HE TAI WHATIWHATI RUA:* THE INCORPORATION OF RĀHUI IN THE STATE LAW OF AOTEAROA NEW ZEALAND

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Rāhui is a customary legal practice in te ao Māori which prohibits certain activities from occurring or continuing in accordance with the nature or circumstance in which it is applied.

Although it is a well-established legal tenet in te ao Māori, the incorporation of rāhui in the state law of Aotearoa New Zealand is uncertain and untested. At present, rāhui largely exists as an expression of Māori autonomy outside the state legal system. Its legitimacy and enforceability beyond tikanga is dependent on voluntary compliance rather than state sanctions.

A recent petition by the Iwi Chairs Forum for greater legal recognition of rāhui, alongside rampant debate in the media as to the enforceability of the rāhui placed on Whakaari White Island, illustrates the shortcomings of the current legislative regime in regards to rāhui. These events prompt questions as to whether state mechanisms, such as legislation, are required to ensure compliance with rāhui, or, whether the practice should remain within the realm of tikanga.

This article adopts a three-limb inquiry into rāhui and its relationship with state law. First, this article attempts to define the many faces of rāhui. Secondly, this article examines the extent to which rāhui is incorporated into New Zealand's state law, including its prevalence in legislation and the common

* "He Tai Whatiwhati Rua" roughly translates to the interplay or clash of two tides. In this sense, each tide can be understood as a metaphor for New Zealand's bi-jural landscape, being tikanga and the Western Tradition. Each tide or legal system brings a distinct understanding of the law, with the "clash" relating to the constant interplay of tikanga and the Western Tradition within New Zealand's current legal framework. It is this "clash" which forms the basis of the article.

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law. Thirdly, this article assesses the risks, challenges and tensions that may arise if rāhui receives increased recognition through state mechanisms.

This article concludes that state recognition of rāhui, either through legislation or the common law, may jeopardise the tino rangatiratanga of Māori to implement rāhui in accordance with tikanga-ā-iwi. It draws parallels with the Fisheries Act 1996 and Waitākere Ranges Heritage Area Act 2008, and highlights the risk of rāhui becoming divorced from its spiritual roots and parameters.

I INTRODUCTION

At 2.11 pm on 9 December 2019, New Zealand's landmark tourist destination and tūpuna of Ngāti Awa, Whakaari White Island, violently erupted.[1] The eruption killed 22 people, two of whose bodies were never located.[2] Before the sun rose the next day, Ngāti Awa placed a rāhui over the area, extending to the wider Whakatāne, Ōhope and Ōhiwa coastlines. In the coming hours, neighbouring iwi Te Whakatōhea and Te Whānau-ā-Apanui placed rāhui over adjoining coastlines within their rohe.[3] The rāhui prohibited the taking of any kaimoana as well as water-related activities such as diving and swimming, and lasted 19 days.[4] While the Whakaari rāhui was largely adhered to, a small number of fishing and tourism operations failed to comply.[5] There were also reports of the general public continuing to surf and swim as normal despite the rāhui.[6] In te ao Māori, this disregard of rāhui risks compromising its spiritual dimension, potentially harming the mauri of the environment in which it operated and imposing utu on the wrongdoers.[7] However, as noted by the National Iwi Chairs, the imposition of rāhui has very little, if any, support from the state legal system.[8] Ngāti Awa and neighbouring iwi were instead reliant on voluntary compliance rather than state sanctions for the rāhui's enforcement.

The rāhui placed at Whakaari White Island is one of the most prominent examples of rāhui placed by iwi in recent times. The media attention garnered as to its enforceability, alongside a government

1 *Worksafe New Zealand v Whakaari Management Ltd* [2023] NZDC 23224, [2023] 20 NZELR 138 at [1].

2 At [2].

3 Māni Dunlop and Te Aniwa Hurihanganui "What the rāhui in place after Whakaari erupted means and why they are important" *RNZ* (online ed, New Zealand, 12 December 2019).

4 Law Commission *He Poutama* (NZLC SP24, 2023) at 85.

5 Māmari Stephens "Rāhui, mana, and Peter Ellis" *E-Tangata* (26 July 2020) <www.e-tangata.co.nz>.

6 Kathy Forsyth "Eruption rāhui takes a toll on Whakatāne business" *Whakatāne Beacon* (Online ed, Whakatāne, 18 December 2019).

7 See Hirini Moko Mead "Tikanga Māori: Living by Māori Values" (1st ed, Huia, Wellington, 2003) at 201.

8 Letter from the National Iwi Chairs to Jacinda Ardern (Prime Minister) calling for rāhui to be legally recognised (10 January 2022).

contingency fund for business loss arising from the rāhui, illustrated the legal pluralism of rāhui; existing largely as a legal tenet of tikanga, yet attracting a degree of support from the government through the contingency fund.[9] In this sense, rāhui can be viewed as a tangible example of the intersection between tikanga and the Western legal tradition. The Whakaari rāhui demonstrates the shortcomings of the current state legal system to provide for rāhui in a legally enforceable manner. However, it also illustrates the potential success of legislative recognition given general compliance by the public. It is both this shortcoming and the potential of Aotearoa's current legal regime to encompass rāhui as a legally enforceable practice that forms the basis of this article.

Part II of this article reiterates tikanga as an independent legal system and notes that the legitimacy of rāhui is not in dispute. Rather, this article centres on the legal enforcement of rāhui in the state legal system, not in te ao Māori. Part III seeks to define the many faces of rāhui and their reasons for enactment. Part IV explores the current legislative framework within the state legal system in relation to rāhui and assesses whether rāhui may be enforced as a customary right under the common law. However, this analysis is limited in scope and does not provide a complete exploration of the topic. Lastly, Part V discusses the threats, tensions and risks posed should rāhui receive greater recognition in state law.

II TIKANGA AS AN INDEPENDENT LEGAL SYSTEM

Tikanga is an independent legal system consisting of values, principles, practices, norms and mechanisms from which a person or community can determine the correct action in te ao Māori.[10] It is the first law of Aotearoa and operates alongside the state legal system rather than within it, though the two may intersect.[11] This proposition was affirmed by Palmer J in *Ngāti Whātua Ōrākei Trust v Attorney General (No 4)*, who articulated tikanga as a "free-standing" legal framework which does not cease governing iwi or hapū solely because the state legal system fails to recognise its operation.[12]

On this basis, exercises of jurisdictional authority, such as rāhui, are not dependent on recognition by state law to be legally legitimate. As rāhui is birthed of te ao Māori, its enforceability and legitimacy derive from te ao Māori.[13] Specifically, rāhui derives power through tikanga's spiritual dimension, and adherence is driven by the fear of the consequences of disturbing its mauri.[14]

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9 Forsyth, above n 6.

