Māori Freehold Land & Climate Change Adaptation

If the government is bound by a duty of active protection to Māori, what in law can be done to address the need for adaptation of Māori freehold land to climate change?

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Introduction

Climate change is an issue that is already affecting many people, in New Zealand and throughout the world. Adaptation to the effects of climate change is necessary due to the impact greenhouse gases have already had on our environment.[1] These impacts will continue into the future due to the slow-moving nature of environmental changes. Sea level rise places strain on New Zealand's coastal environment with the incidence of increased levels of flooding and erosion.[2] Climate change will also bring about changing weather patterns such as higher levels of drought in some areas and increased rainfall and storms in others.[3] It is therefore important to be prepared for these challenges in order to protect our environment.

Indigenous peoples are often more acutely affected by changes to the environment than other groups, as their identity and history are heavily connected to the land and the natural world.[4] For Māori, this is no different. They describe themselves as "tangata whenua," which means "people of the land." The land is a major source of identity for Māori.[5] The Māori worldview sees the environment and the people living within it as being interconnected and interdependent.[6] The principle of whanaungatanga describes relationships as being central to Māori society.[7] This includes the relationships between people and the natural world,[8] which means that any changes to the environment have significant impacts on Māori culture.

The other significant factor that contributes to an increased vulnerability to climate change is the detriment Indigenous peoples have invariably suffered due to the effects of

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[1] Climate Change Adaptation Technical Working Group *Adapting to Climate Change in New Zealand: Stocktake Report from the Climate Change Adaptation Technical Working Group* (December 2017) at 6

[2] Parliamentary Commissioner for the Environment *Preparing NZ for rising seas: Certainty and uncertainty* (November 2015) at 5

[3] Climate Change Adaptation Technical Working Group, above n 1, at 6

[4] See Andrea Tunks "Tangata Whenua Ethics and Climate Change" (1997) 1 NZJEL 67

[5] Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 67

[6] Jemima Jamieson "The Role of Indigenous Communities in the Pursuit of Sustainability" (2010) 14 NZJEL 161 at 174

[7] Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 4

[8] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuarua* (Wai 262, 2011) at 267

colonisation. Despite the signing of the Treaty of Waitangi, Māori were denied proper protections of their lands and way of life.[9] The approach used today is to apply principles from the Treaty as a basis to provide redress to Māori to rectify the Crown's past and present wrongdoing.

This dissertation examines these issues head-on. Its purpose is to consider the government's duty of active protection under the Treaty, and what this requires in terms of climate change adaptation of Māori freehold land.

The first chapter will examine Māori freehold land and the unique characteristics that make it especially vulnerable to the impacts of climate change. The second chapter will look at the current law and policy in place addressing climate change adaptation. At this point, it will be established that Māori freehold land is more vulnerable to climate change than other types of land, and that current government actions are not adequately addressing the issue. Chapter three will focus on the Treaty of Waitangi principle of active protection. If providing assistance to owners of Māori freehold land in terms of climate change adaptation is a component of the principle of active protection, then greater action will be required on the part of the government. Chapter four will also provide recommendations as to how to address this issue.

[9] See Waitangi Tribunal reports, such as Waitangi Tribunal *The Ngāi Tahu Report 1991* (Wai 27, 1991); Waitangi Tribunal *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wai 145, 2003), see also Crown apologies in settlement legislation, such as Ngāi Tahu Claims Settlement Act 1998

I Chapter I: What Makes Māori Freehold Land More Vulnerable to Climate Change?

Māori freehold land is defined by Te Ture Whenua Māori Act 1993 (TTWMA) as land that has had its beneficial ownership determined by the Māori Land Court by freehold order.[10] This chapter will examine the unique features of Māori freehold land and explain how these characteristics combine to make this class of land especially vulnerable to climate change. It will first explain the historical background to Māori freehold land and analyse how this informs its characteristics today. This chapter lays the context for this dissertation.

A History of Māori Freehold Land

The category of Māori freehold land originates from the Native Lands Acts 1862 and 1865.[11] This legislation created the Native Land Court with the purpose of converting customarily held Māori land into an individualised title derived from the Crown.[12] This meant that once the land had been investigated and its ownership had been confirmed by the Land Court, it was able to be freely sold to the arriving Europeans on an open market.[13] Converting customary land to freehold land further quickened the colonial goal to extinguish the customary Māori property system, replacing it with a system similar to the English land tenure model, as well as continuing to facilitate the large-scale transfer of land from Māori to the new arrivals.[14]

The advent of the Native Land Court resulted in a steady decline in Māori landownership, especially in the North Island, which still had large proportions of land in tribal ownership at 1864.[15] The Native Land Court was highly effective in converting this land to individual ownership during its first 50 years.[16] The processes involved with taking a

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[10] Te Ture Whenua Māori Act 1993, s 129(2)(b)

[11] R P Boast "Property Rights and Public Law Traditions in New Zealand" (2013) 11 NZJPIL 161 at 168

[12] Bill Maughan and Tanira Kingi "Te Ture Whenua Māori: Retention and Development" (1998) NZLJ 27 at 32

[13] Richard Boast *The Native Land Court: A Historical Study, Cases and Commentary, 1862-1887* (Brookers, Wellington, 2013) at 52

[14] Boast, above n 13, at 56-57

[15] David V Williams *'Te Kooti Tango Whenua' The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999) at 52

[16] Williams, above n 15, at 56

claim to the Court were highly prejudiced against Māori for a number of reasons. The Court gave individual rights to Māori and allowed them to alienate their shares in the land without considering the welfare of the hapu or any requirements in Māori customary law.[17] The Court was not inquisitorial and therefore relied only on what was presented to it, meaning that the onus was on Māori to present their claim.[18] This led to prejudicial outcomes if Māori were unable to be present in the Court.[19] Since the Court was located in areas that were often far from Māori settlements, it was difficult and costly for Māori to travel to hearings.[20] Māori were required to bear the burden of the majority of costs associated with bringing the claim, such as paying for surveys of the land and fees for each day their case was heard in court.[21] Bringing a claim was expensive, and since land was the most valuable asset of many Māori, they were forced to sell their land simply to cover the costs associated with their claim.[22] Even though Māori were not required to convert their land to freehold title, the vast majority of customary land in Māori ownership at 1865 had been brought before the Native Land Court within a few decades of its establishment.[23]

The majority of Māori freehold land that exists today is the land that was not acquired by the Crown or British settlers, as once it had been alienated to settlers, it became general land outside the jurisdiction of the Native Land Court.[24] Māori freehold land makes up approximately 5.6% (1.5 million hectares) of New Zealand's total land mass and is most highly concentrated in the central and eastern areas of the North Island.[25] This is owned for the most part by the descendants of the original owners, giving the land cultural and historical importance.[26] The disadvantage that Māori faced with the introduction of British colonial government and the imposition of a British-based legal and property system on New Zealand meant that Māori were deprived of their most valuable asset,

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[17] Williams, above n 15, at 56

[18] Bryan Gilling "Engine of Destruction – An Introduction to the History of the Māori Land Court" (1994) 24 VULWR 115 at 132

[19] Gilling, above n 18, at 132

[20] Stuart Banner "Conquest by contract: wealth transfer and land market structure in colonial New Zealand" (2000) 34(1) LSR 47 at 82

[21] Williams, above n 15, at 189

[22] Gilling, above n 18, at 132

[23] Waitangi Tribunal *Report on Claims About Reform of the Te Ture Whenua Māori Act 1993*, above n 5, at 15

[24] Williams, above n 15, at 157

[25] Tanira Kingi "Māori landownership and land management in New Zealand" in *Making land work (volume 2)* (Australian Agency for International Development, Canberra, June 2008) 129 at 132

[26] Kingi, above n 25, at 133

their land. This historical disadvantage has meant that Māori are often overrepresented in low income statistics, making them more in need of government support.[27] The limited economic uses of Māori freehold land and the higher instances of economic hardship faced by Māori as a result of the historical loss of land and resources due to colonisation decreases the ability of some Māori freehold landowners to respond to climate change issues.[28]

B Physical Characteristics of Māori Freehold Land

High quality land that had economic potential or was located in a populated area was the main target for the colonial government to purchase and confiscate during the 19th and 20th centuries.[29] Therefore, Māori freehold land that remains today is the land that was not desired by Pākehā purchasers, as it was not alienated after going through the Court.[30] Many of these areas of land were not able to be used for agriculture or building work, which inform its features today.

There are numerous characteristics of Māori freehold land that make it vulnerable to climate change. There are large proportions that are low-lying and located in coastal areas, which results in higher susceptibility to damage from rising seas.[31] Some land is located by rivers and lakes, while other areas contain fragile environments such as wetlands.[32] These areas are at risk of erosion, storm surges and flooding.[33] Land with these characteristics needs infrastructure to improve their resilience. However, around 30% of Māori freehold land is estimated to be landlocked and remote (at the time of writing), which makes it more difficult for improvements to be made.[34]

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[27] Controller and Auditor General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at 23

[28] MH Durie *Te Mana, Te Kawanatanga. The politics of Māori self-determination* (Oxford University Press, 1998) at 280 as cited in Darren N. King, Guy Penny and Charlotte Severne "The climate change matrix facing Māori society" in Richard A.C. Nottage, David S. Wratt, Janet F. Bornman and Keith Jones (eds) *Climate Change Adaptation in New Zealand: future scenarios and some sectoral perspectives* (New Zealand Climate Change Centre, Wellington, 2010) at 102

[29] Ministry for Primary Industries *Rural Land Use and Land Tenure: observations and implications for Māori* (June 2014) at 2

[30] Kingi, above n 25, at 134

[31] Kingi, above n 25, at 134

[32] Kingi, above n 25, at 134

[33] Ministry for the Environment *Preparing for coastal change* (December 2017) at 6

[34] Controller and Auditor General, above n 27, at 26

Māori freehold land is today disproportionately marginal compared to general land,[35] which means that the land can be unstable, isolated, or economically limited based on current or potential use. This land will often need trees and vegetation to protect soils, as well as measures taken to limit erosion and maintain water quality.[36] Climate change impacts will place further pressure on these areas and will worsen the already "marginal" quality of this land if nothing is done to maintain and improve its resilience.

