



Māori Rights and Responsibilities relevant to the Resource Management Reforms

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This report and accompanying table has been prepared by Te Tai Kaha Māori Collective (Kāhui Wai Māori, New Zealand Māori Council, and the Federation of Māori Authorities) as a contribution to work on the reform of Resource Management legislation and Māori Rights, Interests and Responsibilities in Freshwater.

Resource management legislation and regulation is about management and control of “natural resources.” To give effect to Te Tiriti of Waitangi requires knowledge and understanding of current Māori rights, interests, duties, responsibilities, and obligations (“rights”) in relation to “natural resources” and te Taiao.

This work is designed to assist Māori in their relationship with Central and Local Government, and to support their inclusion, participation, and role as “partner” under Te Tiriti of Waitangi in resource management matters.

This work captures the status quo, and addresses what are the relevant rights, interests and responsibilities that need to be provided for in governance relating to Resource Management, Three Waters, and Local Government reform.

It is also relevant more broadly to the Tiriti relationship between the Crown and Māori.

Hierarchy of Māori Rights and Responsibilities

Table 1 sets out the sources of Māori constitutional legal rights and responsibilities, the nature of those “rights,” and who is the holder of those “rights” in relation to natural resources.

Māori rights and responsibilities existed pre-Te Tiriti of Waitangi and have developed over time, through various legal processes, including judge made “common law.”

Māori rights and responsibilities exist in accordance with tikanga and state law. All relevant rights translate to the practice of whānaungatanga, mana, manaakitanga, kaitiakitanga, tapū/noa/utu and rangatiratanga.

The starting point, and primary source of all Māori rights and responsibilities is within Te Ao including mana atua, mana tangata and mana whenua, and tikanga Māori as the framework of Māori law.

Table 1: Hierarchy of Māori Rights and Responsibilities

Source of Right	Explanation & Examples	Rights Holder
1. Tikanga Māori	<ul style="list-style-type: none">• Based in Māori laws, values, and practices• Affirmed and protected by Te Tiriti o Waitangi• Recognised by Courts in common law• Affirmed in Aotearoa New Zealand’s constitution, legislation	Primarily hapū <ul style="list-style-type: none">• ancillary rights held by ahi kā / landowners / individuals• whānau• hapū collectives, confederations
2. Te Tiriti o Waitangi	<ul style="list-style-type: none">• Based in tino rangatiratanga, and Article 2• Reaffirmed by Supreme Court as having “constitutional significance”• Recognised by Courts and Cabinet• Recognised in Legislation	Primarily hapū <ul style="list-style-type: none">• ancillary rights held by ahi kā / landowners / individuals• whānau• hapū collectives, confederations

Source of Right	Explanation & Examples	Rights Holder
3. Common Law (Judge Made)	<ul style="list-style-type: none"> • Rights recognised through the common law doctrine of native title • Crown fiduciary duties, administrative law rights and international law rights including rights set out in UNDRIP 	<ul style="list-style-type: none"> • Hapū • ahi kā, landowners, individuals • Māori representative bodies, e.g., NZMC, FoMA
4. Property Rights	<ul style="list-style-type: none"> • Recorded in present Torrens titles • Traceable back to tikanga (customary) rights and native title • Te Ture Whenua Māori Act 1993 • Treaty settlement legislation 	<ul style="list-style-type: none"> • Hapū • ahi kā, landowners and individuals • Māori representative bodies, including Trusts, Incorporations and entities set up to own Treaty settlement assets • Particular iwi/Post Settlement Governance Entities (PSGEs) specified in legislation
5. Statute	<ul style="list-style-type: none"> • Treaty Settlement legislation • Māori Community Development Act 1962 • Treaty of Waitangi Act 1975 • Marine and Coastal Area (Takutai Moana) Act 2011 • RMA 1991 e.g., Te Mana o te Wai, Joint Management Agreements 	<ul style="list-style-type: none"> • Iwi, PSGEs • Particular hapū specified in legislation • Māori representative bodies e.g., NZMC, Māori Committees under Māori Community Development Act 1962, FoMA, PSGEs • Ahi kā, landowners, individuals
6. Relationships and Crown Policy and Practice	<ul style="list-style-type: none"> • Policies such as Whānau Ora • Crown relationships with NZMC, FoMA, Iwi Leaders Group • Ministerial / Crown expectations e.g., as to the disposal of land (Protection Mechanism (OTS), etc) 	<ul style="list-style-type: none"> • Hapū • ahi kā / landowners/individuals • PSGEs • Māori representative bodies e.g., NZMC, FoMA, ILG

A more detailed two-page version of Table 1 is at Appendix 1, which cites relevant sources and evidence that supports this analysis.