10 ET Durie "Will the settlers settle? Cultural conciliation and law" (1996) 8 Otago LR 449 at 452.

11 Joseph Williams "Lex Aotearoa: An heroic attempt to map the Māori dimension in modern New Zealand law" (2013) 21 Wai L Rev 1 at 32.

12 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [355].

13 Stephens, above n 5.

14 Mead, above n 7, at 202.

Although enforceable under tikanga, it cannot be said that knowledge or fear of utu is sufficient to deter one from breaching a rāhui in modern New Zealand's multicultural environment. Recent petitions and a lack of compliance following Whakaari have shown a failure of compliance, from those who arguably do not understand rāhui. Instead, state law may provide an alternate means of enforceability which can be tailored towards New Zealand's multicultural environment.

III DEFINING RĀHUI

The intricate connection between the spiritual and natural worlds is embedded in te ao Māori.[15] In accordance with a Māori worldview, the spiritual and natural worlds are closely linked with numerous practices and customs required to balance their interactions.[16] Rāhui is an example of such a practice, triggered where the mauri or spiritual force of an area has been disturbed.[17] The practice reflects the importance of the spiritual dimension in te ao Māori and should be understood through the parameters and values governing it, namely tapu, mauri and mana.[18]

At a high level, rāhui is a customary means of prohibiting a specific human activity from occurring or continuing.[19] The most prevalent example of rāhui arises in a drowning, where restrictions are placed over a body of water prohibiting the gathering of kaimoana for a specified period.[20] However, rāhui is not limited to drownings or even incidents relating to death. Rather, rāhui encompasses a myriad of circumstances extending to political skirmishes and, most recently, the COVID-19 lockdown. In this sense, rāhui is better understood as a nuanced means of social and political control capable of adapting to a variety of situations.[21] This nuanced nature is perhaps best articulated by Mead, who recounted his own experiences with rāhui in his book *Tikanga Māori*. Mead discussed a rāhui imposed on playing rugby in South Africa as a way to prevent Māori participation in the 1981 Springbok Tour, demonstrating how rāhui can be applied to political issues, not just whenua. This highlights the somewhat abstract nature of rāhui.

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15 He Poutama, above n 4, at 50.

16 At 50.

17 At 50.

18 At 50.

19 Mead, above n 7, at 193.

20 At 194.

21 At 203.

A Categorising Rāhui

Rāhui can be distinguished between those that operate with "teeth" and those without.[22] The "teeth" of a rāhui are a metaphor for the "bite" or consequence imposed for breaching a rāhui. This understanding has also been expressed as "mild" and "severe" forms of rāhui.[23]

Rāhui with teeth were implemented almost exclusively by tohunga and were believed to be endowed with magic or supernatural powers. Those who challenged the rāhui committed kairāmua[24] and were expected to experience some form of disaster or "wasting disease" as utu.[25] Conversely, rāhui without teeth were implemented via declaration by either a chief or tohunga. The atua, or spiritual forces, were not called on to enforce the rāhui, and offenders were not susceptible to severe forms of utu as the rāhui was created "without the deadly soul-destroying spells".[26]

It has been suggested by Maxwell and Penetito that the nature of rāhui has shifted in modern times to milder forms of rāhui (those without teeth) exclusively.[27] Such a shift may be rooted in the sharp reduction of tohunga following the Tohunga Suppression Act 1907, and the difficulty of persuading the community at large to observe rāhui.[28] Examining the sequence of events leading to rāhui provides an alternative means to distinguish between the various forms of rāhui.[29] Distinguishing rāhui on the basis of purpose rather than spiritual power is arguably more suited to the modern context, given the decline in tohunga and rāhui's operation in a multicultural environment, which may struggle to understand its spiritual component. Employing this method, Mead grouped rāhui into three main categories: death, conservation and political.[30] Each expression of rāhui operates with varying levels of "teeth" and is expanded on below.

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22 Elsdon Best "Notes on the custom of rahui: Its application and manipulation, and also its supposed powers, its rites, invocations and superstitions" (1904) 13 Journal of the Polynesian Society 83 at 85. Whilst a somewhat older source, Best's work still holds relevance and captures the substance of rāhui according to tohunga.

23 Mead, above n 7, at 194.

24 Kairāmua refers to an offence against a rāhui and translates to "eating before the right time". See Mead, above n 7, at 201.

25 At 202.

26 Fiona McCormack "Rāhui: A Blunting of Teeth" (2011) 120 Journal of the Polynesian Society 43 at 45.

27 Maxwell and Penetito "How the use of rāhui for protecting taonga has evolved over time" (2007) MAI Review 2 at 2.

28 At 2.

29 Mead, above n 7, at 194.

30 At 203.

B The Death Rāhui

Arguably, the most well-known use of rāhui occurs following the loss of life. Rāhui is warranted as an area that has been affected by the tapu of death, upsetting the mauri and, in turn, impacting the food supply.[31] This stems from the belief that food can be contaminated spiritually by the tapu of death, and needs to be avoided to allow for the tapu to dissipate.[32] Simultaneously, rāhui operates as a means to express respect for the deceased.[33]

A predominant example of the death rāhui is that of Tūwharetoa rangatira Te Heuheu Tukino, who was killed alongside his people in a landslide at Mount Kakaramea in 1846.[34] All harvesting of food in the surrounding land and water was prohibited under a rāhui for five years. This length translates to the time required for the tapu to dissipate.[35] The dissipation of tapu was symbolically evidenced with the first fish caught in the waters following the rāhui consumed by tohunga Te Takinga, solely.[36] Notably, the rāhui was lifted by rangatira Te Heuheu Iwikau, demonstrating how mana or "chiefly standing" is a conceptual regulator of rāhui.

The 1957 Māori Land Court proceedings concerning Ninety Mile Beach reiterated mana as both a conceptual regulator and instigator of rāhui. Witness Hohepa Kanara explained to the Court that "a Chief could affect a rāhui by declaring a certain area subject to the mana of a rāhui".[37] These remarks mirror those of Rev Richard Taylor, who in 1870 stated "it is evident therefore that the tapu arises from the will of the chief; that by it he laid a ban upon whatever he felt disposed".[38]

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31 At 194.

32 Maxwell and Penetito, above n 27, at 5.

33 At 4.

34 Mead, above n 7, at 195.

35 At 195, citing Apirana Ngata "Nga Moteatea (Part 1)" (1959) Journal of the Polynesian Society at 190–195.

36 Walter Buller "On Some Peculiar Māori Remains" (1895) 27 Transactions and Proceedings of the Royal Society of New Zealand 148 at 152. Similar to the work of Best, Buller captures the substance of rāhui according to tohunga and contains numerous accounts of rāhui which have been referenced by Hirini Moko Mead in recent publications.

37 *Ninety-Mile Beach Title Investigation* (1957) 85 Northern MB 7 (85 N 7) at 19–20.