C Legal Characteristics of Māori Freehold Land

Te Ture Whenua Māori Act 1993 is the main statute today dealing with Māori freehold land. The preamble to TTWMA affirms that land is a "taonga tuku iho of special significance to the Māori people."[37] This means it is considered to be a part of Māori cultural heritage and so is deserving of extra protection under the law.[38] The dual purposes of the Act are to promote retention and utilisation of Māori land by Māori owners.[39] The preamble also confirms the Treaty as the basis for the special relationship between Māori and the Crown. The Māori Land Court[40] was given the responsibility to "assist the Māori people to achieve the implementation of these principles."[41]

1 Multiple ownership

One of the distinguishing factors of Māori freehold land is that it is largely multiply owned, with only 10% of titles having one owner.[42] Its ownership structure is classed as a tenancy in common where there are more than 2 or more owners.[43] This means that each individual has their own share in the property, which can be separately inherited.[44]

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[35] King, Penny and Severne, above n 28, at 102

[36] Ministry for Primary Industries *Climate change business opportunities for Māori* (November 2012) at 21

[37] Te Ture Whenua Māori Act, preamble

[38] Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1999,* above n 4, at 54

[39] Te Ture Whenua Māori Act, preamble; s 2

[40] Formerly the Native Land Court; "Native" was changed to "Māori" in all legislation and statutory instruments by Māori Purposes Act 1947, s 2

[41] Te Ture Whenua Māori Act, section 17(1); Māori Land Court *150 Years of the Māori Land Court* (30 October 2015) at 77

[42] Controller and Auditor-General *Māori Land Administration: Client Service Performance of the Māori Land Court and the Māori Trustee* (Office of the Auditor-General, March 2004) at 28

[43] Te Ture Whenua Māori Act, s 345

[44] Te Ture Whenua Māori Act, s 108(2)

Initially, the Native Lands Act 1865 only allowed for up to ten owners to be registered on the title, effectively excluding others who had customary ownership interests in the land.[45]

The Native Lands Act 1865 gave the Native Land Court the power to determine successions to Māori freehold land. The succession provision was interpreted to mean that interests in Māori freehold land were to be succeeded by all descendants equally, despite it being contrary to Māori custom or inherited English common law of the time.[46] This has resulted in an exponential increase of the number of owners of Māori freehold land through the generations.[47] Currently, the average number of owners on a block of land is 100 and total ownership interests number over 3 million.[48] The large number of owners on each block has created a situation where it is very difficult to manage the land and use it productively.[49] Many of these owners are absentee owners and are difficult to contact due to poor upkeep of ownership registers over time.[50] The difficulties and increased costs associated with managing such a large number of interests mean that it will be harder to come to an agreement as to how best to approach the climate change adaptation problem, as well as making sure all owners are aware of the specific issues. However, there are many blocks that are controlled by trusts or incorporations, which partly alleviates this issue.[51] TTWMA allows for whanau trusts to be set up in order address the issue succession issue, as they stop further succession and fragmentation of ownership interests.[52]

2 Limited alienation

Alienation of Māori freehold land is limited under TTWMA.[53] Māori freehold land must first be offered to people in the preferred class of alienees listed in the statute and can

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[45] Boast, above n 13, at 68

[46] Chief Judge Fenton in the Native Land Court interpreted section 30 Native Land Act 1865 (the succession section) to mean that land should be succeeded by all Māori children equally; Gilling, above n 18, at 135; Williams, above n 15, at 177-178

[47] Williams, above n 15, at 184

[48] Māori Land Court *Māori Land Update – Ngā Āhuatanga o te whenua* (Office of the Chief Registrar, Māori Land Court, Annual Update, June 2017)

[49] Kingi, above n 25, at 137

[50] Waitangi Tribunal *Report on Claims about the Reform of the Te Ture Whenua Māori Act 1993*, above n 4, at 8

[51] Māori Land Court, above n 48 (11,452 blocks with a management structure and 16,021 without)

[52] Juliet Chevalier-Watts "New Zealand and Māori land trusts" (2016) 22(2) Trusts & Trustees 211 at 211

[53] Te Ture Whenua Māori Act, s 146

only be sold outside this group if none of these people have accepted the offer.[54] Any alienation must also be confirmed by the Māori Land Court,[55] among other limitations depending on the ownership/management structure.[56] These restrictions are imposed to make sure that the land stays in Māori ownership, in order to address the historical prejudices that resulted in Māori losing most of their land during colonisation. While this is beneficial in terms of promoting retention of Māori land ownership, it can make it more difficult for owners to utilise, repair and improve their land.

Access to finance is difficult for owners of Māori freehold land because of these limits.[57] Banks are wary about using Māori freehold land as a security against a loan or mortgage, as the land cannot be easily sold in the event of a default.[58] It is more difficult to sell a house on Māori freehold land, since the right to occupy the land is restricted under TTWMA. [59] This limited market means that the price of a house on Māori freehold land is likely to decrease in value.[60] These factors have meant that lending to owners of Māori freehold land is perceived as higher risk than lending to owners of general land.[61] Banks are reluctant to take on this extra risk, or if they do, it will likely be at a higher cost to the landowners.

There has been some improvement in this area with the introduction of Kainga Whenua mortgage loans, which can be used by Māori to build papakainga housing on Māori freehold land.[62] These loans were developed specifically to address the difficulties that Māori landowners have regarding access to finance. The loan is underwritten by Housing New Zealand in order to give the lending bank (Kiwibank) security in case of a default.[63] Despite this development, a person choosing to build on Māori freehold land is still taking on a significant risk. Due to the limited right to occupy houses on Māori freehold land under TTWMA, the landowner will likely get a minimal amount for the house if

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[54] Section 147A

[55] Sections 150A(3)(a), 150B(3)(a), 150C(3)(a)

[56] Sections 150 – 150D

[57] Kingi, above n 25, at 145

[58] Controller and Auditor General, above n 27, at 77

[59] Te Ture Whenua Māori Act, s 328(1); Controller and Auditor General, above n 27, at 84

[60] E Toomey, J Finn, B France-Hudson, J Ruru *Revised Legal Frameworks for Ownership and Use of Multi-dwelling Units* (External Research Report, Wellington, BRANZ, 2017) at 153

[61] Kingi, above n 25, at 145

[62] Controller and Auditor General, above n 27, at 26

[63] Controller and Auditor General, above n 27, at 26

they are forced to sell on default of the loan, meaning that they face being unable to repay their debts by selling their house.[64]

While Kainga Whenua loans have increased the ability of Māori landowners to gain access to finance, it is still difficult for these landowners to get financing outside the scheme compared to owners of general land. Applicants for Kainga Whenua loans will not be eligible in every case, as there are specific criteria that need to be met to qualify for a loan.[65] Although various government funds are available to supplement the scheme[66], MBIE's Māori Housing Strategy warned that the competition for government funding meant that access to private funding was still necessary for Māori landowners.[67]

Since the Kainga Whenua loan scheme was created primarily for the building of houses, there may be challenges where funds are needed for significant repairs or investment in infrastructure. This makes owners of Māori freehold land more vulnerable to climate change effects as they are less able to raise finance if there has been a natural disaster requiring repairs or improved infrastructure. The widened scope of the Kainga Whenua scheme may partly address this issue by providing grants to cover the costs of connecting developments on Māori freehold land to existing infrastructure.[68] However, the current purpose of these grants and loans is for enabling better building of homes on the land, which indicates that finance for other purposes will have to be obtained through the general system. The availability of finance may be further limited depending on the quality of the land, as the wider banking sector is increasingly reluctant to finance projects on land that is coastal and therefore vulnerable to the effects of sea level rise.[69]

Insurance is an issue related to the access to finance problem for Māori freehold landowners. It is a requirement that all residential mortgages be insured in order to protect banks from loss.[70] However, mortgages are generally long-term loans while insurance policies are often reviewed yearly. If the insurance is not renewed partway through the mortgage or loan term, banks will be left vulnerable to significant loss if the

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[64] Controller and Auditor General, above n 27, at 84

[65] Controller and Auditor-General *Government planning and support for housing on Māori land: progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, December 2014) Figure 3 at 13

[66] Controller and Auditor-General, above n 65, Figure 4 at 28

[67] Ministry of Innovation, Business and Employment *Māori Housing Strategy* (July 2014) at 30

[68] Controller and Auditor General, above n 27, at 12

[69] Climate Change Adaptation Technical Working Group, above n 1, at 71

[70] Climate Change Adaptation Technical Working Group, above n 1, at 71

debtor cannot repay. Climate change increases the likelihood of this type of scenario. Damage to the land or risk of future damage may cause insurers to decline cover, as the exposure to risk and potential cost becomes too high. Alternatively, risk premiums may increase and become unaffordable for the customer, leaving them with a mortgage to repay and no insurance on their property. These factors combine to form the result of limited access to finance which negatively impacts Māori ability to cope with heightened strain on their land.[71]

