups, like Ngāti Manawa and Ngāti Whare, their lands were not suitable for crops, so they got resources from the streams and forests, placed a rāhui on a used site,⁹⁸ and migrated to a new area to maintain balance with the environment.⁹⁹

On the outskirts of a tribe's rohe,¹⁰⁰ members would visit boundaries periodically to demonstrate ahikā by cultivating small areas of ground, snaring birds or trapping rats.¹⁰¹ These acts were important at whenua tautohe¹⁰² to challenge others to stake their claim to that land.¹⁰³ But even if a hapū held mana whenua in a particular rohe, they still had to "respect and indeed manaaki the interests and rights of others".¹⁰⁴ External validation by neighbouring hapū secured a group's position in their area, and military and trade alliances strengthened the interconnectedness between them.¹⁰⁵

The ahikāroa principle has parallels with the Lockean theory of appropriation. Locke considered that the world is held by people in common and that private rights to resources accrue through a person or group's mixing resources with their labour and effort.¹⁰⁶ The caveat, however, was that those rights were conditional on there being "enough, and as good, left in common for others".¹⁰⁷ It reflects the Māori relationship to the environment. A hapū held the land in common, and the group's and individual rights depended on their ongoing occupation, labour and effort. For without that, their rights would wane over time, becoming ahi mātaotao ('fires that become cold').¹⁰⁸

Land could become ahi mātaotao when mana whenua abandoned an area or failed to maintain occupation. However, this could be avoided by regular nominal works of the land,

⁹⁷ Firth *Primitive Economics*, above n 16, at 376.

⁹⁸ 'A temporary prohibition'.

⁹⁹ Wiri "Mana Whenua and the Settlement", above n 42, at 8.

¹⁰⁰ 'Boundaries'.

¹⁰¹ Firth *Primitive Economics*, above n 16, at 378.

¹⁰² 'Contested lands'.

¹⁰³ At 378.

¹⁰⁴ Jackson, Potiki and Ngata *Findings of the Adjudication Panel*, above n 49, at 8.

¹⁰⁵ Mead *Tikanga Māori*, above n 3, at 223.

¹⁰⁶ John Locke *Two Treatises on Government* (1690), as cited in Jeremy Waldron "Enough and as Good Left for Others" (1979) 29 *The Philosophical Quarterly* 319.

¹⁰⁷ *Ibid.*

¹⁰⁸ Mead *Tikanga Māori*, above n 3, at 226.

so long as the wider tribe agreed.¹⁰⁹ The ahi tere¹¹⁰ principle dictated that if no ancestral descendants returned for three or four generations, they would forfeit their rights.¹¹¹

5 *Take Tipuna – Ancestral Rights in Land*

In many instances, long-term sustained occupation by a hapū would have elevated their claim to the land from take ahikāroa to take tipuna, an ancestral right; the most substantial claim to land under tikanga. Ahikāroa by itself was enough to acquire some level of mana whenua because that demonstrates some base level of authority in an area. But Wahawaha was of the view that an ancestral right must support their claim.¹¹² This reflects the priority of ancestral rights under tikanga. Even a defeated group could continue to claim ancestral rights over land if they had buried their dead there, or spilt blood in battle. They might continue their cultural links to the land, through specifically named landmarks, narratives, or by leaving tohu,¹¹³ small groups of kin, or women of high rank on the land.¹¹⁴

The priority for ahikāroa as supported by an ancestral right is more suited to the contemporary context because the Māori population today is much more dispersed. Māori became much more urbanised from the 1950s onwards to the extent where 80% live in cities, particularly Auckland and Hamilton.¹¹⁵ If customary rules were applied today, some tribes might have ahikāroa type evidence far outside of their lands, for example, because the Native Land Court wrongly awarded them title. But any such rights would be inferior to those tribes with ancestral rights who maintained ahikāroa, as *Figure 1* shows. There is also a temporal problem, as discussed in Chapter 2.

¹⁰⁹ Norman Smith *Native Custom and Law Affecting Native Land* (Māori Purposes Fund Board, Wellington, 1942) at 57 as cited in Wiri “Mana Whenua and the Settlement”, at 9-10.

¹¹⁰ ‘Flickering fire’.

¹¹¹ Wiri “Mana Whenua and the Settlement”, above n 42, at 10.

¹¹² Mead *Tikanga Māori*, above n 3, at 230.

¹¹³ ‘Marks or emblems’.

¹¹⁴ Erueti “Māori Customary Law”, above n 84, at 55.

¹¹⁵ Jacinta Ruru, “Constitutional Indigenous Treaty Jurisprudence in New Zealand” in Patrick Macklem and Douglas Sanderson *From Recognition to Reconciliation: Essays on the Constitutional and Entrenchment of Aboriginal & Treaty Rights* (University of Toronto Press, Toronto, 2016) at 417.

D The Substance of Mana Whenua Rights

Once a group had mana whenua over particular land, rangatiratanga, which Jackson described as “total political authority”,¹¹⁶ followed.¹¹⁷ Hapū held it collectively, but it was vested primarily in rangatira,¹¹⁸ who usually derived from the tuakana lines of descent, possessing mana tipuna.¹¹⁹ However, occasionally those who demonstrated individual skills and qualities of leadership or battle would gain mana tangata, and could “jump the queue” ahead of tipuna-based rangatira.¹²⁰

A rangatira’s level of control over tribal lands differed in scope, from “an immediate property interest in certain areas [derived from ancestry or occupation] to a somewhat vague social or political jurisdiction over others”.¹²¹ They had a governance role with a political dimension,¹²² acting as a sort-of trustee.¹²³ Their part was more as a “guardian of the tribal interests” than a ruler. They would act largely democratically, except in emergencies.¹²⁴ They would consult with subordinate chiefs and high-ranking men who had interests in lands that could be affected by some act.¹²⁵ Further, in iwi matters, hapū could dissent from the overall ruling: “ko te puta matou ki waho o tenei kōrero”.¹²⁶

The corollary to rangatiratanga meant, in day-to-day terms, that mana whenua could “go about their work and enjoy their new environment”,¹²⁷ holding rights over the rohe “akin to ownership”.¹²⁸ They had an intricate system which allocated various use rights and privileges over the land and resources, analogous to licences.¹²⁹ These rights could be

¹¹⁶ Jackson “The Treaty and the Word”, above n 20, at 5.

¹¹⁷ Mead *Tikanga Māori*, above n 3, at 228.

¹¹⁸ *Rangatira* should be distinguished from *ariki*, who derived from senior lines of descent but whose role was more ceremonial than governmental: Erueti “Māori Customary Law”, above n 84, at 50.

¹¹⁹ At 50.

¹²⁰ *Ibid.* Another term used for this is *mana whakatipu*, which refers to “acquired leadership”, or the “power and status accrued through one’s leadership talents”, or “strength of character and force of will”, and their means to “enforce their wishes”.

¹²¹ Firth *Primitive Economics*, above n 16, at 370.

¹²² Mead *Tikanga Māori*, above n 3, at 229.

¹²³ Firth *Primitive Economics*, above n 16, at 369.

¹²⁴ Brookfield *Waitangi & Indigenous Rights*, above n 32, at 88.

¹²⁵ Firth *Primitive Economics*, above n 16, at 369-370.

¹²⁶ “We will keep out of this decision”: At 369-370.

¹²⁷ Mead *Tikanga Māori*, above n 3, at 228.

¹²⁸ Erueti “Māori Customary Law”, above n 84, at 43.

¹²⁹ Durie “Will the Settlers Settle?”, above n 12, at 453.

enjoyed personally, by the whānau, or the hapū as tenants in common.¹³⁰ They were carefully defined, even to a minute level, and were jealously guarded and exclusively maintained.¹³¹ For example, trees suitable for waka building were marked on the trunk to denote ownership if disputes arose by unlawful interference.¹³² These rights were transferrable by inheritance or gift,¹³³ but not to those outside the hapū, at least without hapū consent.¹³⁴ All rights derived from the communal hapū unit, which were “inseparable from duties to the associated community, from being part of it, contributing to it, and abiding by its authority and law”.¹³⁵ Those who held extensive individual use rights had a higher duty to ‘give back’ to the community, under the utu principle. Tikanga enforced this by muru to ensure that the community’s, rather than an individual’s, accumulation of wealth and benefits were maintained.¹³⁶ Therefore, this intricate system was not so much about allocating strict ‘property’ rights, but rather the arrangement of kin relationships, without an English legal parallel.¹³⁷

E Conclusion

Although the term “mana whenua” has more contemporary origins, we can see it as a legitimate evolution of tikanga to encapsulate the Māori relationship with land against a new sovereign power. It can reconceptualise Māori land tenure, which gave rangatiratanga, exercised primarily at the rangatira level, and defended by the paramount hapū collective. That rangatiratanga gave individuals and whānau use rights which carried associated duties to the community and their environment. The core values of tikanga guided these kinship and inter-tribal relations – and they continue in the contemporary context, being the kinds of values that might inform the resolution of overlapping disputes today.

¹³⁰ Erueti “Māori Customary Law”, above n 84, at 53.

¹³¹ At 53.

¹³² Firth *Primitive Economics*, above n 16, at 374.

¹³³ Erueti “Māori Customary Law”, above n 84, at 53.

¹³⁴ Durie “Will the Settlers Settle?”, above n 12, at 452.

¹³⁵ At 453.

¹³⁶ At 454.

¹³⁷ *Ibid.*

II *Mana Whenua Under Cook's Laws*

Whatungarongaro te tangata toitū te whenua
People are lost from sight but the land remains

In 1840, the Crown and over 500 rangatira signed the Treaty of Waitangi / Te Tiriti o Waitangi.¹³⁸ This marked the constitutional moment when the Crown started gaining exclusive sovereignty in New Zealand.¹³⁹ At common law, new regimes take power subject to pre-existing indigenous rights protected by the doctrine of aboriginal title.¹⁴⁰ The Treaty and the common law protected Māori land and resource rights as exercised by mana whenua until lawfully extinguished. But the Crown's sovereignty and land system have largely displaced mana whenua's customary rights, and ability to carry out ahikāroa. Most contemporary rights are statutory. This chapter looks at the position for mana whenua under Cook's laws and argues for a new statutory definition recognising mana whenua rights at 1840.

A *Erosion of Mana Whenua Customary Rights*

The English system of land law originated in Norman law, which featured a centralised, feudal nation-state with a hierarchical social structure.¹⁴¹ Under its system, the Crown is both sovereign and paramount landowner with all governmental authority within its jurisdiction.¹⁴² Individuals hold titles, derived from the Crown, in the form of estates like fee simple, from which they can parcel out various lesser rights.

¹³⁸ This document, signed between the Crown and some 500 *rangatira*, comprises three articles. The first article of the English version transfers 'sovereignty' from the *iwi* to the Crown, whereas the Māori version only transferred mere '*kawanatanga*' (governance) rights. The second article in English confers Māori full, exclusive and undisturbed possession of their lands, fisheries, forests, and other properties, and the Crown the right of pre-emption to lands which Māori wished to sell. Under the Māori version, however, the chiefs retained '*tino rangatiratanga*' over those interests. The third article in both versions accords Māori the same rights and privileges of British subjects.

¹³⁹ The Waitangi Tribunal found that the chiefs did not cede their sovereignty, only governance rights: *He Whakaputanga me te Tiriti*, above n 4, at xxii.

¹⁴⁰ *Symonds*, above n 6, at 390; *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [30]-[34].

¹⁴¹ *Symonds* at 388.

¹⁴² At 388.