38 Richard Taylor *Te Ika A Maui, or New Zealand and its Inhabitants* (Wertheim and MacIntosh, London, 1855) at 63. Although this source is from the 19th century, Taylor's works continue to be referenced and upheld, most recently by Hirini Moko Mead. The publication is valuable for its pre-colonial influences and accounts of Māori despite being articulated through a Western lens.

Evidence provided in the 1957 proceedings by witness James Bowman further suggests rāhui could be imposed as a means of respect. Bowman discussed how a rāhui was imposed to respect Te Rarawa rangatira Ngapipi Mumu following his death in the 1880s. He stated that:[39]

> … if anyone came along and broke the rahui they would make him pay. They might chuck him in the tide. Later on they did away with this custom; when the older chiefs died.

Bowman's comments suggest a degree of adaptation of the death rāhui in response to colonisation and subsequent loss of mātauranga.

Despite colonisation, the death rāhui has remained largely intact, with only the boundaries and length of the rāhui condensing.[40] This shift to shorter timeframes was exemplified by a recent rāhui over Mount Ruapehu, which lasted only three days following the death of a climber, contrasting greatly with the five-year rāhui at Mount Kakaramea.[41] The rāhui was further limited to the eastern slopes of Ruapehu, showing a narrowing of the boundaries of rāhui. Reduced size and length may reflect the societal pressures in enforcing rāhui, especially with practical difficulties, including New Zealand's larger population compared to pre-colonisation.[42] The ritualistic practices undertaken by tohunga are also largely absent today, again likely due to the Tohunga Suppression Act.[43]

C The Conservation Rāhui

Rāhui are further implemented for the replenishment of resources or conservation purposes. This can be considered a "mild" expression of rāhui, operating without "teeth" or support of spiritual forces.[44] This expression of rāhui centres on the belief that all animate forms of life, alongside domains such as rivers and lakes, possess a mauri or life force.[45] The rāhui functions to replenish a resource's mauri where it has become sickly, polluted or threatened.[46] Its implementation differs from that of other forms of rāhui, with special karakia required to ensure restoration, and a pou erected to indicate the rāhui.[47]

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39 *Ninety-Mile Beach Title Investigation*, above n 37, at 33–35.

40 Maxwell and Penetito, above n 27, at 4.

41 Department of Conservation "Rāhui on eastern slopes of Mt Ruapehu" (media release, 30 June 2024).

42 Maxwell and Penetito, above n 27, at 5.

43 At 12.

44 Mead, above n 7, at 197.

45 Maxwell and Penetito, above n 27, at 6.

46 At 6.

47 Mead, above n 7, at 197.

Although extending to environmental domains, the conservation rāhui seems to have been largely imposed on food resources as a form of food regulation prior to colonisation.[48] On this, rāhui were placed seasonally in line with breeding or fruiting seasons to ensure a species' vitality. For example, Richard Taylor, in his 1855 work *Te Ika A Maui* recalled how the kiekie was placed under a rāhui until the fruit was deemed ripe to harvest.[49] Only once the fruit was deemed ripe would the community access it. Similar to the death rāhui, the first fruit was presented to the rangatira for assessment, reiterating mana as a regulator of rāhui.

A somewhat modern approach to conservation rāhui was the December 2017 rāhui over the Waitākere ranges to combat kauri dieback disease (phytophthora agathidicida). Human activities have been attributed as a key driver in the disease's spread, with 70 per cent of infected kauri trees located within 50 metres of a walking track. The rāhui sought to prevent public access to the ranges, reducing disease contagion and protecting the mauri of the kauri therein.[50]

However, similar to that of the death rāhui, the rituals and specialist karakia undertaken by tohunga are rarely observed today.[51] This decline may be attributed to land conservation and development, which have alienated Māori from exercising kaitiakitanga over resources in a universal manner.[52] Additionally, this form of rāhui has received varying degrees of legal recognition through legislation, setting it apart from its counterparts. The exact expressions of legislative recognition are discussed below in Part IV.

D The Political Rāhui

The last expression of rāhui is arguably the most contemporary; literature suggests rāhui could be employed for political purposes. Mead refers to this as an aukati, which means to prevent one from crossing a defined line or border.[53] The aukati is better understood as an extension of rāhui, given it was often implemented in response to a social issue, rather than a disturbance of mauri.

While a common practice among the Pacific, the aukati gained traction in New Zealand within the colonial land disputes of the 19th century.[54] The aukati was employed as a strategy to assess and aid in battle. A predominant example can be observed with Ngāti Pikiao in 1864; the chiefs of Ngāti

48 At 197.

49 Taylor, above n 38, at 171-172.

50 Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitakere Ranges Protection Society and Friends of Regional Parks "Rāhui" (2018) <www.waitakererahui.org.nz>.

51 McCormack, above n 26, at 51.

52 At 50.

53 Mead, above n 7, at 198.

54 At 198.

Pikiao declared an aukati over Lake Rotoiti in an attempt to block reinforcements from reaching Maniapoto leader, Rewi Maniapoto. Ngāti Pikiao applied and enforced the aukati against advancing troops, with numerous killed in the process.[55] Mead suggests that the defence of the aukati was closely linked to the integrity of the rōpū.[56] In this sense, it can be argued that the aukati was an assertion of an iwi's mana and could be employed for one's own advantage.

In modern times, it has been argued that the COVID-19 lockdown translated to an aukati or political rāhui.[57] The lockdown imposed certain restrictions on the public, affecting their freedom of movement and was established in response to a social issue. One can draw similarities between the COVID-19 lockdown and the aukati placed over Lake Rotoiti in this sense. Additionally, Ngāhiwi Apanui, chief executive of Te Taura Whiri i te Reo Māori, argued that Jacinda Ardern likely had the standing to declare a rāhui over Aotearoa, given the mana accompanying a Prime Ministerial role.[58] Although there is some debate as to whether the COVID-19 lockdown was truly a rāhui in the strict sense, using rāhui to combat illness or disease is not an isolated occurrence. Following the so-called Spanish influenza epidemic in the early 20th century, rāhui were placed around urupā to limit those exposed to the deceased, and checkpoints were erected to regulate movement.[59]

The political rāhui is evidently contemporary and abstract in nature. It seems to be a creature of social issues rather than an instrument to balance the spiritual and natural worlds, as in the death and conservation rāhui. Given this, statutory incorporation poses a greater degree of difficulty and will be discussed below.

IV INCORPORATION IN STATE LAW

New Zealand's state legal system is premised on a two-tier structure comprising legislation and the common law. Where the two conflict, an implicit hierarchy forms, where the interpretation of legislation will trump that of the common law.[60] This section will explore the extent to which rāhui is incorporated within each regime, either enacted through legislation or as a customary right under the common law.

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55 At 199.