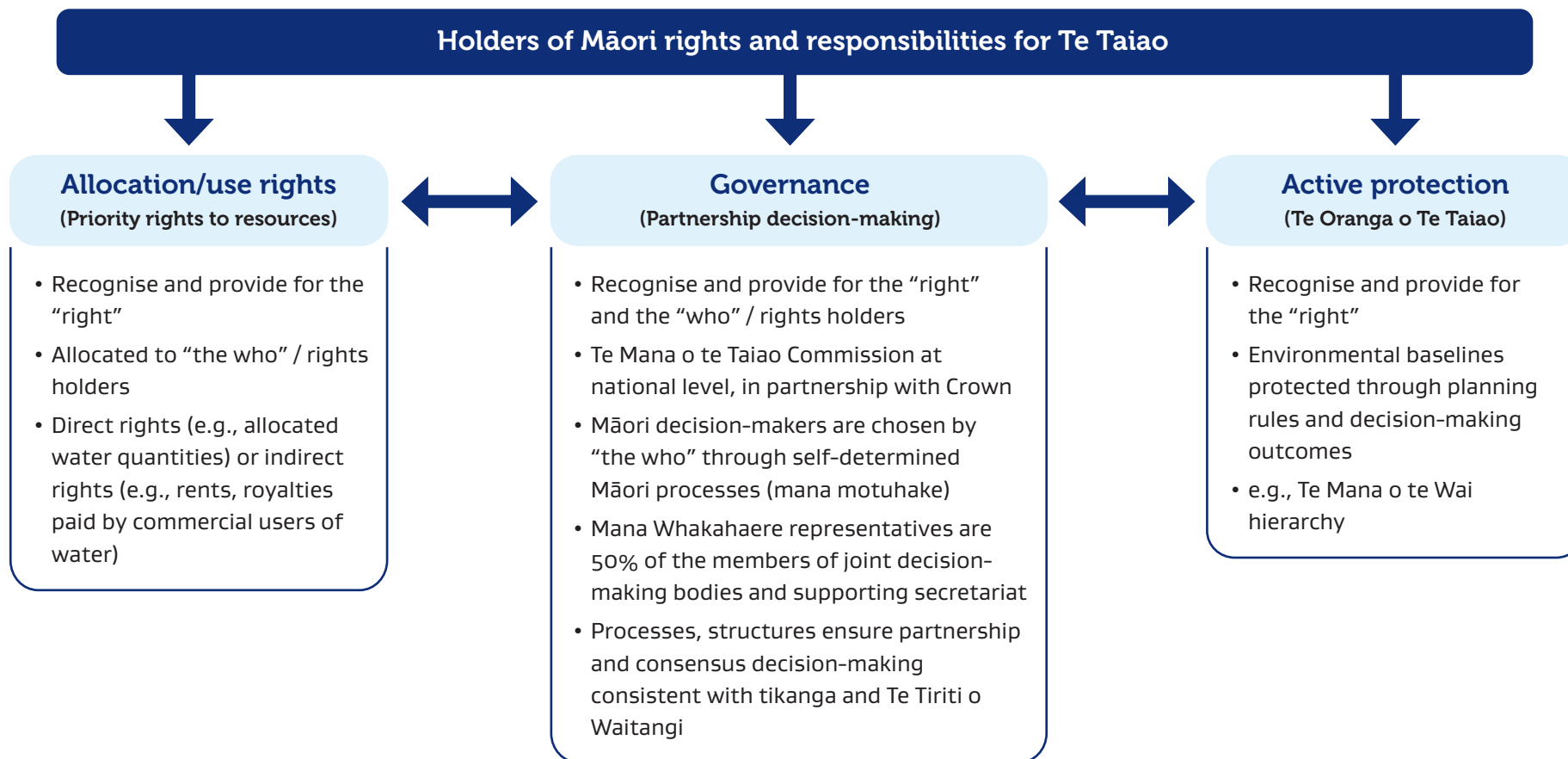
The conclusion is that in accordance with tikanga Māori and Te Tiriti of Waitangi the primary “rights holders” in the natural resource space is primarily hapū, with ancillary or relational rights held by ahi kā / landowners/ individuals, whānau and hapū collectives / confederations.