3 Occupation orders and licences to occupy

The large number of owners and the marginal nature of a significant proportion of Māori freehold land means that not all owners will be able to live on the land. The preferred mechanism for giving owners a legal right to live on the land is through the occupation order or licence to occupy.[72] These orders do not confer a title to the land; they only grant exclusive use of a particular area of the land for a house.[73] Whether an ownership interest over the house will be granted to an individual depends on the particular facts of the case.[74]

This creates uncertainty as to ownership of a house built on Māori freehold land. If the Court decides that the house is a fixture, then it is considered part of the land and therefore owned by all the landowners.[75] The Court may instead decide to award ownership of the house to the occupiers under its equitable jurisdiction.[76] Awarding ownership of the house to an individual in this way treats the house as if it is a chattel.[77] This could have implications where there has been damage to the house or the land after a natural disaster. If the house is determined to be a fixture, then responsibility for repairs and insurance payments could be allocated across all owners. If the effects of climate change worsen the quality of the land, insurance companies may charge increased

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[71] King, Penny and Severne, above n 28, at 106

[72] Toomey, Finn, France-Hudson, Ruru, above n 60, at 134; 139

[73] Toomey, Finn, France-Hudson, Ruru, above n 60, at 134

[74] *Herewini – Maungaroa 1 Sec 23K (Keterau)* (2013) 85 Waiariki MB 141 at [15]

[75] Te Ture Whenua Māori Act, s 18(1)(a), *Tohu – Te Horo 2B2B2B* (2007) 7 Whangārei Appellate Court MB 34 (7 APWH 34) at [16]

[76] Te Ture Whenua Māori Act, s 237; *Mikaere-Toto - Te Reti B and C Residue Trust* [2014] Māori Appellate Court MB 249 (2014 APPEAL 249)

[77] *Tohu – Te Horo 2B2B2B*, above n 75, at [18]

premiums.[78] If there is uncertainty of ownership, there is also uncertainty as to who should bear these costs. This has the potential to create disputes between owners who live on the land and those who do not.

4 Access to justice

Māori freehold land raises unique issues that require specialised knowledge. Quality access to support after a natural disaster is important so that appropriate action can be taken, preventing the land from deteriorating further. Dispute resolution services focused on Māori land issues are uncommon.[79] One of the proposed changes contained in the now defunct Te Ture Whenua Māori Bill 2016 was to introduce a mediation service for owners of Māori freehold land. However, the Bill was not enacted and it is unclear whether a mediation service will still be introduced in future reforms.[80]

5 Government policy to increase building on the land

The Government is committed to encourage building on Māori freehold land.[81] Te Puni Kokiri received an extra budget allocation in 2018 to fund papakainga (housing on multiply owned Māori land) building and repairs.[82] MBIE's Māori Housing Strategy includes a policy to increase housing on Māori owned land.[83] Encouraging building on Māori freehold land is consistent with the purpose of utilisation in the preamble of Te Ture Whenua Māori Act. However, if significant resources are going to be used for papakainga housing, the land should be resilient enough to support the buildings, and the housing that is built should be able to withstand any climate risks that are associated with the land. Government policy encouraging building often does not mention these risks and the importance to safeguard against them.[84]

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[78] Belinda Storey and others *Insurance, Housing and Climate Change Adaptation: Current Knowledge and Future Research* (Motu Economic and Public Policy Research, 2017) at 2

[79] Toomey, Finn, France-Hudson, Ruru, above n 60, at 179

[80] Toni Love "Review of the Te Ture Whenua Māori Act 1993 2017 progress of Te Ture Whenua Māori Bill" (2017) September Māori LR

[81] Toomey, Finn, France-Hudson, Ruru, above n 60, at 146

[82] The Treasury *Summary of Initiatives in Budget 2018* (17 May 2018) at 16

[83] Ministry of Innovation, Business and Employment, above n 67, at 28

[84] For example, Te Puni Kokiri *A Guide to Papakainga Housing* (Māori Housing Network, 2016)

D Conclusion

The difficulties identified due to the nature of Māori freehold land means that the costs of adapting the land to climate change will be disproportionately high and unachievable in many cases if government support is not provided. Therefore, climate change may act to increase the socio-economic disparities between these groups and non-Māori.[85] As well as this, the spiritual, cultural and historical significance of Māori freehold land means that conventional approaches to these issues may not be a viable option for Māori and novel solutions based on the communities in question will need to be investigated.[86] Part of the purpose of TTWMA is to encourage utilisation of the freehold land resource by Māori. However, the land and the structures on it needs to be resilient for this purpose to have any effect in the face of a changing climate. The right resources and government support are needed for this to be achieved.

[85] King, Penny and Severne, above n 28, at 101

[86] King, Penny and Severne, above n 28, at 108

II Chapter II: What is the Current Law and Policy Addressing Climate Change Adaptation?

This chapter will outline the current law and policy that already exists relevant to climate change adaptation. There are no plans or provisions specific to adaptation of Māori freehold land to climate change, so the focus of this chapter will be on policies addressing the adaptation of land and environmental management in general. The purpose of this inquiry is to determine whether this law and policy addresses the specific issues arising for Māori freehold land.

A Legislation

Legislation touches on climate change adaptation but only to a limited extent. The relevant statutes for climate change adaptation include the Resource Management Act 1991 (RMA), the Building Act 2002, the Local Government Act 2002 (LGA) and the Civil Defence Emergency Management Act 2002. The RMA is the primary environmental management statute in New Zealand and was amended in 2004 to include climate change provisions.[87] One of the amendments was to add climate change as a matter that authorities must have "particular regard to" under section 7. It is set out below:

7 Other matters
In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall have particular regard to-
…
(i) the effects of climate change:

This section exists only as a very small part of the legislation, and forms part of the balancing exercise decision makers must carry out when exercising powers under the legislation, along with the other factors contained in the section and elsewhere in the

[87] Resource Management (Energy and Climate Change) Amendment Act 2004; DN King, W Dalton, J Bind, MS Srinivasan, DM Hicks, W Iti, A Skipper, M Home, D Ashford-Hosking *Coastal adaptation to climate variability and change: Examining community risk, vulnerability and endurance at Mitimiti, Hokianga, Aotearoa-New Zealand* (National Institute of Water & Atmospheric Research, September 2013) at 19

legislation.[88] The preceding section of the RMA sets out the seven matters of national importance that authorities must "recognise and provide for" when making decisions under the Act.[89] The relationship between section 6 and section 7 is a hierarchical one.[90] This means that the requirements in section 6 are stronger than the ones in section 7, indicating that climate change impacts are not considered as important in decision making as the matters of national importance.

The purpose of the Amendment Act was to "require local authorities to plan for the effects of climate change.[91]" The current case law on section 7(i) RMA has predominantly addressed whether local government can consider the emission of greenhouse gases when making resource consent decisions. The majority of the Supreme Court found in two decisions that it could not (except when considering the benefits of renewable power plants), thereby limiting the scope of section 7(i) in this area.[92] However, the Court accepted section 7(i) extended to planning for the effects of climate change, as confirmed by the purpose section of the Amendment Act.[93]

The RMA requires authorities to recognise and provide for the relationship of Māori with their ancestral lands, water, sites, waahi tapu and other taonga as a matter of national importance.[94] Since Māori freehold land is a taonga (treasure), it comes within this provision. This means that authorities should take the needs of Māori freehold landowners into account when making decisions under the RMA, such as creating district or regional plans. However, Māori interests are only one of the matters of national importance under section 6, meaning that other interests may be prioritised.

The Building Act 2004 addresses climate change indirectly. This Act prevents a building consent authority from granting a consent where the land is expected to be vulnerable to natural hazards, unless provisions have been made to protect against the hazard.[95] The

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[88] Resource Management Act 1991, s 7

[89] Section 6

[90] *Waikanae Christian Holiday Park v Kapiti Coast District Council* HC Wellington CIV-2003-485-7764, 27 October 2004 at [99]; Paul Beverley "The Mechanisms for the Protection of Māori Interests Under Part II of the Resource Management Act 1991" (1998) 2 NZJEL 121 at 123

[91] Resource Management (Energy and Climate Change) Amendment Act 2004, s 3(b)(i)

[92] *West Coast ENT Inc v Buller Coal Ltd* [2014] 1 NZLR 32; *Genesis Power Ltd v Greenpeace New Zealand Inc* [2009] 1 NZLR 730

[93] *West Coast ENT*, above n 92, at [130]

[94] Resource Management Act, s 6(e)

[95] Building Act 2004, ss 71(1)(a), 71(2)(a)

consent authority must consider hazards over the intended life of the building, usually a minimum of 50 years.[96] However, there is no express requirement to take climate change into account when making decisions under the statute.[97] The focus of the provisions for natural hazards are focused on the safety of the building over its lifetime, and not on the wider environmental effects of development in an area that may become more hazardous over time, such as coastal environments.[98] The statute is relevant to Māori freehold land as a building consent must be obtained under the Act before building work can commence.[99]

Local government has a significant role in adaptation planning.[100] The Local Government Act 2002 sets out a number of requirements for local government, such as the requirement to create long term plans for their area.[101] An infrastructure strategy for the next 30 years must be created as part of the long term plan.[102] This requires councils to look at possible future outcomes when making their plans, thereby implicitly touching on climate change effects. Similar to the Building Act, there is no express requirement in the LGA that climate change is a factor that must be included in council plans. The Civil Defence Emergency Management Act 2002 requires a risk management approach when dealing with hazards and provides a framework for local governments to manage hazards in their area.[103] The Climate Change Response Act 2002 controls New Zealand's emissions trading scheme and does not address adaptation.