56 At 202.

57 Stephens, above n 5.

58 Carman Parahi "Is it time to declare a rāhui over Aotearoa NZ?" (3 April 2020) Stuff <www.stuff.co.nz>.

59 Luke Fitzmaurice and Maria Bargh *Stepping up: COVID 19 Checkpoints and Rangatiratanga* (Huia Publishers, Wellington, 2021) at 19; and Parahi, above n 58.

60 McCormack, above n 26, at 46.

A Legislation

A limited degree of recognition of rāhui exists through legislation. Although this recognition is somewhat diluted and operates largely through statutory discretion, legislative acknowledgement provides a degree of enforcement in the state legal system.

It is important to note that the imposition of rāhui following a drowning receives no legislative backing despite general, though voluntary, adherence by the public.[61] Instead, current legislation appears to limit rāhui to a conservation mechanism.[62] According to Ruru and Wheen, this limitation may reflect a lack of understanding or willingness from legislators to implement a form of rāhui which accurately reflects the practice.[63] Others, such as Maxwell and Penetito, argue that this form of rāhui represents an adaptation of the practice to function effectively in a modern context, rather than the work of legislators.[64] Regardless of intent, rāhui expressed in legislation differs from rāhui expressed through tikanga.[65] The Fisheries Act 1996, the Tītī (Muttonbird) Islands Regulations 1978 and the Waitākere Ranges Heritage Area Act 2008 illustrate this notion.

Ultimately, rāhui conveyed in legislation seems to be a conservation tool available to those with governmental or statutory authority.[66] Such an expression is not only a limitation of rāhui, but dilutes it as a customary practice centred on mana, tapu and mauri.

1 The Fisheries Act 1996

The Fisheries Act 1996 confers a degree of legislative recognition of rāhui by way of temporary closures. Sections 186A and 186B of the Fisheries Act allow for the Minister of Fisheries to "temporarily close an area to fishing, or to restrict a method of fishing, in order to provide for the use and management practices of tangata whenua".[67] Whilst the term "rāhui" is not explicitly used in reference to temporary closures, it is adopted on the Ministry's official website and in temporary closure applications submitted by tangata whenua.[68]

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61 At 43.

62 Nicola Wheen and Jacinta Ruru "Providing for Rāhui in the Law of Aotearoa New Zealand" (2011) 120 JSTOR 169 at 169.

63 At 169.

64 Maxwell and Penetito, above n 27, at 13.

65 Wheen and Ruru, above n 62, at 179.

66 At 179.

67 Maxwell and Penetito, above n 27, at 9.

68 Wheen and Ruru, above n 62, at 178.

Sections 186A and 186B are arguably an avenue for the government to formally recognise and enforce the practice of rāhui.[69] Temporary closures are legally enforced, with breaches conferring a fine of up to $100,000.[70] This enforceable nature provides closures with "teeth", albeit in a different form than under tikanga.[71]

However, this expression of rāhui is undermined by the Act's operative functions. Namely, the power to instate and remove "rāhui" is directed to the Minister of Fisheries rather than Māori. It is only upon application to the Minister that a temporary closure can be declared, providing the Crown with the ultimate authority to dictate the closure.[72] It should further be noted that an application for a temporary closure is not restricted to Māori, with any individual or group empowered.[73] This broad eligibility limits mana as a conceptual regulator and shifts control away from Māori.

It can be argued that holding a ministerial position confers a degree of mana.[74] On this understanding, the Minister's ability to declare a closure is not entirely divorced from customary expressions of rāhui, as mana continues as a conceptual regulator. However, Maxwell and Penetito imply that the role of a tohunga or rangatira cannot be equated to those with statutory or governmental authority, such as a minister;[75] the spiritual standing and knowledge of tikanga are absent. The risks this poses to customary expressions of rāhui will be discussed at a later point in this article.

Rāhui, in the customary sense, is further undermined through the application process. The process of requesting a temporary closure is fairly arduous and can take up to a year to implement.[76] Temporary closures can only be reinstated twice, extending for a total of just six years. This dilutes the practice by imposing time constraints and curtailing flexibility,[77] and stands in stark contrast to customary expressions of rāhui where duration was determined by the dissipation of tapu or replenishment of mauri, rather than a fixed period.[78]

Additionally, temporary closures in the Act are designed to replenish a resource in order to facilitate manaakitanga (providing food for visitors), rather than kaitiakitanga and the replenishment

69 McCormack, above n 26, at 49.

70 Fisheries Act 1996, s 252(5) and (6).

71 Maxwell and Penetito, above n 27, at 10.

72 McCormack, above n 26, at 49.

73 At 49.

74 See comments by Ngāhiwi Apanui, Chief Executive of Te Taura Whiri i te Reo Māori in Parahi, above n 58.

75 Maxwell and Penetito, above n 27, at 9.

76 At 9.

77 At 9; and McCormack, above n 26, at 49.

78 Maxwell and Penetito, above n 27, at 9.

of mauri.[79] Maxwell and Penetito have interpreted this limitation as stemming from an anthropocentric worldview instead of a holistic worldview,[80] with temporary closures being a Eurocentric interpretation of rāhui.

It seems the Fisheries Act intended to capture the practice of conservation rāhui but neglected its essence, which is to replenish mauri. Whilst, in practice, temporary closures are generally implemented for this purpose, the notion of temporary closures under the Fisheries Act is largely divorced from customary expressions of rāhui. It can be argued that referral to these closures as rāhui is superficial, amounting to a Eurocentric interpretation of rāhui that diverts power away from Māori and towards the Crown.

2 Tītī (Muttonbird) Islands Regulations 1978

In pre-colonial times, seasonal rāhui were employed as a mechanism for food regulation and conservation.[81] One predominant seasonal rāhui can be observed with tītī (muttonbird) harvesting on the Tītī Islands, located off the coast of Rakiura (Stewart Island). Tītī have long been an essential food source for Ngāi Tahu, with the harvesting and trade of the species forming an integral component of the local economy.[82] According to Williams, the Islands were placed under rāhui and were not visited between May and March of the following year, ensuring a sustainable tītī population.[83] This practice is centuries old and is deeply intertwined with whakapapa, with only certain individuals allowed to harvest in accordance with their genealogy.[84]

The seasonal rāhui for tītī harvesting has been codified into the Tītī (Muttonbird) Islands Regulations 1978. The Regulations forbid visitation of the Islands, allowing only a brief window annually from March to May for harvesting by customary rights holders.[85] The Regulations are governed by whakapapa, with only certain families holding customary rights to harvest.[86] Mana and whakapapa continue as a conceptual regulator of rāhui in this sense, despite statutory codification.

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79 At 9.

80 At 9.

81 Mead, above n 7, at 197.

82 Wheen and Ruru, above n 62, at 176.

83 Jim Williams "E Pakihi Hakinga a Kai: An Examination of Pre-Contact Resource Management Practice in Southern Te Wai Pounamu" (Doctoral Dissertation, University of Otago, 2004) at 140.