This hierarchy of Māori rights and responsibilities is directly relevant to Crown – Māori engagement on resource management matters. It also has implications for Local Authorities. It will be important that the reformed system is based on a sound understanding of the source of the current relevant “rights” and who are the “rights holders” within the sphere of kāwanatanga influence. The reformed system must accommodate the different layers of Māori rights, interests and responsibilities.

Translating rights and responsibilities into a new Te Tiriti compliant Resource Management System

Diagram 1 below explains how Māori rights and responsibilities at a conceptual level should be translated into the new Resource Management System. Māori decision-makers (Mana Whakahaere representatives) should be determined through self-determined processes consistent with the principle of Mana Motuhake, and the guarantees in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) that Indigenous peoples are entitled to choose their own representatives.

Diagram 1: Translating rights



Te Tai Kaha have adopted the principle of Mana Whakahaere, consistent with that principle in Te Mana o te Wai. It is an expansive term, which accommodates the hierarchy of Māori rights, interests and responsibilities.

Mana Whakahaere:

Iwi, hapū, ahi kā (Māori landowners) who exercise mana whakahaere (authority) and other obligations (kaitiakitanga and manaakitanga) to a particular area, water source, space, and resource.

Mana Whakahaere representatives should be acknowledged leaders with skills, knowledge, and experience, including Mātauranga, tikanga, sciences, law, and planning. Appointments should constitute a broad representation, including women, youth, and urban Māori. A residential requirement in the region / catchment may also be required.

There should also be requirements for Mana Whakahaere representatives to regularly report and consult with those who hold relevant rights, interests, and responsibilities; as well as mechanisms to allow for Mana Whakahaere representatives to be held to account and replaced in defined circumstances.

Primary legislation should specify timeframes for when Mana Whakahaere representatives are chosen, the region, and the number of representatives to achieve 50:50 partnership at all levels. Arrangements should also be specified that include appropriate mediation and resolution processes/ determinator mechanisms, which should also be time bound.

This process achieves timely outcomes and “certainty” for all and will build enduring relationships over time.

Funding to build the capacity and capability of hapū, ahi kā / landowners, iwi / Māori to engage in the reformed system is required.

There will also be a need to provide resourcing to support the process of selection of Mana Whakahaere representatives.

Treaty Settlements Transition

Te Tai Kaha acknowledge that Treaty Settlements with Post Settlement Governance Entities (PSGEs) are legally binding and that specific obligations in relation to resource management will, as appropriate, be transferred into the new resource management system. However, any transition needs to ensure rights holders based on tikanga are not usurped through this process.

PSGEs should not determine how rights held by hapū (e.g. takutai moana rights) are incorporated into governance arrangements.

PSGEs have no general mandate to represent hapū as customary rights holders and should not be assumed by the Crown to do so unless hapū free and prior informed consent is demonstrated.

Te Tai Kaha recommend that Māori representation in the reformed resource management system needs to be based on the principle of Mana Whakahaere, enabling all those with rights, interests and responsibilities to come together.

Conclusion

It will be critical to ensure that the new Resource Management system in Aotearoa New Zealand provides for all holders of rights and responsibilities to be represented as Te Tiriti partners in the new system.

Māori rights and responsibilities should not be defined by the last 40 years of Crown policy on the settlement of historical Crown breaches of Te Tiriti, and the emergence of Crown established PSGEs.

PSGEs have an important place in the rich tapestry of Māori society today and going forward. They should however not be a “one-stop” shop, with PSGE / Iwi as the sole voice of Māori expression of rangatiratanga across all kāwanatanga activities.

Partnership and participation must encompass those who are the “rights” holders, primarily hapū.

A Te Tiriti compliant reformed Resource Management system requires an “inclusive process,” based on the principle of mana whakahaere.

It is not for the Crown to determine, or to “pick winners” e.g. PSGEs. This is not a policy choice to be made or directed by the Crown.

The solution lies in a reformed Resource Management system which is inclusive of hapū, ahi kā, landowners, marae, iwi / PSGEs underpinned by the principle of equity, mana whakahaere, kaitiakitanga, and manaakitanga, and mana motuhake. A system where Māori partnership is based on the principle of Mana Whakahaere and the formation of Mana Whakahaere Committees.

