Maori Values and Tikanga Consultation under the RMA 1991 and the Local Government Bill – Possible Ways Forward

Inaugural Maori Legal Forum Conference
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CONFERENZ

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Paper prepared by Robert Joseph¹ and Tom Bennion²

Introduction – Tikanga Maori Legal Precedent

Historically, the New Zealand legal system acknowledged and accommodated for the inclusion of Maori values, tikanga, customary laws and institutions. The non-Maori legal authority for such actions is the common law doctrine of aboriginal rights which is an acknowledgement and acceptance of Maori values and tikanga. The other authority is the Treaty of Waitangi which recognised tikanga Maori in Article II: ‘...te tino rangatiratanga ... o ratou taonga katoa.’ The Waitangi Tribunal translated taonga katoa as ‘all their valued customs and possessions.’³ William Colenso also described an incident prior to signing the Treaty where Governor Hobson agreed to protect Māori custom in the alleged fourth article.⁴

Consequently, official instructions were forwarded from London directing the Governor to respect and uphold tikanga Maori within the New Zealand legal system. In 1842, Lord Stanley suggested that certain Maori institutions such as tapu be incorporated into the system.⁵ Stanley also directed that legislation be framed in some measure to meet Maori practices including punishment for desecrating wāhi tapu.⁶ One statutory example was the Native Exemption Ordinance 1844⁷ which provided that in crimes between Māori, non-Maori interference depended on Māori request. In ‘mixed culture’ cases, Māori convicted of theft could pay up to four times the value of goods stolen in lieu of other punishment which could be used to compensate the victim of theft and was an obvious adaptation of the institution of muru.⁸

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² Barrister and editor of the Maori Law Review.
³ Waitangi Tribunal Report Findings of the Waitangi Tribunal. Relating to Te Reo Māori (WAI-11, Wellington, 29 April 1986) para. 4.2.4; 4.2.8, 4.2.3, at 20.
⁴ Colenso, W The Authentic and Genuine History of the Signing of the Treaty of Waitangi (Capper Press, Reprint, 1890) at 31-32. The alleged fourth Article stated: ‘E mea ana te Kawana ko nga whakapono katoa o Ingarani, o nga Weteriana, o Roma, me te ritenga Maori hoki e tiakina ngatahitaia e ia – The Governor says that the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Maori custom shall alike be protected by him.’ See Orange, C The Treaty of Waitangi (Allen Unwin Press, Auckland, 1987) at 53.
⁵ Lord Stanley, Secretary of State for the Colonies, Memorandum, 23 August 1842.
⁷ “An Ordinance to exempt in certain cases Aboriginal Native Population of the Colony from the ordinary process and operation of the law.” Legislative Council, Ordinances, Session III, No. XVIII, 16 July 1844.
⁸ Ordinances of New Zealand, sess. III, no. XVII.
Perhaps the most important yet overlooked constitutional provision for the inclusion of Maori values and tikanga was section 71 of the Constitution Act 1852. Section 71 stated:

71. And whereas it may be expedient that the laws, customs, and usages of the Aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed: It shall be lawful for her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.

This section thus provided for the establishment of native districts where tikanga Maori would prevail between Maori inter se. The section was never implemented however and was subsequently repealed by the Constitution Act 1986.9

In Wi Parata v Bishop of Wellington10 Prendergast C.J erroneously held that Māori custom and usage, although included in section 4 of the Native Rights Act 1865, did not exist because ‘a phrase in a statute cannot call what is non-existent into being. No such body of law existed.’11 Prendergast C.J reinforced this finding in Rira Peti v Ngaraihi Te Paku12 when he held that native districts, pursuant to section 10 of the New Zealand Government Act 1846,13 were never appointed because Maori were British subjects governed by the laws of the land and not by their usages.14 Maori rights under the Treaty of Waitangi and many of their tikanga values were thus marginalised and lay legally dormant until the Treaty of Waitangi Act 1975 with the establishment of the Waitangi Tribunal. The Tribunal resurrected the acknowledgement and accommodation of Maori values and tikanga in the legal system.

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9 For an analysis of the development and demise of s. 71 of the Constitution Act 1852, see Joseph, R The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852 (Te Matahauariki Institute, University of Waikato Press, Hamilton, 2002).
10 Wi Parata v Bishop of Wellington (1877) 3 N.Z Jur. (N.S) S.C 79.
11 Idem
12 (1889) 7 NZLR 235
13 The New Zealand Government Act 1846 was the forerunner to the New Zealand Constitution Act 1852. Governor Grey managed to have the former Act suspended and subsequently over-ridden by the latter. Section 10 was the equivalent to section 71 native districts in the former statute.
14 Rira Peti v Ngaraihi Te Paku (1889) 7 NZLR 235, 238-9.
In 1985, in its *Manukau* report, the Waitangi Tribunal considered the issue of taking water from the Waikato River at a point some miles from the sea and discharging it into the Manukau harbour, rather than allowing the water to reach the sea via the Waikato River mouth, some distance south of the Manukau harbour. The objection was entirely a ‘metaphysical’ one, that the *mauri* of the Waikato should not be mixed by human intervention in this way with the *mauri* of the Manukau harbour and ‘dead’ or ‘cooked’ water should not be discharged to living water that supplies seafood.

The tribunal first pointed out that ‘the values of a society, its metaphysical or spiritual beliefs and customary preferences are regularly applied in the assessment of proposals without a thought as to their origin.’ It continued:

> In our multicultural society the values of minorities must sometimes give way to those of the predominant culture, but in New Zealand, the Treaty of Waitangi gives Maori values an equal place with British values, and a priority when the Maori interest in their taonga is adversely affected. The recognition of Maori values should not have to depend upon a particular convenience as when the meat industry found it convenient to introduce Halal killing practices to accommodate Islamic religious values.

