TREATY OF WAITANGI PRINCIPLES RELEVANT TO ADAPTATION TO COASTAL HAZARDS FROM SEA-LEVEL RISE

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This article addresses some duties that arise under Te Tiriti o Waitangi/the Treaty of Waitangi that are commonly referred to as "Treaty principles", and applies them to the new issue of protection of Māori interests in the face of coastal hazards associated with sea-level rise. It summarises the Māori interests likely to be affected by sea-level rise and related coastal hazards, and some adaptation measures. It summarises existing information on Crown duties under the Treaty of Waitangi with some comment on their application to local authorities. This includes a summary of the Treaty duties of the Crown (held by central government) and an explanation of how they are enforced. It outlines the Waitangi Tribunal decision on the MV Rena as an illustration of duties relevant to the handling of a disaster that damaged the coastal environment. It then discusses climate adaptation initiatives in the light of Treaty obligations, suggesting what Treaty principles might require of decision-makers and decision-making on climate adaptation measures under current law. While the focus of this article is limited to what existing law on the Treaty principles might require of government, it also briefly addresses recent developments that might expand legal obligations in the future. While this article stems from a project addressing adaptation to coastal hazards from sea-level rise, these findings and principles will be relevant to all climate adaptation decision-making, such as in relation to handling future floods and droughts.

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I INTRODUCTION

> It is generally recognised that Māori society is climate sensitive due to the strong links that exist between Māori economic, social and cultural systems and the natural environment.[1]

This article addresses some duties that arise under Te Tiriti o Waitangi/the Treaty of Waitangi that are commonly referred to as "Treaty principles", and applies them to the new issue of protection of Māori interests in the face of coastal hazards associated with sea-level rise.[2] Many aspects of Māori society and economy are environmentally dependent; much of their land is low-lying and they have large investments in agriculture and forestry.[3] Furthermore, Māori have rights to continued customary practices, such as collecting seafood, and to protection of land of cultural and historical significance to them.[4] Māori coastal communities are particularly vulnerable to the hazards associated with sea-level rise.

Recognised Treaty principles already hold that the Crown has a duty to actively protect Māori lands, estates, forests, fisheries and other taonga, and must enable Māori to protect these taonga.[5] I suggest that it is possible to extrapolate from existing Treaty principles and determine what they may require of decision-makers in order to achieve such protection for coastal taonga in the face of sea-level rise. This article accordingly addresses the development of Treaty principles relevant to the Crown's Treaty obligations for adaptation to the coastal hazards associated with sea-level rise.

Many of the climate adaptation measures that would be necessary to actively protect Māori coastal interests fall within local government authorities' jurisdictions; they are thus guided largely and primarily by the procedures and standards under the Local Government Act 2002 and Resource Management Act 1991 (RMA), as well as by district and regional plans and related documents. Local government authorities are not currently directly accountable for Treaty duties when acting pursuant to these Acts;[6] these relevant obligations are still held by the Crown or central government. However,

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1 DN King and others *Coastal adaptation to climate variability and change: Examining community risk, vulnerability and endurance at Mitimiti, Hokianga, Aotearoa-New Zealand* (NIWA, Report No AKL2013-22, September 2013) at 21.

2 While Treaty duties are largely owed to iwi and hapū, this article frequently refers to Māori interests for ease of use.

3 Ministry of Agriculture and Forestry *Māori Agribusiness in New Zealand: A study of the Māori Freehold Land Resource* (March 2011) at 7.

4 Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims* (Wai 2391, 2015) at 12.

5 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 62.

6 See discussion below at Part III B. It is an interesting question whether the common law might in the future find that councils do in fact have duties to uphold Treaty principles; the possibility exists but is not addressed here.

the actions of local government, on delegated authority from the Crown, can give rise to these authorities either upholding the central government Treaty obligations or creating new, modern-day breaches of the Treaty (for which the central government would have to answer).

Climate adaptation planning is currently being undertaken within a legal framework that has been criticised by the Waitangi Tribunal as not protecting Māori interests strongly enough and as breaching the Treaty principles. The development of Treaty principles that better uphold Māori interests can assist with higher standards for climate adaptation decision-making under current law, as well as guidance for reform and adoption of new rules and standards.

Part II of this article provides a summary of the Māori interests likely to be affected by sea-level rise and related coastal hazards, and summarises some adaptation measures. Part III summarises existing information on Crown duties under the Treaty of Waitangi with some comment on their application to local authorities. This includes a summary of the Treaty duties of the Crown (held by central government) and an explanation of how they are enforced. It outlines the Waitangi Tribunal decision on the MV Rena as an illustration of duties relevant to the handling of a disaster that damaged the coastal environment. Part IV then discusses climate adaptation initiatives in the light of the Treaty obligations summarised in Part III, suggesting what Treaty principles might require of decision-makers and decision-making on climate adaptation measures under current law, which is largely the RMA.

While the focus of this article is limited to what existing law on the Treaty principles might require of government, Part V briefly addresses recent developments that might expand legal obligations in the future. There are three matters addressed in this final Part: an expanded interpretation of Treaty clauses in legislation, the recognition by courts of tikanga as a source of law, and the resource management law reform that proposes to uphold the Treaty principles, if not also some of the wider protections contained in the Treaty/Te Tiriti.

In conclusion, I suggest that all decision-making in respect of climate adaptation, including any retreat from coastal lands, must be undertaken in a manner that actively protects taonga and genuinely attempts to ensure that Māori can maintain their ties to ancestral lands and their relationships with the coastal environment and their taonga. This has both substantive and process elements: the respect of iwi and hapū as Treaty partners to substantive active protection of their coastal environmental assets, as well as achieving recognition of their authority to preferably control but at least share in making decisions over those assets. Further, as Treaty principles and other laws are developed to meet changes in society, we will likely find they go even further and protect more than current law does today, possibly better reflecting the guarantees in Te Tiriti o Waitangi. I suggest that, when making decisions on climate adaptation measures, central and local government need to keep in mind the wider picture of upholding at least the Treaty principles, rather than solely the (minimum) conditions in the Resource Management and Local Government Acts. The recent move by New Zealand courts to interpret Treaty clauses generously and to recognise tikanga in law in Aotearoa will likely surprise any decision-makers in local and central government who cling to legislative rules and processes that

do not fully uphold current Treaty principles. Finally, it is important to note that, while this article stems from a project addressing adaptation to coastal hazards from sea-level rise, these findings and principles will be relevant to all climate adaptation decision-making, such as in relation to handling future floods and droughts.

II SEA-LEVEL RISE, COASTAL HAZARDS AND MĀORI INTERESTS

> The detrimental effect of climate change on ecosystems caused by climate change will have a devastating impact on economic, social and cultural values across Māori society.[7]

The threat posed by the combination of climate change and the existence of communities living in low-lying coastal areas is a problem affecting countries worldwide. These coastal hazards will consist of both acute effects – such as intermittent but increasingly frequent and violent storms – and chronic effects – such as slow sea-level rise. Both will give rise to a gradual but increasing change in habitats and biodiversity, including predicted losses of current species. The acute and chronic aspects of the problem raise distinctive challenges for policy-makers. Both aspects are affected by uncertainty around the specific impacts and timeframes, not least because it is not yet known what emissions scenario(s) will unfold.[8] Yet, despite some uncertainty, it is known that rising sea levels will continue to produce increasing risks of coastal hazards for humans and other species.

Māori are predicted to be disproportionately affected by climate change, as are indigenous people across the world.[9] Physical changes to the climate will be felt economically as well as culturally. Māori have strong cultural and spiritual ties to lands, waters and ecosystems, so damage to ancestral

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7 Waitangi Tribunal *Mataatua Statement of Claim* (Wai 2607, 2016) at [23].

8 The uncertainty around the future emissions trajectory is reflected in the decision of the Ministry for the Environment to include a range of estimates for sea-level rise in its 2017 guidance for local government, now formulated as four separate sea-level rise scenarios: Ministry for the Environment *Preparing for coastal change: A summary of coastal hazards and climate change guidance for local government* (ME 1335, December 2017) at 18. See also Judy Lawrence and others "National guidance for adapting to coastal hazards and sea-level rise: Anticipating change, when and how to change pathway" (2018) 82 Environmental Science & Policy 100 at 103, where the lead authors of the Ministry for the Environment's *Guidance* (see below n 201) give the following rationale for using four plausible scenarios of varying severity:

> More recent [sea-level rise] projections that include updated polar ice sheet responses … mean that it is difficult to pre-determine what coastal future might eventuate for any community, even over planning timeframes of the next 100 years. It is therefore more appropriate and inherently flexible to use a range of [sea-level rise] scenarios to test the emergence of an adaptation threshold for the current situation and the performance of adaptive actions, than attempting to provide either a worst-case or "most-likely" estimate of [sea-level rise] to devise a policy or plan.

9 See for example Rachel Baird *The Impact of Climate Change on Minorities and Indigenous Peoples* (Minority Rights Group International, 2008).

territories and taonga species will impact the well-being of local communities.[10] "Many Māori communities are situated along coastal margins",[11] and Māori have a larger amount of coastal land as a proportion of the population than other groups of New Zealanders, where such land is likely to be inundated by sea-level rise over time.[12] Primary industries are a large proportion of the Māori economy, making their economic resilience to climate change lower.[13]

A Property

Changes to the physical environment have tangible economic consequences and more nuanced psychological effects on people. The Wai 2607 *Statement of Claim* noted the particular vulnerability of ecosystems and coastal communities, and the negative well-being effects on Māori communities when the natural environment is harmed.[14]

1 Māori land

The Māori Land Court describes Māori land as "taonga tuku iho, of special significance to Māori passed from generation to generation".[15] While only approximately five per cent of all land in New Zealand is Māori land, it is different to general land in New Zealand. There are different legal types of Māori land, with Māori customary land and Māori freehold land[16] having the most restrictions on their alienation, including needing to be in accordance with the Te Ture Whenua Māori Act 1993 and the relevant Māori Land Court process.[17]

It is not possible to say precisely how much Māori land will be affected by different sea-level rise scenarios and their related inundation because the effects have not been formally determined – not on a national scale, nor consistently around the country. Mapping of such hazards and risks is just

10 King and others, above n 1.

11 Darren N King, Guy Penny and Charlotte Severne "The climate change matrix facing Māori society" in RAC Nottage and others (eds) *Climate Change Adaptation in New Zealand: Future scenarios and some sectoral perspectives* (New Zealand Climate Change Centre, Wellington, 2010) 100 at 107.

12 Note that proximity to the coast does not on its own determine susceptibility to sea-level rise or associated coastal inundation; height above sea level, as well as land and seabed movements, all help determine such susceptibility. Such land and seabed movements include those due to seismic and tectonic movements, as well as simple sediment movements due to wave and tidal action. See also below n 18.

13 King and others, above n 1.

14 Waitangi Tribunal, above n 7, at [19].

15 Māori Land Court "Your Māori Land" (2018) <www.maorilandcourt.govt.nz>.

16 Te Ture Whenua Māori Act 1993, s 129.

17 Section 146.

beginning, and such risks are generally not yet even identified in management plans.[18] However, there is a significant amount of coastal Māori land, so it is fair to say generally that Māori land is at risk of being lost or devalued by coastal inundation.

Any coastal customary land or Māori freehold land that is lost to sea-level rise cannot be replaced under the Māori Land Court's current jurisdiction. The loss of or damage to Māori freehold land is perhaps most significant as such land constitutes a far greater proportion of Māori land. Māori freehold land lies predominantly in rural areas and contains little arable value while remaining mostly uninhabited and, until recently, not actively managed.[19] The loss of or damage to Māori land – particularly Māori freehold land – from coastal inundation will have significant cultural effects. Any marae and related cultural and spiritual sites situated on such land are keystones for the community.[20] Risks to Māori land from coastal inundation must be carefully managed with the cultural needs of those to whom the property belongs.

B Coastal Communities

There is a significant number of Māori communities in low-lying areas of New Zealand who are "highly vulnerable to sea level rise and other climatic events such as storms and high tides".[21] Their identity, health and well-being, economies and their marae could all be adversely affected.

1 Identity

Coastal areas are intrinsic to Māori identity due to the cultural, historical, social and economic significance they embody.[22] They are a source of identity in that they are places of learning, where communities can pass on their knowledge and significance of that place.[23] This is achieved through customary practices that seek to ensure Māori maintain the connection between the living and the past. The coastal environment provides fishing grounds and diving rocks that are an important source of food for Māori. Significant social, cultural and economic impacts on Māori in many coastal regions are likely to occur with "[c]oastal erosion and changes to the productivity of inshore fisheries and

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18 Such mapping requires considerations of geomorphology of the site and coast in question, GIS mapping, hydrology, tidal wave and sediment modelling, and comparisons with sea-level rise scenarios. See for example Akuhata Bailey-Winiata "Understanding the potential exposure of coastal marae and urupā in Aotearoa New Zealand to sea level rise" (MSc Earth Science Thesis, University of Waikato, 2021). Note that some private study of risks to individual marae and urupā has been undertaken: at 3.

19 Elizabeth Toomey and others *Revised Legal Frameworks for Ownership and Use of Multi-dwelling Units* (Building Research Association New Zealand, Report ER23, May 2017) at 125.

20 For more discussion on coastal marae, see below at Part II B 3.

21 King, Penny and Severne, above n 11, at 107.

22 Ministry for the Environment and The Treasury *The Framework for a New Zealand Emissions Trading Scheme* (ME 810, September 2007) at [8.1].