84 Maxwell and Penetito, above n 27, at 7.

85 Titi (Muttonbird) Islands Regulations 1978, reg 4.

86 Regulation 3.

Despite Crown creation, the Regulations are administered by Ngāi Tahu following the Ngāi Tahu Claims Settlement Act 1998.[87] Breaches of the Regulations confer a fine of $200, somewhat measly in comparison to the Fisheries Act.[88] However, these fines enable the rāhui to operate with "teeth", providing enforceability in the state system.

On the surface, the Tītī (Muttonbird) Islands Regulations are an illustration of a rāhui which strikes a balance in being recognised as a legal practice in state law, with the retention of control by iwi. The rāhui is further governed by customary parameters of mana and whakapapa, contrasting the somewhat Eurocentric expression of rāhui in the Fisheries Act. However, despite exacting the substance of a customary rāhui, the term "rāhui" is absent from the Regulations.[89] This mirrors the Fisheries Act and appears as a common theme through legislation implementing rāhui expressed as temporary closures and controlled areas. It is beyond the scope of this article to explore this theme in depth, although it raises an interesting question as to the Crown's motivation for neglecting the term.

3 Waitākere Ranges Heritage Area Act 2008

Lastly, the Waitākere Rangers Heritage Area Act 2008 is an example of legislation that can be employed to support rāhui. Unlike the Fisheries Act and Tītī Island Regulations, the Waitākere Ranges Heritage Area Act does not explicitly or implicitly seek to implement the substance of a rāhui. Instead, its provisions can be adapted to enforce rāhui through track closures and Controlled Area Notices.

In 2017, mana whenua of Waitākere, Te Kawerau ā Maki, imposed a rāhui over the Waitākere Ranges in an attempt to limit the spread of kauri dieback.[90] The fungus-like pathogen has devastated much of New Zealand's native kauri due to its rapid spread via soil carried on footwear.[91] By imposing a rāhui, human presence in the area could be greatly limited, effectively curbing the key driver in the disease's spread.

The Ranges themselves are governed by the Waitākere Ranges Heritage Act, which aims to promote the protection and enhancement of the Waitākere Ranges.[92] The Act acknowledges Te Kawerau ā Maki as mana whenua and requires the Council to establish "consultation processes" with the iwi for its implementation.[93]

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87 Wheen and Ruru, above n 62, at 177.

88 Titi (Muttonbird) Islands Regulations, reg 11(3).

89 Wheen and Ruru, above n 62, at 177.

90 Te Kawerau ā Maki, above n 50.

91 Te Kawerau ā Maki, above n 50.

92 Waitākere Ranges Heritage Act 2008, s 3.

93 Section 33.

Despite overt statutory recognition and consultation requirements, Auckland Council initially declined to recognise the rāhui, only closing "high-risk" tracks and issuing Controlled Area Notices in May 2018.[94] These measures followed a number of organisations expressing public support for the rāhui, including Forest and Bird, the Waitākere Ranges Protection Society and the Tree Council.[95] Additionally, the national Hillary Trail Marathon was cancelled out of respect for the rāhui despite Auckland Council granting consent for the event.[96] This show of public support somewhat affirms Stephen's assertions that rāhui is generally adhered to regardless of state recognition.[97]

Although the Council appeared hesitant to recognise the rāhui, the Act provided them with the legislative support to enforce the conservation objectives of the rāhui. Controlled Area Notices and track closures were imposed per s 131 of the Biosecurity Act 1993, with the authority delegated to the Council in s 22 and sch 3 of the Waikākere Ranges Heritage Area Act. This contrasts with the Fisheries Act and Tītī Regulations, which seek to enact the substance of a rāhui. In this sense, one can observe the distinction between track closures imposed by the Council and the rāhui established by mana whenua. Track closures supported an existing rāhui in state law rather than implementing one.

Ultimately, the Waitākere Ranges Heritage Area Act offers a legal framework to support the objectives of rāhui.[98] However, the Act confers the ultimate authority on Auckland Council to either accept or reject rāhui based solely on its discretion.[99] This limitation can be attributed to the Act's drafting, which allows support for rāhui to function primarily through statutory discretion. The limitations and risks this poses are discussed in Part V.

In summary, the Fisheries Act, the Tītī (Muttonbird) Regulations and the Waitākere Ranges Heritage Area Act illustrate that rāhui expressed through legislation operates largely as a conservation tool available to those with governmental or statutory authority. Such an expression is not only a limitation of rāhui but dilutes it as a customary practice centred on mana, tapu and mauri.

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94 Rhianna Morar "Ka wera hoki i te ahi, e mana ana anō: Multi-jurisdictional approaches to biodiversity and climate change in Aotearoa New Zealand" (LLB (Hons) Dissertation, Victoria University of Wellington, 2021) at 49; and Ministry for Primary Industries "Controlled Area Notice - Kauri Dieback (Phytophthora Agathidicda) in the Waitākere Ranges" (Public Notice, 1 May 2018).

95 At 49.

96 Alice Peacock "Organiser 'gutted' Hillary Trail 2018 event unlikely due to Kauri dieback concerns" *The New Zealand Herald* (online ed, 17 November 2017); and Susana Lei'ataua "The Waitakere rāhui is kaitiakitanga in action – so where's the support from government?" E-Tangata (18 February 2018) <www.e-tangata.co.nz>.

97 Stephens, above n 5.

98 Waitākere Ranges Heritage Act, ss 3 and 33.

99 Section 22 and Schedule 3.

B The Common Law

New Zealand's state legal framework positions itself as the mechanism that governs the intersection of tikanga with the common law.[100] Through this interaction, the common law offers an alternative avenue for the recognition of rāhui in the state legal system. Recent developments on the treatment of tikanga within the common law highlight the potential for this recognition.

1 Tikanga and the common law

Tikanga and the common law have grappled with each other for two centuries, with their earliest interaction being through the Western presumption of continuity.[101] The presumption holds that the customary laws of indigenous peoples in British colonies are retained unless explicitly altered or extinguished by legislation.[102] This reflects the notion of parliamentary sovereignty and the common law's subordinate position to legislation.[103] Given tikanga *generally* has not been explicitly extinguished, it continues to operate as normative legal order recognisable by the state under the common law. Specifically, common law rights derived from tikanga have been categorised by the Law Commission's *He Poutama* report as either customary property rights or general custom.[104]

Despite the presumption of continuity incorporating tikanga in state law, customary rights have been afforded minimal acknowledgement. The limited influence of tikanga is evident in early case law, which often either rejected customary interests outright or denied their enforceability despite recognition.[105] A prominent example is the infamous case of *Wi Parata*, where Prendergast CJ rejected customary interests in land on the basis that tikanga was not a legitimate form of law.[106] The precedent established by *Wi Parata* persisted well into the 20th century, notably being cited in the 1963 *Ninety Mile Beach* decision regarding the nature and extent of customary title.[107] It was not until

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100 Natalie Coates "The recognition of Tikanga in the Common Law of New Zealand" (2017) 5 Te Tai Haruru 25 at 29.