B Central Government Policy and Investment

Central government provides the overarching policy framework from which local authorities and others can base their actions regarding climate change adaptation.[104] Current policies include the *Thirty Year New Zealand Infrastructure Plan 2015*, the *National Policy Statement for Freshwater Management 2014* and the *New Zealand Coastal Policy Statement 2010*. These policies address climate change adaptation, as well

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[96] Building Regulations 1992, sch 1, cl B2.3.1(a)

[97] Ministry for the Environment *Coastal Hazards and Climate Change: Guidance for Local Government* (December 2017) at 40

[98] Ministry for the Environment, above n 97, at 40

[99] Toomey, Finn, France-Hudson, Ruru, above 72, at 143

[100] Climate Change Adaptation Technical Working Group, above n 1, at 53

[101] Local Government Act 2002, s 93(1)

[102] Local Government Act, s 101B(1)

[103] Climate Change Adaptation Technical Working Group, above n 1, at 48

[104] Climate Change Adaptation Technical Working Group, above n 1, at 46

as many other issues, but do not comprehensively provide solutions to the adaptation issue.

Climate change adaptation is addressed to some extent in the *New Zealand Coastal Policy Statement*, issued by the Department of Conservation (DOC) to give direction to local councils regarding management of coastal land and coastal hazards. Climate change is mentioned in Objective 5 of the policy statement, which states that climate change should be considered when managing coastal hazards.[105] Policy 24 requires councils to identify areas of the coast that are prone to hazards and assess their risk over a timeline of 100 years, considering the effects of climate change with reference to national guidance.[106] Planning for hazards that may occur in the future is especially important in the context of climate change, where the coastal environment is predicted to undergo significant changes over the next century.[107] The policy statement does not specifically mention Māori freehold land, but it does include a requirement to take Treaty of Waitangi principles into account and "recognise the role of tangata whenua as kaitiaki" (guardians of the land).[108] Policy 6 refers to the need for papakainga housing and marae on coastal lands and requires that councils make "appropriate provision" for them.[109]

A review of the *Coastal Policy Statement* was undertaken by DOC in 2017.[110] It found that in general there had been action by councils to adopt the policies contained in the policy statement, but that "significant challenges" with full implementation remain.[111] National guidance is clearly contemplated in the policy statement, but this is not currently being provided by central government to any great extent.[112] Funding issues had made implementation of the policies difficult, meaning that iwi consultation and involvement in decision making had not always been possible.[113] DOC found that solutions to coastal issues were significantly challenging for local councils to deal with and that national guidance would alleviate some of this pressure.[114]

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[105] Department of Conservation *New Zealand Coastal Policy Statement 2010* (November 2010) at 10

[106] Department of Conservation, above n 105, at 23

[107] Parliamentary Commissioner for the Environment, above n 2, at 5

[108] Department of Conservation, above n 105, at 9

[109] Department of Conservation, above n 105, at 13

[110] Department of Conservation *Review of the effect of the NZCPS 2010 on RMA decision-making* (June 2017)

[111] Department of Conservation, above n 110, at 7

[112] Climate Change Adaptation Technical Working Group, above n 1, at 52

[113] Department of Conservation, above n 110, at 8

[114] Department of Conservation, above n 110, at 10

Climate change is mentioned in the *Thirty Year New Zealand Infrastructure Plan 2015* and the *National Policy Statement for Freshwater Management 2014*. The freshwater policy requires that regional councils should have regard to the "reasonably foreseeable" effects of climate change when managing freshwater[115], while the infrastructure plan includes a short discussion on potential problems that climate change may have on infrastructure, but does not go further to offer any solutions.[116]

Guidance has also been given to local government from the Ministry of Environment to some extent as to how they should be adapting to climate change.[117] This approach sees councils as having primary responsibility for planning and implementing adaptation measures specific to their area, [118] which is evident of the dominant method central government has taken when addressing climate change adaptation. The guidance from the Ministry for the Environment does provide local government with a resource from which to make adaptation decisions, however, its recommendations are not mandatory as they are not issued under a statute. This means that councils have discretion as to whether or not they will take the guidance into account. This further contributes to the fragmented approach currently taken by councils, whereby some councils are doing more than others in this area.[119]

The main actions that central government have taken with regards to climate change adaptation have been in the research area.[120] The government has supported studies that inform New Zealand as to the changes that we can expect in coming years, which have provided a base of knowledge to draw from when deciding how to plan for the effects of climate change.[121] The Stocktake Report from the Climate Change Adaptation Technical Working Group found that while central government had done significant research on the effects of climate change in New Zealand in general, there was minimal understanding as to how climate change would impact the specific roles and operations of each

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[115] Ministry for the Environment *National Policy Statement for Freshwater Management 2014* (Updated August 2017) at 12

[116] The Treasury *Thirty Year New Zealand Infrastructure Plan 2015* (August 2015) at 17

[117] Ministry for the Environment, above n 97; Ministry for the Environment *Climate change effects and impacts assessment: a guidance manual for local government in New Zealand – 2nd edition* (May 2008)

[118] Ministry for the Environment, above n 97, at 28

[119] Climate Change Adaptation Technical Working Group, above n 1, at 55

[120] Climate Change Adaptation Technical Working Group, above n 1, at 45

[121] Climate Change Adaptation Technical Working Group, above n 1, at 46-47

government agency.[122] This has led to a lack of consistency in some areas. For example, the *Coastal Policy Statement*, the Building Act and the LGA all have different timeframes for considering future environmental effects.[123] The Building Act requires a 50-year life of a building to be considered, while the Coastal Policy Statement uses a 100-year timeframe and the LGA uses a 30-year timeframe.[124] Central government currently does not have a clear statement of priorities or responsibilities for climate change adaptation, which has resulted in unclear and inconsistent direction to other parties, such as local councils.[125]

To date, most of central government's funding outside the research area has been reactive, in response to a natural disaster.[126] This is problematic as it is preferable for damage to be avoided, rather than needing to repair damage after it has occurred. This is because people may be restricted from access to their homes or other services, causing higher costs, harm and distress than would have occurred had preventative measures been taken. Action taken solely as a response to a natural disaster will not always address long term, slow moving issues that result in land degradation, such as gradual sea level rise or coastal erosion.[127] One of the difficulties with creating an impetus to adapt to the effects of climate change is that many of the current effects of climate change are very slow moving and gradual. For example, average sea level rise in New Zealand is approximately 1.8 millimetres per year.[128] This is indistinguishable to most people and so is not considered a direct threat by the general public. Without an obvious pressing threat, it is easier politically for central government to do little on this issue.

Central government has the ability to give stronger guidance on this issue through National Policy Statements, but is currently under-utilising this ability.[129] Creating a National Policy Statement specific to climate change adaptation has the potential to aid

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[122] Climate Change Adaptation Technical Working Group, above n 1, at 47

[123] Climate Change Adaptation Technical Working Group, above n 1, at 48

[124] Local Government Act s 101B(1); *New Zealand Coastal Policy Statement,* policy 10(2)(a), policy 24(1), policy 25, policy 27(2)(b), Building Regulations 1992, schedule 1 (The building code) B2.3.1

[125] Climate Change Adaptation Technical Working Group, above n 1, at 49

[126] Climate Change Adaptation Technical Working Group, above n 1, at 45

[127] Climate Change Adaptation Technical Working Group, above n 1, at 51

[128] Ministry for the Environment *Preparing for coastal change: a summary of coastal hazards and climate change guidance for local government* (December 2017) at 6

[129] Resource Management Act, s 45. Current National Policy Statements in force are the National Policy Statement on Urban Development Capacity, National Policy Statement for Freshwater Management, National Policy Statement for Renewable Electricity Generation, National Policy Statement on Electricity Transmission, New Zealand Coastal Policy Statement

development in this area significantly, by determining central government's expectations and objectives in this area and how they should be achieved. A national policy statement on adapting to climate change would be a powerful tool, as local and regional councils must implement the policy statement in their plans.[130]

C Local Government Policy and Planning

Local government is responsible for many issues relevant to climate change, such as flood control, stormwater management, operation and maintenance of infrastructure, freshwater management and coastal issues,[131] meaning that they are seen as being "on the front line" when considering climate change adaptation.[132] Despite local government's significant role in climate change adaptation, not all councils have seen this as an issue that needs to be addressed, according the Climate Change Adaptation Technical Working Group.[133] The Working Group reached this conclusion by surveying 48 local government authorities for their Stocktake Report.[134]

The Stocktake Report found that councils were generally in the early stages of adaptation, despite being relatively well informed as to the risks of climate change.[135] Adaptation has been included in some council plans, such as including flood hazard maps and restrictions on land use in areas that are vulnerable to sea level rise (included in the Auckland Unitary Plan).[136] Despite some progress in this area, councils currently do not have plans or policies with regard to the specific risks Māori freehold land faces from climate change.[137]

The RMA provides guidelines for authorities making decisions about natural resources. The resource management regime has developed consistently with the principle of subsidiarity, which means that authorities at the local level are best positioned to take the appropriate course of action for their area.[138] The operation of the RMA, and therefore the decisions authorities must make relevant to climate change adaptation, is enacted

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[130] Resource Management Act, s 62(3), s 67(3) and s 75(3)

[131] Climate Change Adaptation Technical Working Group, above n 1, at 54

[132] Ministry for the Environment, above n 97, at 28

[133] Climate Change Adaptation Technical Working Group, above n 1, at 55

[134] Climate Change Adaptation Technical Working Group, above n 1, at 54

[135] Climate Change Adaptation Technical Working Group, above n 1, at 56

[136] Climate Change Adaptation Technical Working Group, above n 1, at 57

[137] This conclusion was reached by researching New Zealand local and regional council long term plans.