23 Waitangi Tribunal, above n 7, at [45].

shellfish gathering areas".[24] These effects include the direct threat to Māori commercial and customary fisheries.[25] Those whose cultural identity is linked with the coastal environment will experience these impacts the most, due to the adverse, yet indirect, impacts on cultural practices and the overall well-being of Māori communities.[26]

2 *Health and well-being*

Māori well-being is tied to the well-being of the natural environment, to which iwi, hapū and whānau are bound via interconnected and interrelated whakapapa reference systems. The local environment frames the worldview of that group and the cultural system is created through tikanga Māori.[27] This cultural system of ethics includes the idea that "cultural order comes from the natural environment and hence people have a responsibility to care for these systems".[28] A key characteristic of Māori society is that they should be seen as cultural guardians of the land (kaitiaki).[29] Issues such as ecosystem degradation, extinction of vulnerable species[30] and adverse effects on the waterways over which they hold customary rights[31] will have direct impacts on the ability of Māori to protect their land. Any reduction in the health and well-being of the environment will in turn adversely affect the health and well-being of the people, with their inability to exercise kaitiakitanga affecting the mauri and therefore health of the community.[32]

Climate change affecting property thus goes deeper than economic loss for Māori. "Adverse mental health and psychological issues" can result from changes to the ecosystems.[33] Loss in property value, leading to loss in wealth amongst the Māori community, could also "dramatically decrease

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24 Ministry for the Environment and The Treasury, above n 22, at [8.1].

25 While any customary interests recognised under the Marine and Coastal Area (Takutai Moana) Act 2011 may be affected, as may Māori fisheries, these aspects relevant to ownership are not within the scope of this article on local government decision-making on adaptation. They are thus not discussed here, even if they may raise interesting legal issues including in relation to the application of Treaty principles.

26 King, Penny and Severne, above n 11; and Waitangi Tribunal, above n 7, at [23].

27 Waitangi Tribunal, above n 7, at [19].

28 At [20].

29 At [21].

30 Phillip L Munday and others "Behavioral impairment in reef fishes caused by ocean acidification at CO_2 seeps" (2014) 4 Nature Climate Change 487.

31 Waitangi Tribunal, above n 7, at [26].

32 For example, the effects of the grounding of the MV Rena: Waitangi Tribunal, above n 4, at [2.3]; and *Ngāi Te Hapū Incorporated v Bay of Plenty Regional Council* [2017] NZEnvC 073 at [95] and [99]. Discussed below at Part IV.

33 Waitangi Tribunal, above n 7, at [51].

community health and wellbeing".[34] As well as accessing the physical environment, having safe places to live in the community is vital. If property is lost to sea-level rise, there may not be enough land left physically to house the community, forcing them to relocate. Continued cultural well-being will then be much more difficult to maintain, due to both the physical separation and loss of colocation with ancestral territories for those who have to move.

3 Coastal marae

Marae are particularly important to consider in the context of the effects of climate change. They are the focal point and hope of a Māori community, connecting the present members to the land, to the past and to the future:[35]

> Marae are a place where members of the associated iwi/ hapū or whānau can go and feel a spiritual connection to the Earth and to their tūpuna (ancestors) through whakapapa, a connection known as tūrangawaewae (right to stand, place of belonging).

The marae provides the base for the development of tikanga and the maintenance of the spiritual life of a hapū.

There are 767 marae in New Zealand.[36] The majority of these are in the North Island. A disproportionate number of the marae are situated on or near the coast.[37] While the precise risks of all coastal marae have not yet been determined (for example, whether and to what extent they will be subject to erosion and/or flooding), it is clear that the susceptibility of coastal properties to hazards will increase over time.[38] The "Māori Maps" website provides detail about land and marae.[39] It does not provide detail about its characteristics – such as elevation above sea level – nor any other assets or taonga that might also be on the land, such as urupā or other sacred sites.

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34 At [51].

35 Merata Kawharu "Environment as a marae locale" in Rachael Selby, Pātaka Moore and Malcolm Mulholland (eds) *Māori and the Environment: Kaitiaki* (Huia, Wellington, 2010) 221 as cited in Bailey-Winiata, above n 18, at 6.

36 Māori Maps "Map" <www.maorimaps.com>.

37 This was so as to access kaimoana and for transport, including for trade. See for example Bailey-Winiata, above n 18, at 3.

38 As mentioned above, University of Waikato Master of Science student Akuhata Bailey-Winiata recently completed his thesis researching the vulnerability of marae in the Bay of Plenty region: Bailey-Winiata, above n 18.

39 Baird, above n 9. This mapping is only an approximation of at-risk marae due to the site, Māori Maps, lacking geographical data.

There have been previous occasions where rivers have flooded marae and the hapū has had to bear the cost.[40] Without explicit government intervention, this is expected also to be the case for coastal flooding and other damage as a result of sea-level rise and its associated coastal hazards.

4 Economic

A good financial position is critical to being prepared for risks in the community.[41] As with many indigenous groups across the world, Māori are predicted to be among the New Zealanders most vulnerable to adverse effects from sea-level rise. This is only partly because Māori hold proportionally higher amounts of coastal land than non-Māori; it is also partly because Māori are disproportionately in lower socio-economic groupings that will make it financially difficult to adapt. Moreover, "almost 50 [per cent] of the total Māori asset base is invested in climate sensitive primary industries (forestry, fishing, agriculture and to a lesser extent tourism)".[42] It is noted that:[43]

> Climate-induced changes in regional ocean temperature, currents, winds, nutrient supply, ocean chemistry and increasing acidification (as well as extreme weather conditions) are expected to alter regional fisheries productivity and operations, fishing incomes and ocean-based investment.

This will compound existing financial disadvantage, making adaptation increasingly difficult as adverse climate effects increase.

C Case Study One: Mōkau River Mouth[44]

The Mōkau River mouth has long been under the guardianship of Māori, who have looked after the environment with a view to protecting the mauri or life force of the environmental taonga in the area.[45] However, years of Crown occupation have threatened this. In 1956, the government went ahead with a coastal subdivision on a spit that was advised against by the local authority on the basis of the risk of future erosion. Since the subdivision, there have indeed been multiple erosion events in a decadal cycle.[46] A large erosion event in the 1960s caused the loss of several sections; the

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40 Peter de Graaf "Mission to raise flood-hit marae" *New Zealand Herald* (online ed, New Zealand, 27 March 2017).

41 Jones, above n 5, at 94.

42 King, Penny and Severne, above n 11, at 102.

43 At 105 as cited in Waitangi Tribunal, above n 7, at [37].

44 I acknowledge and thank Nicolaas Platje, VUW law student and research assistant, for researching and providing a draft for this case study in 2019. It is excerpted from Catherine Iorns *Treaty of Waitangi duties relevant to adaptation to coastal hazards from sea-level rise* (Deep South National Science Challenge, Wellington, 2019) at 126–129.

45 Waitangi Tribunal *The Environmental Management of the Mōkau River Mouth* (Wai 898, A149, 2014) at 11.

46 Paula Blackett, Terry Hume and Jim Dahm "Exploring the social context of coastal erosion management in New Zealand: What factors drive particular environmental outcomes?" (2010) 1 AJDTS at [12].

government provided compensation to the affected parties, but no long-term strategy that would prevent future events was implemented.[47] Indeed, development through subdivision increased, with more holiday homes being built "close to the edge of the dune".[48]

In the 1990s, a proposed sea wall was rejected by the wider community because of the cost and its potential to ruin the natural aesthetics of the beach.[49] This led to the illegal sandbagging of the beach and construction of makeshift sea walls by private owners trying to protect their property in desperation.[50] As a result of inaction by the governing bodies of Mōkau, the retreating land has left some houses teetering above waves that crash upon their doorstep.[51]

This "do nothing" approach is reportedly the consequence of a council with a high turnover of staff, and a non-permanent residential population that has been happy to continue to get use out of their properties for the foreseeable future.[52] In order to manage the erosion, a long-term strategy is needed. However, a shifting population has meant that, as time goes on, individual erosion events are forgotten and nothing is done.

The one constant in the area has been the local Māori population, who have long demanded action by the council, and yet their cultural and environmental expertise has been ignored as thoroughly as their customary rights.[53] The wider Mōkau area contains several sites of customary importance and the sandspit itself is the location of an important Māori urupā known as Te Naunau. One researcher, reporting to the Waitangi Tribunal, concluded that:[54]

> … local Maori have expressed continued dissatisfaction with the environmental management of the Mokau River mouth, particularly as it relates to wahi tapu. Te Naunau remains a major site of contention, and the unilateral actions of Mokau residents to combat erosion on the spit, the reluctance of Waitomo District Council to confront them, and the general confusion over which local or central government agency is responsible for addressing the problem remains an issue to this day. Maori concerns regarding their urupa seem to have been sidelined in this debate.

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47 At [12].

48 At [12].

49 At [12].

50 Waikato District Council "Illegal Seawalls being Constructed at Mōkau" (27 June 2006) <www.waikatodistrict.govt.nz>.

51 Rachel Thomas "Coastal Erosion Eats Away at Mōkau" *Stuff* (online ed, New Zealand, 7 July 2015).

52 Blackett, Hume and Dahm, above n 46, at [12].

53 Waitangi Tribunal, above n 45, at 11.

54 At 103. It is most likely that the "local Maori" referred to in this quote are hapū Mōkau Ki Runga, of Waikato-Tainui: at 21.

The case of the Mōkau sandspit illustrates a number of issues discussed in this article. First, in relation to the important taonga of tangata whenua, there appears to be no active protection being undertaken by the local council, and the important urupā, Te Naunau, appears likely to be lost to future sea-level rise and related inundation and erosion. The reported "dissatisfaction of environmental management … as it relates to wāhi tapu" suggests that leaving the urupā to be taken by the sea is not the preferred option of tangata whenua. There is thus a duty on the Crown to ensure that measures of active protection of such taonga are taken, in partnership and good faith with tangata whenua. In terms of council involvement, this may have to go beyond the minimum requirements in the RMA that the council is adhering to. In the context of climate change adaptation, active protection should require examining accommodation and protection measures before undertaking managed retreat. In the case of the Mōkau sandspit urupā Te Naunau, because of the importance of ensuring that it is not lost in any upcoming flood event, it may be that discussions about relocation of the urupā – that is, managed retreat – need to take place sooner rather than later.

Acting in good faith requires general consultation and collaboration with tangata whenua on solutions before they are proposed, including basing those solutions on both mātauranga Māori and Western science about the environment, the risks and the best measures for protection. This may require Crown intervention and collaboration with local government. It may require Crown funding of protection measures. If the taonga were lost due to Crown inaction, it would likely be a breach of Treaty duties and the Crown would thus be liable for redress. Given that the loss of an urupā is particularly hard to provide appropriate redress for, it would be better to prevent its loss (assuming that is the wish of mana whenua).

In terms of dealing with existing developments, the longer-term historical view shows that the government compensation for those individual landowners in the 1960s is not a long-term solution. Indeed, that early compensation has become irrelevant in the long term, particularly to current landowners in the area. It is also not a solution that can be widespread. The political pressure to compensate at the time was strong, and no doubt it felt doable because there was only a small number of people affected at the time. However, it would not be doable if hundreds or thousands of homes within a jurisdiction were to be affected. While the erosion itself likely cannot be prevented, there must be wider efforts to implement long-term strategies to prevent unexpected suffering from such events and to increase community preparedness and resilience. This case study also shows that councils need to utilise the existing knowledge of the community, specifically the Māori community, in order to evaluate the best way of dealing with long-term environmental effects in achieving such preparedness and resilience.

D Case Study Two: Māori Freehold Land in Waitara[55]

In 2016, residents of a Māori settlement in Waitara, Taranaki, pleaded with their local council for the construction of a sea wall, as they feared that their homes would be swept into the sea.[56] The settlement included the Rohotu Block, which lies at the mouth of the Waitara River, with the river on one side of the Block and the Tasman Sea on another; it was the subject of a Waitangi Tribunal claim by iwi Te Atiawa and has the status of Māori freehold land.[57] Residents were particularly worried about the elderly who were living on this Block, yet the requests for a sea wall were denied by the New Plymouth District Council.

The New Plymouth District Council's response was that the Council was working with the trustees of the Māori freehold land. The Council strategy manager also stated that:[58]

> Māori freehold land is the same as private land holdings and council's policy at the moment is only to protect strategic and significant assets, and it's (the Rohotu Block) not considered to be one in that sense because it's not a public asset, it's freehold private land.

I suggest that this statement is misguided. Māori freehold land does not have the same legal status as private land holdings because Māori freehold land is both legislatively protected and is a Treaty asset. It thus has greater protection than that afforded by private freehold land. Te Ture Whenua Māori Act gives legislative protection to Māori freehold land, especially through the notion of retention.[59] Extra adaptation protection thus needs to be given to ancestral lands. Further, the Crown needs to uphold the principle of keeping land that is currently owned by Māori in that Māori ownership, whether freehold or not.[60] The Rohotu Block land may not have been considered a "significant" or "strategic asset" by the New Plymouth District Council, but it should be seen by at least central government as an asset protected by art 2 of the Treaty (and thus also by the Council on that basis). A council that does not take into account the need for these extra protections could be opening the Crown up to at least a claim of a Treaty breach, if not also other actions based on the principle of retention.

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55 This case study is excerpted from Iorns, above n 44, at 129–130.

56 Robin Martin "Waitara locals plead for sea wall" *Radio New Zealand* (online ed, New Zealand, 3 June 2016).

57 See for example Suzanne Woodley *A Report Commissioned by the Waitangi Tribunal for the Taranaki Claim concerning Rohutu* (Wai 143, 1995). I note that there are seven hapū which comprise Te Atiawa: Manukorihi, Ngāti Rahiri, Ngāti Tawhirikura, Ngāti Te Whiti, Otaraua, Pukerangiora and Puketapu. However, the news report does not say which hapū are involved.