This system lies in contrast to the Māori system, where all individual rights depended on the community. Yet Māori land tenure could not be extinguished “otherwise than by the free consent of the native occupiers”.¹⁴³ The Crown sought to introduce its national, formally recorded system to facilitate the exchange and capitalisation of land in a market economy and mass society.¹⁴⁴ However, it would not be a parallel system; the express goal was to assimilate one body of law within the other.¹⁴⁵ Customary title was transformed into Crown-derived title, facilitating the alienation of Māori from their land. This occurred in three principal ways, each sanctioned by the law: purchases of land by the Crown; war and confiscation; and the individualisation of title by the Native Land Court.¹⁴⁶

1 *Purchases of Land by the Crown*

Under Article 2, Māori granted the Crown a pre-emptive right to any lands they wished to sell.¹⁴⁷ Mason Durie explains that the clause’s dual purpose was to protect Māori from “unscrupulous dealers” and to “fund emigration by creating a price differential and providing a mechanism for colonisation”.¹⁴⁸ Orange argues, however, that its implications were not well understood by Māori, only seen as “a minor concession in return for the guarantee of complete Māori ownership”.¹⁴⁹

This left the Crown with a monopoly on land purchases from Māori. Yet, it was not in a financial position to act as an intermediate between Māori and the growing settler demand, delaying extinguishment of customary title.¹⁵⁰ In 1844, the Governor waived the Crown’s pre-emptive right, certifying direct transactions between Māori and settlers without Crown agency. But what happened when the Crown sought to reinstate its right by granting title to someone other than the owner who had purchased from Māori under the Crown’s waiver? In *R v Symonds*, the Supreme Court affirmed the existence of Māori customary

¹⁴³ At 390-391.

¹⁴⁴ See generally Mason Durie *Te Mana, Te Kawanatanga: The Politics of Māori Self Determination* (Oxford University Press, Auckland, 1998).

¹⁴⁵ At 116.

¹⁴⁶ At 117.

¹⁴⁷ The right has been suspended and resumed on several occasions, but it would not be finally abandoned until 1900. See further Native Land Purchase and Acquisition Act 1893, and the Māori Lands Administration Act 1900.

¹⁴⁸ Mason Durie *Te Mana, Te Kawanatanga*, above n 144, at 118.

¹⁴⁹ Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) at 100.

¹⁵⁰ Alan Ward *National Overview* (Waitangi Tribunal Rangahaua Whanui Series, 1997) at 110.

title and its protection under the law but held that only the Crown's grant of title could be recognised.¹⁵¹ Those who purchased from Māori under the waiver did so on the Crown's behalf.

That decision enabled the Crown to resume its pre-emptive right, and with British government financial support, it embarked on an active government purchase policy.¹⁵² Those purchases probably ignored Māori custom, as admitted by some Crown land agents, because it appeared "strange" that tribes would "base their pretensions" on mana when "Māori law is almost annihilated by European usages".¹⁵³ Waitangi Tribunal reports have found sales were often legally dubious.¹⁵⁴ But the purchase policy had the dual effect of transforming customary title into Crown title, and reducing the practice of long-term lease arrangements between Māori and settlers which "impeded the process of alienation".¹⁵⁵

2 Native Lands Legislation

In 1862, Parliament introduced the Native Lands Act 1862 which sought to assimilate Māori lands "as nearly as possible to the ownership of land according to British law".¹⁵⁶ In 1865, further legislation sought to "encourage the extinction of such proprietary customs".¹⁵⁷ It established the Native Land Court to ascertain who, as nearly as could be reconciled with native custom, should succeed to interests in Māori land.¹⁵⁸

The Court's work was problematic because the evidence before it may not have always been credible, partly in response to the Court's misunderstandings of Māori custom.¹⁵⁹ Further, the Government assured some tribes that surveys and investigations of their titles would not facilitate leases or sales.¹⁶⁰ But following such inquiries, customary rights were

¹⁵¹ Symonds, above n 6, at 390-391.

¹⁵² Mason Durie *Te Mana, Te Kawanatanga*, above n 144, at 118.

¹⁵³ Vincent O'Malley *Agents of Autonomy: Māori Committees in the 19th Century* (Huia Publishers, Wellington 1998) at 90-91.

¹⁵⁴ See for example, Waitangi Tribunal *Te Mana Whatu Ahuru: Report on the Te Rohe Pōtae Claims* (Wai 898, 2018).

¹⁵⁵ Mason Durie *Te Mana, Te Kawanatanga*, above n 144, at 118.

¹⁵⁶ Native Lands Act 1862, Preamble.

¹⁵⁷ Native Land Act 1865, Preamble.

¹⁵⁸ Section 30.

¹⁵⁹ See further in Chapter 3.

¹⁶⁰ O'Malley *Agents of Autonomy*, above n 153, at 86-87.

superseded by Crown grants as conclusive proof of ownership.¹⁶¹ Their rights were no longer communal, with a limit of 10 owners on a certificate of title, unless the block was over 5,000 acres which could be vested in a tribe.¹⁶²

The individualisation of title fractured tribal customary land interests, making them more amenable to a free market economy. Tribal consent to sale no longer had to be obtained, only that of individual (or group of 10) owners. As Ngāti Rangiwewehi chief Te Rangikaheke commented, “[m]en of no standing in the tribe began to lease or sell without the knowledge or consent of the acknowledged leaders of the people”.¹⁶³ Where consent remained unobtained, O’Malley describes that in the Arawa region, the Crown negotiated leases as a preliminary to purchase, and made advance payments to individuals “who would accept these in defiance of those seeking to maintain some form of tribal control” causing serious tribal rifts.¹⁶⁴ Further, “many owners were forced to sell their lands to repay financial debt incurred in the transaction process”.¹⁶⁵

Proposed kinds of alternative forms of resolution by runanga, which would have seen the tribes negotiate their boundaries between themselves and the Court ratify those decisions as a matter of form, were rejected.¹⁶⁶ The Crown set aside “consensus-based, mutually beneficial, and reciprocal solutions” in favour of their “combative, winner-takes-all forum”.¹⁶⁷ Because of the Court’s proceedings, “land was carved up at a rate of three-quarters of a million acres per year, and sold for a while at nearly the same rate”.¹⁶⁸

¹⁶¹ Native Lands Act 1862, s 12.

¹⁶² Native Land Act 1865, s 23.

¹⁶³ O’Malley *Agents of Autonomy*, above n 153, at 86-87.

¹⁶⁴ At 93.

¹⁶⁵ Jacinta Ruru, “Constitutional Indigenous Treaty Jurisprudence in New Zealand” in Patrick Macklem and Douglas Sanderson *From Recognition to Reconciliation: Essays on the Constitutional and Entrenchment of Aboriginal & Treaty Rights* (University of Toronto Press, Toronto, 2016) at 419.

¹⁶⁶ O’Malley *Agents of Autonomy*, above n 153, at 88.

¹⁶⁷ Jackson, Potiki and Ngata *The Findings of the Adjudication Panel*, above n 49, at 19.

¹⁶⁸ Durie “The Law and the Land”, above n 13, at 79.

3 Confiscation

Māori had opposed land alienation since shortly after the Treaty's signing, marked by Hone Heke chopping down British flagpoles on his land in 1844.¹⁶⁹ In 1863, Parliament passed the Suppression Rebellion Act which empowered the Governor to authorise “the most vigorous and effectual measures” to suppress “the Rebellion” across the colony.¹⁷⁰ The Crown then assumed a confiscation policy against tribes who resisted land sales and surveying. The New Zealand Settlements Act 1863 empowered the Governor to declare lands held by rebellious tribes to be ‘districts’ eligible as ‘settlements for colonisation’ and confiscate those lands for the Crown.¹⁷¹ Approximately 3.25 million acres were seized in this way in the North Island.¹⁷²

4 Repudiation of Aboriginal Rights by the Judiciary

Having been affirmed in *Symonds*, aboriginal rights as protected by the common law were subsequently repudiated by the judiciary during the same era. In *Wi Parata v Bishop of Wellington*, Prendergast CJ held that no such native custom existed, despite the Native Lands Act's express reference to the “Ancient Customs and Usages of the Native People”. He held that “a statute cannot call what is non-existent into being”.¹⁷³ Yet, tikanga was reflected in other legislation. For example, The Native Exemption Ordinance 1844 reflected aspects of the muru custom.¹⁷⁴ It provided that a Māori convicted of theft could pay four times the value of the stolen good instead of the usual punishment¹⁷⁵ and for crimes other than rape or murder, they could continue at large, and a deposit could be paid to the victim if the offender did not appear at trial.¹⁷⁶

Boast describes Prendergast's approach as “idiosyncratic, and cannot be used to typify the approach of the New Zealand legal system as a whole, or indeed of the time”.¹⁷⁷ The Privy

¹⁶⁹ See further Paul Moon *Ngapua: The Political Life of Hone Heke Ngapua*, MHR (David Ling Publishing, 2006).

¹⁷⁰ Suppression Rebellion Act 1863, s 2.

¹⁷¹ New Zealand Settlements Act 1863, s 4.

¹⁷² Mason Durie *Te Mana, Te Kawanatanga*, above n 144, at 119.

¹⁷³ *Wi Parata v Bishop of Wellington* (1877) 2 NZ Jur (NS) SC 72 at 79.

¹⁷⁴ Mikaere “The Treaty of Waitangi”, above n 2, at 377.

¹⁷⁵ Native Exemption Ordinance 1844 7 Vict 18, cl 7.

¹⁷⁶ Clauses 6 and 8.

¹⁷⁷ Boast “Māori Customary Law and Land Tenure”, above n 30, at 33.

Council in *Nireaha Tamaki v Baker* rejected Prendergast’s logic, stating that it was “rather late in the day” for the Courts to apply it.¹⁷⁸ In reaffirming the existence of customary rights, the Board observed it was the Court’s duty “to interpret the Statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence”.¹⁷⁹ However, in 1903, the judiciary and legal profession, led by Stout CJ, rejected the Privy Council’s reasoning in *Baker* and refused to apply it.¹⁸⁰ They restated Prendergast’s logic that “[a]ll lands of the Colony belonged to the Crown”.¹⁸¹ The Crown was the “root of all title” so it could not “recognise Native title”.¹⁸² It argued that under the Privy Council’s view, “no land title in the Colony would be safe”.¹⁸³ This reflects Mikaere’s observation that “the overwhelming response of the New Zealand legal system to tikanga Māori has indeed been typified, if not by complete denial, then at least by cynical pragmatism, and, ultimately, patronising intolerance”.¹⁸⁴

Even the aforementioned Native Exemption Ordinance reflected a broader assimilation strategy in its long term goal of bringing the “whole aboriginal native population” to a “ready obedience to the laws and customs of England”.¹⁸⁵ The Native Land Court’s determinations were conclusive, “valid and effectual... as grants made by the Governor of Waste or Demense Lands of the Crown and as if the land comprised therein had been ceded by the Native proprietors”.¹⁸⁶ The analogy to waste lands reinforced the notion that the Crown had gained sovereignty as if they had discovered New Zealand unencumbered.

Ultimately, Parliament passed the Land Titles Protection Act 1902, barring proceedings which challenged Crown grants of title older than 10 years.¹⁸⁷ This made challenges based on customary ownership virtually impossible since many lands had long been converted

¹⁷⁸ *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577 per Lord Davey.

¹⁷⁹ At 577-578.

¹⁸⁰ “*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903” [1840-1932] NZPCC Appendix 730. See further John William Tate “The Privy Council and Native Title: A Requiem for *Wi Parata*” (2004) 12 Waikato L Rev 99.

¹⁸¹ At 732.

¹⁸² At 746.

¹⁸³ *Ibid.*

¹⁸⁴ Mikaere “The Treaty of Waitangi”, above n 2, at 336.

¹⁸⁵ Native Exemption Ordinance 1844 7 Vict 18, Preamble.

¹⁸⁶ Native Lands Act 1865, s 23.

¹⁸⁷ Land Titles Protection Act 1902, s 2.

into individual Crown grants. Parliament has carried over this limitation in subsequent legislation to the present day.¹⁸⁸

5 Conclusion

The combined effect of these legislative, executive and judicial decisions was to displace many of the legal rights and duties of mana whenua. As Durie put it, “[t]he end result was that tribal authority and the communal Māori society, were finally destroyed”.¹⁸⁹ By 1896, only 11 million out of 66.5 million acres of land remained in Māori ownership, and a century later, that had dwindled further to just 3.5 million acres.¹⁹⁰ Of that, only 700 hectares in total is held by Māori according to custom.¹⁹¹

As a result, the Crown severed longstanding relationships with the land. This may have affected hapū at varying points and extents, but the common implication is that the Crown displaced the ultimate source of their authority and rights. Individualised title entailed enforceable property rights in land against others, but post-alienation, many would not have been able to exercise ahikā to the same extent. Previously hapū members would have had various use rights which derived from and depended on their kin, but now their rights derived from the Crown ‘sovereign’ to whom they were ultimately accountable. Therefore, mana whenua as a unified tribal unit could no longer exercise rangatiratanga over its land, resources and people, nor could it traditionally maintain ahikāroa.