Te Tai Kaha Māori Collective are confident that PSGEs, Iwi, Hapū, ahi kā, marae, hāpori, can work together on this innovative and inclusive pathway forward.



Appendix 1:

Māori Rights and Responsibilities relevant to Resource Management Reform

This table sets out current legal and constitutional rights, interests and associated responsibilities (which are collectively referred to in the table below through the shorthand reference to “rights”) held by Māori that are relevant to reform of the Resource Management (RM) system, and from which responsibilities, obligations and duties also arise.

The focus is on rights already conferred specifically to Māori, rather than on rights that Māori also have simply by virtue of being citizens in Aotearoa or by virtue of being human. The sources of rights have been listed hierarchically, in te ao Māori terms, starting with Tikanga and descending to Māori/Crown policy and practice.

The table illustrates, amongst other things, that rights are not solely held by iwi or only by post-settlement governance entities (PSGEs), but are held primarily by hapū. It also illustrates that the sources of rights overlap in practice. It also shows that Māori rights are not dependent on the Crown.

Source of rights/responsibilities	Relevant rights/responsibilities	Holder of rights/responsibilities
<p>1. Tikanga (also echoed in Article 2, and perhaps Article 4 of Te Tiriti)</p> <ul style="list-style-type: none"> Based in Māori laws, values and practices; expression of “tino rangatiratanga o ratou kainga me o ratou taonga katoa” Subsequently affirmed in ko te tuarua of Te Tiriti¹ Recognised by Courts to be part of the development of the common law² Referred to or affirmed in Aotearoa New Zealand’s constitution, legislation (e.g. s 186 of the Fisheries Act 1996) and policy 	<ul style="list-style-type: none"> Customary title to bodies of freshwater and lands Customary fishing rights Rights over wāhi tapu and all it embraces (taonga, kōrero tuku iho, koiwi) Mana whakahaere rights/kaitiakitanga responsibilities, including to past, present and future generations Use rights over natural resources³ With all relevant rights translating to the <i>practice</i> of whānaungatanga, mana, manaakitanga/kaitiakitanga, tapu/noa/utu and rangatiratanga 	<ul style="list-style-type: none"> Primarily hapū But ancillary (relational) rights held by: <ul style="list-style-type: none"> Ahi kā/Landowners (including trusts and incorporations)/ Individuals Whānau Hapū collectives/confederations
<p>2. Articles of Te Tiriti o Waitangi</p> <ul style="list-style-type: none"> Based in tino rangatiratanga, see particularly ko te tuarua of Te Tiriti (and supported by article 2 of the Treaty “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties” Recently reaffirmed by the Supreme Court as having “constitutional significance”,⁴ the articles of Te Tiriti protect interests beyond tikanga Māori and go beyond the principles of the Treaty in legislation Courts⁵ and Cabinet⁶ have recognised direct applicability of Te Tiriti Legislation has recognised the applicability both of Te Tiriti (eg s 4(d) of the Education and Training Act 2020) and of Te Tiriti principles (eg s 8 of the RMA and s 9 of the State-Owned Enterprises Act 1986) 	<p>As recognised by the Waitangi Tribunal and/or Courts:</p> <ul style="list-style-type: none"> Distinct Rangatiratanga and Kāwanatanga spheres of influence Ability to reclaim tino rangatiratanga over kāinga Ability to take responsibility to lead positive and systemic transformational change More broadly, rights include: <ul style="list-style-type: none"> Partnership, reciprocity and mutual benefit, including partnership in governance and decision-making at all levels active protection of ko te tuarua “taonga”, including through informed decisions rights of development, including priority commercial opportunities principles of equity arising from disparities⁷ and equality principle of options⁸ right to redress for past wrongs, including compensation as appropriate rights grounded in “peace” and “good order” promised in Te Tiriti preamble⁹ rights grounded in the guarantee of religious freedom and customary rights through the oral protocol/Article 4¹⁰ Te Tiriti can provide the basis for Māori-led institutions or distinctive Māori strategies, such as MAIHI Ka Ora/the National Māori Housing Strategy and the Māori Health Authority¹¹ 	<ul style="list-style-type: none"> Primarily hapū But ancillary (relational) rights held by: <ul style="list-style-type: none"> Ahi kā/Landowners/ Individuals Whānau Hapū collectives/confederations