58 Martin, above n 56, quoting Liam Hodgetts.

59 See Te Ture Whenua Māori Act, preamble and s 2.

60 For example, this principle was applied by the Environment Court to Patricia Grace's Māori freehold land, denying its compulsory purchase for the purposes of a national highway, even under the Public Works Act 1981: *Grace v Minister for Land Information* [2014] NZEnvC 82. That is greater protection than ordinary freehold land enjoys.

This does not mean that a sea wall is necessarily the right solution for that land; there can be other reasons to reject that as a solution, such as the significant adverse effects of a wall on land on the seaward side of the wall. The important point is that the reason for denying a sea wall cannot simply be because the land is "merely" privately-owned Māori freehold land; more needs to be done to protect such land. This is something that all of local government needs to be aware of, as Māori freehold land is found throughout the country. Application of the existing laws, including Treaty principles, may have provided a more protective result for these Māori landowners.

E Adaptation Measures

Coastal erosion and landslides are among the changes to the natural coastal ecosystem that are already affecting the way Māori connect with the land for cultural, economic and spiritual purposes.[61] In the future, it is predicted that erosion of coastal infrastructure will affect structures such as marae.[62] With the addition of future flooding as a result of more frequent and intense storm events, in combination with sea-level rise, low-lying coastal communities are likely to need to adjust significantly in order to adapt to the worst effects.

As with all communities, there will be some calls for the use of hard protection structures such as sea walls.[63] However, sea walls and similar structures are not long-term solutions and often have adverse side effects on the coast through altered sea movements. Nature-based solutions that utilise the generations of hapū and iwi knowledge about protecting the land in their specific areas may better align with a Māori worldview to protect the land in its natural state. The restoration of coastal wetlands and riparian plantings can even work more effectively to prevent harm from sea-level rise, although they may still require humans to retreat further from the coast. For Māori, that may require moving further from ancestral territories.

One major difficulty with relocation is that land needs to be found for people to move to. Some precedents for relocation away from natural hazards have involved government compensation, and some have involved private insurance payments, but others have entailed no compensation.[64] In all modern cases, affected owners have had to purchase their own replacement properties to move to; the government has not organised rebuilding, for example. Without major law reform in this area, those without financial compensation for their abandoned assets will find it much harder to adapt.

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61 Waitangi Tribunal, above n 7, at [45].

62 At [47].

63 See the example of calls to extend a sea wall to protect Māori freehold land at Waitara described in the previous section of this article.

64 For some examples of retreats from natural hazards, see Catherine Iorns *Case Studies on Insurance and Compensation after Natural Disasters* (Deep South National Science Challenge, Wellington, 2018) at 42.

Yet, financial compensation is still not enough in the case of affected ancestral lands. The strong ties to the land and other natural features from which ancestors came makes replacement of that land or other features very difficult. Further, it cannot and should not be assumed that appropriate land will be able to be purchased by those who are relocating, nor that land can simply be replaced by other land of comparable economic value, for example. Cultural value is more important.

An additional factor is that kaitiaki relationships with traditional territories need to be maintained. This is difficult if sea-level rise has removed previous coastal access, and private land now stands in the way. Under current law, government jurisdictional boundaries at the coastal margins will change as sea levels rise and the tidal lines change. Maintaining access to the coastal marine environment thus needs to be planned for, and Māori needs for their practice of kaitiakitanga must be planned and provided for.

It is also important to understand the diversity within Māori culture when assessing both how Māori may be affected by climate change and the likely responses to it.[65] A diversity of approaches will likely be necessary when adapting and building Māori resilience to climate change. Further, it is important – if not crucial – to recognise Māori values when considering the ways in which Māori might be affected by climate change.[66] For example:[67]

> [Adaptive] capacity is rooted in the collective strength of whānau and hapū relationships, as well as more elemental cultural principles defined by whakapapa and tikanga, and thereafter actioned through practical values of whanaungatanga, manaakitanga, kotahitanga and aroha.

The likely effects to be suffered from climate change highlight how the current laws will need to handle new situations that will not have been envisaged before. Most focus has been on the need to provide for better adaptation options under the RMA,[68] from the approval of new buildings in coastal zones to measures dealing with existing developments, including relocation away from the coast. However, the effect of sea-level rise on Māori taonga illustrates how there needs to be more of an explicit focus on protecting these interests. Some of this can be done with closer attention being paid to existing law such as that of the Treaty principles. For others, these laws need to be improved beyond the current Treaty principles.

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65 L Kanawa "Climate change implications for Māori" in Rachael Selby, Pātaka Moore and Malcolm Mulholland (eds) *Māori and the Environment: Kaitiaki* (Huia, Wellington, 2010) 109.

66 Ministry for the Environment *Consultation with Māori on climate change: Hui Report* (ME 830, November 2007) at 4–29.

67 King and others, above n 1, at 109.

68 For a comprehensive discussion of the changes needed in the RMA, see for example Catherine Iorns and Jesse Watts *Adaptation to Sea-Level Rise: Local Government Liability Issues* (Deep South National Science Challenge, Wellington, 2019) at 234.

This article starts with the existing Treaty principles, if only because application of what has already been stated to be law is more readily accepted than arguments for new extensions of that law. Moreover, even the Treaty principles provide better protection than the RMA, which is the statute under which most adaptation decision-making is currently made . Despite that, it is recognised that the current Treaty principles, while more legally certain, represent a compromised position between the two texts of the Treaty and Te Tiriti; they have not in fact been able to protect art 2 taonga appropriately even under the English Treaty guarantees. The focus in this article on utilisation of the Treaty principles does not endorse them as the right political choice; it merely uses them as the current law. The difficulties that will be faced by climate change effects will both develop these Treaty principles as a result of new applications and illustrate how even greater protection is needed. This article thus focuses largely on the development of the Treaty principles but then also pays some attention to other recent developments for better protection of Māori interests.

III THE TREATY PRINCIPLES

The Treaty of Waitangi/Te Tiriti o Waitangi is New Zealand's founding document between the Crown and tangata whenua. The accepted legal position is that it established governorship and rule by the Crown, even though the discrepancies between the two language versions mean that the extent and level of governorship or rule is disputed. Notably, neither the English version of the Treaty nor the Māori version of Te Tiriti have been fully honoured. The establishment of the Treaty of Waitangi Act 1975 and the Waitangi Tribunal, as well as the incorporation of some Treaty obligations in legislation, has led to a large amount of material explaining what is required of the Crown for it to honour the Treaty.

This Part summarises the Treaty principles and their application to local and regional authorities. It then turns to relevant claims made to the Waitangi Tribunal and discusses in detail the application of Treaty principles to the handling of the disaster that occurred due to the grounding of the MV Rena. The findings of the Waitangi Tribunal in relation to the MV Rena are instructive for how breaches of the Treaty might be caused by government responses to a disaster. It provides procedural and substantive requirements that can in turn be applied to decision-making in respect of the adoption of climate adaptation measures.

A The Treaty Principles

The principles of the Treaty were first devised by the Waitangi Tribunal as a means of finding common duties derived from the two language versions of the Treaty.[69] The courts have in turn

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69 Treaty of Waitangi Act 1975, the long title of which is:

> An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

Section 6(1) implemented this legislative purpose and sch 1 provided the two texts for the Tribunal to derive the principles from.

utilised Tribunal jurisprudence and elicited Treaty principles in law, forming the foundation of what is required of the Crown today. The predominant legal approach – at least at present – is to utilise this reconciliatory approach using both texts, and so the same approach will be used here. This approach provides the minima that must be upheld and may well be developed more extensively in the future.[70] It is notable that these minima are still more than is required by the legislation that currently governs climate adaptation decision-making. It is also worth noting that both the Tribunal and the courts draw on additional materials as aids to developing and applying the Treaty principles, including drawing on tikanga.[71]

1 Partnership

As the President of the New Zealand Court of Appeal has described it, "the Treaty signified a partnership between the races" and each partner has to act towards the other "with the utmost good faith which is the characteristic obligation of partnership".[72] This includes Crown consultation with the Māori Treaty partner on "major" issues, and the obligation to obtain the full, free and informed consent of the correct rights-holders in any transaction for their land.[73] There has been significant discussion on the identity of the Treaty partner in any given situation, and whether the focus on race is appropriate in place of iwi or hapū.[74] But, whichever is used, the relevant Treaty partner can vary depending on the situation.

2 Right to govern

Article 1 of the Treaty of Waitangi is accepted in New Zealand law as having given the Crown the right to govern.[75] The right of the Crown to govern is very important and cannot be constantly hampered by "unreasonable restrictions".[76] Notwithstanding this right to govern, Māori retained the rights to their territories and resources. Where decisions made by the Crown affect such Māori rights, there is a duty to act in the interests of Māori. These duties are to actively protect and give effect to property rights, management rights and self-regulation of Māori. The Crown's role extends to protection of tikanga and other taonga, including mātauranga Māori. The right to govern as a partner

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70 The key criticism of this approach is that it does not adequately provide for the guarantees in the Māori text of Te Tiriti that the various Māori signatories were promised and that they signed up to.

71 See for example *Smith v Fonterra Co-Operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394.

72 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*SOE Case*] at 662.

73 See the discussion on "good faith" at Part III A 5 below.

74 See for example Anne Salmond "Te Tiriti and Democracy, Part 3: Arguing for a tikanga-based, rather than a race-based, approach to Te Tiriti" *Newsroom* (online ed, New Zealand, 11 April 2022).

75 It is accepted that this is only specified in the English version of the Treaty, but that is the legal position in New Zealand today.

76 *SOE Case*, above n 72.

links with the partnership duties of consultation established in *New Zealand Māori Council v Attorney-General* (*SOE Case*).[77]

3 Reciprocity

Reciprocity is an overarching principle that guides the interpretation of other Treaty principles.[78] The benefit of governing the territory does not exist without the permission of Māori; therefore, the Crown should respect the interests that Māori have in that territory. Acknowledging such interests could require at least consultation with Māori. Any such consultation should be widespread and genuine.[79]

4 Active protection[80]

The principle of active protection signifies that the cession of sovereignty (kawanatanga) to the Crown by Māori in art 1 of the Treaty was in exchange for the protection by the Crown of Māori tino rangatiratanga, as stated in art 2. Accordingly, both the Crown's right of governance and Māori authority and control are qualified by the unique relationship established by the Treaty. The essence of the principle of active protection is that, to the extent that is consistent with the Māori cession of sovereignty, the Crown is obliged to take positive steps to ensure that Māori interests under art 2 are protected. What steps are required to be undertaken in any particular situation, and to what degree, is a question of fact and thus varies.

Pursuant to this Treaty principle, the Crown has a responsibility to actively protect Māori lands, estates, forests, fisheries and other taonga. This is "analogous to fiduciary duties".[81] In case law, such duties have been described as honourable conduct and fair process, and have required historical promises to be fulfilled.[82] Sometimes active protection has been held to amount to mere consultation rights for Māori.[83] However, in other circumstances, the Crown is required to allow Māori to continue

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77 At 683.

78 At 663.

79 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 560.

80 *SOE Case*, above n 72, at 663.

81 At 663.

82 Note that the law on fiduciary duties is separate and can found a claim in its own right. For a New Zealand example, in 2017 the Supreme Court found that the government owed fiduciary duties to abide by undertakings given to customary owners near Nelson post-1845. This required the Crown to "reserve 15,100 acres for the benefit of customary owners and, in addition, to exclude their Pā, urupā and cultivations from the land obtained by the Crown": *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [1]. Those duties require the Crown to actively protect the land it holds on trust today: see *Stafford v Attorney-General* [2021] NZHC 335.

83 *Ngai Tahu*, above n 79, at 560.

to protect those things that are sacred to Māori.[84] But the overriding duty on the Crown is still to take active steps to protect those art 2 lands, estates, forests, fisheries and other taonga.[85]

Taonga are things that are central to the identity of Māori: language, places, skills and resources, among other things. The definition of "taonga" used by the Waitangi Tribunal is "any material or non-material thing having cultural or spiritual significance for a given tribal group";[86] further: "a taonga will have kōrero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested".[87] The Privy Council found that where a taonga is more vulnerable, the duty to protect it might be stronger.[88] The protection of taonga requires the Crown to consult with iwi when they make decisions regarding the taking or using of taonga, although this has not been found to be a broad rule.[89] Active protection of taonga may also require Māori being entitled to a "reasonable degree of preference" in decisions about that taonga – that is, preference over those without such Treaty protections.[90]

5 Good faith

Both parties are expected to act in good faith at all stages of the Treaty process as "what matters is the spirit".[91] It is a particular role of the Crown to act in good faith to Māori.[92]

A key sign of good faith as well as partnership is consultation; the Crown should not make decisions without the input of tangata whenua.[93] Moreover, consultation must be meaningful. As held in *Wellington International Airport Ltd v Air New Zealand*, consultation is more than notification, and more than simply telling or presenting the results of a decision that has already been made.[94]

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84 Waitangi Tribunal, above n 4, at 13.

85 It is acknowledged that this interpretation is a compromise between the two texts and does not uphold the guarantees of full chieftainship in the Māori version of art 2 of Te Tiriti.

86 Waitangi Tribunal *Ngawha Geothermal Resource Report* (Wai 304, 1993) at 20.

87 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua* (Wai 262, 2011) vol 1 at 269.

88 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517.