101 He Poutama, above n 4, at 135.

102 The presumption of continuity can be attributed to Lord Mansfield in *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 (KB) at 895–896, where his Honour stated that "the laws of a conquered country continue until they are altered by the conqueror". While this statement was made in relation to conquered territories, the presumption of continuity has been extended to ceded and settled colonies. See Coates, above n 100, at 29.

103 Coates, above n 100, at 41.

104 He Poutama, above n 4, at 137.

105 Rachael Brown and others "Tikanga Māori in Aotearoa New Zealand law – He Poutama explored in detail – part two: interaction between tikanga and state law" (March 2024) Māori Law Review <www.maorilawreview.co.nz>.

106 *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur (NS) SC 72 at 77 and 79.

107 He Poutama, above n 4, at 138, citing *Re the Ninety Mile Beach* [1963] NZLR 461 (CA) at 476.

2003 that the case was finally overturned.[108] The *He Poutama* report explores this development in depth. It emphasises that the current legal approach largely upholds the presumption of continuity; customary property rights are enforceable under the common law unless explicitly extinguished by statute.[109]

By contrast, the enforceability of general custom has been governed by rules of incorporation and reasonableness under the *Loasby* test. However, the past five years have been marked by a distinct shift in the judiciary's treatment of tikanga and by extension, general custom. It appears the courts have turned from their initial reliance on the rules of incorporation for recognising tikanga as customary law, moving instead towards a broader repositioning of tikanga within the legal framework.[110]

This shift is perhaps best illustrated by the Supreme Court's progression in acknowledging tikanga as informative values in *Takamore*, to its recognition as an independent legal system in *Ellis* and *Ngāti Whātua Ōrākei Trust*.[111] As stated by counsel in *Ngāti Whātua Ōrakei Trust*:[112]

> … the importance and centrality of tikanga as part of the fabric of the common law and its operation and relevance as part of the state legal system is now undeniable.

It is fair to assert that tikanga is now interwoven with, or forms "part of", the common law, with assessments of its legitimacy or reasonableness no longer relevant.[113]

As explained above, rights derived from tikanga can be enforceable under the common law. In the context of rāhui, the common law may provide for rāhui both as an extension of customary property rights derived through the doctrine of native or aboriginal title, and as a general custom.

2 Rāhui as a customary property right

The doctrine of native or aboriginal title asserts that customary land tenure and proprietary rights to physical resources continue to exist even after sovereignty has been assumed.[114] In the modern context, customary property interests can only be extinguished by explicit reference in statute.[115]

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108 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

109 He Poutama, above n 4, at 139.

110 Brown and others, above n 105.

111 Brown and others, above n 105.

112 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, above n 12, at [354].

113 At [358].

114 He Poutama, above n 4, at 136.

115 At 136.

The doctrine has been extended to include rights to hunt, gather and fish, as the source of the title lies with the connection to the whenua, rather than the whenua itself.[116] A notable example is the case of *Te Weehi v Regional Fisheries Officer*, where the High Court upheld an aboriginal title claim which recognised non-exclusive customary rights to fish and gather shellfish.[117] The decision hinged on the common law's acknowledgment of customary fishing rights as part of an unextinguished aboriginal title over land vested in the Crown.

It can be argued that the practice of rāhui mirrors customary hunting and fishing rights, given the imposition of rāhui is derived from mana whenua. In this sense, rāhui is founded on an iwi or hapū's connection to the whenua rather than the whenua itself. The granting of customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011 offers support to this argument. Although a creature of statute, customary marine title is only granted where a claimant group has held and exclusively occupied a specified area in accordance with tikanga.[118] Evidence provided in customary marine title applications includes the imposition of rāhui as an illustration of mana whenua.[119]

International jurisprudence strengthens the framing of rāhui as a right founded in customary proprietary titles. The Australian High Court proceedings of *Mabo v Queensland (No 1)* stated that where a proprietary title is capable of recognition, the antecedent rights and interests should also be recognised as a burden on the Crown's radical title. In the context of New Zealand, the same argument can be made in relation to tikanga.[120] Rāhui, as a custom or right conferred under tikanga, should be recognised as adjacent to customary property title.

If rāhui is tied to a customary property title, it may be a recognisable right under the common law provided the customary property title itself has not been extinguished. Elias CJ commented in *Ngāti Apa* that any property interest of the Crown in land, over which it has acquired sovereignty, is dependent upon pre-existing customary interests.[121] The content of such interests was held to be a question of fact, and extended from mere usage, to occupation rights held as a matter of custom.[122] Her Honour expanded on this in *Paki v Attorney-General* in assessing customary property interests in the Waikato River. Building on *Ngāti Apa*, the Chief Justice ruled that the common law presumption of riparian ownership to the midpoint of the river could not apply until Māori customary interests were

116 Coates, above n 100, at 30.

117 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

118 Marine and Coastal Area (Takutai Moana) Act 2011, s 58(1).

119 *Re Appln for an order recognising customary marine title and protected customary rights* [2024] NZHC 309 at [115] and [180].

120 Coates, above n 100, at 37, citing *Mabo v Queensland (No 1)* [1990] 166 CLR 186 at [53] and [62].

121 *Attorney-General v Ngati Apa*, above n 108, at [31].

122 At [31].

extinguished.[123] As a result, customary rights in the riverbed took precedence over the common law presumption of riparian ownership. These proceedings indicate that where a customary property title has not been extinguished by legislation, rāhui may continue to operate as a recognisable right and even displace long-held colonial common law presumptions.

However, there are critiques to the framing of rāhui as an extension of the customary title. Unlike customary fishing rights in *Te Weehi*, it appears the common law has not expressly acknowledged rāhui as a recognisable customary right.[124] Additionally, the question arises whether the privatisation of title effectively extinguished rāhui under the common law. In other words, if rāhui is sourced in the customary property title, the extinguishment of title operates to extinguish rāhui by extension. It is beyond the scope of this article to explore this issue in depth, although it is important to note that there appears to be little, if any, research on the subject.

Ultimately, jurisprudence surrounding aboriginal or native title indicates that rāhui can be conceived of as adjacent to customary property rights. As such, where a customary property title has not been extinguished, rāhui may continue to operate as a recognisable right under the common law. However, concrete conclusions as to the recognition of rāhui through this framing cannot be drawn as this issue is yet to be explored in New Zealand.