[138] Climate Change Adaptation Technical Working Group, above n 1, at 53

largely by local and regional councils through their policies and plans.[139] Local authorities must make district plans under section 73 of the RMA, to assist them in carrying out their sustainable management functions under the Act. Since district plans are prepared under the RMA, authorities must "have particular regard to" the effects of climate change when making these plans. They must also consider Māori interests under section 6(e) and take into account the principles of the Treaty of Waitangi under section 8. Overall, the direction given in legislation to local governments is weak on the adaptation issue. There is no specific provision in the LGA requiring local governments to take climate change into account. Both Māori interests and climate change are only one factor to take into account when making decisions under the RMA. This partly explains the lack of action in the area of Māori freehold land adaptation on the part of councils.

The lack of direction from central government has meant that many councils are unsure as to how to make effective adaptation plans, as well as a lack of clarity surrounding funding and resources.[140] It is difficult for councils to act on these challenging issues without a clear mandate from central government. Issues among ratepayers may arise if rates from the entire region are disproportionately used to protect private coastal property.[141] Some of the smallest councils, based on ratepayer contributions, have the most complex issues facing their coastal land.[142] This means that they generally lack enough resources to address these issues. Councils are also required to have a rates remission or postponement policy in place for owners of Māori freehold land, meaning that councils in areas with large amounts of Māori freehold land face further limitations on their resources.[143] The land needs to be utilised so that the owners can become more actively attached to the land and therefore will be more likely to pay rates. However, without the funds to improve and strengthen the capacity of the land to withstand environmental impacts, it is unlikely that such land will be developed. This situation can likely only be resolved if support is given to either the landowners or the relevant councils.

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[139] Resource Management Act, ss 30-31

[140] Climate Change Adaptation Technical Working Group, above n 1, at 56

[141] Climate Change Adaptation Technical Working Group, above n 1, at 61

[142] Department of Conservation, above n 110, at 28

[143] Local Government Act, s 102(2)(e)

D Conclusion

Central government has so far addressed climate change adaptation through statutes and policies that have been created for management of the environment in general. Many are highlighting that this approach has led to misalignment of the legislation and a lack of direction for local government. Councils are currently at different stages of preparing for climate change, depending on the risks for each area. Central and local government are therefore not addressing the needs of landowners, and especially not the unique needs of owners of Māori freehold land. The next chapters will determine if the current approach and lack of action on the part of the government is enough to establish a Treaty breach.

III Chapter III: What is the Duty of Active Protection?

This chapter will look at the duties arising from the principles in the Treaty of Waitangi (the Treaty), specifically the duty of active protection. The purpose of this chapter is to determine whether the current government inaction on adaptation measures specific to Māori freehold land can constitute a current breach of this Treaty principle, by investigating the content of the duty and how it has been applied and interpreted by government in other contemporary contexts.

A The Origin of the Duty of Active Protection

The general early approach in the courts established that Treaty rights can only be enforced if they have been expressly incorporated by statute.[144] The Waitangi Tribunal, however, is able to investigate allegations of Treaty breaches through Crown actions or omissions as well as through legislation.[145] The Tribunal's recommendations are not binding on courts or the Crown, but still have considerable weight in terms of good-faith dealing with Māori. The Tribunal is empowered by the Treaty of Waitangi Act 1975 to identify Treaty principles and determine whether matters brought before it are inconsistent with these principles.[146]

Since the two texts of the Treaty differ in meaning, the modern focus is not on the specific words but on the spirit in which it was signed and the overarching principles that can be distilled from the agreement.[147] The duty of active protection applies to the interests guaranteed under Article 2 of the Treaty.[148] It also arises from the guarantees given in the preamble and in Article 3.[149] The preamble of the Treaty states that the Queen will protect the chiefs and tribes of New Zealand, while Article 3 goes on to guarantee Māori the same rights and privileges of British citizens.

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[144] *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1940] AC308; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680

[145] Treaty of Waitangi Act 1975, s 6

[146] Treaty of Waitangi Act, preamble

[147] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 663

[148] Waitangi Tribunal *Ngawha Geothermal Resources* (Wai 304, 1993) at 100

[149] Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 247

The obligation of active protection was first recognised and affirmed judicially by the Court of Appeal in the 1987 SOE case.[150] This was the first court case to inquire into the content of Treaty principles in some detail, made possible because of section 9 of the State Owned Enterprises Act 1986.[151] The Court of Appeal held that the Treaty created responsibilities similar to fiduciary duties, and that the duty on the Crown is not passive but "extends to active protection of the Māori people in the use of their lands and waters to the fullest extent practicable. That duty is not a light one and is infinitely more than a formality."[152] The Waitangi Tribunal reports have gone on to elaborate what is required by the duty and will be discussed further below.

However, according to the Privy Council, the duty is not absolute, meaning that the government is only required to take action that is reasonable in the circumstances.[153] What is reasonable in the circumstances will depend on the vulnerability of the taonga involved and the available resources of the government. If the taonga is rare and irreplaceable, the duty on the Crown to protect it will be greater.[154] In the *Broadcasting Assets* case, the Privy Council said that the duty will likely require more of the Crown where the vulnerability of the taonga is due to past breaches of the Treaty.[155] For a well-founded claim of a Treaty breach, the Tribunal has stated that it must be found that there was a Crown act or omission that breached Treaty principles and that this breach will cause prejudice to Māori.[156] This chapter now turns to consider in more detail how this principle of active protection has developed in subsequent Waitangi Tribunal reports and judicial decisions concerning Crown action or inaction in the current era.

B The Duty of Active Protection in the Current Era

1 Tribunal reports

Over the last 40 years, the duty of active protection has been applied many times by the Waitangi Tribunal to a wide range of taonga. This is due to the nature of the Treaty as an

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[150] *New Zealand Māori Council v Attorney General,* above n 147

[151] Linda Te Aho "Contemporary Issues in Māori Law and Society: Crown Forests, Climate Change, and Consultation – Towards More Meaningful Relationships" (2007) 15 Wai L Rev 138

[152] *New Zealand Māori Council v Attorney General,* above n 147, at 642

[153] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) *[Broadcasting Assets case]* at 5

[154] Waitangi Tribunal, above n 148, at 100

[155] *New Zealand Māori Council v Attorney-General,* above n 153, at 5

[156] Waitangi Tribunal *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 21

agreement that develops with new circumstances.[157] Four Tribunal reports on contemporary claims of a breach of active protection of a taonga are discussed here. These four reports have been chosen because they represent a range of different type of taonga, demonstrating the flexible application of the duty. This is important to appreciate as it lays the foundations for the subsequent chapter of this dissertation that considers explicitly the context of the core question of this work: *If the government is bound by a duty of active protection to Māori, what in law can be done to address the need for adaptation of Māori freehold land to climate change?*

(a) Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011)

The Wai 262 claim has been the most significant and comprehensive Tribunal report to date, described by the Tribunal as a "whole-of-government" inquiry.[158] It is therefore important to look at the Tribunal's findings as to active protection in this wide-ranging report. The Report addressed the challenges brought by the claimants as to the government's authority to make decisions regarding various taonga.[159] The focus of the Report was on contemporary law and policy, in order to make recommendations for the future of the Crown-Māori relationship in this area.[160] The general scope of the report was to address all forms of current Crown control over mātauranga Māori (Māori knowledge).[161]

The specific inquiries under this general umbrella were Māori interests in taonga works, genetic and biological resources in taonga species and in environmental management under the RMA and the Conservation Act 1987.[162] The work of government agencies in supporting te reo Māori was considered, as were other agencies that use mātauranga Māori.[163] Government actions towards rongoā Māori (Māori healing) and consultation with Māori before entering into international instruments were also considered.[164]

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[157] *New Zealand Māori Council v Attorney-General,* above n 147, at 663

[158] Waitangi Tribunal, above n 8, at 1

[159] David V Williams "Ko Aotearoa Tēnei: Law and Policy Affecting Māori Culture and Identity" (2013) 20 IJCP 311 at 316

[160] Waitangi Tribunal, above n 8, at 10

[161] Waitangi Tribunal, above n 8, at 19

[162] Waitangi Tribunal, above n 8, at 20

[163] Waitangi Tribunal, above n 8, at 23

[164] Waitangi Tribunal, above n 8, at 23

The Tribunal found that the framework for environmental management of land, air and water under the RMA was not performing effectively for Māori.[165] Even though the RMA expressly provides for Māori input and recognition of Māori interests, most of the environmental management had been delegated to councils, which had effectively sidelined Māori involvement.[166] Councils had not been adequately following the requirements to involve Māori in decision making, meaning that Māori had generally been treated as consultees without any power or influence.[167]