89 Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims: Stage One* (Wai 1200, 2008) vol 4 at 1234.

90 See *Ngai Tahu*, above n 79, where Ngāi Tahu was held to be entitled to a "reasonable degree of preference" in the allocation of commercial whale watching permits due to the cultural significance of whale watching to Ngāi Tahu and their exercise of kaitiakitanga.

91 *SOE Case*, above n 72, at 663.

92 At 665.

93 At 663.

94 *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA).

There can be a proposal, but one that is not yet finally decided upon, and there must be sufficient time to comment on it. Consultation requires listening to what others have to say about it, considering their responses, and then deciding. Moreover:[95]

> … for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.

However, consultation does not require that parties reach agreement, and is distinguished from negotiation "which has as its object arriving at an agreement".[96]

The nature of consultation with tangata whenua under RMA case law has been summarised as:[97]

(i) The nature and object of consultation must be related to the circumstances.
(ii) Adequate information of a proposal is to be given in a timely manner so that those consulted know what is proposed.
(iii) Those consulted must be given a reasonable opportunity to state their views.
(iv) While those consulted cannot be forced to state their views they cannot complain if, having had both time and opportunity, they for any reason fail to avail themselves of the opportunity.
(v) Consultation is never to be treated perfunctorily or as a mere formality.
(vi) The parties are to approach consultation with an open mind.
(vii) Consultation is an intermediate situation involving meaningful discussions and does not necessarily involve resolution by agreement.
(viii) Neither party is entitled to make demands.
(ix) There is no universal requirement as to form or duration.
(x) The whole process is to be underlain by fairness.

Consultation requirements will thus vary in different situations. Generally, some kind of input is required from affected Māori, even if it does not necessarily extend to following through with action in accordance with the wishes expressed. It has often been said that there is no right of veto over the matter being consulted on.[98] Sometimes significant consultation is required; other times, less is

95 At 676.

96 At 676.

97 *Land Air Water Association v Waikato Regional Council* EnvC Auckland A110/01, 23 October 2001 at [453]. Also reproduced in Ministry for the Environment *Guidelines for Consulting with Tangata Whenua under the RMA: An Update on Case Law* (ME 496, December 2003) at [5.2].

98 RMA case law stresses that tangata whenua do not possess a right of veto over resource management consent or planning proposals, although this is more because of the legislation than anything else. See for example the summary of this in Iorns, above n 44, at Part VI 2.

required on the basis that it might "hold up the processes of Government in a way contrary to the principles of the Treaty".[99]

In a governance situation, consultation works best when it is formalised and regular, rather than ad hoc, and it is even better to be institutionalised. However, it is dependent on an assessment of a decision-maker as to when, how and with whom such consultations may be undertaken. The tikanga of those being consulted may also help to determine what is acceptable or reasonable conduct, and thus form part of best practice. However, following tikanga has been held not to be a legal requirement of consultation; for example, who is consulted depends more on the RMA context.[100] (Of course, this may change as tikanga becomes upheld as a source of New Zealand common law; in line with the development of the common law generally, it may be a gradual development as cases arise clarifying tikanga-based obligations.)

Despite these comments on consultation duties, consultation must be upheld in conjunction with the other substantive duties, such as active protection. The courts have held that substantive Treaty interests might not be able to be sidelined or outweighed.[101] Thus, active protection may require a substantive result from good faith consultation, instead of simply requiring the process to be undertaken, wherever the process falls on the consultation spectrum.

6 Development

The Court of Appeal has said that the Treaty must be regarded as a living instrument, capable of adapting to changing circumstances.[102] This includes the ability to develop and modify traditional practices, such as to take advantage of scientific developments and modern technologies, for example, and to uphold the Treaty principle of mutual benefit.[103] This has also been extended to a "principle of options", whereby Māori have the choice "to develop along customary lines", "to assimilate into a new way" or "to walk in two worlds", the last of which "may represent the ultimate in partnership".[104] As a result, "[t]he Crown is obliged to offer reasonable protection to Maori in the exercise of the rights so guaranteed to them".[105]

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99 *SOE Case*, above n 72, at 666.

100 *Beadle v Minister of Corrections* [2002] NZEnvC 124 at [627]–[630].

101 See for example *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.

102 *SOE Case*, above n 72, at 655–656 per Cooke P.

103 Waitangi Tribunal *Muriwhenua Fishing Claim Report* (Wai 22, 1988) at 194–195. See also Waitangi Tribunal *Radio Spectrum Management and Development Final Report* (Wai 776, 1999) at 52.

104 Waitangi Tribunal *Muriwhenua Fishing Claim*, above n 103, at 195.

105 Waitangi Tribunal *Ngai Tahu Sea Fisheries Report* (Wai 27, 1992) at 274.

7 Redress

When the Crown has breached the principles of the Treaty it has a duty to set matters right. The Court of Appeal has found that there is a right of redress whenever there is a breach of the partnership.[106] Where the Crown has breached the Treaty principles, Māori can lodge a claim with the Waitangi Tribunal for a determination of that breach and can request recommendations of measures for redress. Generally, the Waitangi Tribunal can only make non-binding recommendations to the Crown.[107] Any redress is thus made via a Treaty settlement between the claimant and the Crown.[108]

The principle of redress requires the Crown to restore the integrity and mana of the status of Māori.[109] It has been argued that such redress requires mana tangata (the ability to reclaim and promote their identity in relation to the land), mana whenua (protection and use of the land) and mana rangatira (the enhancement of the relationship with the land).[110]

Where a Treaty duty is provided in legislation, that may be adjudicated in the normal way, such as via a claim before the High Court for judicial review.[111] The precise legal duty will depend on the wording of the provision. Even where the Treaty is not enshrined in legislation, it may be used as an aid to interpretation and can thereby affect a legal duty. Note that interpretations can change over time as Treaty principles evolve in response to changed circumstances and application. Thus, some Treaty principles may be found in future situations that might not have been envisaged previously. Given the moves to better uphold tikanga within New Zealand common law and prescribe it as a subject for education of New Zealand judges and lawyers, it is likely that more duties to uphold Māori values and tikanga will emerge in the future.

B Treaty Duties and Local Authorities

The Waitangi Tribunal has found that territorial authorities generally are agents of the Crown in relation to honouring Treaty obligations and must thus give effect to and implement them. The High

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106 *SOE Case*, above n 72, at 694.

107 Treaty of Waitangi Act, s 6(3). While there is a facility for some binding recommendations, this is not exercised often.

108 For more information, see Catherine Iorns "Reparations for Māori Grievances in Aotearoa New Zealand" in Frederico Lenzerini (ed) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, Oxford, 2008) 523 at 552–553. See also Catherine Iorns "Māori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment" (2015) 21 Widener L Rev 273.

109 *SOE Case*, above n 72, at 694.

110 Jones, above n 5, at 101.

111 For more information, see for example Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014).

Court has affirmed this view and held that local government needs to "accept responsibility" for delivering on the art 2 Treaty guarantees.[112] However, in relation to the RMA, the Environment Court has held that territorial authorities are not required to uphold the Treaty duties, as the RMA only provides that they must "take into account" the principles of the Treaty under s 8.[113] The greater protections for Māori under the RMA are thus provided not via Treaty duties but via ss 6 and 7, which specify that decision-makers under the Act must provide for particular taonga to certain extents.[114] However, even these specific provisions appear among a list of typically competing priorities and can be outweighed in RMA decision-making. This result can be criticised as not being Treaty-compliant, if only because Treaty protections can be outweighed by other provisions in the legislation. The Waitangi Tribunal has criticised the legislation for producing this result, and held that the RMA itself breaches the Treaty. For example, the Tribunal has noted that "the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business".[115] Even provisions that could provide for better protection of Māori interests have either not been utilised or have been outweighed by other competing factors.[116]

Most decisions on climate adaptation measures are seen as the province of the RMA; local government is therefore subject only to RMA requirements and has not been required to uphold Treaty duties more generally in these processes or resulting decisions. Where decisions on climate adaptation measures might be made outside the RMA, such as pursuant to processes conducted under the Local Government Act 2002 (LGA), the same reasoning is likely to apply.[117] Both the LGA and the RMA contain provisions requiring local government authorities to implement both procedural and substantive protections for Māori and tangata whenua. However, these statutory provisions do not go as far as requiring Treaty principles to be upheld.[118]

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112 *Ngati Maru ki Hauraki Inc v Kruithof* [2005] NZRMA 1 (HC) at [57].

113 See for example *Sea-Tow Ltd v Auckland Regional Council* [1994] NZRMA 204 (PT); and *Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 (EnvC).

114 See the discussion of ss 6(e), (f) and (g) and 7(a) for example in Iorns, above n 44, at 76–82.

115 Waitangi Tribunal, above n 87, at 279.

116 In 2013, Joe Williams J criticised the operation of the various provisions that were designed to benefit Māori and better uphold Treaty guarantees as choices that had been made by local authorities not to utilise the partnership powers: Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 22.

117 For an outline of legislative protections for Māori interests in the LGA and RMA, see for example Iorns, above n 44, at 74–104.

118 The 2021 decision of the Supreme Court in *Trans-Tasman Resources Ltd v Taranaki–Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 has upheld a duty to interpret Treaty clauses generously. This has not yet been applied to the Treaty clause in the RMA, but some comments are made in Part V of this article on potential future developments.

Yet, even if local government is not legally required to uphold Treaty duties when undertaking RMA activities and decision-making, any breaches of Treaty duties that are caused by a local government authority – such as a failure to actively protect an art 2 asset – could still give rise to liability on the part of the Crown, even if not liability on the part of the local government authority itself. (Although Crown liability may also depend on the Crown actions undertaken.) It is thus prudent for the Crown to enable and persuade local government to better uphold Treaty principles and protections when making decisions on climate adaptation measures.

It is also prudent for local government to uphold Treaty principles, even if they might not currently be required to do so by statute. The common law may move over time so as to require greater compliance by local government itself with Treaty principles,[119] as well as with Treaty obligations more generally, including tikanga. The current judicial position is that local government does not have to uphold the Treaty itself when working under the RMA, because it merely operates pursuant to legislation which has specific Treaty clauses. However, this could change one day as judges' opinions change on what is appropriate. Such duties could also be imposed by Parliament in legislation, whether generally or specifically in relation to environmental and/or climate law reforms. Such developments might thus entail more local government accountability for breaches, whether through legislation or developed by courts.

C Treaty Principles Relevant to the Handling of a Disaster: The MV Rena

Existing Waitangi Tribunal claims relating to climate change have focused on the mitigation of greenhouse gas emissions, even while claimants have clearly got the future adverse effects of climate change firmly in their minds. The Waitangi Tribunal has already determined that emissions mitigation is a kaupapa issue because of the need to act to prevent harm to Māori coastal property around the whole country.[120] The current Wai 2607 claimants similarly argue that obligations of active protection require the Crown to protect taonga in the face of climate change.[121] As the claimants are likely to be affected by coastal hazards in the future, they want the Treaty obligations to compel the Crown to act to both reduce emissions[122] and introduce policies to address the ongoing effects of

119 For example, pursuant to decisions such as in *Trans-Tasman Resources Ltd*, above n 118. See also below n 216–227 and accompanying text.

120 Waitangi Tribunal *Te Rohe Potae Inquiry: Scope of inquiry issues* (Wai 898, 2012) at 10. Kaupapa claims are nationally significant, affecting Māori across the regions of New Zealand in broadly similar ways. For other kaupapa claims, see for example Waitangi Tribunal *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wai 26, 1990); and Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017).

121 Waitangi Tribunal, above n 7.

122 At [52]–[53]. See also Waitangi Tribunal *Mataatua Second Amended Statement of Claim* (Wai 2607, 16 December 2019) at [62]–[63].

climate change.[123] However, the Tribunal has not yet begun to investigate this claim, and has not determined how Treaty principles and duties might be tailored to elaborate on the Crown's duties on this matter.

I suggest that the closest the Waitangi Tribunal has come to elaborating Treaty duties relevant to climate adaptation is in respect of the central and local government handling of the aftermath of the wreck of the MV Rena. The MV Rena disaster event is not equivalent to current decision-making on climate adaptation measures, nor is it equivalent to a sea-level rise-induced flooding event. The MV Rena wreck was a man-made disaster with adverse effects on the coastal and marine environment, as opposed to a natural weather event with effects on land, for example. However, it is illustrative of how the Tribunal might consider claims of breaches of Treaty principles in relation to the government's handling of such a disaster. Further, it provides lessons on some of the likely obligations provided by Treaty principles in relation to adaptation decision-making. This section examines the Tribunal findings in respect of this claim.

1 Background

On 5 October 2011, the MV Rena (hereinafter, Rena) was grounded on the Astrolabe reef (Ōtāiti) carrying over 1,733 tonnes of oil. Salvage operations began immediately after the event, but a tropical storm on 7 January 2012 caused the ship to be split in two, resulting in the spillage of cargo and debris, including 1,700 tonnes of oil, onto the reef and nearby beaches. It caused the deaths of many marine animals, including thousands of seabirds.[124] The stern section remained submerged on the reef, leaking contaminants.[125] Volunteers removed more than 1,000 tonnes of oil and debris from the beaches.[126] A two nautical mile exclusion zone around the wreck was established and a clean-up plan put in place.[127] The Rena disaster is considered to be the worst marine environment disaster in New Zealand's history, and amounted to the second most expensive salvage operation ever recorded.[128]

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123 See Waitangi Tribunal, above n 7, at 51 "Relief Sought (e)"; and Waitangi Tribunal, above n 122, at 29 "Relief Sought 5".