Source of rights/responsibilities	Relevant rights/responsibilities	Holder of rights/responsibilities
<p>3. Judge made (common) law (reflecting aspects of Articles 1–3)</p> <ul style="list-style-type: none"> • Rights recognised through the common law doctrine of native title • Rights incidental to Crown fiduciary duties (as affirmed in <i>Wakatu</i>)¹² • Rights owed to Māori because of duties of care owed in particular circumstances, including by the Crown (as upheld in South Australia)¹³ • Rights incidental to international law (including United Nations Declaration on the Rights of Indigenous Peoples), capable of influencing interpretation of statutes and the development of policy and of law¹⁴ • Rights incidental to administrative law, eg flowing from the duty to consult people or groups who are specially affected by proposed decisions and/or to accommodate their rights and interests in decisions that are made • Other rights, eg flowing from executors' duties (as in <i>Takamore</i>)¹⁵ 	<ul style="list-style-type: none"> • Context-sensitive rights, such as rights where: <ul style="list-style-type: none"> – People or groups are specially affected by proposed exercises of public power – A fiduciary duty can be established (e.g. owed by the Crown to Māori) – A duty of care can be established – International law obligations apply 	<ul style="list-style-type: none"> • Hapū • Ahi kā/Landowners/Individuals • Māori representative bodies, eg the NZMC, FOMA
<p>4. Property rights (also protected by Articles 1–3 of Te Tiriti)</p> <ul style="list-style-type: none"> • Recorded in present day Torrens title documents, with titles traceable back to customary ownership/rights (eg ahi kā/inalienability of customary rights in tikanga terms) that are reflected in common law native title • Includes some relevant incidental/riparian rights (eg rights to water for individuals' reasonable domestic needs in RMA ss 14(3)(b) and (d)) • Also includes rights provided for in Te Ture Whenua Māori Act 1993 • Rights provided in various Treaty settlement legislation 	<ul style="list-style-type: none"> • Customary title (eg where land does not yet have a registered (Torrens) title) • Various forms of registered (Torrens) titles, eg as General Land and Maori Freehold Land • (Registered) rights or interests of a usufructory nature (eg easements) • Rights in various Treaty settlements (eg rights of first refusal) 	<ul style="list-style-type: none"> • Hapū • Ahi kā/Landowners/Individuals • Māori representative bodies, including trusts, incorporations and Special Purpose Vehicles (eg, entities set up to own Treaty settlement assets, which are generally not PSGEs themselves) • Particular iwi/PSGEs specified in legislation

Source of rights/responsibilities	Relevant rights/responsibilities	Holder of rights/responsibilities
<p>5. Statute (reflecting Article 1 of Te Tiriti, and informed by Articles 2 and/or 3)</p> <ul style="list-style-type: none"> Contemporary Treaty settlement legislation, including the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Te Urewera Act 2014 and Te Awa Tupua (Whanganui River Claims Settlement Act) 2017 Contemporary legislation enacted to protect Māori rights, eg the Māori Community Development Act 1962, the Treaty of Waitangi Act 1975, and the Marine and Coastal Area (Takutai Moana) Act 2011 Rights incidental to the right to culture under s 20 of the NZ Bill of Rights Act 1990 (as affirmed in <i>Takamore</i>)¹⁶ Rights conferred by or through the RMA, eg: <ul style="list-style-type: none"> water managed for cultural purposes (RMA, s 69 and Sch 3) geothermal water used tikanga consistently (RMA, s 14(3)(c)) the fundamental Te Mana o te Wai concept in NPS-FM 2020 Joint management agreements with local government¹⁷ Rights to participate (also sourced in Te Tiriti), eg under cl 3(1)(d) of Sch 1 of the RMA, s 14(d) and s 81 of the Local Government Act 2002, and ss 18 and 45 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012¹⁸ 	<ul style="list-style-type: none"> Co-management or co-governance of key natural resources, such as Waikato River, Te Urewera, and Te Awa Tupua Rights to participate in statutory and/or regulatory decision-making (processes) Rights/responsibilities over the marine and coastal area Independent Statutory Authorities over natural resources Customary Bylaws for taonga e.g. Waikato River Tuna Bylaws 	<ul style="list-style-type: none"> Particular iwi/PSGEs specified in legislation Particular hapū specified in legislation Māori representative bodies specified in legislation, eg the NZMC, Māori Committees under Māori Community Development Act 1962, FOMA, PSGEs Ahi kā/Landowners/Individuals
<p>6. Relationships and Crown practice and policy</p> <ul style="list-style-type: none"> Te Mana o te Wai Whānau Ora policy and arrangements¹⁹ Crown relationships with eg the NZMC, FOMA, Iwi Chairs Forum Ministerial/Crown expectations as to the disposal of land, eg the Protection Mechanism (OTS), Sites of Significance process (TPK), Landcorp Protocol 	<ul style="list-style-type: none"> Duties (or at least expectations) to notify and consult Legitimate expectations 	<ul style="list-style-type: none"> Hapū Ahi kā/Landowners/Individuals PSGEs Māori representative bodies, eg the NZMC, FOMA, ILG