The Crown was required to do more to actively protect the kaitiaki relationship of Māori with the environment.[168] The lack of leadership and guidance from central government towards Māori involvement with RMA issues had meant that councils had been able to disregard Māori interests.[169] A Treaty-compliant RMA would require councils to make decisions consistent with the Treaty, instead of merely including it as a factor to be considered. Kaitiaki would have greater control over taonga and greater influence in decision making.[170] The Tribunal found that the government should issue a national policy statement under the RMA requiring councils to act consistently with Treaty principles.[171] National policy statements are important instruments that allow central government to set the framework for environment management under the RMA, and therefore should be utilised in order to focus the attention of local authorities onto iwi participation.[172] The Tribunal found central government was neglecting their Treaty responsibilities by allowing local government to ignore Māori interests in this area.[173]

The Tribunal also inquired into the protection given to taonga works. The guarantee in the second article of the Treaty of protection of taonga required that measures be put in place that protected these works.[174] At the time of the report, anyone could use Māori taonga in advertising or artwork without consultation with kaitiaki (guardians). There was also no accountability for non-Māori using taonga works in a derogatory manner. This

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[165] Waitangi Tribunal, above n 8, at 272
[166] Waitangi Tribunal, above n 8, at 273
[167] Waitangi Tribunal, above n 8, at 273
[168] Waitangi Tribunal, above n 8, at 285
[169] Waitangi Tribunal, above n 8, at 283
[170] Waitangi Tribunal, above n 8, at 285
[171] Waitangi Tribunal, above n 8, at 283
[172] Waitangi Tribunal, above n 8, at 283
[173] Waitangi Tribunal, above n 8, at 283
[174] Waitangi Tribunal, above n 8, at 100

was a framework that provided no protection at all for taonga works and so was not consistent with the duty of active protection.[175]

In this case, the appropriate measures to satisfy the duty of active protection were mechanisms that allowed for complaints to be made about derogatory uses of taonga works, as well as consultation or consent, depending on the circumstances, with kaitiaki where a taonga work was used in a commercial setting.[176] The Tribunal balanced the competing interests of Māori and non-Māori in coming to their recommendations, which demonstrates the reality of recognising Māori interests in modern society. The Māori interest will not often be absolute and will be qualified depending on the competing interests involved.

(b) Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017)

This Report is the most recent addressing the principle of active protection. The Report considered the duty of active protection in the context of the disproportionately high Māori reoffending rates. Here it was found that the disparity between the reoffending rates of Maori and non-Māori caused the duty of active protection to be engaged.[177] This was an interference with the "ultimate taonga" (enjoyment of life) and therefore required a strong response from the Crown.[178]

To satisfy the duty, according to the Tribunal, the Crown needed to put in place policies to prioritise the reduction in Māori reoffending rates and rectify the disadvantage that Māori were facing in the system.[179] The Crown previously had a plan specific to Māori targeting reoffending, but had allowed this to lapse without replacing it.[180] This meant that at the time of the report, there was no policy that addressed Māori reoffending. There was a plan to reduce reoffending in general, but this was found to be not enough to satisfy the requirements on the Crown.[181] The significantly higher rate of Māori reoffending meant that the duty of active protection required that Māori issues be prioritised and a

[175] Waitangi Tribunal, above n 8, at 77
[176] Waitangi Tribunal, above n 8, at 100
[177] Waitangi Tribunal, above n 156, at 27
[178] Waitangi Tribunal, above n 156, at 28
[179] Waitangi Tribunal, above n 156, at 28
[180] Waitangi Tribunal, above n 156, at 28
[181] Waitangi Tribunal, above n 156, at 41

separate approach targeting Māori needs should be set up.[182] The recommendations made by the Tribunal were that the Māori Advisory Board should work as partners with the Department of Corrections and create a revised strategy focusing on a reduction in Māori reoffending.[183]

(c) Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001)

This Report, of more than 15 years ago, addressed active protection in the context of the health sector. The Tribunal examined historical and contemporary actions of the Crown as regards health policy and the events occurring at Napier Hospital. The Crown had breached the principle of active protection by failing to inform itself of the health status and needs of Māori in the Napier area, both in contemporary times and historically.[184] The Tribunal also found that the Crown had an ongoing obligation to protect Māori against the adverse effects of settlement on Māori health, for example due to introduced diseases.[185]

Active protection had been breached in the contemporary context by the failure to address the poor state of health of Māori in the Ahuriri hapu.[186] The breaches of Treaty principles had the prejudicial effect of Ahuriri Māori suffering significantly worse health than non-Māori, due to the combined effect of introduced diseases and poor provision of healthcare services to Māori.[187] The main recommendation from this Report was that a health centre be established. This health centre would be open to all, but would be situated in the area of Maraenui, which was where most Māori in need of its services were located.[188] The Tribunal also recommended that a Treaty-based relationship should be established between the Hawkes Bay District Health Board and Te Taiwhenua o Te Whanganui a Orotu (the representative Māori organisation for the area).[189]

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[182] Waitangi Tribunal, above n 156, at 41

[183] Waitangi Tribunal, above n 156, at 65

[184] Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 368

[185] Ani Mikaere and Craig Coxhead "Treaty of Waitangi and Māori Land Law" (2002) 2002 NZ L Rev 415 at 417

[186] Waitangi Tribunal, above n 184, at 359

[187] Waitangi Tribunal, above n 184, at 374

[188] Mikaere and Coxhead, above n 185, at 418

[189] Waitangi Tribunal, above n 184, at 385

(d) Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004)

This Report is an example of an urgent claim being heard by the Tribunal concerning imminent Crown action to legislate in a manner that many Māori regarded would result in a series of breaches of the Treaty principles. The subject of the report was the proposed legislation that was going to extinguish Māori rights to have their property claims to the foreshore and seabed considered by the courts.[190] The Tribunal found that the principle of active protection was breached first by the disregard of Māori interests in the preparation of the legislation and secondly by the failure to attempt to reach a negotiated settlement.[191] The Tribunal acknowledged that a negotiated settlement is not possible in every situation, but said that a meaningful attempt to achieve one is necessary to satisfy the principle of active protection.[192]

In summary, these Tribunal reports all deal with the principle of active protection in different contexts. The adaptable nature of the principle to modern circumstances is important when considering its application to the climate change issue.

2 Court cases:

Since 1987, many cases have been heard by appeal courts concerning an alleged breach of the Treaty principle of active protection.[193] Since the courts can only enforce Treaty principles where they have been incorporated by statute, there is a general theme to these cases. Statutes often require decision makers to take the principles of the Treaty into account along with other factors.[194] This means that the protection given to Treaty

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[190] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 133

[191] Waitangi Tribunal, above n 190, at 133

[192] Waitangi Tribunal, above n 190, at 133

[193] See *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429; *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation* [2017] NZCA 613; *Te Rūnanga o Ngāi Tahu v Christchurch City Council* [2017] NZHC 541; *Ngati Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407; *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422; *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2012] NZRMA 123; *Waikanae Christian Holiday Park v Kapiti Coast District Council* HC Wellington CIV-2003-485-7764, 27 October 2004; *Bleakey v Environmental Risk Management Authority* [2001] 3 NZLR 213; *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98; *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553; *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140

[194] For example, see Resource Management Act, Part 2

principles in legislation is rarely absolute and will depend on the facts of the case.[195] The following cases are recent examples of this approach.

(a) *Attorney General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1426

In this case, the Trustees wanted their regional council to restrict fishing under the RMA in order to preserve the indigenous biodiversity in the waters surrounding Motiti Island. Doing so would protect the relationship Māori had with the taonga.[196] The Council argued that they were not empowered to make decisions on fisheries under the RMA, as this would be encroaching on the powers in the Fisheries Act (the statute that manages fishing in New Zealand).[197] The case was decided largely on the principles of statutory interpretation. The Court found that the RMA allowed for councils to make regulations as to fishing where the purpose was to preserve the natural environment, not the level of fisheries.[198] An interpretation consistent with Māori interests was preferred since both the Fisheries Act and the RMA seek to recognise and provide for Māori interests.[199] While the decision was not made solely on the basis of the principle of active protection, the Court took it into account when deciding how to interpret the statute, in order to achieve an outcome that would maximise protection of the Māori relationship with the indigenous biodiversity.[200]

(b) *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation* [2017] NZCA 613

The claimants in this case argued that the Crown was breaching the principle of active protection by granting tourism concessions to two other businesses in regards of access to land that the claimant tribe had proven ancestral links to.[201] The decision was made under the Hauraki Gulf Marine Park Act 2000, which required that many different interests be taken into account when making decisions, only one of which was the Māori interest in the area.[202] This made a balancing act inevitable.[203] Ngai Tai's case was unsuccessful, as the Court found that the decision maker had given adequate regard to active protection of

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[195] Beverley, above n 90, at 123

[196] *Attorney-General v Trustees of the Motiti Rohe Moana Trust,* above n 193, at [1]

[197] Fisheries Act 1996, s 8(1)

[198] *Attorney-General v Trustees of the Motiti Rohe Moana Trust,* above n 193 at [11]

[199] *Attorney-General v Trustees of the Motiti Rohe Moana Trust,* above n 193 at [117]

[200] *Attorney-General v Trustees of the Motiti Rohe Moana Trust,* above n 193 at [117]

[201] *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation,* above n 193 at [12], [45]

[202] Hauraki Gulf Marine Park Act 2000, ss 7-8

[203] *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation,* above n 193 at [38]

Ngai Tai's interests and had concluded that the provision of concessions to others did not prevent Ngai Tai from pursuing their own concessions. The decision did not therefore breach the principle of active protection.[204]

In summary, these cases demonstrate active protection as applied by the courts, in the context of competing statutory obligations. This is relevant to the climate change issue for Māori freehold land as the legislation and government policy currently only incorporate Māori issues and climate change along with other factors.