B ‘By the Grace of Statute’ – Contemporary Mana Whenua Rights

McHugh observed that “Māori custom obtains legal status in the Pākehā system by the grace of statute”.¹⁹² Seven Acts of Parliament refer to mana whenua, according them contemporary rights and interests under environment, resource management, local

¹⁸⁸ See the Native Land Act 1909, ss 84-93; the Māori Affairs Act 1953, pt XIV; Te Ture Whenua Māori/Māori Land Act 1993, s 348; and the Limitation Act 2010, s 28.

¹⁸⁹ Durie “The Law and the Land”, above n 13, at 79.

¹⁹⁰ Mason Durie *Te Mana, Te Kawanatanga*, above n 144, at 120.

¹⁹¹ Māori Land Court “Your Māori Land” <<https://Māorilandcourt.govt.nz/your-Māori-land/>>.

¹⁹² Paul McHugh *The Māori Magna Carta* (Auckland, Oxford University Press, 1991) at 95. He excepts aboriginal title claims which have not yet been statutorily extinguished, but very little land is held by customary ownership now.

government, and Treaty of Waitangi settlement legislation.¹⁹³ There is also emerging jurisprudence for procedural and substantive rights under administrative law in the settlements sphere.

1 Environmental and Resource Management Legislation

Mana whenua's authority over environmental and resource management matters has been subordinated to a mere consultative, kaitiakitanga role or relevant consideration. For example, where Māori would have once had the customary authority to enforce rāhui over certain lands, now that is a Crown decision "having regard" to mana whenua.¹⁹⁴ Resource consent applicants may consult with mana whenua, but consultation is expressly not required.¹⁹⁵ The Resource Management Act 1991 also provides indirect recognition of mana whenua interests by overarching provisions recognising the Māori relationship to lands, waters, waahi tapu and other taonga,¹⁹⁶ kaitiakitanga,¹⁹⁷ and Treaty principles.¹⁹⁸ But as Ruru pointed out, at least where water is concerned, the courts have tended to balance out Māori concerns in favour of competing economic and social considerations.¹⁹⁹

¹⁹³ Catherine Iorns Magallanes, "The Use of Tangata Whenua and Mana Whenua in New Zealand Legislation: Attempts at Cultural Recognition" (2010) NZACL Yearbook 83 at 97. Aside from specific settlement legislation, these are the Resource Management Act 1991, the Fisheries Act 1996, and Local Government (Auckland Council) Act 2009 (as inserted in a 2010 amendment). The Local Government (Tamaki Makaurau Reorganisation) Act 2009 also used "mana whenua" but is now repealed. The Reserves Act 1977 and the Conservation Act 1987, both refer to "manawhenua" inserted in 1993 amendments, as does the Walking Access Act 2008. The Māori Fisheries Act 2004, sch 4 refers to proper names of Māori authorities which include "Manawhenua" in their titles. Magallanes argues, and I agree, that the inconsistent spelling of the terms should be corrected.

¹⁹⁴ Reserves Act 1977, s 77A(1)(c).

¹⁹⁵ Resource Management Act 1991, s 36A. See, for example, *Te Kura Pukeroa Māori Inc v Thames-Coromandel District Council* (NZEnvC W069/07, 5 September 2007). Consultation will usually occur to avoid litigation, and because an assessment of effects requires identification of people affected by the activity, any consultation undertaken, and their responses to that consultation: see sch 4, cl 6(f).

¹⁹⁶ Section 6(e).

¹⁹⁷ Section 7(a).

¹⁹⁸ Section 8.

¹⁹⁹ Jacinta Ruru "The Failing Modern Jurisprudence of the Treaty of Waitangi" in Mark Hickford and Carwyn Jones *Indigenous Peoples and the State* (Routledge, London, 2018) at 118-121.

Express provisions enable the transfer of powers,²⁰⁰ the formation of joint-management agreements²⁰¹ or Mana Whakahono ā Rohe.²⁰² Local authority powers have only been transferred once (in 2020) by transferring water quality monitoring functions from the Waikato Regional Council to the Tūwharetoa Māori Trust Board.²⁰³ Joint management agreements have been used comparatively more, although these may have limited scope. For example, in 2009, Taupo District Council and Tūwharetoa agreed to jointly decide on notified consents or plan changes applicable to multiply owned Māori land. But it is only optional for applicants to be heard by the panel, meaning Council members “do not have to worry about getting voted out of their positions for “forcing” a potentially unpopular administrative procedure on an unwilling population”.²⁰⁴ Limited post-settlement co-management regimes provide co-equal authority with the Crown in managing some freshwater, but this gives Māori a more kaitiakitanga role, rather than enabling economic development as they customarily did.²⁰⁵

Another issue with the Resource Management Act, however, is that it conflates several technically different Māori groups. Mana whenua is treated as being exercised by tangata whenua,²⁰⁶ and sometimes, “iwi authorities” are treated as representing tangata whenua²⁰⁷ in consultation for national²⁰⁸ and regional policy statements,²⁰⁹ or regional or district plans.²¹⁰

Further, the Environment Court is reluctant to determine disputes of mana whenua status. Although they did in *Ngāi Te Hapū v Bay of Plenty Regional Council*,²¹¹ the court’s usual

²⁰⁰ Section 33.

²⁰¹ Section 36B.

²⁰² Section 58M.

²⁰³ Waikato Regional Council, “Go-ahead to transfer functions to iwi authority a New Zealand first” (30 July 2020) <<https://www.waikatoregion.govt.nz/community/whats-happening/news/media-releases/go-ahead-to-transfer-functions-to-iwi-authority-a-new-zealand-first/>>.

²⁰⁴ Natalie Coates, “Joint-Management Agreements in New Zealand: Simply Empty Promises?” (2009) 13(1) *Journal of South Pacific Law* 32 at 39.

²⁰⁵ Such as Te Arawa Lakes, Te Waihora (Lake Ellesmere), and the Waikato and Waipa Rivers.

²⁰⁶ Resource Management Act 1991, s 2.

²⁰⁷ Schedule 1, cl 3. The Reserves Act 1977, Walking Access Act 2008, and Conservation Act 1987 do not define *mana whenua* in relation to *mana whenua*.

²⁰⁸ Resource Management Act 1991, s 46.

²⁰⁹ Section 61(2A)(a).

²¹⁰ Sections 66(2A)(a) and 74(2A).

²¹¹ *Ngāi Te Hapū Incorporated & Anor v Bay of Plenty Regional Council* [2017] NZEnvC 073. Discussed further in Chapter 3.

approach is “if a party asserts this status to the Court, it is accepted”.²¹² Its focus is on the relevant cultural measures under ss 6(e), 7(a) and 8 of the Resource Management Act, which requires consideration of multiple affected groups rather than according to status per se.²¹³ So for example, in *Tūwharetoa Māori Trust Board v Waikato Regional Council*, its finding that an impugned site fell within the iwi’s rohe did not determine who held mana whenua at the site.²¹⁴ Even evidence of title from the Native Land Court to a different tribe was not determinative because they “turn on different kinds of relationships than matters of title”.²¹⁵ The Court has also rejected determining primacy of mana whenua, because “[s]uch a question does not reflect the potential for there to be many layers of differing interests, some strong, some weak, and some in between”. They have acknowledged, however, that primacy or exclusivity might be found,²¹⁶ and have jurisdiction to determine the relative strengths of iwi/hapū relationships in an area affected by a proposal.²¹⁷ However, the latest RMA review noted that local authorities had difficulty in identifying mana whenua interests in view of the complexity.²¹⁸

2 Independent Māori Statutory Board

Mana whenua in the Auckland area have an advisory capacity to the Auckland Council. The city is highly urbanised and economically valuable, which also created “dense layers of interests” among hapū traditionally.²¹⁹ Parliament established the Independent Māori Statutory Board to provide advice on the views of both mana whenua²²⁰ and mataawaka.²²¹ This is the first legislative use of the term “mataawaka”, defined as “Māori who (a) live in

²¹² *Auckland Council v Auckland Council* [2011] NZEnvC 77 at [35]. See further *Luston v Bay of Plenty Regional Council* A 49/94; *Paihia v Northland Regional Council* A77/95 (EC); *Tawa v Bay of Plenty Regional Council* A18/95 (EC); *Te Pairi v Gisborne District Council* W93/04 (EC).

²¹³ Gerald Lanning, “Reconciling “Layers of Māori Interest” *Resource Management Bulletin* (online ed, March 2020) at 73.

²¹⁴ *Tūwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZRMA 520 at [139].

²¹⁵ At [45].

²¹⁶ *Ngāti Whātua Orākei Whai Maia Ltd v Auckland Council* [2019] NZEnvC 184 at [84].

²¹⁷ At [88].

²¹⁸ Ministry for the Environment *New Directions for Resource Management in New Zealand*, above n 10, at 92.

²¹⁹ Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 13.

²²⁰ See the narrower definition of “mana whenua group” in Local Government (Auckland Council) Act 2009, s 4.

²²¹ Part 7.

Auckland, and (b) are not in a mana whenua group”.²²² The Board has nine members sitting for three-year terms,²²³ seven of which are mana whenua representatives, and the remaining two for mataawaka.²²⁴

The Royal Commission on Auckland Governance deliberately drew this distinction. They defined mana whenua as “local Māori with ancestral ties to the region”²²⁵ or “Māori who have ancestral rights to occupy the Auckland region or part of it; namely, their tribal rohe falls within the Auckland region”.²²⁶ These groups stand in contrast to non-mana whenua groups who were defined as “Māori who may live in a certain area but have ancestral ties to another region”.²²⁷ That definition also mentioned their ‘loose’ description as urban Māori, who “greatly outnumber mana whenua Māori”.²²⁸

This approach accords with the *Rekohu* Tribunal’s view that if legislation intends to hear from particular Māori communities, especially with ancestral links, “then it would be best to describe the type of community be it traditional or modern”.²²⁹ But the Commission’s specific ancestral delineations were not included in the final legislation. As Magallanes notes, the courts can use the Commission’s findings as an extrinsic interpretive aid but such materials “are not as reliable as later sources, mainly because government and parliamentary purposes may have changed since such reports, so that the resulting legislation might not reflect the reform recommendations”.²³⁰

But the Board’s establishment is significant because mana whenua have a clear majority, so will lead the Board’s opinion. They also appoint mataawaka representatives, which is consistent with primary authority belonging to mana whenua. The Board is positive in terms of Treaty principles because it enables the Crown to be more informed of Māori

²²² Section 4.

²²³ Schedule 2, cl 9(1).

²²⁴ Schedule 2, cl 1.

²²⁵ Peter Salmon, Margaret Bazley and David Shand *Report of the Royal Commission on Auckland Governance* (2009) at [22.6].

²²⁶ At [22.11].

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ Waitangi Tribunal *Rekohu*, above n 46, at [26]-[27].

²³⁰ Magallanes “The Use of Tangata Whenua and Mana Whenua”, above n 47, at 96. She offers the example where the Commission recommended the establishment of three seats to be reserved for Māori representatives (two elected by Māori roll voters, and one appointed by mana whenua). But that proposal was politically controversial and was not adopted in the legislation.

views. However, the Board's influence is ultimately subject to the attitude of an elected Council. Some have criticised the Board for under-representing mataawaka, since 'urban Māori' represent close to 90% of Auckland's population.²³¹

3 Treaty of Waitangi Settlements

Mana whenua plays a significant role in Treaty settlements. The first significant Treaty settlement involved the fisheries which, as Cooke P observed, was "much influenced by the principle mana whenua mana moana".²³² The Māori Land Court has jurisdiction to determine tribal coastlines under customary ownership for settlement.²³³ Mana whenua participate in the content of sustainability measures under the quota management system,²³⁴ and the Minister of Fisheries can make special arrangements for customary non-commercial fishing, including steps for kaitiaki to "make bylaws restricting or prohibiting the taking of fish, aquatic life or seaweed".²³⁵ They may also restrict fishing methods harmful to customary practices.²³⁶

Mana whenua is also the crucial factor determining the return of some 176,000 hectares of exotic pine forests, worth over \$500 million, under the 'Treelords' settlement.²³⁷ The Central North Island Collective Settlement Act 2008 includes a tikanga-based dispute resolution process where there are overlapping claims,²³⁸ because:²³⁹

The Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. These groups are able to negotiate their own settlements with the Crown. Nor is it intended that the Crown will resolve the question

²³¹ Willie Jackson, "Independent Māori Statutory Board" *Waatea News* (online ed, 2 December 2014). See also his successful challenge to the selection process for failing to account for mataawaka views in appointing mataawaka representatives: *Jackson v Te Rangi* [2014] NZHC 2918, and *Te Rangi v Jackson* [2015] NZCA 490 (appeal dismissed).