References

- ¹ See, eg, *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18]; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [154] ('TTR').
- ² See, eg, *TTR* at [166]–[169].
- ³ As discussed in: Edward Taihakurei Durie, 'Custom Law', Discussion Paper, Waitangi Tribunal, 1994.
- ⁴ See *TTR* at [150] and [296].
- ⁵ See *TTR* at [154].
- ⁶ See Cabinet Office Te Tiriti o Waitangi / Treaty of Waitangi Guidance (2019), online at <https://dpmc.govt.nz/publications/co-19-5-te-tiriti-o-waitangi-treaty-waitangi-guidance-html>; see [17]: "While the courts and previous guidance have developed and focussed on principles of the Treaty, this guidance takes the texts of the Treaty as its focus." At [23] the guidance associates Article 1 with good government and good faith; at [47] it associates Article 2 with the need "to respect the right of Māori to control decisions in relation to their lands and the things of value to them"; at [67] the guidance links Article 3 to an "assurance that rights would be enjoyed equally by Māori with all New Zealanders", noting that special measures to attain equal enjoyment of benefits are allowed by international law and also referring at [72] to other legal values such as natural justice, due process, fairness, and equity, as well as tikanga values (at [74]).
- ⁷ This can require positive intervention to address disparities, so that there is equality of outcomes, rather than equality of access to services, treatment or care: Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 62; see also xxxiii.
- ⁸ This means that Māori can pursue a direction based on personal choice. The Tribunal has explained that Te Tiriti protected traditional Māori rights, and also gave Māori the rights of British subjects. As a result, Māori have the option to operate in one or other world, or to "walk in two worlds": Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) at 195. The principle also assures Māori of the right to choose their own social and cultural path in accordance with tikanga Māori. In the context of health services, Māori have the right to access health services that provide traditional rongoā and/or are provided in a manner consistent with tikanga Māori that embraces Māori beliefs, tapu practices, and whānau support relevant to the care of Māori patients: Waitangi Tribunal, *Napier Hospital* (above n 7) at 65.
- ⁹ See Kawharu translation at <https://nzhistory.govt.nz/files/documents/treaty-kawharu-footnotes.pdf>.
- ¹⁰ As discussed in: Heather Came and Keith Tudor, 'Bicultural Praxis: The Relevance of Te Tiriti o Waitangi to Health Promotion Internationally' (2016) International Journal of Health Promotion and Education 1–9, online at <https://core.ac.uk/download/pdf/56365118.pdf> (see in particular p. 4 of online version).
- ¹¹ See <https://www.hud.govt.nz/maihi-and-maori-housing/maihi-ka-ora/>.
- ¹² *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [1].
- ¹³ *State of South Australia v Lampard-Trevorrow* [2010] SASC 56 at [348]–[409] in relation to the removal of Aboriginal children from the care of their parents.
- ¹⁴ The presumption that legislation should be read, so far as possible, as being consistent with New Zealand's relevant international obligations is discussed in *Fitzgerald v R* [2021] NZSC 131 at [63] and [225].
- ¹⁵ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.
- ¹⁶ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [12].
- ¹⁷ As discussed (critically) in: Natalie Coates, Joint-Management Agreements in New Zealand: Simply Empty Promises? (2009) 13 Journal of South Pacific Law 32, online at <http://www.pacii.org/journals/fjSPL/vol13no1/pdf/coates.pdf>.
- ¹⁸ ¹As discussed by Caren Fox and Chris Bretton, 'Māori Participation, Rights and Interests' (Resource Management Law Association of New Zealand Conference, 2016), online at <https://www.rmla.org.nz/wp-content/uploads/2016/09/carenfox.pdf>, at 15.
- ¹⁹ <https://www.tpk.govt.nz/en/whakamahia/whanau-ora>.



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