124 A figure of 20,000 was initially reported on *Newshub* and *3 News* as the potential number of bird deaths. This number was later found to be unverifiable and likely hyperbolic: see Michael Szabo "Rena: 20,000 birds may have died - 3 News" (11 April 2012) BirdingNZ <www.birdingnz.net> for the text of the initial *3 News* piece.

125 *Decision of Panel on MV Rena Resource Consent Applications* (Bay of Plenty Regional Council, 26 February 2016) at [35].

126 K Smith and others "Local volunteers respond to the *Rena* oil spill in Maketū, New Zealand" (2016) 11 Kōtuitui: New Zealand Journal of Social Sciences Online 1 at 9.

127 Ministry for the Environment and others *Rena: Long-term Environmental Recovery Plan* (December 2011).

128 Waitangi Tribunal, above n 4, at [1.3.2].

Later in 2012, the owner of the Rena, Daina Shipping Company, was found to be criminally liable under the RMA for the discharge of harmful substances into the sea, and was fined $300,000.[129] The shipping company was also liable under the Maritime Transport Act 1994 for the removal of the wreck[130] and for remedying the hazard to navigation,[131] and senior crew-members including the master of the ship were found guilty of operating a vehicle in a manner likely to cause danger.[132]

In late 2011, the Crown moved from the initial emergency response into a recovery phase. This consisted of two initiatives running in parallel: the first involved the creation of a comprehensive recovery plan by the Ministry for the Environment with input from key government agencies; the second involved confidential negotiations with Rena's owners and insurers, primarily in an effort to recoup some of the $47 million that the Crown had spent on clean-up activities. Both the owners of the Rena and their insurer were well-established companies in the international maritime industry.[133] A Crown witness in the Waitangi Tribunal hearing subsequently stated that there was a strong public demand for the government not to bear the clean-up costs. However, they noted that liability in both New Zealand and international law was limited to $11.3 million.[134]

As a result of their negotiations, the Crown signed three deeds of settlement with the Rena's owners. However, the Crown did not consult with Māori prior to entering into these deeds. The deeds recovered $27.6 million for the Crown in exchange for indemnifying the owners for any subsequent liability, whether brought by a public or private actor, up to $38 million. However, one of the deeds – known as the Wreck Removal Deed – contained a provision whereby the Crown would receive $10.4 million from the company if a resource consent was granted to leave the stern of the ship on the reef. Additionally, this deed specified that the Crown would consider "in good faith" whether to submit in support of the application for the stern to remain.[135]

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129 *Maritime New Zealand v Daina Shipping Company* DC Tauranga CRI-2012-070-001872, 26 October 2012 at [17].

130 Maritime Transport Act 1994, s 248(2)(a). See also *Decision of Panel on MV Rena*, above n 125, at [9].

131 Maritime Transport Act, s 248(4)(b)(iv). See also *Decision of Panel on MV Rena*, above n 125, at [9].

132 Waitangi Tribunal, above n 4, at [1.3.3].

133 At [1.3.4].

134 At [3.2].

135 A similar deed was reportedly signed by the Regional Council, but this was not at issue in the subsequent urgent inquiry in the Waitangi Tribunal: at [1.3.5].

Even while the wreck remained on the reef, by 2013 the physical effects outside the reef were much improved;[136] by 2015 it was considered by many to be a matter solely for history.[137] However, the impact on Māori lasted longer and, for some, continues today. For local Māori, both on the mainland and those based on Mōtītī Island near the reef, Ōtāiti is a tipuna and "an important taonga and wāhi tapū; and … a significant mahinga kai (traditional food gathering place)".[138] For some, Ōtāiti is also a toka tapū, where the spirits of the deceased depart for Hawaiki.[139] It is thus a site of spiritual significance, and the physical damage to Ōtāiti thereby damages its mauri. Because of this connection to Ōtāiti and the regard in which iwi held it, they were severely affected by the grounding of the Rena. The Ōtāiti kaitiaki argued that the existence of the wreck on the reef indicated that they had failed in their duties to protect it, which in turn affected their mauri and their mana, their spiritual and physical health.[140]

In May 2013, the Waitangi Tribunal received two applications for urgent inquiries into Crown conduct around the handling of the Rena. A year later, the Waitangi Tribunal released a statement of issues, limiting the scope of the inquiry to the conduct of the Crown when entering into the Wreck Removal Deed, and the then pending decision of the Crown with respect to whether it would submit in support of the consent application to leave the Rena on the reef.[141] An interim report was released by the Waitangi Tribunal with recommendations for how the Crown ought to consult with Māori in order to better facilitate Māori input in the forthcoming hearings. By the time the Tribunal had released its final report in November 2014, the Crown had already made a submission partially in opposition to leaving the wreck on the reef, although the consent panel had not rendered a decision. The application to leave the wreck on the reef was subsequently approved in February 2016,[142] and later affirmed in 2017 by the Environment Court.[143]

2 Obligations of the Crown

Having previously identified reefs as being taonga, the Tribunal was quick to identify Ōtāiti as having this status, while also noting that the Crown had only accepted this status very late in the

136 *Decision of Panel on MV Rena*, above n 125, at [349].

137 See comments in 2015 by the Bay of Plenty Mayor that, for the average Bay of Plenty resident, the Rena disaster was "out of sight, out of mind": Jamie Morton "Rena: What to do with a shipwreck" *New Zealand Herald* (online ed, New Zealand, 7 September 2015).

138 *Decision of Panel on MV Rena*, above n 125, at [536].

139 At [637].

140 *Ngāi Te Hapū*, above n 32, at [95] and [99].

141 Waitangi Tribunal, above n 4, at [1.4].

142 *Decision of Panel on MV Rena*, above n 125.

143 *Ngāi Te Hapū,* above n 32.

hearing.[144] They also noted the broad impact on local Māori of the Rena's presence on the reef. This ranged from the more readily tangible, such as the fact that the exclusion zone prevented fishing grounds from being accessed, to the more intangible damage to the mauri of the reef due to the presence of the wreck.[145]

The Tribunal also noted that the facts of the case were unusual, in that damage to a taonga had been caused by a third party rather than the Crown. It was not seriously submitted by any of the claimants that the Crown was responsible for removing the wreck rather than the Rena owners.[146] Nevertheless, the Crown was still required to undertake consultation, both to guarantee that it was adequately informed about the relationship between local hapū and iwi to Ōtāiti, and to preserve the relationship between local Māori and the Crown, prior to entering into confidential commercial negotiations. As such, the Crown was obligated to have done the following:[147]

- recognise which hapū and iwi have interests in Otaiti;
- identify the nature of the relationship of these hapū and iwi to Otaiti and the interests that arise from that relationship, paying particular regard to the cultural and historical significance of the reef and whether the hapū or iwi say that the reef is a taonga and that they are kaitiaki;
- understand how the Rena grounding has affected that relationship;
- consult on important issues concerning taonga if Māori interests were likely to be affected and if it was reasonable to do so in the circumstances, having regard to the nature of the resource or taonga and the likely effects of the policy, action, or legislation; and
- ensure that any actions, policies, or agreements were informed by, and took proper account of, Māori interests, where those interests were potentially affected.

Having identified the relevant Crown obligations, the Tribunal moved on to evaluating whether these obligations were breached during the commercial negotiations, or subsequently in the Crown's conduct surrounding the resource consent application for the wreck to remain.

3 Did the Wreck Removal Deed breach the Crown's obligations?

To answer this question, the Tribunal addressed two further issues: first, whether the obligations incurred under the Wreck Removal Deed affected or had the potential to affect Māori interests in the

144 Waitangi Tribunal, above n 4, at [2.2]–[2.3].

145 At [2.3].

146 At [2.3].

147 At [2.4].

reef; and, secondly, whether the Crown discharged its obligations before entering into the Wreck Removal Deed.[148]

On the first issue, the Tribunal examined the Crown's obligations before and after the agreement was signed, paying close attention to cl 4. That clause obligated the Crown to:[149]

> … in good faith consider making a submission or submissions in support of the Consent taking into account the environmental, cultural and economic interests of New Zealand and the likely cost and feasibility of complete removal of the Wreck.

They concluded that the cl 4 obligations went beyond the Crown's typical response to a resource consent application.[150] First, they noted that the contractual obligation to the Rena owners could not be reconciled with the Crown's duty of good faith to Māori given that the interests of the two parties were starkly opposed. Secondly, they found that the clause did not represent a normal weighing of the national interest given that the "cost and feasibility" consideration was weighted towards the Rena owners, and that the reference to "cultural" interests was insufficiently precise in terms of protecting Treaty interests. Finally, and most importantly, the Tribunal noted that the possibility of receiving an additional $10.4 million was clearly a consideration in the Crown's decision-making.

On the second issue, the Tribunal found that the Wreck Removal Deed had the potential to impact on Māori interests despite not directly obliging the Crown to support the application. The Tribunal noted that an all-of-government submission, as contemplated by the Wreck Removal Deed, had the potential to be very influential in the process given the substantial resources available to it, especially when compared to the comparatively under-resourced position of local Māori. Furthermore, the potential impact of a Crown submission would have been known to the Rena owners, hence their willingness to include cl 4 of the Wreck Removal Deed.[151] The language of cl 4 thus put "the owners in a special position in relation to a potential resource consent application".[152] The Tribunal thus held that Māori interests were potentially affected by the inclusion of cl 4.

The next question to be asked was whether adequate consultation was carried out given the potential for Māori interests to be affected and the circumstances facing the Crown. The Tribunal noted that the Crown's right to govern clearly included entering into commercial agreements with third parties to recover expenditure in situations like the Rena disaster.[153] However, the Tribunal was

148 At [3.1].

149 At [3.3].

150 At [3.3.2(2)(a)].

151 At [3.3.2(2)].

152 At [3.3.2(3)].

153 At [3.4.2].

required to investigate whether the Crown was adequately informed of Māori interests before entering into the Wreck Removal Deed, and whether consultation by the Crown was necessary prior to entering into the agreement.[154]

On the first issue, the Crown was found to have adequate general knowledge of local interests to begin commercial negotiations for cost recovery, largely because of the parallel process being carried out by the Ministry for the Environment to create a recovery plan. However, when the negotiations began to contemplate the possibility of leaving the Rena on the reef, additional consultation was required to make an informed decision.[155] The Tribunal did not accept the argument from the Crown that consultation was not possible in the circumstances because the Rena owners may have walked away from negotiations and/or declared bankruptcy. This characterisation of the Rena owners and their insurer did not stand up to scrutiny. Moreover, the claim that consultation would have breached commercial confidence was dismissed.[156]

4 Did the Crown's consultation prior to the consent hearing breach the Treaty?

The Tribunal released an interim report prior to the Crown giving submissions in the consent hearing to leave the wreck on the reef. The interim decision of the Tribunal formed part of the final decision released after the Crown had given its submissions. The interim report concluded that Crown consultation had occurred within overly tight timeframes and that, moreover, the Crown had failed to give proper assistance and/or resourcing to Māori to participate in the consultation process.[157] The interim report also held that the funding available to Māori to take part in the consenting process was insufficient because, first, no funding was available to Māori for preparing for the initial consent hearing, and, secondly, the limited amounts of funding available for the inevitable hearing in the Environment Court ($40,000) would be insufficient given the complexity of the issues in the case. Moreover, the absence of funding during the initial consent hearing would prove to be a permanent setback to participating fully in the subsequent process in the Environment Court.[158] Given these findings, the Tribunal gave its initial conclusions that the Crown was not adequately informed of Māori interests and values pertaining to Ōtāiti as a taonga, and that Māori were unequipped to engage

154 At [3.4.2].

155 At [3.4.2(1)].

156 At [3.4.2(2)].

157 At 54.

158 At 54–55.

in the consenting process.[159] In particular, the Tribunal highlighted the particular plight of Mōtītī Māori:[160]

> On the evidence before us, it is clear that they will consider themselves to have been left alone to suffer the consequences of a decision in which they played no meaningful part and through which they were rendered powerless to protect their taonga.

The interim report of the Tribunal recommended that the Crown give particular consideration to the position of local Māori when deciding to make a submission on the consent application. It recommended that, if the Crown were to make a submission, then they ought to give a degree of active protection to local Māori in the content of that submission, including that the reef was a taonga and therefore of national significance.

The findings of the Tribunal in their eventual decision were softened given that the Crown had submitted in partial opposition to the wreck remaining on the reef; because of this, the full adverse impact on Māori interests of a supportive submission had not come to pass.[161] However, the Crown was still criticised for failing to identify the reef as a taonga, instead submitting that local Māori viewed the site as a taonga. Moreover, the Tribunal continued to criticise the lack of additional funding available for local Māori to contribute to the consenting process. As a final note, the Tribunal also drew attention to the damage that had been done to the relationship between local Māori and the Crown.[162] It therefore recommended that the Crown take an active protection role in its submissions to the Environment Court, including making a firm statement on the taonga status of the reef, and also recommended that the Crown make additional resourcing available for local Māori to participate in those hearings.[163]

5 Hearing in the Environment Court

The resource consent to let the wreck remain on the reef was granted by the Regional Council decision-making panel[164] and upheld by the Environment Court.[165] Notably, Judge Fox of the Māori Land Court presided in the Environment Court decision and spent considerable time discussing the

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159 At 57.

160 At 57–58.

161 At [4.3.3].

162 At [4.2.3].

163 At [4.4].

164 *Decision of Panel on MV Rena*, above n 125, Appendix 1, at 2.