²³² *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika Association* [1996] 3 NZLR 10 (CA) at 15 per Cooke P.

²³³ Māori Fisheries Act 2004, s 182(4).

²³⁴ Fisheries Act 1996, ss 12(1)(b), 25(3)(c), 115 and 116.

²³⁵ Section 186.

²³⁶ Sections 186A and 186B.

²³⁷ Wiri "Mana Whenua and the Settlement", above n 42, at 1.

²³⁸ Central North Island Collective Settlement Act 2008, sch 2.

²³⁹ Office of Treaty Settlements *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington, 2018) at 53.

of which claimant group has the predominant interest in a general area. That is a matter that can only be resolved by those groups themselves.

This policy has had a profound effect on the Auckland isthmus. To avoid overlapping claims and layers of interest, Parliament granted all settling iwi a rotating right of first refusal to Crown-owned properties in Auckland.²⁴⁰ Ngāti Whātua brought proceedings challenging the Minister of Treaty of Waitangi Negotiations' proposal to take land out of the right-of-first-refusal pool to apply it to a new settlement with Ngāti Paua and Marutūāhu.²⁴¹ The decision would only take effect upon statutory ratification of the Deed of Settlement, which raised questions of non-interference in parliamentary proceedings. Ngāti Whātua sought declarations that the Crown's overlapping claims policy, and the Minister's decision, were unlawful because transferring lands to other hapū would breach their mana whenua, maintained by their ongoing ahikā.²⁴² They argued the Crown owed procedural duties to consult them on the proposed transfer.²⁴³

Both the High Court and Court of Appeal struck out the proceedings because it interfered in parliamentary proceedings.²⁴⁴ The Court of Appeal there were "no justiciable rights" affected by the decisions taken "in the development of legislative proposals".²⁴⁵ In the Supreme Court, the parties accepted Ngāti Whātua could advance a claim based on customary rights.²⁴⁶ They cautioned the extent to which past cases applied the non-interference principle in this context:²⁴⁷

It would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice to take the advice leading up to that decision out of the reach of supervision by the courts. That would be to ignore the function of the courts to make declarations as to rights.

Here, Ngāti Whātua was not challenging legislative proposals:²⁴⁸

²⁴⁰ Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 120.

²⁴¹ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84 [*Ngāti Whātua Ōrākei* (SC)].

²⁴² At [23].

²⁴³ At [26].

²⁴⁴ See *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516, and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648 [*Ngāti Whātua Ōrākei* (CA)].

²⁴⁵ *Ngāti Whātua Ōrākei* (CA) at [95] per Kós P, Cooper and Asher JJ.

²⁴⁶ *Ngāti Whātua Ōrākei* (SC), above n 241, at [34].

²⁴⁷ At [46]. See also [113] per Elias CJ (partly concurring, partly dissenting).

²⁴⁸ At [48].

Rather, there are live issues as to the nature and scope of the rights claimed which Ngāti Whātua Ōrākei should be permitted to pursue in the usual way.

So, in allowing the appeal in part, the Court found it was open for Ngāti Whātua to argue at trial that both the Minister’s decisions and the overlapping claims policy breached their mana whenua, tikanga and settlement rights.²⁴⁹

This case marks a departure from previous approaches to the separation of powers in the Treaty settlements context. In *Milroy v Attorney-General*, Tuhoe challenged a proposed settlement between the Crown and Ngāti Awa over lands at which they were cross-claimants.²⁵⁰ The Court found that “no rights” were affected by the decision taken on officials’ advice.²⁵¹ But in *Port Nicholson Block Settlement Trust v Attorney-General*, Williams J found jurisdiction to construe rights to different iwi under the relevant Deed.²⁵² He said that “[u]nlike the way the case appears to have been pitched in *Milroy*, there are rights at issue here... [t]here is a satisfactory legal yardstick that a court can utilise in resolving the controversy”.²⁵³ He considered the Crown should not be the “sole arbiter of its own justice” when justiciable questions of statutory or Deed interpretation arose, “or indeed of customary law if properly pleaded”.²⁵⁴ Perhaps if Tuhoe based their challenge in *Milroy* as a breach of their mana whenua, it might have been decided differently.²⁵⁵

Therefore, depending on the outcome at trial, the Minister may be under duties to consult mana whenua on proposed transfers of Crown lands where they are affected. As Elias CJ stated, “giving greater significance to mana whenua rights based on tikanga, [may] invite greater scrutiny of Ministerial decisions in this area”.²⁵⁶ This may also demand substantive, not just procedural, outcomes. The Supreme Court recently held in *Ngāi Tai ki Tamaki v Minister of Conservation* that the Conservation Act’s Treaty clause was “powerful”,

²⁴⁹ At [59].

²⁵⁰ *Milroy v Attorney-General* [2005] NZAR 562.

²⁵¹ At [11].

²⁵² *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181.

²⁵³ At [62].

²⁵⁴ At [63].

²⁵⁵ Note the Court’s hint at this in *Ngāti Whātua Ōrākei* (SC), above n 241, at [46].

²⁵⁶ At [92].

requiring not just procedural steps, but sometimes substantive outcomes too.²⁵⁷ One way to “give effect” to the principles was to enable reconnection to ancestral lands,²⁵⁸ but this did not create a general power of veto for mana whenua.²⁵⁹ It may be, therefore, that as new cases emerge, mana whenua could receive greater recognition under administrative law where legislation allows, as distinct from the currently limited forms of statutory mana whenua rights.

C Problems in Incorporating Tikanga Concepts in Statute

It is important that tikanga is included in statute to reflect its relevance across many different areas of law. As the Law Commission noted nearly 20 years ago, “there has been a steady increase in Māori terms used in statutes”.²⁶⁰ However, there are some difficulties in this ‘blending’ process. Statutory language may not convey the nuance and complexity of indigenous concepts, which risks fossilising tikanga concepts simplistically or incorrectly. Parliament did not include the ancestral delineations justifying the mana whenua/mataawaka distinctions in the Local Government (Auckland Council) Act 2009.²⁶¹ And in many cases, English definitions may not correspond well to the Māori concept. There is a risk that Māori concepts are inevitably heard in their English meaning.²⁶²

The statutory definition of mana whenua, which settles on “Māori customary authority” causes such difficulties. It makes no reference to the concept’s tipuna and ahikā bases

²⁵⁷ *Ngāi Tai ki Tamaki v Minister of Conservation* [2018] NZSC 122 at [52(a)]. See Conservation Act 1986, s 4 (“This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”).

²⁵⁸ At [52(c)].

²⁵⁹ At [95].

²⁶⁰ Ministry of Justice *He Hinatore ki to Ao Māori: A Glimpse into the Māori World* (Ministry of Justice, 2001) at iii.

²⁶¹ Magallanes “The Use of Tangata Whenua and Mana Whenua”, above n 47, at 96.

²⁶² At 84. She refers to Metge’s example of the word “kaumatua”, which tends to be translated as meaning “elder”. This tends to mislead people into thinking that old age is a fundamental requirement to be a kaumatua. But as Metge notes, age is probably the “least essential” requirement in the five components of the kaumatua concept: “age plus social seniority plus life experience plus wisdom gained from reflecting thereon plus current occupancy of a position as leader to a group”: see Joan Metge “Commentary on Judge Durie’s Custom Law” (paper prepared for the Law Commission’s Customary Law Guidelines project, 1996) at [2.4] and [6.4.4].

which combines whakapapa (genealogy) with territoriality.²⁶³ The Tribunal noted it was problematic to link mana whenua to tangata whenua because the latter was not customarily used to describe political power and so cannot be defined “by asking who has customary authority in a place”.²⁶⁴ The current definition also impliedly limits customary mana whenua rights in diluting it to mere “authority” when it traditionally entailed rights of tino rangatiratanga. This demonstrates Jackson’s point that “our tikanga has been diminished and constrained by the labels of colonisation”.²⁶⁵

Another problem is that its statutory treatment may not reflect the layers of mana whenua interests of different hapū in a location, as avoided with the rotating right of first refusal.²⁶⁶ The Settlement Act lists just 13 distinct groups; all deemed to be “ngā mana whenua o Tāmaki Makaurau”.²⁶⁷ But this treats all the iwi and hapū listed as having the same status, without the nuance of the relative strengths and dominance between the groups. As Williams J has commented in *Port Nicholson*:²⁶⁸

The problem with statutory acknowledgements and deeds of recognition in the modern era is that they do not reflect the sophisticated hierarchy of interests provided for by Māori custom. They have the effect of flattening out interests as if all are equal, just as the Native Land Court did 150 years ago. In short, modern RMA-based acknowledgements dumb down tikanga Māori.

Despite these challenges, there is clear utility in having statutory definitions for tikanga concepts. They may bring certainty to indigenous concepts that may not be as well understood by judges who rely on their linguistic competence to interpret statutes.²⁶⁹ This avoids litigation on terms. For example, whether Urban Māori Authorities fell within the

²⁶³ Nin Tomas “Key concepts of tikanga Māori (Māori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, University of Auckland, 2006) at 91-92.

²⁶⁴ Waitangi Tribunal *Rekohu*, above n 46, at 26.

²⁶⁵ Moana Jackson, “Labels, Reality and Kiri Te Kanawa: The Origins of the Culture of Colonisation and their Influence on Tikanga Māori” (paper presented at the Mai I te Ata Hapara Conference, Te Wananga o Raukawa, Otaki, 2000) at 8-9.

²⁶⁶ Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 120.

²⁶⁷ Section 9.

²⁶⁸ *Port Nicholson*, above n 252, at [95] per Williams J.

²⁶⁹ Magallanes “The Use of Tangata Whenua and Mana Whenua”, above n 47, at 98.

definition of “iwi” to receive a portion of the Fisheries Settlement.²⁷⁰ Not only was that litigation extensive, but it also raised dangers of trying to define ‘iwi’ rather than ‘hapū’ as the core unit of Māori society.²⁷¹ Each has unique histories, populations, geography, aspirations, and notions of tino rangatiratanga and mana motuhake.²⁷² These issues demonstrate the importance of providing statutory definitions that are accurate, detailed, and culturally authentic. As Durie has commented:²⁷³

Many colonists perceived Māori law in the light of the Western system. Analogies assisted their understanding but distorted the reality. Māori law now has to be revised in its own cultural terms.

Where possible, it would be desirable for the Crown to partner with Māori to develop statutory definitions, to enhance authenticity and avoid shifting definitional issues to the Court.

D The Randerson Review and a New Statutory Definition for “Mana Whenua”

In 2020, a panel chaired by former Court of Appeal judge the Hon. Tony Randerson QC, reviewed the Resource Management Act 1991. They noted that mana whenua engagement has often been “inconsistent and ineffective”, treated as a “tick-box exercise”.²⁷⁴ Local authorities and consent applicants find it difficult to know which mana whenua groups should be engaged.²⁷⁵ They made several recommendations to improve mana whenua engagement, including repealing and replacing the current definitions of “iwi authority”

²⁷⁰ See *Te Runanga o Muriwhenua*, above n 232; *Treaty Tribes Coalition, Te Runanga o Ngāti Porou & Tainui Māori Trust v Urban Māori Authorities* [1997] 1 NZLR 513 (PC); *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285; and *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17 (PC). On Urban Māori Authorities, see generally Pare Keiha and Paul Moon, “The Emergence and Evolution of Urban Māori Authorities: A Response to Māori Urbanisation” (2008) 1 *Te Kaharoa* 1.