C Who is the Duty Attributable To?

The duty of active protection is an important one, yet it is unclear exactly who is responsible for it. This depends on the limit of what constitutes "the Crown." Does it extend to local government, or is it solely central government? If local government are included in the definition of the Crown, then they will have Treaty responsibilities for their actions beyond decisions under the RMA.[205] It would mean that local government, as well as central government, would directly be able to be held accountable for lack of action regarding climate change adaptation of Māori freehold land. If local government is not considered part of the Crown, then central government will solely be held responsible and will need to ensure that any of their delegated powers are being exercised consistently with Treaty principles.[206]

The Treaty of Waitangi is stated to be between the Crown and Māori, but the concept of "the Crown" is amorphous and uncertain.[207] The orthodox approach is that "the Crown" refers to central government, but it is less clear if it extends beyond this.[208] Local government has argued that they are not "the Crown" and so are not subject to the full duties and responsibilities of a Treaty partner.[209] The Waitangi Tribunal has approached the issue by focusing on the empowering statute and looking at whether these parameters

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[204] *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation,* above n 193 at [46]

[205]Tama Potaka "A Treaty Agendum for Local Government" (1999) 29 VUWLR 111 at 131

[206] Waitangi Tribunal, above n 156, at 22

[207] Potaka, above n 205, at 116

[208] Geoff Melvin "The jurisdiction of the Waitangi Tribunal" in Janine Hayward and Nicola R Wheen (eds) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004) at 21

[209] Maria Bargh "Tiers of Confusion and Blurring Boundaries: Māori, the Local Government Act 2002 and the General Agreement on Trade in Services (GATS)" (2004) 56(1) Political Science 65 at 66

are consistent with the terms of the Treaty.[210] The Crown cannot escape Treaty responsibilities by delegating powers, instead, they must ensure that the delegation is consistent with the Treaty.[211]

There have been arguments on either side as to the extent of the responsibility on local governments to uphold Treaty principles. Councils have argued that their responsibility is limited to the express incorporation of the Treaty in legislation relevant to the exercise of their powers and duties. However, the High Court has held that the highly significant nature of the Treaty as a constitutional document means that it could have an influence on the outcome of interpretation of the law even when it is not specifically included in relevant legislation.[212] This would affect local authorities as it would mean that the LGA would be able to be interpreted in light of Treaty principles.[213] Others have argued that since local government's powers are delegated and devolved from central government, they should be considered a Treaty partner the same as central government.[214]

Even if local government is not part of the Crown, it is still bound by the Treaty to the extent it is included in statutes relevant to local authorities. Local governments exercise powers of kawanatanga that were originally conferred by the Treaty, which means that local governments have some form of Treaty obligations that have been introduced into legislation.[215] The LGA states that in order to comply with the Crown's obligations under the Treaty, local government must comply with the provisions that require Māori participation in decision-making.[216] It requires that councils take into account the relationship between Māori and their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga where a significant decision is being made in relation to land or water.[217] Local governments must also comply with Treaty principles when they are exercising RMA powers.[218]

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[210] Melvin, above n 208, at 22

[211] Waitangi Tribunal *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22; Waitangi Tribunal Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 265; Waitangi Tribunal *Ngawha Geothermal Resource Report* (Wai 304, 1993) at 100

[212] Potaka, above n 205, at 123

[213] Potaka, above n 205, at 123

[214] Bargh, above n 209, at 146

[215] Karen Webster and Christine Cheyne "Creating Treaty-based local governance in New Zealand: Māori and Pakeha views" (2017) 12(2) New Zealand Journal of Social Sciences Online 146 at 148

[216] Local Government Act, s 4

[217] Local Government Act, s 77(1)(c)

[218] Resource Management Act, s 8

In the absence of a definitive ruling as to the Treaty responsibilities or a distinct statutory definition of "the Crown," it will be difficult to hold that local government is bound by general Treaty principles to the same extent as central government. However, since central government is bound by the Treaty and can have a Tribunal ruling brought against them for their actions, there could be a claim made that the Crown has not done enough to ensure consistency with Treaty principles by local government actions through their delegation of powers in the LGA.[219]

D Conclusion

The Treaty principles have been applied to new situations that were not directly envisaged when it was first signed, meaning that its application is constantly developing. In summary, the duty of active protection is engaged when a taonga is negatively affected. This may involve a disparity between Māori and non-Māori, in which case an approach specific to Māori may be needed in order to satisfy the duty. A lack of legislation or a policy framework protecting Māori interests may mean that Māori are disadvantaged. A balance between Māori and non-Māori interests will normally be necessary when determining how far active protection will go, especially where non-Māori interests are commercial in nature. The next chapter will go on to consider more explicitly whether the duty of active protection is engaged in the context of adaptation of Māori freehold land to climate change.

[219] Webster and Cheyne, above n 215, at 150

IV Chapter IV: If the government is bound by a duty of active protection to Māori, what in law can be done to address the need for adaptation of Māori freehold land to climate change?

This chapter will draw together the concepts discussed in the preceding chapters by comparing the need for adaptation of Māori freehold land to the duty of active protection. It will analyse whether the current government policy and law on adaptation discussed in chapter two is adequate to satisfy the duty, bearing in mind the obligation on the Crown is to act reasonably in the current circumstances. It will finish with recommendations as to what more the government can do to satisfy the obligation of active protection in this context.

A What is needed for climate change adaptation of Māori freehold land?

Adaptation can come in a number of forms based on the land in question. A measure that could be taken by local governments is to restrict building developments in high risk areas, such as land that is vulnerable to erosion.[220] This has been done to some extent by councils in their plans, such as the Auckland Unitary Plan, but is not consistent across all local authorities.[221] Changes in the environment can be accommodated in some cases by making sure that the environment is protected and resilient to these changes.[222] This could include proper planting work to prevent erosion and maintaining natural features such as sand dunes and estuaries that protect against natural hazards.[223] Retreat from particularly at-risk areas may be required over time.[224] This represents a challenge as to adequate compensation to the owners for any loss of land, an issue compounded for Māori freehold land due to its historical and cultural significance. Another form of adaptation is defence from hazards, such as building sea walls and river flooding protection.[225]

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[220] Climate Change Adaptation Technical Working Group, above n 1, at 57

[221] Climate Change Adaptation Technical Working Group, above n 1, at 57

[222] Climate Change Adaptation Technical Working Group *Adapting to Climate Change in New Zealand: Recommendations from the Climate Change Adaptation Technical Working Group* (May 2018) at 31

[223] Ministry for the Environment, above n 27, at 34

[224] Climate Change Adaptation Technical Working Group, above n 222, at 31

[225] Climate Change Adaptation Technical Working Group, above n 222, at 31

Adequate funding for adaptation efforts is needed. Difficulties have been identified with council funding for adaptation issues, meaning that greater support and direction is needed from central government.[226] This is heightened with regards to Māori freehold land, as it is more difficult for owners to get access to finance. Dispute resolution services are also necessary due to the unique legal framework surrounding Māori freehold land, as discussed in chapter one. Support should be given to Māori organisations and land trusts as to how to communicate with their landowners, to inform them of the issues and begin discussions as to which solutions would work best for each group of owners. Information on the uncertainty that can arise regarding ownership of houses on Māori freehold land, depending if it is judged to be a fixture or a chattel, should be communicated to landowners so that they are aware of the issues that may arise.

B Does climate change adaptation of Māori freehold land come under the duty of active protection?

The duty of active protection is generally engaged by identification of something as a taonga.[227] This is due to the promises given by the Crown in the Treaty of Waitangi as discussed in the previous chapter. TTWMA confirms Maori freehold land as a taonga in its preamble, which indicates that it is something that should be protected.[228] As well as this, the Waitangi Tribunal has said that "it would not be possible to overstate the importance of this taonga" when discussing Māori land.[229] The question is to what extent should it be protected, and does adaptation come within this boundary.

Past breaches of the Treaty by the Crown have resulted in Maori retaining land that is generally of poorer quality than other land in New Zealand and much of it is isolated in coastal areas.[230] The physical characteristics of Maori freehold land are part of the cause of its increased vulnerability to the effects of climate change.[231] The other causes of increased vulnerability are the legal framework that restricts Māori freehold landowners in the use of their land, and the limited ability of poor and isolated communities to fund adaptation efforts.[232] Despite the challenges surrounding Māori freehold land, it still has

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[226] Climate Change Adaptation Technical Working Group, above 1, at 56

[227] Māmari Stephens "Taonga, Rights and Interests: Some Observations on Wai 262 and the Framework of Protections for Māori Language" at 245

[228] Te Ture Whenua Māori Act, preamble

[229] Waitangi Tribunal, above n 5, at 67

[230] Kingi, above n 25, at 134

[231] King, Guy and Severne, above n 28, at 102

[232] Controller and Auditor-General, above n 27, at 27

significant cultural and practical value to its owners. Māori are overrepresented on state housing waiting lists and are more likely to be in poorer living conditions than non-Māori.[233] This means that Māori freehold land has significant value as an asset that can provide affordable access to housing for its owners.[234] The preamble to the Te Ture Whenua Māori Act states that retention and utilisation of Māori freehold land is to be promoted; various measures have been put in place to achieve this objective.[235] However, new considerations must be addressed in the context of climate change and adaptation. The challenges that Māori freehold landowners will face in the coming years due to climate change will likely be more difficult due to the factors identified in chapter one.