165 *Ngāi Te Hapū*, above n 32. For more information on the decision, see for example Catherine Iorns "Access to Environmental Justice for Māori" (2017) 20 Yearbook of New Zealand Jurisprudence 129.

relevant Māori values, paying particular attention to the mauri of the reef.[166] The Court noted its lack of jurisdiction to order removal of the wreck, and that the conditions offered by the applicant meant that the consent met the requirements of the RMA.[167] Overall, the granting of consent to let the wreck remain was the best way to "positively recognise and provide for Māori" in regards to the ongoing substantive effects of the wreck.[168]

6 *Potential application to climate adaptation issues*

The Rena saga is in some ways unique, given the enormous costs that the Crown was needing to recoup and the international dimension to the commercial negotiations. However, other aspects are likely increasingly relevant to climate adaptation initiatives, especially those involving managed retreat – ie, circumstances in which the Crown will need to engage in negotiations with third parties for the expensive removal of an asset now posing a risk to the coastal environment. The Rena saga is also relevant to circumstances involving major coastal flooding and disaster clean-up. Furthermore, the Rena saga also demonstrates that the power to order the removal of chattels from the coastal marine area is not always clear-cut; negotiations and commercial agreements may provide the best – or perhaps only – means of recouping the cost of cleaning up the coastal environment.

The Rena saga shows that the Treaty obligations of active protection and partnership, especially the facilitation of consultation, will apply no matter what the process is. This includes commercial negotiations with an overlay of confidentiality and urgency. In the Rena saga, there was considerable urgency in the Crown's negotiations, and yet consultation obligations were still found to exist. Therefore, it is likely that consultation will be required in any instance of planning for climate adaptation measures, including managed retreat and/or widespread compensation/acquisition along the lines of what occurred after the Canterbury earthquakes. In other words, any current or future Crown agency, such as an equivalent of the Canterbury Earthquake Recovery Authority, would need to consult with Māori with respect to the clean-up of former residential sites. The situation would be less clear if any agency carrying out climate adaptation was a creation or arm of local government, but the Crown would still be ultimately answerable for any Treaty breaches that were found to have occurred.

Moreover, the Crown will need to be careful if any negotiations for the removal of property from the coast involve undertakings with respect to future submissions in the consenting process. It is conceivable that property owners faced with the hazards of climate change may wish to leave certain structures and materials where they currently are, rather than paying for a full clean-up. If the Crown is to take on these obligations, then it must make sure that it does not enter into duties which conflict

166 *Ngāi Te Hapū*, above n 32, at [94].

167 At [226] and [407].

168 At [192].

with its duty of good faith to Māori, and must do what it can in the submission process to actively protect Māori Treaty interests.

It is also conceivable that local government and/or the Crown could enter into commercial agreements for future removal processes significantly in advance of sea-level rise and/or climatic hazards reaching dangerous levels – for example, by entering into long-term leaseback arrangements with a clean-up clause, or agreements to remove property as a precondition to allowing new coastal development to occur. In these scenarios, the Crown agency would be wise to make sure that what is agreed will not adversely affect Māori at some future date.

Another relevant scenario concerns the erection of protection structures in the coastal area – most notably sea walls, or large structures placed in the ocean to alter sea-flow. It is not uncommon for these structures to be funded through private-public partnerships, and therefore through commercial negotiations between local government, local residents or businesses, and the Crown. In such instances, Māori will need to be consulted, and the Crown will need to be careful about any undertakings regarding submissions in future consent hearings. Furthermore, even if commercial negotiations are not at issue, the Crown is potentially still obliged to make submissions in protection of Māori interests when climate adaptation initiatives are being decided upon.

IV TREATY OBLIGATIONS RELEVANT TO CLIMATE ADAPTATION

There has been no Treaty claim yet brought on decisions about climate adaptation measures, and thus no determination of what the Treaty principles may require in this respect. However, it is possible to make some suggestions for what Treaty obligations might require of climate adaptation decision-making, based on previous determinations of what the Treaty principles require.

The Crown, for its part, must not create policies and laws that undermine the ability of iwi to protect the land. In the case of climate adaptation, this is hard because the duty is on the Crown, yet many – if not most – climate adaptation decisions are made by local and regional government under the RMA. Thus, under current law, even if actions of local government breach Treaty principles, any claim will be made against the Crown, and thus will be defended by central government. However, councils have decision-making powers that have been delegated by the Crown and, especially as they are generally considered to be agents of the Crown, they are exercising some of those functions and should do so in order to avoid creating Treaty breaches, even when acting under the RMA. Notably, it is hard for local government to comply with the Treaty when some of the procedures and standards in the RMA that it operates under have already been held to breach the Treaty of Waitangi. Thus, simple compliance with the legislation may not be enough to avoid a Treaty breach. If they are to avoid breaching Treaty guarantees, councils will need to be thinking of more than simple compliance and, instead, thinking of better practice in line with (at least) the Treaty principles.

A Active Protection of Taonga

Active protection entails ensuring that Māori continue to have rights to and relationships with their lands, estates, forests, fisheries and other taonga; it is vital to upholding Treaty obligations. Climate change calls for protection of many taonga at once. Not all property of significance will be able to be spared from coastal hazards. New Zealand should therefore begin planning ahead for adaptation measures; this includes planning for protection as well as for retreat, even from sacred and fertile lands, in order to reduce future economic and cultural harm. In order to comply with Treaty principles, councils will need to be paying particular attention to the active protection of things that are protected by art 2 of the Treaty.

B Maintaining Kaitiakitanga

Active protection suggests the maintenance of Māori relationships with the coast. This entails the protection of the tikanga and mātauranga Māori that underpin it. Thus, perhaps the first priority of climate adaptation measures should be attempts to enable tangata whenua to live on or near the coast, in order to maintain those relationships. If that will become too difficult with sea-level rise and related inundation, then the next priority is to find other ways to maintain those relationships.

This also suggests that central government funding – ie, central government as the Treaty partner – should first be directed towards maintaining those relationships. There may be a greater duty to Māori than to the general population because of the special nature of their relationship with the environment and the coast, especially where there are marae and Māori lands. This has to be seen in the light of the history of Treaty breaches that has seen the alienation of most Māori land, therefore requiring more rigorous efforts to protect remaining lands.[169]

Resources may be needed to *protect* existing sites or infrastructure, or for modifications to be made to important Māori assets to *accommodate* climate change. For example, Māori may wish to maintain a presence in a hazardous coastal area due to an ancestral connection, but might require assistance or a special resource consent to allow a building to be made removable upon sea-level rise trigger points being reached.[170]

The other aspect relevant to the protection of mātauranga Māori is the use of mātauranga Māori in order to assist climate adaptation, especially of Māori communities. Local knowledge can be used to amplify scientific knowledge in order to identify "options to eliminate and/or at least minimise" the worst effects as well as build capacity to adapt to future changes in/to the land and weather.[171] In one study, in conjunction with a Māori community, "the maintenance of close relationships with the land

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169 *Grace v Minister for Land Information*, above n 60.

170 For more detail and explanation of such measures, see for example Iorns, above n 44, at 108; and Iorns and Watts, above n 68, at 23–26.

171 King and others, above n 1, at 6.

and sea were acknowledged by a number of interviewees as crucial to understanding, and dealing with, local hazards and environmental risks".[172]

C Prohibiting New Development in the Coastal Environment

One of the easiest climate adaptation measures for councils is to prohibit new development in the coastal environment. All development of Māori land is subject to the same resource management regulation as development of other kinds of land. If a hapū wants to build on their land, but there is science indicating that land might be susceptible to coastal inundation, then it will be subject to the resource management regime, which balances avoidance of the future risks of coastal hazards with the maintenance of kaitiakitanga and the protection of Māori relationships with the coastal environment. In the past, the Environment Court has held that a cultural relationship can outweigh – and justify taking some risks of – future coastal hazards.[173] However, this decision was made under the previous New Zealand Coastal Policy Statement (1994 NZCPS) and prior to the Ministry for the Environment and Department of Conservation's current *Guidance documents*, both of which limit coastal development that is subject to climate hazard risks.[174] Because current laws and policies prioritise the avoidance of future risks from coastal hazards, it is likely that situations that have been approved before would not be so approved today.[175] This is despite current Department of Conservation *Guidance* that reinforces upholding such cultural relationships.[176] There is thus a real issue as to how far climate adaptation laws can help maintain cultural relationships with the coastal environment, especially if they can override the Treaty principle of a right to development of Māori land and art 2 assets.

D Identifying Article 2 Assets and Taonga at Risk

As per the MV Rena example, the first substantive step of active protection is the identification of culturally significant coastal land, resources and other taonga that will be at risk of inundation. Only if they are identified can they be considered in any discussion of climate adaptation measures with a view to their protection in a culturally appropriate way. Some taonga can be easily identified,

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172 At 7.

173 See for example *Hemi v Waikato District Council* [2010] NZEnvC 216.

174 Ministry for the Environment *Preparing for Coastal Change: a summary of coastal hazards and climate change guidance for local government* (ME 1335, December 2017); and Department of Conservation *NZCPS 2010 guidance note: Coastal Hazards* (December 2017).

175 See for example Iorns, above n 44, at 147–160: this revisits *Hemi v Waikato District Council*, above n 173, in light of the more recent developments in law and guidance. For a similar revisiting in another adaptation case, see CJ Iorns Magallanes and MJ Dicken "Climate Change Adaptation in the Environment Court: Revisiting the 2010 *Holt* Case" (2019) 50 VUWLR 609.

176 Department of Conservation *NZCPS 2010 guidance note, Policy 2: The Treaty of Waitangi, tangata whenua, and Māori heritage* (2017). For example, this guidance indicates that it is a necessity to provide tangata whenua the opportunity to exercise kaitiakitanga: at 18.

such as marae and Māori land, and should be clearly mapped. Currently, while maps of marae and Māori land exist, there is not easily accessible information about the position of marae regarding sea level and projections of potential risks in one place.[177] For example, Māori land maps show that a significant proportion of Māori land is low-lying; but, in respect of marae, they do not identify vulnerabilities to sea-level rise such as from:

(a) the type of ground the buildings are on;
(b) the height of the buildings off the ground;
(c) any existing protections from inundation and other coastal hazards;
(d) the value of the property;
(e) whether it is insured.

Further, regional councils each have their own mapping websites and disparate policies, such that a national dataset is not always available. This is relevant when Treaty liabilities will fall on the Crown.

Identification of any wāhi tapu may be sensitive, such that it is not appropriate simply to call for a requirement of active mapping and registration by territorial authorities, such as for the purposes of district plans. However, the issue of identification should at least be considered in discussion with tangata whenua, in an appropriate manner. It would be helpful to clearly identify who needs to undertake such identification and impose such a requirement. For example, this may depend on jurisdiction such as under the RMA; around the coast, this may be fragmented between different local government authorities and the Department of Conservation, and this will presumably be varied over time as jurisdictional boundaries shift in response to sea-level rise.[178]

E Coastal Protection Works

In the choice of coastal protection works, active protection of taonga requires that decision-makers consider the protection of the tapu and mauri of the place, and how that will be best facilitated and not diminished. For example, sea walls erected to protect coastal residential housing may cause erosion of the foreshore elsewhere; this may not accord with tikanga nor the protection of the mauri of the foreshore or of the tangata whenua themselves. Natural measures such as dune or wetland enhancement will typically be preferred, especially if they may enhance the mauri of the area in question. Thus, involvement of Māori in decision-making will be necessary in order to determine what kinds of coastal protection works are consistent with mauri and tikanga, and are otherwise appropriate in an area.

Even if coastal protection works are funded through private-public partnerships – and therefore through commercial negotiations between local government, local residents or businesses, and the

177 See for example Māori Maps, above n 36.

178 See the discussion of the coastal zones in Iorns, above n 44, at Parts II 3 and II 8.

Crown – Māori will need to be involved in the decision-making. Importantly, as was demonstrated in relation to the Rena, in all resource consent applications for coastal protection measures, the Crown is potentially obliged to make submissions for the protection of Māori interests.

F Managed Retreat

The strong tie between specific groups of Māori and the land and other natural features from which their ancestors came makes replacement of that land or other features very difficult. The Waitangi Tribunal and the courts have both determined that it is a Treaty principle that traditional territory is not fungible and should not simply be replaced by other land of comparable economic value, for example.[179] Discussion of managed retreat as an option "detracts from the need for adaptation policies to allow people to 'lead the kind of lives they value in the places where they belong'".[180] Managed retreat will be a last resort for tangata whenua.

Where managed retreat needs to be discussed, decisions will need to be made about how and whether Māori who jointly own a piece of land will move away from it even when they likely have ancestral connections to it. These decisions should be made by the affected tangata whenua, in conjunction with central government if necessary; tangata whenua will likely need to be at least an equal partner in decision-making. Where these decisions are about ancestral lands, decisions made by councils alone pursuant to the RMA and LGA, and not in partnership with Māori, will not be consistent with existing Treaty principles about partnership and good faith decision-making, especially about their taonga lands. If there were state-sponsored relocations, there would have to be truly joint decision-making – that is, more than just consultation, and more than even significant consultation. It may be best dealt with centrally, given the Treaty partnership, but it is expected that local and/or regional government would also become involved. There may be opportunities to move inland, including to land that the iwi has a proven connection with. However, retreat would be hindered if relevant inland property was owned privately or by local government, making it more important for all levels of government to become involved.[181]

Even where there is managed retreat from the coast, relationships with traditional territories would still need to be maintained; for that, access is needed. Access to the coastal marine environment is easier to achieve than for some other lands near the coast, because of the traditional public access to the coast. This should be taken into account in relation to any relocation away from the coast.

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179 See for example *SOE Case*, above n 72, at 674 per Richardson J.