²⁷¹ Erueti “Māori Customary Law”, above n 84, at 51. Settlement assets were to be distributed to iwi because of the Crown’s stated preference to negotiate with “large natural groupings”. See Office of Treaty Settlements *Healing the Past*, above n 239, at 27.

²⁷² Te Aho “Contemporary Issues in Māori Law And Society”, above n 45, at 117.

²⁷³ Durie *Custom Law*, above n 34, at 1-3.

²⁷⁴ Ministry for the Environment *New Directions for Resource Management*, above n 10, at 91.

²⁷⁵ At 88.

and “tangata whenua” with a new meaning for mana whenua. The proposed Natural and Built Environments Act would define mana whenua as:²⁷⁶

an iwi or hapū or whānau that exercises customary authority in an identified area.

There are two substantive differences from the current definition. Although slight, they raise the potential for inconsistencies with tikanga conceptions of mana whenua.

The first is that it would include ‘whānau’ as being able to exercise mana whenua. Under tikanga, however, mana whenua was collectively held by hapū as the core societal unit, to which whānau were responsible. This extension may cause further disputes, since there are many more whānau than hapū so that mana whenua views may become more split than at the hapū or iwi level. It also risks creating further overlapping interests because many Māori families can claim multiple whakapapa connections.

The second difference is the change from past to present tense (“exercised” to “exercises”). That raises a temporal problem because it risks conflicting with the ‘1840 Rule’:²⁷⁷

1. After 1840, no rights could be acquired by force.
2. No later assertion of rights could be upheld which did not have the consent of those who were the dominant occupiers at 1840.
3. Lack of occupation did not destroy a claim which was valid at 1840.
4. The dominant occupiers at 1840 could voluntarily dispose of their rights or admit other persons to ownership.

The new definition could exclude hapū and iwi who ‘exercised’ mana whenua at 1840, but who no longer exercise sufficient ahikā to demonstrate a contemporary ‘exercise’. But as some tribes would not have been able to continue the same level of occupation because of alienation of their land post-1840, it risks causing unjust outcomes. For example, one tribe may have had mana whenua at 1840, but had their land awarded to a different (and wrong) tribe by a Native Land Court order or the Crown. They could not strictly maintain occupation against the new private property rights, while new tribes may have developed new connections over that land.

²⁷⁶ At 95. Compare current definition as “customary authority exercised by an iwi or hapū in an identified area”: Resource Management Act 1991, s 2.

²⁷⁷ Waitangi Tribunal *Rekohu*, above n 46, at 132.

Further, hapū and iwi who did not exercise mana whenua at 1840 may now be recognised as such because of their contemporary ‘exercise’ of it. Ahikā evidence might show this, such as marae building, or use of land for certain purposes. Since the Native Land Court made its determinations over 150 years ago, there is a strong chance that new groups could have occupied new lands and developed ancestral links to them as well.

This is fundamental because either the law recognises customary interests at 1840, or it recognises those customary interests to the extent that hapū currently exercise them. Although the latter approach would recognise the evolution of traditional rights, it is problematic in Treaty terms because Article 2 of the Treaty guaranteed tribes their tino rangatiratanga. 1840 marked the critical date triggering the aboriginal title protection. The proposed definition risks undermining their recognition. It may become more important because while the Environment Court is principally concerned now with matters in ss 6(e), 7(a) and 8, the proposed reforms would replace tangata whenua and iwi authorities with mana whenua. If there are powers, joint-management agreements, or iwi participation agreements at stake, mana whenua status may become more contested.

A more tikanga- and Treaty-consistent approach would recognise mana whenua interests as they were at 1840, but identify new groups as mataawaka, similar to the approach taken in the Local Government (Auckland Council) Act 2009. A new statutory definition across all relevant contexts could be:

- (1) **Mana whenua** means the one or more iwi or hapū who exercised customary authority or rangatiratanga over land and resources as at 6 February 1840 within an identified area on the basis of take tipuna and take ahikāroa.
 - a) **Take tipuna** means the customary right to land tenure under tikanga Māori based on ancestral connections to an identified area.
 - b) **Take ahikāroa** means the customary right to land tenure under tikanga Māori based on the requirement for continued occupation in the identified area where mana whenua rights are claimed.
- (2) **Mataawaka** means those iwi or hapū who have exercised acts of take ahikāroa on lands after 6 February 1840 which were customarily held by mana whenua.
- (3) In exercising all relevant powers and functions under the Act, mana whenua takes precedence to mataawaka, unless mana whenua agree otherwise.

This approach reconciles both the interests of mana whenua and those living in that rohe without mana whenua connection. It recognises the fundamental requirements of take tipuna and ahikāroa in 1840. Delineating interests in this way improves certainty, because

they will only need to be determined once. A key criticism against this approach will be that it risks ‘fossilising’ tikanga when it is dynamic, flexible and evolving.²⁷⁸ As the Waitangi Tribunal explained:²⁷⁹

[M]ana is personal to persons or to people, and it comes and goes – it is not an institutional power given by history and then entrenched for all time. Were it the case that mana is irretrievably lost by conquest and enslavement, then many tribe, including Ngati Mutunga, would have no mana today. If it were true that mana went for all time when people were displaced from the land, then most Maori would be without mana today in light of the land losses and the outcome of the wars that followed European colonisation.

But it is precisely because of the post-1840 effect that mana whenua interests must be preserved at 1840. That avoids the multi-faceted ways in which Māori were dispossessed of the source of mana whenua and the subsequent effect of new groups. Hapū and decisionmakers could treat 1840 as a benchmark date, or a qualifying point when mana whenua interests can arise.²⁸⁰ Claims at that point should be the predominant reflection of the relative strengths of iwi, although subsequent acts could “feather” it to inform the assessment of relative strengths between other 1840 rights holders.²⁸¹ But any effect should only reflect voluntary hapū acts that may affect their status under tikanga (e.g., voluntary abandonment). Involuntary consequences, such as confiscation or inconsistent Crown title, should not affect the primary assessment of strengths at 1840. In the High Court, Collins J appeared to accept the proposition that while a Court or the Crown can recognise mana whenua, “they cannot confer or take away mana whenua”.²⁸²

Subsequent groups that have interests post 1840 should be recognised as mataawaka to account for modern day interests in land within a mana whenua’s rohe. But they must be subject to the primary rights of mana whenua if the 1840 guarantee is to be meaningful. Under tikanga, the rights to people external to the hapū depended on mana whenua consent.

²⁷⁸ Hirini Moko Mead “The Nature of Tikanga” (paper presented at Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 2000) at 16.

²⁷⁹ Waitangi Tribunal *Rekohu*, above n 46, at 27.

²⁸⁰ I note that the Local Government (Auckland Council) Act 2009 defines “mana whenua group” as one that “exercises historical and continuing mana whenua”, which implies that 1840 is the benchmark date to qualify as *mana whenua*.

²⁸¹ See further *Te Ohu Kaimoana Trustee Ltd v Te Rūnanga Nui o Te Aupōuri* (2015) 102 Taitokerau MB 2 (78 TTK 112) at [87], where Judge Doogan took a similar view in outlining provisional guidance and factors for disputes over tribal coastlines for the purposes of the Fisheries Settlement.

²⁸² *Kamo*, above n 81, at [77].

E Conclusion

When the Crown introduced British land law principles to New Zealand, they were inconsistent with principles of land tenure under tikanga. Instead of individual hapū authority sourced from longstanding relationships with the land, now the Crown had sovereignty. Its policies dispossessed Māori of their land by assimilating customary title into a system that gave them a redefined, individual right. With sovereignty, governance and land superseded by legislation, traditional mana whenua rights were virtually extinguished. They depend on the ‘grace of statute’. But contemporary rights have diminished their role to mere consultation or advice (aside from the return of property by Treaty settlement). Parliament should give further recognition to mana whenua and tikanga to evolve towards a more certain ‘Third Law’ of Aotearoa. But many concepts, including mana whenua, are insufficiently nuanced, omitting layers of interests. A new, consistent, authentic definition for mana whenua should recognise those nuances and the bases of take whenua. It should also preserve rights in 1840 to respect the guarantee of tino rangatiratanga. Groups that have formed new relationships on mana whenua lands could be recognised as mataawaka where necessary, but subject to mana whenua primacy.

III Resolving Mana Whenua Disputes under Aotearoa New Zealand's Third Law

Ko te kai a te rangatira he kōrero
The food of chiefs is dialogue

An approach that blends the roles of Kupe and Cook's laws and processes could resolve these questions in a way that respects and upholds the place of tikanga in the law's future. In contemporary Aotearoa New Zealand, identifying who mana whenua are can be a complex issue. There may be overlapping layers of interests without clear or exclusive boundaries of authority in the Western sense.

A Challenges for Legal Positivism in Mana Whenua Disputes

With a system as fluid as tikanga, there may be inconsistencies with a broadly positivistic legal system which values certainty, predictability and the rule of law. Mana whenua disputes bring forth clashes between legal traditions.

1 Lack of Definitive Boundaries in Western Sense

The first challenge is that there were not certain boundaries (in the Western sense) when one group's mana whenua began to enable clear allocation of rights. Because the land was not divided into exclusive parts, different groups could share resources and mana whenua in the same location.²⁸³ That is not to say that people at the time did not know the bounds of their authority. White stated that Māori knew "with as much certainty as the exact boundary of his land as [Pakehā] could do from the distances and bearings given by a surveyor".²⁸⁴ This knowledge was passed intergenerationally.²⁸⁵ Large natural landmarks like streams or mountains (waewae kapiti) provided larger, general signifiers of the land-

²⁸³ Meredith *Mana Whenua, Mana Moana*, above n 60, at 17-18 as cited in Mead *Tikanga Māori*, above n 3, at 230.

²⁸⁴ White *Māori Customs*, above n 72, at 185.

²⁸⁵ Firth *Primitive Economics*, above n 16, at 383-384.

people relationship. Further, hapū laid down certain marks to demarcate territory, including paenga,²⁸⁶ pokapoka,²⁸⁷ and pou paenga.²⁸⁸

2 Problems with Evidence

A second challenge is that evidence of customary use rights may not be easily distinguished from proof of occupation. As Erueti explains, “competing claims of rights [to resources] coupled with the intricate system of overlapping and intersecting rights held by members of different kinship groups makes it difficult to say who “owned” the land, or waters of lakes, lagoons, rivers, and the open seas”.²⁸⁹ However, rights of use is a separate question from the boundaries of a hapū’s territory. One tribe may have use rights in another’s rohe, but that does not mean it is part of their territory over which they have mana whenua. There were also rights analogous to an easement, called pou rāhui, which provided “corridors of access” for neighbouring iwi to access food resources.²⁹⁰ The Adjudication Panel also found that the common use of huarahi²⁹¹ did not give rise to mana whenua, analogising to powhiri in which manuhiri do not gain mana whenua from mere access to the land.²⁹² So rights of use cannot per se demonstrate mana whenua, although it may show inter-tribal relationships providing evidence of belonging to the area.

There may also be a lack of primary evidence from 1840, or earlier events, relevant to the inquiry, mainly because these customs were exercised amongst a predominantly oral culture. For example, evidence of ancestral significance might be challenging to ascertain, as the Environment Court found in one case, being unable to decide whether certain lands were waahi tapu because of competing views on whether an ancestor was buried there.²⁹³ However, in *Ngāi Te Hapū*, responding to the notion that the lack of written evidence weakened the strength of oral evidence, it said:²⁹⁴

²⁸⁶ ‘Lines of flat boulders’.

²⁸⁷ ‘Holes or pits’.

²⁸⁸ ‘Carved posts’. Firth *Primitive Economics*, above n 3, at 383-384.

²⁸⁹ Erueti “Māori Customary Law”, above n 84, at 43.

²⁹⁰ Wiri “Mana Whenua and the Settlement”, above n 42, at 5.

²⁹¹ ‘Roads’.

²⁹² Jackson, Potiki and Ngata *The Findings of the Adjudication Panel*, above n 49, at 29.