Māori freehold land generally faces greater obstacles to adaptation than general land, due to multiple ownership and limited access to finance, creating a disparity between the two (Māori freehold land and general land). The Waitangi Tribunal has found that where a disparity between Māori and non-Māori exists, an approach that targets Māori needs will be required.[236] The Tribunal also said that a "key index of prejudice" was consideration of how much could have been achieved through measures to reduce this disparity.[237] Here the difficulty lies with the uncertainty of future climate change effects, and the fact that while climate change effects may only have a minimal effect on Māori freehold land today, the prejudice to Māori freehold landowners will become more pronounced in the future as environmental conditions worsen. Not all Māori freehold land is marginal nor will all Māori freehold landowners be disadvantaged due to climate change, as there are some very successful developments on Māori freehold land.[238] However, the proportion that is marginal and under-utilised is at risk of never being utilised if action is not taken to adapt the land to environmental changes.

The absence of central government leadership in the environmental sphere is significantly contributing to the lack of action regarding adaptation in general and Māori freehold land specifically. The minimal central government direction in environmental management was addressed in the Wai 262 report and is applicable here. The problems identified in that report were the lack of Māori participation in decision-making and limited regard to Māori interests, despite there being express provision for these in the RMA.[239] In this

[233] Controller and Auditor-General, above n 27 at 23

[234] Controller and Auditor-General, above n 27 at 25

[235] Controller and Auditor-General, above n 65

[236] Waitangi Tribunal, above n 156, at 27

[237] Waitangi Tribunal, above n 184, at 375

[238] See case studies in Te Puni Kokiri *A Guide to Papakainga Housing* (2016)

[239] Resource Management Act, ss 33, 38, 36B; Waitangi Tribunal, above n 8, at 273

context, these issues have meant that there has been limited attention towards the specific needs of Māori as regards climate change and little consideration of Treaty implications in this area. In the Wai 262 report, the Tribunal recommended a national policy statement be issued directing councils to act consistently with Treaty principles.[240] The NZCPS provides a general approach to all coastal land and only mentions Māori freehold land to a limited degree. This has also contributed to councils generally not addressing issues surrounding Māori freehold land in the context of natural disasters and other climate change effects. The flow-on effect from allowing local government to take actions that are not consistent with Treaty principles means that central government is breaching their responsibilities as a Treaty partner. National policy statements could be used more effectively, as recommended in Wai 262, so that central government fulfils their Treaty responsibilities.

The duty of active protection is not absolute; it does not require the Crown to go beyond what can reasonably be expected given the circumstances.[241] It requires "a reasonable degree of protection, not perfection."[242] This means that where there are competing interests, or limits on the Crown's ability to act (such as in a time of recession), the requirements on the Crown may be reduced.[243] However, since there is minimal Crown assistance given for Māori freehold land specifically relating to climate change adaptation, it is likely that current Crown action does not meet the threshold for reasonable protection.

The courts have dealt with cases that have competing Māori and non-Māori interests. These kinds of situations call for a balancing exercise between the interests involved. The position has been that whether Māori interests are prioritised depends on the specific facts of each case.[244] The competing interests regarding climate change adaptation are the interests of other parties for council and central government funds, as the effect of increased funding and focus on the adaptation needs of Māori freehold land means that there is reduced funding for others. Other ratepayers who are expected to cover increased costs will also have an interest in the choice of funding for adaptation efforts. This indicates that a balance may be required when determining how much should be spent on Māori freehold land. While active protection does not always necessitate complete

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[240] Waitangi Tribunal, above n 8, at 283

[241] *New Zealand Māori Council v Attorney-General,* above n 153, at 5

[242] Waitangi Tribunal *Report on the Trans-Pacific Partnership Agreement* (Wai 2522, 2016) at 38

[243] *New Zealand Māori Council v Attorney*-General, above n 153, at 5

[244] *Attorney-General v Trustees of the Motiti Rohe Moana Trust*; *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation,* above n 193

protection, the importance of Māori freehold land and the Crown's duties under the Treaty means that action should not be precluded simply because there are other interests involved.

C What more could be done to satisfy the duty? (Recommendations)

A claim could be brought to the Waitangi Tribunal alleging Treaty breaches of the Crown in failing to produce adequate law and policy on the issue of climate change adaptation of Māori freehold land and allowing local governments to act inconsistently with Treaty principles by doing very little in this area. The Mataatua Distract Māori Council submitted a claim for urgency in the Waitangi Tribunal in 2017 regarding a breach of the principle of active protection due to government inaction on climate change issues.[245] This claim largely focused on mitigation and is currently on hold while the current government introduces new climate change legislation and policy. If the Waitangi Tribunal found in the claimants' favour, recommendations could be given to the government as to how they could act consistently with the Treaty principle of active protection.[246] However, these recommendations are not binding on the Crown, and there has not always been a consistent record of Crown compliance with Treaty recommendations.[247] Despite this, a finding of a Treaty inconsistency is still important and will draw public attention to the issue.

There are a number of measures that both local and central government can take in order to achieve Treaty compliance. National policy statements can be issued under the RMA,[248] which are a powerful tool for generating and prioritising action in this area, both for adaptation in general and in terms of bringing the needs of Māori freehold landowners to the attention of councils. Councils must take national policy statements into account when making their plans[249], meaning that this direction from central government would guarantee a response from local government. This will go towards satisfying the principle of active protection if there are specific provisions in the national policy statement made for Māori freehold land, as active protection requires a targeted approach where Māori are disadvantaged.[250]

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[245] Waitangi Tribunal (Wai 2607, 2017)

[246] Treaty of Waitangi Act, s 5(1)(a)

[247] United Nations *Concluding observations on the fourth periodic report of New Zealand* (March 2018) at 2

[248] Resource Management Act, s 45

[249] Resource Management Act, s 55

[250] Waitangi Tribunal, above n 156, at 41

Central government should provide adequate guidance as to how the necessary adaptation measures should be funded. Without proper funding, adaptation cannot proceed effectively. Confusion and difficulties as to funding has been one of the major factors preventing development in the adaptation area. Directions on funding would give local government more authority to implement policies that directly address adaptation of Māori freehold land. They currently may be more reluctant to provide this funding without a specific mandate due to potential backlash from other ratepayers.

The LGA should be amended so that it requires local government to take responsibility for climate change adaptation specific to Māori freehold land. There is currently no requirement that local government consider the effects of climate change in their decision making outside of the RMA. [251] Including a climate change provision in the LGA would align these two statutes. It would also provide a stronger directive on local government to consider adaptation planning in their decisions. The timeframes the LGA requires for long-term plans (10 years) and infrastructure strategies (30 years) should be extended to allow decisions to include long term climate change impacts.[252] The timeframes in the *Coastal Policy Statement* and the Building Act should also be aligned so that authorities making decisions under them can apply a consistent approach.

There are already existing policies and efforts to increase papakainga housing. The scope of these could be widened to include support for climate change issues for Māori freehold land and educate Māori landowners as to specific risks they face from the environment and the legal framework they must work with to resolve these issues. This could be set up through Te Puni Kokiri, which is usually the first point of contact for Māori freehold land matters.[253] Funding for adaptation purposes could be set up through Te Puni Kokiri also, in order to address the access to finance issues that Māori freehold landowners face. Since the Kainga Whenua loan scheme is generally limited to facilitate housing, other sources of funding are needed where the purpose of the funding is to improve the resilience of the land separate to home-building.

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[251] Climate Change Adaptation Technical Working Group, above n 222, at 33

[252] Climate Change Adaptation Technical Working Group, above n 222, at 33

[253] Controller and Auditor-General, above n 27, at 6

D Conclusion

In summary, it is likely that current government inaction amounts to a Treaty breach. There is recognition in some areas that adaptation is important, but the lack of clear guidance from central government means that action in this area is minimal. The combination of Māori freehold land facing extra difficulties regarding adaptation yet receiving no targeted policy to improve this situation means that it is highly likely that the government inaction in this area is a Treaty breach.

Conclusion

Māori freehold land is an important taonga that warrants Treaty protection. The poor treatment of Māori as regards their land during colonisation has meant that the Māori freehold land that remains has characteristics that make it vulnerable to climate change. The complex legal framework governing the land increases the challenges that the landowners will face. Despite this, the protection given to owners of Māori freehold land in the context of climate change adaptation is inadequate at present. It remains to be seen whether the Zero Carbon Bill will address this issue, which is soon to be introduced at the time of writing. Even if adaptation of Māori freehold land is addressed in the Bill, the remaining legislation and policy still does not adequately provide for adaptation measures to be taken in this area.

This dissertation has evaluated the needs of Māori freehold landowners and established a basis, from the principle of active protection, for a government response to these needs. The recommendations outlined above can be introduced to improve the current situation and make the Crown's actions more consistent with the principle of active protection. However, it is unlikely that these will solve all issues that will arise in the future, due to the level of uncertainty that still remains surrounding the future impacts of climate change. Collaborative decisions between Māori and government should be made so as to best address the coming challenges and protect Māori freehold land.

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