180 Colette Mortreux and Jon Barnett "Climate change, migration and adaptation in Funafuti, Tuvalu" (2009) 19 Global Environmental Change 105 at 106, citing W Neil Adger and Jon Barnett "Compensation for climate change must meet needs" (2005) 436 Nature 328.

181 For example, it would be a stretch to argue that a managed retreat would count as a "public work" for the purposes of a Public Works Act 1981 compulsory purchase: see Public Works Act 1981, s 2 definition of "public work".

It is conceivable that many property owners faced with the hazards of climate change may wish to leave certain structures and materials where they currently are, rather than paying for a full clean-up. If the Crown is to take on these obligations, then it must make sure that it does not enter into duties which conflict with its duty of good faith to Māori. For example, it must do what it can by way of submission in the consenting process in order to actively protect Māori Treaty interests. As with the Rena, the Treaty obligations of active protection and partnership, especially the facilitation of consultation, will apply, even in confidential, urgent and/or commercial negotiations.

It is also conceivable that local government and/or the Crown could enter into commercial agreements for future removal processes significantly in advance of sea-level rise and/or climatic hazards reaching dangerous levels – for example, by entering into long-term leaseback arrangements with clean-up clauses, or agreements to remove property as a precondition to allowing new coastal development to occur. In these scenarios, the Crown agency would be wise to make sure that what is agreed will not adversely affect Māori taonga in the future.

G Insurance

The Earthquake Commission (EQC) provides a public insurance safety net for those caught up in natural disasters. While its scheme covers a range of damage including from storms, floods and landslips, EQC coverage will not extend to gradual inundation from sea-level rise, only sudden flooding events. Nor will money for erosion and instability be able to be paid out until any risk of collapse is imminent; thus, the current scheme will not pay for any managed retreat from the coast in advance of an urgent need.[182]

In response to forecast private insurance retreat from future coastal hazard risks, there have been public calls for EQC to step into the breach and/or for the government to provide insurance for such properties.[183] However, even if such insurance is provided, it can only form part of compensation or redress after damage from inundation such as from sea-level rise. It is hard to see how EQC-type insurance compensation would amount to actively protecting the Treaty assets such as coastal marae; active protection requires more substantive action than simple compensation in the event of a loss. Instead, focus would need to be placed on the proposed law reform intended to provide for a social insurance scheme for managed retreat.[184]

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182 See Vanessa James, Catherine Iorns and Jesse Watts *The extent of EQC liability for damage from sea-level rise* (Deep South National Science Challenge, 2019).

183 Jamie Morton "Auckland's rising seas: Insurance warning as 43,000 at risk" *New Zealand Herald* (online ed, New Zealand, 24 March 2019); and Brent Edwards "Property owners should brace themselves for higher risk profile" *National Business Review* (online ed, New Zealand, 17 May 2019).

184 The Managed Retreat and Climate Change Adaptation Act that is proposed as part of the government's environmental law reforms will create "a fund to support climate change adaptation and reducing risks from natural hazards, including principles for cost-minimisation and burden sharing, and cost-sharing

H Decision-Making Procedures: Crown Partnership and Consultation

Climate change is as important to Māori as the sale of state assets, for example, because of the clear effects on Māori land and resources, and thus on iwi, hapū and individuals. Thus, the Crown will need to follow the Treaty principles in relation to partnership and good faith, including consultation.[185] As part of good faith partnership, the Crown must consult with the Māori Treaty partner on "major" issues and obtain the full, free and informed consent of the correct rights-holders in any transaction for their land.[186] The Treaty principles suggest that there be a Māori-specific process when decisions affect Treaty-guaranteed assets. This should not vary between councils around the country; the Crown is required to provide that partnership is carried out, such as through appropriate consultation rights. Such partnership decision-making should achieve better incorporation of Māori values in decisions, and alignment of policies with such values. Such conclusions have been reached in the related situation of mitigation measures. A government consultation report on the framework for an emissions trading scheme stated:[187]

> … Māori perspectives in relation to climate change should be adequately considered and the proposed policies should protect the environment … The need for Māori input into policy development alongside quality engagement [is] another key theme.

Sea-level rise risks and future adaptation possibilities are relatively new concerns, yet iwi and hapū will be required to make informed decisions about their preferred coastal safety measures. In order to ensure effective partnership in decision-making on climate adaptation measures, good faith will likely require Crown assistance with capacity-building to enable hapū to participate. This will likely need to be at least a tripartite exercise between tangata whenua, the Crown and local government authorities, and involve traditional Māori knowledge alongside the relevant science. The knowledge-sharing would extend beyond what to do with the required land, to where people would be relocated or what adaptation might look like if people were to stay on their properties. Co-management and co-governance arrangements are being used increasingly to better enable this knowledge to be used within such decision-making structures.[188]

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arrangements": *New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel* (June 2020) at 189–190.

185 *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA) at 153.

186 *SOE Case*, above n 72, at 665. See generally the discussion on "good faith" at Part III A above.

187 Ministry for the Environment and The Treasury, above n 22, at [8.2].

188 For more discussion of co-management and co-governance arrangements in Aotearoa, see for example Catherine Iorns "Māori co-governance and/or co-management of nature and environmental resources" in R Joseph and R Benton (eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, 2021) 301.

There is a long way to go in consultation over climate adaptation measures around Aotearoa: as noted by the Climate Change Adaptation Technical Working Group, there is currently no widespread Māori information and consultation process in relation to climate adaptation.[189] The Waitangi Tribunal has recommended that Māori advisory bodies be appointed to be involved in environmental protection.[190] This recommendation has not yet been implemented by the New Zealand Government, but is included in the current environmental law reform proposals.[191] This may need to change for the development of climate adaptation measures. Climate change requires a large, coordinated governmental and social response. Tangata whenua will need to have a genuine say in how they can mitigate and adapt to the effects of climate change.

The Crown will need to play a bigger role in adaptation measures than it does at present. The duty of active protection may require significant investments to be made to protect existing Māori interests, and thus may be more appropriately undertaken by central government as Treaty partner. Resources may be needed to protect existing sites or infrastructure, or for modifications to be made to important Māori assets to accommodate climate change. For example, Māori may wish to maintain a presence in a hazardous coastal area due to an ancestral connection, but might require assistance or a special resource consent to allow a building to be made removable upon sea-level rise trigger points being reached. Māori may also require some form of assistance if they are to relocate away from sites of ancestral significance. Some efforts may in turn be needed to re-establish a presence in the same area, especially where there is limited public land available for resettlement, for example. These are matters for more central than local government adaptation decision-making procedures.

I Decision-Making Procedures: Local Government

For local government, likely the most important measure to be adopted in order to uphold the Treaty principles will be the establishment of procedures and structures for good faith cooperation in decision-making between Māori and relevant councils. Such systems need to go beyond the minimum requirements of the RMA and utilise more of the currently optional methods of cooperation and decision-making that implement best practice. It would be helpful for central government to develop a better practice guide for local government, with examples related to climate adaptation decision-making – ie, decision-making procedures that uphold at least the Treaty principles and better prevent Crown liability for future Treaty breaches. As mentioned above, such guidance will be most helpful

189 *Adapting to Climate Change in New Zealand: Recommendations from the Climate Change Adaptation Technical Working Group* (May 2018) [*CCATWG Recommendations*].

190 Waitangi Tribunal, above n 87.

191 See Ministry for the Environment "Overview of the resource management reforms" <https://environment.govt.nz>. The reforms adopt the recommendations of the Resource Management Review Panel, above n 184, also available at that site.

for local government, but also for any central government decision-makers with responsibility for areas within the coastal environment.

Existing government guidance on the RMA can be very helpful as an indication of good practice. For example, the Ministry for the Environment's *Guidelines for Consulting with Tangata Whenua* provide some helpful recommendations to councils about how to carry out Treaty of Waitangi obligations that apply to resource management decisions generally.[192] There is also guidance on making participation arrangements between iwi and councils.[193]

In relation to the coastal environment, the current NZCPS 2010 provides the objective:[194]

> To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:
>
> - recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
> - promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;
> - incorporating mātauranga Māori into sustainable management practices; and
> - recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.

Policy 2 within the NZCPS recognises Māori cultural ties in the following ways: recognition, consultation and kaitiakitanga. Policy 2 acknowledges the role of Māori as kaitiaki and provides ways for knowledge of the Māori world (mātauranga Māori) to be incorporated into plans, policy statements and decisions.[195] The same is true for tikanga Māori and Māori resource management plans (where they exist).[196] In terms of upholding the Treaty principles of partnership and good faith, the decision-making capability does not go much further than consultation and collaboration; this reflects the non-Treaty-compliant RMA framework.

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192 Ministry for the Environment *Guidelines for Consulting with Tangata Whenua under the RMA: An Update on Case Law* (2003).

193 See for example Ministry for the Environment "Mana Whakahono ā Rohe: Iwi participation arrangements" (1 April 2021) <https://environment.govt.nz>; and Ministry for the Environment *Mana Whakahono ā Rohe guidance* (ME 1348, 1 April 2018).

194 Department of Conservation *New Zealand Coastal Policy Statement 2010* (November 2010) at 9, "Objective 3".

195 At 11, "Policy 2(c)".

196 At 11, "Policy 2(b)" and "Policy 2(e)".

The Department of Conservation has produced two relevant guidance notes on the NZCPS 2010: one that focuses on the protection of Māori interests in the coastal environment;[197] and another on dealing with coastal hazards (including climate adaptation measures).[198]

Both the Ministry for the Environment and the Department of Conservation's guidance provides helpful resources for upholding Treaty principles; if followed by councils in discussing and accepting climate adaptation measures, such measures are much more likely to be compliant with these principles. However, they still need specific elaboration in the context of climate adaptation measures. For example, Ministry for the Environment guidance for local government on consultation with iwi sets out some minimum requirements for consultation.[199] One requirement is that iwi authorities must receive any draft plans or draft policy statements before the time of public notification in order to provide feedback and lodge any disputes. Councils must then have *particular regard* to input from iwi authorities before the plan or statement goes to the public.[200] However, I suggest that such guidance is insufficient for decisions on climate adaptation measures. Protection of coastal taonga should require collaboration on the options well before a draft plan or policy is developed, let alone drafted. Hence my suggestion that guidance be developed that is tailored specifically to climate adaptation decision-making and protection of Māori interests under it.

The Ministry for the Environment has produced additional guidance for local government on climate adaptation. The two main reports are the Ministry's 2017 *Coastal Hazard and Climate Change: Guidance for Local Government* (MfE *Guidance*),[201] and a report and set of recommendations by the independent Climate Change Adaptation Technical Working Group (CCATWG).[202] Both of these reports helpfully address issues such as the impact of climate change on Māori coastal communities and government's obligations for addressing them, including within a Treaty framework. They both identify that council decision-making should be done with iwi partners and recognise that this partnership approach to decision-making derives from an obligation under the

197 Department of Conservation *NZCPS Guidance Note: Policy 2: The Treaty of Waitangi, tangata whenua and Māori heritage* (2017).

198 Department of Conservation *NZCPS 2010 guidance note: Coastal Hazards* (December 2017). There are 15 such Department of Conservation NZCPS guidance notes on a range of topics.

199 See Ministry for the Environment, above n 192. See also Ministry for the Environment *Resource Legislation Amendments 2017 – Fact Sheet 3: Changes to Māori Participation in the Resource Management Act 1991* (Info 784d, April 2017).

200 Ministry for the Environment *Resource Legislation Amendments*, above n 199.

201 Ministry for the Environment *Coastal Hazards and Climate Change: Guidance for Local Government* (ME 1341, December 2017) [*Guidance*]; and Ministry for the Environment *Preparing for coastal change: a summary of coastal hazards and climate change guidance for local government* (ME 1335, December 2017) [*Summary*].

202 *CCATWG Recommendations*, above n 189.

Treaty of Waitangi.[203] The MfE *Guidance* stresses the importance of having "adequate support and resources" in order to have "the ability to enable active iwi/hapū and Māori business participation",[204] and that any adaptation team needs to have competency in fostering and managing these relationships.[205] The reports also focus heavily on substantive protection of interests.[206] These documents can enable decision-makers who follow the guidance and recommendations to uphold the Treaty in their decisions on climate adaptation measures.

One illustration of a helpful recommendation is the creation of a mātauranga Māori measure that reflects the cultural impacts of climate change, developed and managed by iwi/hapū.[207] This is a new and possibly significant means for partnership between iwi and the Crown. The CCATWG notes that the Crown has an obligation to act in good faith and use the information they receive in order to inform wider decision-making, and that there is a significant degree of ownership held by those involved.[208] Building adaptive capacity iwi engagement is one vital part of a much wider process of involving the whole community in decision-making. This recommendation is helpful in assisting mātauranga Māori to be woven through the process.

Another illustration is the useful community "dynamic adaptive pathways planning" decision-making process recommended in the MfE *Guidance*.[209] The Hawke's Bay Clifton to Tangoio Coastal Hazards Strategy 2120 was recently developed using this process.[210] In this Hawke's Bay process, there was some special provision for Māori interests, both procedurally and substantively; in addition, it was overseen by a steering group that included three iwi post-settlement governance entities on equal footing with the local and regional councils.[211] This went beyond the protections provided under the RMA and achieved interest protection beyond the normal RMA processes.[212]

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203 At 52.

204 Ministry for the Environment *Guidance*, above n 201, at 59.

205 At [3.2.3].

206 See for example Ministry for the Environment *Guidance*, above n 201, at [7.3]. For more discussion of the provisions in both the Ministry for the Environment *Guidance* and the *CCATWG Recommendations*, see Iorns, above n 44, at 105–124.