²⁹³ *Heybridge Developments Limited v Western Bay of Plenty District Council* EC Tauranga A231/2002 at [58]-[59].

²⁹⁴ *Ngāi Te Hapū*, above n 211, at [37].

By their nature, oral sources are transmitted in forms that are not written sources. The fact that they may be localised may indicate, as in this case, that those with the substantive history and traditions, and customary associations and activities associated to the reef are those with the most proximate relationship to it. In other words, those with the mana whenua and customary authority over the reef, along with those who have cultural and customary associations to Motiti and the reef are likely to be the holders of this knowledge.

It noted in another case that “differences occur in all forms of history, whether traditional, academic or popular, and whether oral or written”.²⁹⁵ Decisionmakers in such disputes could adopt a pragmatic approach to assessing the probity of evidence. Furthermore, the 2014 Adjudication Panel noted that disputing iwi accepted “the right of each iwi to tell their stories “for themselves, on their own terms, answerable to one another”.²⁹⁶

3 Native Land Court Decisions

The difficulty in putting weight on Native Land Court decisions is that they may be defective in several ways. Wiri notes that many decisions were based on economic or political reasons, rather than mana and take whenua.²⁹⁷ For example, in the *Papakura* claim, the Court ignored ahikā and patrilineal descent of rights in deciding that all children of a deceased intestate person would share in the estate regardless of whether they lived on the lands.²⁹⁸ Erueti also notes that the Court placed disproportionate weight on take raupatu, resulting in some parties tailoring their claims to “fit with the Court’s version of custom”, despite not following it up with ahikā.²⁹⁹ In one case, the Court granted 97.3% of title to land to Ngāti Mutunga based on its 1835 conquest, with the remaining 2.7% awarded to Moriori. Ngāti Mutunga only had 20 tribal members living there by 1868,³⁰⁰ despite the Moriori having occupied there for over 500 years with pacifist customs that did not recognise conquest-based land tenure.³⁰¹ So there were sometimes problems of distorted,

²⁹⁵ *Tūwharetoa*, above n 214, at [38].

²⁹⁶ Jackson, Potiki and Ngata *Findings of the Adjudication Panel*, above n 49, at 18.

²⁹⁷ Wiri “Mana Whenua and the Settlement”, above n 42, at 7.

²⁹⁸ *Papakura - Claim of Succession in Oakura Case* (Compensation Court, New Plymouth, 1866) in Fenton *Important Judgements Delivered in the Compensation Court and Native Land Court* (Henry Brett, General Steam Printer, Auckland, 1879) at 19.

²⁹⁹ Erueti “Māori Customary Law”, above n 84, at 55.

³⁰⁰ See *Kamo*, above n 81, at [15].

³⁰¹ See [13], [15] and [22].

even untruthful, evidence.³⁰² As Durie puts it, “evidence given before the court and evidence on the marae is not the same”.³⁰³

Yet, where there may be a lack of primary evidence, the Courts’ decisions may nevertheless assist. As the Māori Land Court acknowledged, “the reality is that... the records that have survived provide a rich source of material on the historical overlays of Māori custom and tradition relating to land”.³⁰⁴ The ‘Treelords’ Deal requires adjudicators to account for the Court’s decisions, and the Adjudication Panel tested the weight it would put on them by using a two-fold measure:³⁰⁵

The first may be called a “tikanga respect measure” in which even allowing for the context within which court evidence was given, and the intent of the Court itself, there should be a presumption of respect for tīpuna kōrero unless there is clear and incontrovertible proof of dishonesty or deceit.

The second measure is the identification of consistency. That is, do the kōrero of tīpuna across a range of cases show consistency in their use and definitions of traditional knowledge, whakapapa, take, tikanga, and so on?

This approach would provide decisionmakers with the benefit of Native Land Court decisions, rather than excluding them altogether, except where the evidence shows that its credibility is questionable.

4 *Layers of Mana Whenua Interests*

A fourth challenge is how to account for the ‘layers of interest’ that existed in 1840. Mana whenua groups may have different purposes in claiming mana whenua. They might seek exclusive interests in certain areas for commercial opportunities or primacy over others in advisory or consultative capacities. In many cases, however, there may be too many layers to recognise merely exclusive interests. But as the Waitangi Tribunal commented:³⁰⁶

³⁰² Jackson, Potiki and Ngata *Findings of the Adjudication Panel*, above n 49, at 19.

³⁰³ Durie “Will the Settlers Settle?”, above n 12, at 452.

³⁰⁴ *Bell v Churton* (2019) 410 MB 244 at [21].

³⁰⁵ Jackson, Potiki and Ngata *Findings of the Adjudication Panel*, above n 49, at 19.

³⁰⁶ Waitangi Tribunal *Rekohu*, above n 46, at 28-29.

[S]ubject to such arrangements as may have been settled by the people themselves, our main concern is with the use of the words ‘mana whenua’ to imply that only one group can speak for all in a given area when in fact there are several distinct communities of interest, or to assume that one group has a priority of interest in all topics for consideration. Some matters may be rightly within the purview of one group but not another.

A more apparent distinction between mana whenua and mataawaka groups should assist here to exclude interest groups from the equation. But where these layers exist, they ought to be recognised to better match rights with consequences more proportionately. For example, in a case before the Māori Land Court, Ngāti Rehia sought exclusive rights in rediscovered taonga, but they had to take a non-exclusive approach to recognise the other “undeniable” hapū interests.³⁰⁷

Depending on the strength of each claimants’ evidence, multiple mana whenua interests could be recognised across a spectrum, as shown in *Figure 2*:

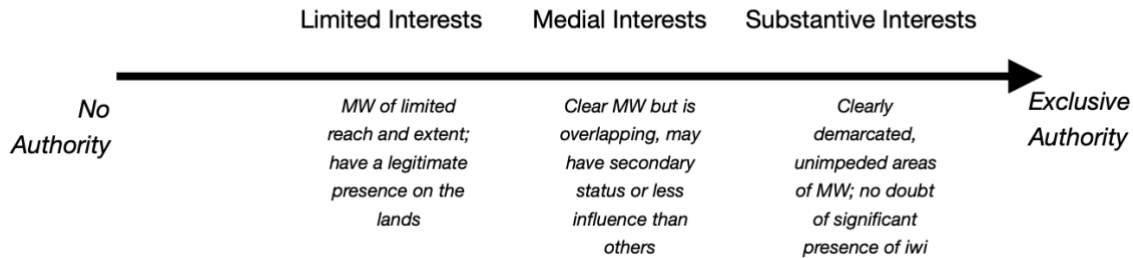


Figure 2: Spectrum of Mana Whenua Interests Based on Take Whenua and Ahikāroa as at 1840

Figure 2, which I have created, draws on some of the work of the Adjudication Panel.³⁰⁸ As shown, they broke down the different layers of interest into limited, medial and substantive interests based on the significance of the tribe’s presence (ahikāroa) and the strength of their authority, in view of others, over the relevant lands.³⁰⁹ They weighed substantive interests twice as much as medial interests, and four times as much as limited interests.³¹⁰

³⁰⁷ *Acting Chief Executive of the Minister for Culture and Heritage v Ngāi Tawake ki Tamaki* (2015) 106 Taitokerau MB 210 at [49].

³⁰⁸ Jackson, Potiki and Ngata *Findings of the Adjudication Panel*, above n 49, at 33.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

There appears to be support in the case law for more varied treatment of mana whenua rights according to layers. Gault J commented that where two entities representing mana whenua present competing evidence on cultural effects, the Environment Court would need to understand each's claim for representative status which may affect the weight given.³¹¹

This may invite approximations or pragmatism in determining relative proportions, but that may be the best possible outcome anyway, even in a world of perfect evidence. It recognises though that this is a task of identifying the arrangements of relationships, rather than specific property rights (although they may be a consequence). As the Māori Land Court commented in recognising non-exclusive interests, it allows parties to “freely recognise their whanaungatanga and responsibilities to each other”.³¹²

Greater accuracy may be obtained by applying an approximation approach over an area of land that is specific as possible. For example, the Environment Court recognised several distinct mana whenua interests in *Ngāi Te Tapu*.³¹³ This case concerned who the mana whenua were in lands, islands and reefs affected by shipwrecking of the *Rena* on a reef off Motiti. Confronted with several competing claims of right, the Court looked at distinct areas. They found that three iwi had mana whenua status over Motiti, and one had mana whenua over the affected mainland.³¹⁴ They recognised the mana whenua status accorded by statute. They made clear that those statutory rights did not extend over all the Mōtiti lands,³¹⁵ but construed them to only the Ōtāiti reef to exercise kaitiakitanga for the fisheries. Any kaitiakitanga they sought to exercise over the lands “must depend on cultural and customary associations with Te Whānau a Tauwhao and for Ngāti Pukengā through Ngāi Te Hapū”.³¹⁶

B A Blended Model for Resolving Mana Whenua Disputes

Finally, this paper sets out what a possible blended model for resolving mana whenua disputes could look like, applying the relevant principles as outlined. I argue this should be

³¹¹ *SKP Incorporated v Auckland Council* [2020] NZHC 1390 at [54] per Gault J.

³¹² *Ngāi Tawake ki Tamaki*, above, n 306, at [49].

³¹³ *Ngāi Te Hapū*, above n 211.

³¹⁴ At [84]-[87].

³¹⁵ At [89].

³¹⁶ At [90].

a three-stage process, which could enhance certainty and the exercise of mana whenua rights.

1 *Whakawhitiwhiti Kōrero: Tikanga Based Negotiations*

The starting point for mana whenua disputes should be direct negotiations between claimants. How these are conducted would matter for them. To arrive at a more blended system, Māori are “seeking to reclaim the validity of our own institutions, the specifics of our own faith, and the truths of our own history”.³¹⁷ Jackson notes that tikanga contemplated the “potential for conflict in human relations, conflict sourced in the beginning disputes of creation”.³¹⁸ While some pre-colonial disputes over territory were settled by raupatu, Jackson notes that tikanga developed approaches of consensual mediation “to maintain balance in accordance with the notion of whakawhitiwhiti kōrero”.³¹⁹ For example, Firth notes that members of the tribe had disputes over land:³²⁰

“[t]he question was generally thrashed out in an open assembly of the people, each party endeavouring to prove their claim by the recitation of whakapapa or genealogy, substantiating it by citing acts of ownership or occupation performed without opposition by his ancestors, such as cultivation, taking of game, putting a mark upon a tree or rock, or some similar deed by which priority was established.”

A range of factors, including the exercise of political authority, mana, rangatiratanga, utu and muru protected the parties’ performance interests.³²¹ As Joseph states, Māori “gave more weight to mediated outcomes or they sought the justice of the case according to the whole context and without a comparable search for a single governing rule”.³²²

In the contemporary context, the first steps would probably include hui at the marae between all the hapū involved. They would be conducted in the spirit of manaakitanga,

³¹⁷ Jackson “The Treaty and the Word”, above n 20, at 9-10.

³¹⁸ At 5.

³¹⁹ *Ibid.* Whakawhitiwhiti kōrero means discussion, deliberations, negotiations and communications.

³²⁰ Firth *Primitive Economics*, above n 16, at 379. In another example of public style decision making, in 1854 the *Kotahitanga* movement was establishing in Taranaki, after 1000 people came together upon Ngāti Ruanui’s invitation to its neighbouring tribes to agree not to sell any more land: Rosenfeld *The Island Broken in Two Halves*, above n 44, at 88.

³²¹ Jackson “The Treaty and the Word”, above n 20, at 5.

³²² Robert Joseph “Re-Creating a Legal Space for the First Law of Aotearoa-New Zealand” (2009) 17 *Waikato L Rev* 74 at 91.

which encompasses notions of mutual respect, generosity, hospitality, and recognition of the mana of others. However, Wiri has argued that that the ‘Treelords’ deal tikanga-based resolution processes have suffered from the “deliberate misinterpretation and false evidence of mana whenua by larger, more powerful iwi”.³²³ He notes an example one tribe argued ahi mātaotao was a claim to land tenure when it refers to extinguishment.³²⁴ He argues there is an imbalance in bargaining power present so that some smaller iwi with “substantial rights to the disputed lands” lose out.³²⁵ Some of this may down to lack of baseline clarity on the mana whenua concept because some thought ahikā was unnecessary for mana whenua.³²⁶ But given that the contemporary context may involve finite commercial opportunities in settlement of grievous Treaty breaches, and representation by modern commercial entities, there is a risk negotiations might be conducted in a more transactional, rather than tikanga, way.