3 Rāhui as general custom

He Poutama defines general custom as encompassing all customs and rights which are not sourced in whenua, with incorporation under the common law governed by parameters established in *Loasby*.[125] Examples of general custom include tangihanga and whāngai.[126] Viewing rāhui through this framework provides an additional mechanism for state recognition. While judicial development on the scope of general custom is somewhat limited, the 2004 proceedings in *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority* indicate rāhui can be framed as general custom. The case surrounded the imposition of rāhui as a defence to a myriad of tort claims.[127] Although the proceedings did not directly confront the enforceability of the rāhui under state law, the Court appeared willing to recognise rāhui should the appropriate case arise. Namely, Harrison J held that the

123 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18].

124 See Harrison J in *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority* [2004] 2 NZLR 201 considered whether the Māori Appellate Court was required to provide guidance on rāhui as a customary practice. Given the case centred on the role of the Māori Appellate Court, the judgement was silent as to whether rāhui was a recognisable customary right. The case is discussed in greater depth below.

125 He Poutama, above n 4, at 225.

126 At 142, citing *Public Trustee v Loasby* [1908] 27 NZLR 801 (SC); and *Hineiti Hirerire Arani v Public Trustee of New Zealand* [1919] NZPCC 1 (PC).

127 *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority* [2004] 2 NZLR 201 (HC) at [7].

imposition of rāhui may give rise to certain customary rights, and the imposition of these rights under the common law would be dictated by the *Loasby* qualifications.[128]

Mead's categorisation of rāhui corroborates this articulation. Political rāhui, such as the rāhui imposed on playing rugby in South Africa and the wider COVID-19 rāhui, illustrate how rāhui can operate independently of whenua. These examples highlight the operative function of rāhui, being a flexible and nuanced form of social and political control centred on mana, mauri and tapu. While one expression of rāhui may manifest as a property right, this is not definitive of the practice itself. Accordingly, the nuanced nature of rāhui can lend itself both to general custom and as a customary property right.

If conceived of as general custom, the recognition of rāhui in the common law is somewhat uncertain. As noted, the 1908 case of *Public Trustee v Loasby* provided the parameters for recognising general customs as conferring enforceable rights and obligations in common law. Recognition was dictated by the generality and longstanding nature of the custom, whether it was contrary to statute, and its reasonableness.[129]

However, the Supreme Court's 2022 decision of *Ellis* overruled the *Loasby* criteria as the governing framework for the recognition of general custom.[130] Glazebrook J highlighted how the requirements were divorced from the nature of tikanga, and the need for reasonableness imposed a Western lens which assumed superiority of tikanga.[131]

There has been no reformulation of the *Loasby* test following its overruling in *Ellis*. This leaves the law in an unsettled state regarding common law recognition of general custom. Calls have been made for an alternative framework, focusing on whether incorporating a general custom into the common law serves, or risks, tikanga as an independent legal system.[132] The principles articulated in *Ngāti Apa*, although relating to customary rights in land, provide guidance in safeguarding against the risk of the common law supplementing tikanga.[133] It is beyond the scope of this article to apply these principles to rāhui. However, it does highlight the possibility for further research on whether the imposition of rāhui as a general custom is better supported under the *Loasby* test, or a framework centred on tikanga protection.

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128 At [18].

129 *Public Trustee v Loasby*, above n 126, at [45].

130 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [21] and [113].

131 At [113]–[115].

132 He Poutama, above n 4, at 226.

133 The principles revolve around the assumption of sovereignty, emphasising that it did not displace pre-existing customary rights. Additionally, any statutory extinguishment of these rights must be clear and explicit, with no presumption in favour of adverse English common law norms; see He Poutama, above n 4, at 226.

In summary, the recognition of rāhui through the common law is untested and uncertain. Operating as an adjacent right to customary property title provides an avenue for recognition, particularly as New Zealand has recognised this framing in *Te Weehi*. Framed as a general custom, however, recognition is unclear. The courts' willingness to recognise and provide for tikanga suggests there may be scope for rāhui, although concerns for the supplantation of tikanga may place additional barriers on recognition. There are also practical considerations relevant in both framings, including whether the privatisation of title creates an obstacle for the operation of rāhui.

V DISCUSSION OF GREATER LEGAL RECOGNITION

Rāhui exists as a legal pluralism, operating as a customary practice rooted in tikanga while deriving limited recognition from state instruments. There have been numerous calls for greater recognition of rāhui, reflecting a growing appreciation of te ao Māori both within and beyond the judicial sphere.[134] However, adapting a statutory-based regime to enforce rāhui should be cautioned. This section will explore the threats, tensions and risks posed should rāhui receive greater recognition in state law. In particular, this section highlights the inherent tension between state law and te ao Māori, alongside the potential for rāhui to become diluted or "Westernised". Given the nuanced nature of tikanga, these concerns overlap. However, they are separated in this article to illustrate the distinct, yet interconnected, challenges that arise when integrating rāhui into a legal system rooted in colonial frameworks.

A Tension with Te Ao Māori

Te ao Pākehā and te ao Māori are underpinned by opposing worldviews. Te ao Pākehā is premised upon anthropocentrism.[135] As a consequence, its legal tradition involves notions of exclusivity and possession, with its operation largely centred on economic value and the exploitation of resources.[136] By contrast, te ao Māori is holistic.[137] The interconnected nature between people, the environment and the spiritual world are paramount in the operation of tikanga.

The inherent differences between the legal traditions pose a challenge for the operation of rāhui in state law. It has been argued that recognising rāhui through state law mechanisms fails to provide for the conceptual regulators that govern rāhui under tikanga.[138] In other words, the state law's origins

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134 *Ellis v R (Continuance)*, above n 130, at [257].

135 Brian Garrity "Conflict Between Māori and Western Concepts of Intellectual Property" (1999) 8 Auckland UL Rev 1193 at 1193.

136 At 1194.

137 At 1193.

138 Morar, above n 94, at 51.

in te ao Pākehā and subsequent focus on anthropocentrism risks divorcing rāhui from its spiritual foundations.

This risk is exemplified in the Fisheries Act and Waitākere Ranges Area Act. Despite operating under the guise of customary closures or controlled areas, these mechanisms enact the substance of a rāhui, albeit to a limited extent. Both temporary closures and Controlled Area Notices are governed by Eurocentric parameters such as fixed time periods, and ignore the spiritual essence for the imposition of rāhui, being mauri. As noted, this stands in contrast to customary expressions of rāhui where duration was determined by the dissipation of tapu or replenishment of mauri, rather than a fixed period. It is somewhat unclear whether this framing was deliberate or simply reflects a misunderstanding on the part of legislators to adequately encompass the Māori dimension. Regardless of the reasoning, it demonstrates the risks of state law divorcing rāhui from its spiritual foundations.

A similar theme can be observed in relation to mana. The Fisheries Act and Waitākere Ranges Area Act place the mana to dictate rāhui with either the Council or the Crown solely. This undermines mana as a conceptual regulator and shifts control away from Māori. Evidence from the application of the Waitākere Ranges Area Act conveys this point well; despite local iwi petitioning for recognition of the rāhui by the Council through Controlled Area Notices, the Council initially rejected the request.[139] Instead, the Council adopted the "principles" of the rāhui and imposed track closures.[140] In this sense, control and mana were shifted to the Crown and its institutions. This shift exemplified how the state can employ rāhui as a mere conservation tool rather than a legitimate tikanga practice grounded in mana, mauri and tapu.