207 *CCATWG Recommendations*, above n 189, at 38.

208 At 38.

209 Ministry for the Environment *Summary*, above n 201, at 26.

210 Simon Bendall and Mitchell Daysh Ltd *Report of the Northern and Southern Cell Assessment Panels* (Clifton to Tangoio Coastal Hazards Strategy 2120, 14 February 2018). See also The Clifton to Tangoio Coastal Hazards Strategy Joint Committee "Clifton to Tangoio Coastal Hazards Strategy 2120" (2016) <www.hbcoast.co.nz>; and Lawrence and others, above n 8, at 102.

211 For more information on this process, see Iorns, above n 44, at 141–147.

212 At 145.

Unfortunately, because of the current legal framework, it is still subject to the RMA processes for approval. Perhaps more importantly, with decision-making left up to community panels, it was open to them not to achieve protection of Treaty interests. However, the excellent substantive attention in fact paid to protection bodes well, and it might indicate that this is a helpful way for communities to make climate adaptation decisions: to better achieve consensus effectively through bottom-up education rather than through a high-level partnership model. However, it could also be a way for minority Māori voices and interests to be outweighed by a majority. Clearer guidance or even rules for protection of Treaty interests still need to be developed. For example, given the Treaty duty of active protection, there may be more justification for protection measures being placed on public land for art 2 taonga and thus for the benefit of tangata whenua and their ability to be kaitiaki.

V BEYOND THE TREATY PRINCIPLES

While the focus in this article has been on what existing law on the Treaty principles might require of government, there have been recent developments that will likely expand legal obligations in the future. There are three such developments addressed briefly in this final Part, all of which arose after the initial draft of this article was written: an expanded interpretation of Treaty clauses in legislation; the recognition by courts of tikanga as an element of law; and the reform of our resource management law. These are not the only possible developments in the law of such Treaty obligations. For example, the substance of the Treaty principles themselves may develop in greater recognition of the guarantees in the Māori text of Te Tiriti; there have certainly been many arguments that they do so.[213] However, for the purposes of this article, I am identifying three areas of law that have already begun to change rather than arguments for how they should develop.

A Treaty Clauses in Legislation

The Treaty principles have frequently been implemented only weakly in statutes. In the RMA, for example, decision-makers are only required to take them into account.[214] This is contrasted with other RMA provisions that require other factors to be given a higher priority: "recognise and provide for" (in s 6); or pay "particular regard" to (in s 7). In other statutes, Treaty clauses can be very specific in identifying particular ways in which that statute is said to give effect to the Treaty principles, thereby supposedly excluding consideration of other matters not specified in that particular Treaty clause.[215] Thus, decision-makers have often been able to avoid upholding Treaty principles in favour of other factors.

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213 See for example Jones, above n 5.

214 Resource Management Act, s 8.

215 See for example Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 697. See also Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 96–101 and 183–184; and Legislation Design and Advisory Committee *Legislation Guidelines* (2018) at ch 5.

In a decision in November 2021, the Supreme Court held that Treaty clauses will not be read narrowly by courts but instead:[216]

> … they must be given a broad and generous construction. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intension is made quite clear.

In that particular case, the Treaty clause that, on its face, only identified a limited number of matters, was held *not* to be limited only to those matters, and it could not exclude consideration of wider Treaty principles and protections.[217]

This development indicates that it will be harder for decision-makers to relegate Treaty principles to matters that might be taken into account, but which will always be outweighed by other factors in a decision. With the Supreme Court's reinforcement that the Treaty of Waitangi is part of the fabric of New Zealand's constitution and thus constitutional law,[218] there will be greater willingness of courts to infuse these principles throughout decision-makers' obligations. This is likely to be relevant to future RMA decision-making even if it has not been interpreted this way in the past. This provides even more reason for decision-makers to uphold Treaty principles as part of normal good practice, even if they might think that their legislative decision-making framework does not legally require it: they might be wrong and it would be unfortunate to find this out via a court action.

B Tikanga as Law

New Zealand courts have, over the years, been increasingly referring to tikanga as a part of the New Zealand common law. Tikanga was first explicitly acknowledged as forming "part of the values of the New Zealand common law" in 2012.[219] In 2018, the Supreme Court recognised that a claim based on tikanga should be possible, but this was for the purposes of a strikeout application, not for consideration of the claim itself.[220] However, it has not been explicitly found by courts to be an independent source of law, such that it might found a claim in its own right, as part of our common law. This issue also arose in the 2021 Supreme Court decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*. This decision considered whether tikanga could be included as an "applicable law", as one of the factors decision-makers must take into account in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).[221]

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216 *Trans-Tasman Resources Ltd*, above n 118, at [151] (citations omitted).

217 At [150].

218 At [150], citing *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

219 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

220 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [77] per Elias CJ.

221 Section 59(2)(l).

The Court of Appeal found that tikanga was part of the common law of New Zealand and could be considered as applicable law under the EEZ Act.[222] The appellants and the Attorney-General thought it was not an independent source of law and could not be so considered. The Supreme Court, in deciding between these positions, noted that the common law in New Zealand has been developing in the direction of recognising tikanga as an independent source of law, even if it has not yet been effected in a particular case. The Court noted that such a determination had not yet been necessary for decisions in the cases where it had arisen, but the direction of travel was towards recognition.[223]

The Supreme Court in *Trans-Tasman Resources Ltd* similarly came very close – perhaps one step further than previous cases – in finding that tikanga could be considered as "applicable law" for the purposes of the EEZ Act. However, it did not do so because tikanga was part of the common law; instead it was because "tikanga-as-law" was a subset of the wider Māori customary values and practices that made up tikanga, where these wider customary values and practices were already referred to in the EEZ Act. Therefore, the subset of tikanga that was considered law could and should be considered under the section referring to "applicable law". This is not a determination that tikanga-as-law is part of the common law, but that tikanga is included in a statutory reference to law as a matter of statutory interpretation.. The Court has thus only gone as far as it needs to for its particular decision; however, it seems that it will not be long before an appropriate claim based on tikanga as being part of the common law will be recognised and upheld by our courts.[224]

If and when tikanga is recognised as a source of rights and obligations, to be upheld by New Zealand courts, then elements of the customs and practices will be highly relevant to decision-makers as part of their legal framework. For example, in relation to adaptation decision-making, kaitiakitanga and practices around upholding the mauri and wairua of taonga and around upholding the mana of the kaitiaki may require a lot more active protection than is currently being undertaken (and a lot more understanding on the part of decision-makers of what these customary laws would require of them in order to uphold them). Indeed, the Supreme Court in *Trans-Tasman Resources Ltd* also commented on kaitiakitanga and how it is beyond a simple guardianship but incorporates whanaungatanga between the kaitiaki and the natural world.[225] The Court acknowledged that kaitiakitanga is both a principle and practice: it "manifests itself in an activity".[226] Moreover, this was protected under "the

222 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [178].

223 *Trans-Tasman Resources Ltd*, above n 118, at [167]–[168].

224 Postscript: The New Zealand Supreme Court did precisely this in the case of *Ellis v R* [2022] NZSC 115.

225 *Trans-Tasman Resources Ltd*, above n 118, at [154], n 243, referring to Williams, above n 116, at 3; and to Waitangi Tribunal, above n 87, at 13.

226 *Trans-Tasman Resources Ltd*, above n 118, at [155].

guarantee in art 2 of the Treaty of tino rangatiratanga".[227] This will have implications for the RMA in requiring decision-makers to have a deeper understanding of the effects of proposed activities on kaitiakitanga and thus on the kaitiaki and their tikanga. That is likely greater than most RMA decision-makers currently conceive of such duties under the RMA.

C Resource Management Law Reform

As I have outlined recently in another article,[228] the government is currently in the process of reforming New Zealand's resource management legislation, particularly the RMA. It has been subject to an independent expert review and the government has adopted the Review Panel's recommendations.[229] An exposure draft of the primary proposed Bill was released in 2021 and the full Bill is expected to be introduced to Parliament in 2022.[230] There are two significant aspects to the reform that are relevant to this article. One is the creation of a new, dedicated statute to handle decision-making on climate adaptation, including "retreat" from risks of natural hazards (ie relocation). This is expected to be introduced to Parliament in 2023. The other aspect – and the one most relevant to this article – is to place a much higher priority on protection of Treaty interests and particularly of art 2 taonga in all the resulting legislation.

The Review Panel proposed that the new legislation comply with Treaty principles and that it contain both procedural and substantive outcomes that protect Māori interests. As a result, the Exposure Draft adopts the strong directive that "[a]ll persons exercising powers and performing functions under this Act must give effect to the principles of te Tiriti o Waitangi".[231] It further directs in the proposed cl 8 that the planning framework and all plans must promote the following outcomes:[232]

> (a) …
> (f) the relationship of iwi and hapū, and their tikanga and traditions, with their ancestral lands, water, sites, wāhi tapu, and other taonga is restored and protected;
> (g) the mana and mauri of the natural environment are protected and restored;
> (h) …
> (i) protected customary rights are recognised.

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227 At [154].

228 Catherine Iorns "Reform of the Rules for the Rising Seas" (2021) 52 VUWLR 837.

229 *New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel*, above n 184.

230 Ministry for the Environment *Natural and Built Environments Bill Exposure Draft* (2021).

231 Clause 6.

232 Clause 8.

There are also significant procedural recommendations to better uphold Treaty-compliant decision-making under the new regime.

With these procedural and substantive outcome statements proposed for the Bill, all resulting decisions will likely better uphold Māori interests, including in relation to climate adaptation decision-making. It places a much higher priority on compliance with the Treaty principles, such that all decision-makers will need to uphold them. This makes the identification of what such principles would require of climate adaptation decision-making even more necessary. For those decision-makers who are not familiar with how they might operate in this context, they will need to be trained as soon as possible.

VI CONCLUSION

Sea-level rise is already locked in, and we will need to adapt differently to our coastal environment. This article has suggested how the Treaty principles might apply to adaptation decision-making. The Crown has a duty to ensure that taonga belonging to Māori are protected and that the Treaty partnership is upheld. Such duties may extend to increasing efforts to reduce climate emissions, while at the same time doing more to protect specific taonga through adaptation. Substantive Treaty interests might not be able to be sidelined or outweighed, and fiduciary duties may be recognised by courts.

Treaty duties require that Māori be involved in all or most adaptation decision-making, including beyond the processes provided in the RMA. This will require at least consultation, but also more likely active roles in decision-making. This will in turn require active facilitation and resourcing so as to allow genuine Māori input into such decision-making. This will most likely be done best through iwi and hapū as mana whenua and as guardians of their ancestral lands and taonga. The right substantive decisions will only eventuate through utilising the right processes and decision-makers. All decision-making must be undertaken in a manner that genuinely attempts to ensure that mana whenua maintain their kaitiakitanga, even in situations of retreat from the coast. Moreover, the meaning and content of kaitiakitanga that is protected is being clarified by the courts.

These Treaty duties are placed on the Crown, but, even if local government is making the decisions, the duties still need to be upheld in order to help avoid the creation of future Treaty breaches on the part of the Crown. Authorities will likely need to adopt much better practices in at least partnership and consultation procedures that go beyond the LGA and RMA requirements. It would be best if advice were published by the Crown on upholding Treaty principles in the specific context of climate adaptation decision-making.

Some guidance currently available to local authorities and central government addresses Treaty principles and protections explicitly and can assist good decision-making in this area. This is particularly the case for the MfE *Guidance* and the CCATWG recommendations that are helpfully tailored to climate adaptation decision-making. Yet, despite such guidance, including on what some substantive obligations are, there are still some unresolved issues around how the Crown is to

discharge its obligations to Māori in respect of climate adaptation. It may be that more detailed guidance is needed, such as on the division of local and central government roles. Or, it may be that what is needed is more than just flexible, non-binding guidance that risks non-compliance from some councils, and/or inconsistent application. This may be a matter for law reform imposing mandatory requirements, such as those in the proposed Natural and Built Environments Act[233] and the proposed Climate Adaptation Act.[234]

Whatever guidance is developed will need to incorporate the legal developments giving greater protection to Treaty interests. This is not a static field, and the guarantees of active protection will need to be detailed, such as to include the Supreme Court's comments on kaitiakitanga and on the generous interpretation of Treaty clauses, so as to uphold the Treaty princples as much as possible. There will need to be consideration of duties under tikanga, and, of course, what the eventual reforms will require, such as if decision-makers will be required to give effect to the Treaty principles as is currently proposed.

In conclusion, Treaty duties require the respect of iwi and hapū as Treaty partners to substantive active protection of their coastal environmental assets and their kaitiakitanga over them, as well as achieving recognition of their authority to preferably control, but at least share in, decisions over those assets. Especially with the legal changes both recent and on the horizon, central and local government need to keep in mind the wider picture of upholding not only the Treaty principles – interpreted generously – but also tikanga, rather than solely the minimum conditions in the RMA. The climate adaptation measures that will be needed both now and in the future will likely have significant implications for the protection of art 2 taonga; this means that this wider picture must be kept in mind in order to uphold the Crown's responsibilities and avoid modern Treaty breaches in relation to these assets. In the future, as courts and/or Parliament elaborate on what tikanga and/or the Treaty/Te Tiriti require of government decision-makers, these duties will likely become stronger and more protective of Māori interests than the existing Treaty principles, with greater recognition of relevant cultural values as well as the governance structures needed to uphold them.

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233 See Ministry for the Environment, above n 230.

234 See a description of the proposed legislation at Ministry for the Environment "Pathway to reform" (12 September 2022) <https://environment.govt.nz>.