There is something to be said for some level of broader involvement of iwi or hapū membership as customarily practised. It would enhance transparency and accountability, and ultimately the people are the source of knowledge for these kinds of historical matters, particularly kaumatua. Conducting these in marae would capture the negotiations’ gravity because they are “architectonic representation[s] of a sacred ancestor [that] incorporates the stories of the people, living and dead”.³²⁷

It is crucial to maintain whanaungatanga that negotiations are conducted in the spirit of good faith and co-operation. It is also how tikanga envisaged this form of customary resolution in terms of whakawhitiwhiti kōrero, and inherent in the values of manaakitanga and mana. That could embrace a willingness to compromise where possible because hapū would customarily give way in favour of tribal unity and the interests of others.³²⁸ The rest of the legal system should then recognise the outcomes of these negotiations. Ultimately, the parties can bring in independent assistance in the next stage, if necessary.

³²³ Wiri “Mana Whenua and the Settlement”, above n 42, at 1.

³²⁴ At 13.

³²⁵ At 1.

³²⁶ At 13.

³²⁷ Rosenfeld *The Island Broken in Two Halves*, above n 44, at 89.

³²⁸ Firth *Primitive Economics*, above n 16, at 371.

2 Intermediate Stage: Arbitration or Adjudication by Tikanga

Arbitration or adjudication, according to tikanga, would be the next stage. As Kawharu notes, “arbitration of cross claims disputes has the potential to be a forerunner to wider use of arbitration for resolving intra Māori disputes”.³²⁹ The principal advantage is that arbitration allows the application of non-state laws to govern their relationships, as in religious and international commercial arbitrations.³³⁰ Arbitration would enhance rangatiratanga of tribes to control their own processes in a way that does not “unacceptably interfere with judicial powers of supervision”.³³¹ For example, in *Bidois v Leef*, the parties could incorporate Māori norms, relax procedural formalities and the approach to witnesses, and try to conduct the proceedings in a “rangatira ki te rangatira” way with independent adjudicators.³³² There is much more flexibility to apply all relevant tikanga than restrictive common law tests that require proof of tikanga before application,³³³ which is problematic because it treats it as analogous to foreign law.³³⁴

However, some argue arbitration methods create potential inconsistencies with the rule of law that like cases must be treated alike.³³⁵ But there are commonalities across tikanga and sufficient specificity and content in the principles of take whenua to support reasoned outcomes. To the extent those are common to the hapū concerned, there will likely be consistent application of the rules to the unique circumstances of each claim. However, it should be remembered that under tikanga, the maintenance of relationships, rather than strict consistency of application, is the primary goal. This might call for a degree of compromise and realism by adjudicators because the context is paramount under tikanga, which contemplates deviations from the norm.

Parliament has shown its support for the arbitrability of mana whenua disputes in the ‘Treelords’ settlement which allocates 176,000 hectares “on the basis of mana whenua and the agreements reached between iwi in a kanohi ki te kanohi process or otherwise determined by the resolution process”.³³⁶ The first stage identifies the mana whenua

³²⁹ Amokura Kawharu “Arbitration of Treaty of Waitangi Settlement Cross-Claim Disputes” (2018) 29 PLR 295 at 296.

³³⁰ At 303.

³³¹ At 305.

³³² *Bidois v Leef* [2017] NZCA 437 at [13]-[14].

³³³ *Takamore (SC)*, above n 36, at [95].

³³⁴ Boast “Māori Customary Law and Land Tenure”, above n 30, at 36.

³³⁵ Kawharu “Arbitration”, above n 329, at 304.

³³⁶ Central North Island Forest Lands Collective Settlement Act 2008, sch 2, cl 2(1).

interests, accounting for non-exhaustive factors like take whenua, ahikāroa, ahi tahutahu³³⁷ and ahi mātaotao, based on oral kōrero, whakapapa, waiata, tribal history, written sources and Native Land Court decisions.³³⁸ The second stage is where overlapping interest groups negotiate, represented by two people appointed by the iwi governance entity in a kōrero rangatira way, without lawyers and historians.³³⁹ The Act promotes a range of “innovative solutions”.³⁴⁰ The final stage, if necessary, is mediation or adjudication, overseen by persons with fluency in Te Reo Māori and knowledgeable in tikanga.³⁴¹ Legal advice may assist them, and they must give written reasons.³⁴²

The underlying principles of the process should promote mana, whanaungatanga, manaakitanga and kotahitanga and desire of post-settlement collaboration amongst the iwi.³⁴³ While this approach was novel in the Treaty settlement context,³⁴⁴ significant disagreements between interested iwi arose during the process.³⁴⁵ Two examples of the tests used for mana whenua in these contexts, by Jackson, Potiki and Ngata over the Kāingaroa Lands, by Sir Hirini Moko Mead for Ngāti Manawa, are located in the Appendixes. The former provides broad principles grounded in take whenua, and the latter offers more specific elements to provide a matrix to consider different claims.

Despite the considerable advantages of an arbitration approach to these disputes, it does not always work and sometimes results in extensive post-award litigation.³⁴⁶ Kawharu notes that appeals against tikanga based awards are limited because the tikanga has to be “notorious”.³⁴⁷ Only notorious customs can be the subject to an arbitral appeal.³⁴⁸ In *Ngāti Hurungaterangi v Ngāti Wahiao*, the High Court noted that the “variability of opinion on the topic, the influences of context (particularly time and space) and the deeply divergent views of the contesting parties necessarily means concepts of mana whenua have not

³³⁷ ‘Intermittent’ fires of occupation.

³³⁸ Schedule 2, cls 2 and 3.

³³⁹ Schedule 2, cls 5(1) and (2).

³⁴⁰ Schedule 2, cl 5(3).

³⁴¹ Schedule 2, cls 6(3),(7) and (10).

³⁴² Schedule 2, cls 6(11) and (15).

³⁴³ Schedule 2, cl 2(3).

³⁴⁴ Aroha Harris and Melissa Matuina Williams “Tangata Whenua, Tangata Ora, 1990-2014” in Atholl Anderson, Judith Binney and Aroha Harris *Tangata Whenua: An Illustrated History* (Bridget Williams Books, Wellington, 2014) at 471.

³⁴⁵ Jones “Whakaeke i ngā ngaru”, above n 51, at 183.

³⁴⁶ See *Bidois*, above n 50, and *Ngāti Hurungaterangi and others v Ngāti Wahiao* [2014] NZCA 592.

³⁴⁷ Kawharu “Arbitration”, above n 329, at 305-306.

³⁴⁸ *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378 at [176].

assumed notorious status.”³⁴⁹ Kawharu argues that the current approach “imposes a hurdle on Māori disputants that is not applied to non-Māori, and treats (local, indigenous) tikanga as a secondary (foreign!) source of law”.³⁵⁰ While finality of arbitrations is an important factor, she argues it denies Māori of the same access to judicial review available to all other arbitrating parties in New Zealand.³⁵¹

In the final section, I argue the courts should better recognise tikanga, and adjudicate mana whenua disputes based on the take whenua principles in this paper.

3 *Final Stage: Judicial Intervention*

Judicial involvement in the consideration and application of tikanga is a contentious issue from the perspective of some Māori. The concern is that the courts may misapply, change or subordinate tikanga to other statutory and common law principles. Many Māori consider tikanga to be a taonga because it was the practice of their tupuna and used in their daily lives, providing a direct connection to the ways of their ancestors. But ‘separating’ Māori laws from the administration of justice by the courts risks the common law, the practices and precedents of our collective society, developing in ways that do not reflect tikanga values. This means legal principles may not reflect New Zealand’s past and present circumstances.

Claimants in mana whenua disputes would benefit from a final judicial determination of status where they cannot negotiate or arbitrate the dispute.³⁵² Wiri argued that in that situation, “the only solution is to allow an impartial legal body with expert knowledge of mana whenua” to determine rights.³⁵³ As Elias CJ observed:³⁵⁴

Rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation.

[...]

³⁴⁹ At [174].

³⁵⁰ Kawharu “Arbitration”, above n 329, at 306.

³⁵¹ *Ibid.*

³⁵² See *Ngāti Whātua*, above n 241, at [126] per Elias CJ.

³⁵³ Wiri “Mana Whenua and the Settlement”, above n 42 at 14.

³⁵⁴ *Ngāti Whātua*, above n 241, at [53].

Where claims of right or legal interest are made in our constitutional order, it is the function of the courts to determine them.

Mead argues that if a thorough historical consideration of the land ascertains who had authority and control of it in 1840, “should we not recognise that fact?”.³⁵⁵ There is, however, an acknowledged lack of expertise amongst the judiciary on traditional Māori words and concepts.³⁵⁶ Here, expert evidence on take whenua and associated mana whenua rights would assist.³⁵⁷

Notwithstanding that, tikanga is being engaged with because it is part of the “values and cultural precepts” of New Zealand’s law.³⁵⁸ The Supreme Court’s recent decision to continue Peter Ellis’s appeal against his convictions despite his death may provide an example of tikanga values of mana and ea might prevail over the longstanding common law position that a person’s rights end on death.³⁵⁹ The judgment may clarify that tikanga values can apply to Māori and non-Māori, elevating their role in New Zealand’s legal system. As more of these cases arise, there will be great value in precedents that appropriately set out and reason through tikanga principles and rules to assist in certainty and predictability.

But there may also be instances where the tikanga rule does not prevail, in favour of other statutory or common law rules. For example, the statutory allocation of mana whenua to one group (who may not have mana whenua, according to tikanga) means that tikanga may not be the sole judge of its own content.³⁶⁰ Ultimately that is a constitutional issue because tikanga, as custom, is recognised by the common law; subordinate to parliamentary supremacy.

³⁵⁵ Mead *Tikanga Māori*, above n 3, at 226.

³⁵⁶ Magallanes “The Use of Tangata Whenua and Mana Whenua”, above n 47, at 100. Proposals aiming to improve *tikanga* knowledge amongst the legal profession have been made recently to increase its role in the LLB curriculum, see Ngā Pae o Te Māramatanga *Inspiring National Indigenous Legal Education for Aotearoa New Zealand’s Bachelor of Laws Degree* (Borrin Foundation, 2020).

³⁵⁷ In *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, customary fishing rules were proved in evidence from B A Nepia, a senior Māori studies lecturer from Canterbury University and W J Karetai, a Ngāi Tahu kaumatua.

³⁵⁸ See further Helen Winkelmann, Chief Justice of New Zealand “Renovating the House of the Law” (Keynote Speech to Te Hūnga Rōia Māori o Aotearoa, Wellington, 29 August 2019).

³⁵⁹ The Court has not given its substantive reasons yet: *Peter Hugh McGregor Ellis v R* [2020] NZSC 89.

³⁶⁰ For example, in *Ngāi Te Hapū*, above n 211, Te Arawa was recognised as *mana whenua* on a particular island only on a statutory basis.

When considering statutory incorporation of tikanga, it will be crucial whether the judge treats it as an issue of interpretation, or a pure application of the custom. Under the former, they may not engage in the complexities of the custom.³⁶¹ If they choose to apply it, it may be limited or restrained by the ‘reasonableness’ requirement.³⁶² For example, in *Takamore v Clarke*, the High Court observed that the Tuhoe tikanga to take a deceased person to return them to the tribal whenua was unreasonable because it would conflict with the personal rights belonging to each citizen subject to the benefits of the common law.³⁶³ They also took the view that the deceased’s person’s choice to live away from the tribal lands meant the tikanga did not apply to him.³⁶⁴ As both higher courts observed, however, a perceived conflict with one’s personal rights would mean no communal or whakapapa based right would survive.³⁶⁵ In their view, the High Court should not have “jumped to the conclusion” that one had repudiated tikanga by choosing to live away from the lands.³⁶⁶

However, the Court of Appeal found the tikanga unreasonable because the custom, which sometimes involved the taking of a deceased,³⁶⁷ inconsistent with the common law principle of “right not might”,³⁶⁸ and the custom’s provision for “debate and negotiation” may not make the custom sufficiently certain for recognition.³⁶⁹ Both of these concerns would also be relevant in understanding the mana whenua concept. Still, they would not seem apt limitations when the custom’s subject matter is about territory, authority and jurisdiction.³⁷⁰ Ultimately, the Courts should not be expected to apply unreasonable customs, but they should take care to make that finding:³⁷¹

³⁶¹ For example, in *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika Association Incorporated* [1996] 3 NZLR 10, the High Court treated the issue as one of statutory interpretation rather than an incorporation of Māori customary law, without hearing evidence on the question: at 18.