This is a clear risk of incorporating rāhui into state law, particularly through legislation that tends to place control with the Crown. A paramount risk is that incorporation shifts rāhui towards anthropocentrism and away from customary parameters of mana, tapu and mauri. It is this shift that operates as a catalyst for Westernisation.

B Risk of Westernisation

Westernisation refers to the impairment of tikanga as an independent system of law, marked by the Crown's encroachment on Māori authority to define and uphold it. The risk of Westernisation is particularly pertinent should rāhui be developed under the common law.

The comments of the Supreme Court in *Ellis* capture the risks associated with greater legal recognition of rāhui under the common law (as with tikanga generally); integrating tikanga into state

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139 Simon Wilson "The Kauri, the Waitakere and the rāhui" *The Spinoff* (online ed, Auckland, 13 December 2017).

140 Note that the principles of the rāhui, as defined by the Council, include education, signage and on the ground efforts to discourage track use; see Wilson, above n 139.

law without proper protection risks its operation as an independent legal system.[141] The Court stressed the danger of distorting tikanga if judges overstep their jurisdiction, noting that they "have neither the mandate nor the expertise to develop or authoritatively declare the content of tikanga".[142] For example, a judge may have limited knowledge or experience in tikanga, leading to misinterpretation or a loss of important nuances during translation.[143] These misunderstandings risk distorting tikanga and codifying such distortion into judicial precedent.

In the context of rāhui, one can pre-empt the risk of judicial interpretation misappropriating the nuances of rāhui as a customary practice. As noted, rāhui does not have a fixed application and can operate both in relation to, or independently of, whenua. This nuanced nature may confuse judges with little experience or understanding of tikanga, potentially leading to rāhui being viewed through a non-Māori lens and contorted into Western frameworks. A similar concern arises in relation to legislation. The nature of tikanga is nuanced, with numerous kawa determined on an as-needed basis.[144] Legislation may struggle to capture this flexibility. Instead, legislation may be better employed to support Māori enactment of rāhui rather than codify the practice, as observed in the Tītī (Muttonbird) Islands Regulations.

Additionally, channelling rāhui into state law risks usurpation by the dominant state law system.[145] While rāhui will continue to operate as a legitimate and enforceable practice under tikanga, state law may undermine its authority by imposing external regulations or interpretations that dilute its spiritual foundations.[146] Rāhui could be shoehorned into a legislative framework which prioritises state interests, similar to that of the Fisheries Act, where the Crown is authoritative and dictates the terms. Over time, rāhui may be reduced to a bureaucratic mechanism rather than an expression of tikanga and the Māori dimension.

It has also been argued that recognition of tikanga and its customs within the state legal system is a continuation of colonisation.[147] It is important to recognise that the state legal system has been employed as an instrument of colonisation, and reservations as to tikanga incorporation in this sense are valid. Given that the foundations of the state system are colonial, there are concerns that

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141 *Ellis v R (Continuance)*, above n 130 at [120] and [122] per Glazebrook J, [181] per Winkelmann CJ and [270]–[272] per Williams J.

142 At [270] per Williams J.

143 Coates, above n 100, at 53.

144 At 49.

145 At 53.

146 At 59.

147 At 53, citing Moana Jackson "Where does Sovereignty Lie?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 196 at 197.

the system is ill-equipped to accommodate tikanga, and this may result in the Westernisation or dilution of tikanga. As posed by Coates, "is seeking recognition of tikanga within the common law 'another futile use of the 'master's language … to dismantle the master's house?""[148] Borrows rejects this notion.[149] He argues that indigenous customs, such as rāhui, will continue to operate in accordance with the indigenous dimension regardless of recognition. Borrows notes that indigenous customs have "survived colonial onslaught thus far", and that common law recognition should not be considered in a vacuum.[150] It seems somewhat odd to argue that self-determination of custom will continue regardless of recognition, as this neglects a key purpose of state recognition, which is broader enforcement. Only time will tell whether Coates' concerns come to fruition, or whether Borrows will be proven correct, with tikanga thriving both within and beyond the bounds of state law.

Ultimately, challenges and tensions are inevitable when two dissimilar legal traditions compound. However, the dominance of state law and the common law being predicated on judicial discretion places tikanga in an exposed position. Tikanga and its customs, rāhui among them, are vulnerable to being shaped or constrained by state mechanisms, like legislation. Accordingly, the contortion of rāhui to reflect Western ideals is arguably the greatest risk should the practice receive greater recognition under state law. Adapting either a statutory-based regime or common law custom to recognise or enforce rāhui should therefore be cautioned against.

VI CONCLUSION

In 2022, the National Iwi Chairs forum called on the government for rāhui to have "official legal standing within the Pākehā legal system".[151] Such a call followed the Whakaari White Island rāhui, which saw general compliance from the New Zealand public across Whakatāne and the wider region. Despite a small number of fishing and tourism operations refusing to comply, the rāhui was largely upheld.

The Whakaari White Island rāhui illustrated two propositions: first, that the imposition of rāhui has very little, if any, support from the state legal system; and secondly, the potential of state recognition given general compliance by the public. These propositions have formed the basis of this article.

This article has attempted to define the nuanced and flexible nature of rāhui and has examined its incorporation in both legislation and the common law. Legislation, including the Fisheries Act and

148 At 54, citing John Borrows and Leonard I Rotman "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36(1) Alta L Rev 9 at 27.

149 At 28.

150 Coates, above n 100, at 55, citing Borrows and Rotman, above n 148, at 30.

151 Mārena Mane "National Iwi Chairs call for Rāhui to be legally recognised." (13 January 2022) Te Ao Māori News <www.teaonews.co.nz>.

Waitākere Ranges Heritage Area Act, indicates rāhui appears limited to a conservation tool available to those with governmental or statutory authority. This highlights the dangers of state mechanisms divorcing rāhui from its spiritual foundations, being mauri, mana and tapu. The Tītī (Muttonbird) Islands Regulations offer an alternative approach, with legislation enacted to support an existing rāhui. Unlike the aforementioned legislation, these Regulations are governed by whakapapa and uphold Māori authority. This suggests that legislation may be better employed to support Māori enactment of rāhui rather than to codify the practice.

In regards to the common law, incorporation is both uncertain and untested. There may be scope for rāhui to operate both as an extension to customary property title and as general custom. However, there is an inherent danger of judges declaring and adapting the content of tikanga. This risks rāhui being Westernised and contorted to fit within state frameworks. Accordingly, this article ultimately concludes that state recognition of rāhui, as with all tikanga customs, should be cautioned against.