³⁶² *Public Trustee v Loasby* (1908) 27 NZLR 801 at 806.

³⁶³ *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [82], [87]-[88].

³⁶⁴ At [88], and *Takamore v Clarke* [2012] 1 NZLR 573 (CA) [*Takamore* (CA)] at [322] per Chambers J (dissenting).

³⁶⁵ *Takamore* (CA) at [150], and *Takamore* (SC), above n 36, at [99]-[100].

³⁶⁶ *Takamore* (CA) at [158], and *Takamore* (SC) at [30].

³⁶⁷ *Takamore* (CA) at [326] per Chambers J (dissenting).

³⁶⁸ At [163]-[166].

³⁶⁹ At [167].

³⁷⁰ The recognised common law doctrine of acquiring sovereignty by conquest also breaches the idea of “right not might”, and debate and negotiation in the *mana whenua* about a “right” does not mean the custom is not sufficiently certain; it just meant possession of the right was disputed.

³⁷¹ *Takamore* (SC), above n 36, at [97].

The role of the Court is not to judge the validity of traditions or values within their own terms. It is concerned with the application of established traditions and values in fulfilling the Court's own function of resolving disputes which need its intervention. The determination of the Court says nothing about what is right according to the value systems themselves. Indeed, the determination of the Court can only settle the immediate legal claim.

Many of these issues could subside by careful analysis of historical evidence as applied to well defined, customs. The High Court has “the judicial jurisdiction that may be necessary to administer the laws of New Zealand”.³⁷² It can also state a case to the Māori Appellate Court on any “questions of fact relating to the interests or rights of Māori in any land” or “any question of tikanga Māori”.³⁷³ The Waitangi Tribunal has similar powers,³⁷⁴ and the Māori Land Court has jurisdiction to advise other courts on representative status.³⁷⁵ The Environment Court has commented that if a mana whenua dispute does have to be settled, it would prefer the Māori Land Court to deal with it under that jurisdiction.³⁷⁶

In these ways, legislation has established mechanisms to ‘funnel’ tikanga-related disputes to the Māori Land and Appellate Courts. This recognises that those bodies are well placed to deal with tikanga matters. There is a certain irony in having these Courts, the Native Land Courts’ predecessor, resolving mana whenua disputes in view of the historical effect on customary land tenure. But its judges are now appointed having regard to their knowledge and experience of Te Reo Māori, tikanga and the Treaty of Waitangi.³⁷⁷ But Judge Fox argues “it would be a mistake to conclude that the judges are experts in tikanga Māori” because the complex statutory framework “means that lawyers... have in the past dominated our bench”.³⁷⁸ But she also notes the Court has more flexible procedures³⁷⁹ which allows it “to adopt marae kawa or protocols and to hear cases in the Māori language”.³⁸⁰ She used these procedures to sit with elders at many standard court sittings,

³⁷² Senior Courts Act 2016, s 12(b).

³⁷³ Te Ture Whenua Māori Act 1993, s 61(1).

³⁷⁴ Treaty of Waitangi Act 1975, s 6A. Maori Land Court judges may also sit on the Waitangi Tribunal, but that is a forum specifically for breaches of the Treaty of Waitangi as between the Crown and Māori, not between Māori themselves.

³⁷⁵ Te Ture Whenua Māori Act 1993, s 30.

³⁷⁶ *Auckland Council*, above n 212, at [37].

³⁷⁷ Te Ture Whenua Māori Act 1993, s 7(2A); Erueti “Māori Customary Law”, above n 84, at 60.

³⁷⁸ Caren Fox “Access to Customary Law: New Zealand issues” (2010-2011) 13-14 Yearbook of New Zealand Jurisprudence 224 at 322.

³⁷⁹ See Te Ture Whenua Māori Act 1993, s 66.

³⁸⁰ Fox “Access to Customary Law”, above n 97, at 322.

not as part of the Court, but to provide assistance on tikanga issues.³⁸¹ The Court is also exploring options to include kaumātua or “pūkenga” as full members of the bench.³⁸² In view of their relative expertise, and flexibility to bring in tikanga experts, the Court is best placed to resolve mana whenua disputes where negotiation and arbitration have failed.

C Conclusion

Resolving disputes of mana whenua in the contemporary context is not a straightforward issue. At issue are real challenges to the Western legal positivistic paradigm which aims for certainty and predictability, when tikanga matters principally aimed for the complex arrangement of relationships between people. There are not the same kinds of clear boundaries of authority, because authority often overlapped amongst hapū and iwi, and shared resources which can blur the line between evidence of territory and use rights. This is difficult where there is a lack of primary evidence, and when the reliability of Native Land Court decisions can be questionable.

But where there are rights at issue cognisable to the dominant English legal paradigm, difficulty cannot be an excuse. A system that pays appropriate respect to tikanga traditions should recognise those rights and the layers of substantive, medial and limited interests within them. These must be primarily assessed as at 1840 to reflect the promise of tino rangatiratanga. Still, only subsequent voluntary acts of hapū and iwi should inform those interests, not acts of the Crown.

These matters should be decided principally by the hapū and iwi involved in a way consistent with tikanga and ultimately determined by them. If that fails, arbitration approaches permit adjudication according to tikanga. A blended Kupe-Cook system demands that the Courts engage in matters of tikanga where there are rights at stake. If parties cannot determine their dispute themselves or by arbitration under their own laws, the Māori Land or Appellate Court is well placed to decide the matter for them at first instance in a way that appreciates and understands tikanga.

³⁸¹ *Ibid.*

³⁸² *Ibid.*

Conclusion

He manu aute, e taea te whakahoro
A kite that is slackened off flies away

This paper has traced mana whenua under Kupe's law, its historical treatment under Cook's law, and how contemporary disputes might be resolved in a process that blends the principles and methods of both traditions.

Their rights mostly depend on statutory incorporation, because their customary rights are inconsistent with the current structure of New Zealand's system of government, which recognises Crown sovereignty and its system of land law and governance. This leaves mana whenua with largely consultative or kaitiaki rights in the resource management, environmental, and local government area, with others standing to gain from relatively meagre compensatory measures from Treaty of Waitangi settlements. Should New Zealand's constitutional and political culture continue to evolve to give further recognition of the Treaty and tikanga Māori, it will become even more critical to identify who mana whenua are in a certain way.

But their definition has not been sufficiently nuanced to recognise their customary bases and layers of interests, and proposed reforms to the RMA risk upsetting the principle that mana whenua should be determined at 1840. That marked the time when customary rights in land received common law protection under a new sovereign which promised tino rangatiratanga over their lands. Opening the potential for mana whenua groups to arise post-1840, when Māori were dispossessed of their lands (often through Treaty breaches) undermines the protection accorded to their customary rights in 1840.

New groups who have formed new relationships with the land in the zone of another's mana whenua might receive recognition in a contemporary form of mataawaka. Still, their rights should be subordinate to those with mana whenua under custom. Any voluntary mana whenua acts after 1840 which may have customary consequences may "feather" the assessment at 1840. However, they should not fundamentally disturb the layers of interests as at 1840 to respect their protection, nor should any Crown action disturb those rights.

Often disputes of mana whenua status among multiple claimant groups when it is in their interests. I have set out a method of resolving disputes based on embracing the best of both Kupe's and Cook's legal traditions. The first step should be negotiations between the

claimant hapū, as those with the foremost expertise and knowledge to apply their own laws. This might involve a marae style hui, in a way that fosters values of manaakitanga and ultimately kotahitanga. It might also involve wider hapū engagement, to ground the process in accountability as was customary.

If parties cannot agree, they could arbitrate the dispute, having the crucial advantage of being able to apply their laws, free from the restraints of a court process and remedy. But experience has shown that these still may not be determinative, and I argue that the courts should finally adjudicate the dispute. There may be difficulties with ascertaining primary evidence or the credibility of Native Land Court decisions, but the courts are well placed to deal with this. Where there are rights at issue, parties should have the right to have their cases decided in a way that understands the complexities of their history and tikanga. The Māori Land and Appellate Courts are best placed at the first instance to resolve them, and other courts have statutory avenues to refer cases to them on such matters.

Over time, that will generate consistency, and once rights and layers of interest are determined as they were at 1840, there will be greater certainty in who should exercise or possess current and emerging rights of mana whenua.

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Appendix 1

Moana Jackson, Tahu Potiki and Wayne Ngata *The Findings of the Adjudication Panel in the Mana Whenua Process* (convened by the Central North Island iwi for Te Kāingaroa a Haungaroa Crown Forest Licences, 2014) at 26-27:

The Principle of Identified Land or sites – a recognised whenua that can provide the base or origin of one’s mana whenua (take whenua).

The Principle of Ancestral Connection – a proven whakapapa connection to the identified land or sites (take tīpuna, take taunaha, take kitenga).

The Principle of War and Peace – the acquisition and retaining of mana whenua through conquest (take raupatu, take ringa kaha, take pakihwi kaha) and the subsequent cementing of authority through intermarriage and ongoing relationships in times of peace.

The Principle of Unbroken Occupation – proven intergenerational occupation of a site through until recent times or until an unjust intervention by the Crown (ahi kā roa).

The Principle of Unbroken or Regular Use – proven use of a particular site or sites for cultural, food gathering, or other social purposes on a regular, semi-permanent basis until recent times or until an unjust intervention by the Crown (ahi tahutahu).

The Principle of Permitted Use or Occupation – evidence of use or occupation granted to one iwi by another with agreed or proven paramountcy (take tuku).

The Principle of Joint Use or Occupation – proven rights of two or more iwi to access or occupy a site with no iwi able to assert a right of paramountcy.

Appendix 2

Hirini Moko Mead *Tikanga Māori: Living By Māori Values* (Revised Edition, Huia Publishers, Wellington, 2016) at 228-229:

The Elements of Mana Whenua

1. How was mana whenua acquired?
 - a) Ringa kaha b) Take kite c) Other
2. If by ringa kaha did the military leaders marry tangata whenua women of the land to maintain the hau (essence) of the land?
 - a) If yes, who? b) If not, how?
3. The land is actually occupied by people and kāinga are established.
 - a) Yes b) No
4. A rohe is marked out in some way. How? Provide a map.
5. Over time urupā are established over the land, tūahu (shrines) are placed in appropriate places, and kāinga are built usually, near a source of water, and wāhi tapu are identified and named.
6. The new group adopts a name and becomes known among the neighbours as an identified iwi/hapū.
7. The iwi proceeds to embrace their new environment, take charge of it, and place their cultural imprint on it. One way is to rename or give names to significant features of the land.
8. The rivers and swamps may be populated with taniwha (monsters) who often act as kaitiaki of the people to warn the children of dangers in the environment. Evidence should be provided of this.
9. The iwi establishes alliances with neighbours and distant iwi. The mana whenua iwi can provide examples of joining with other iwi on military ventures outside their rohe.
10. The rohe provides sufficient sustenance for the people over time and other necessities are obtained through trade. Evidence needs to be provided.
11. The new iwi is able to defend its rohe and can call on allies to help defend the estate. Is there evidence of this happening?
12. The new iwi is approved by the neighbours and its presence is validated by their acceptance. Evidence?
13. In 1840, when the Treaty of Waitangi was signed, this iwi was part of the Māori nation and is a Māori partner of the Treaty with the Queen of England.
14. The name of the iwi enters the historical record through the Native (later Māori) Land Court and other institutions of Aotearoa. There is proof of this.
15. The iwi is here today and has a credible number of members.