The ‘current’ values of a community:

> are not so much to be judged as respected. We can try to change them but we cannot deny them for as Pascal said of the Christian religion, ‘the heart has its reasons, reason knows not of.’ That view alone may validate a community’s stance.

Later in the report the Tribunal noted that Maori values were not opposed to development. Rather, there was a difference of emphasis from European values:

> Maori society … has tempered what might have been a fundamental religious bar with a basic pragmatism, enabling modifications to the environment after appropriate incantations or precautionary steps. …

We consider that Maori values ought to be provided for in planning legislation. We do not think that they should predominate over other values but we do think they should be brought into account and given proper

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16 Ibid at 78
17 Ibid. The halal reference recalls the period when New Zealand abattoirs killed meat in accordance with Muslim religious practices for export to Muslim countries.
18 Ibid p124. Note the use of the word ‘current’ acknowledging the fluidic and dynamic nature of values generally and tikanga Maori.
consideration when Maori interests are particularly affected. And if Maori interests are not exclusively affected then there might at least be a search for a practical alternative if there is one, or a reasonable compromise.\textsuperscript{19}

**Tikanga Maori and the Resource Management Act 1991**

Those provisions of the *Resource Management Act 1991* (RMA) dealing with Maori issues, in particular the Maori trilogy key sections 6(e), 7(a) and 8, were enacted to enable that balancing exercise to occur.\textsuperscript{20} As recognised by the courts, the Maori trilogy and related provisions:

… place the Court directly at the interface between the concepts of British common law (which has its genesis in Roman law) and the concepts of Maori customary law which is founded on *tikanga* Maori. The Treaty promised the protection of Maori customs and cultural values. The guarantee of Rangatiratanga [sic] in Article 2 was a promise to protect the right of Maori to possess and control that which is theirs: ‘in accordance with their customs and having regard to their own cultural preferences.’\textsuperscript{21}

Resource consent applicants and local authorities have generally avoided a ‘direct approach’ to confronting Maori under the RMA until recent times. There are a number of reasons for this change including:

- A growing sophistication in the utilisation of the Maori provisions;
- The various RMA ‘successes’ achieved by Maori; and
- The increasing utilisation of Maori academics/cultural advisers by resource consent applicants and others.

From this direct approach, there is a growing judicial testing of the Maori spiritual and cultural paradigm including values and *tikanga*. The result has been a significant increase in the resources and time local authorities have had to apply to Maori issues. This has led in many cases to resource management outcomes quite different from those which occurred prior to the enactment of the RMA, when Maori cultural and spiritual values could be safely ignored or sidelined. However, while Maori values may now have entered the system, there is evidence that the system may not yet have the tools, or have developed a sufficiently informed approach, to dealing appropriately with those values.

\textsuperscript{19} Ibid pp123-124
\textsuperscript{20} For a good reference on Maori RMA issues, see Majurey, P ‘Environmental Issues’ in New Zealand Law Society *Treaty of Waitangi* (New Zealand Law Society Seminar, Hamilton, August 2002) at 31 – 63.
\textsuperscript{21} *Land Air and Water Association v Waikato Regional Council* Unreported, Judge Whiting, Environment Court, Auckland, A110/01, 23 October 2001 (Hereinafter *Hampton Downs*) at 104. There, the Court considered a proposal to establish a large engineered land disposal facility at Hampton Downs north of Waikato. The proposal received considerable opposition from the local community including tangata whenua.
Methodology

The Environment Court has recognised the need to address *tikanga* Maori\(^{22}\) in its consideration of the RMA Maori provisions and has articulated a methodology of utilising the Waitangi Tribunal:

> It is one thing for a Māori to give evidence in terms of their customs and quite another thing again to give evidence that explains them. It is how customary evidence is interpreted that is the more crucial matter. The Tribunal uses expert evidence, Māori and Pākehā, for that purpose. Today, we have the benefit of anthropologists who provide just that. … Moreover, today there are Māori who are able to clarify the meaning behind symbols and to impart knowledge of their customs in terms comprehensive to Europeans.\(^{23}\)

Judge Whiting continued:

> We feel it important to set out the above. It provides an appropriate methodology for this Court’s role in interpreting concepts of *tikanga* Maori. It answers the criticism which, at the outset of this case, was levelled by one of the parties, at the end of a lengthy hearing, by Ms Maxwell, that the Court, being a specialist Court, was without an expert in *tikanga* Maori. By applying the above methodology the Court can make a determination on the evidence just as it has to make determinations on many matters which are outside the professional expertise of its members.\(^{24}\)

The RMA also recognises, in its definition of ‘*tikanga* Maori’ that the relevant customary values and practices are those of the Māori people.

**Wāhi Tapu**

Take, for example, the debate over *wāhi tapu*. Section 6(e) RMA provides that it is a matter of national importance to recognise and provide for ‘the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.’ In a number of cases, Māori opponents of developments have argued that they will affect *wāhi tapu* covering several hectares of land. The Environment Court appears to have taken two general approaches. The first is a three-stage inquiry for claims of *wāhi tapu* and relies heavily on a close examination of the etymology of ‘*wāhi tapu*.’

> The first is to determine, as best as we are able in the English language, the meaning of the concept. The second is to assess the evidence to determine

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\(^{22}\) Ibid at 105.


\(^{24}\) Supra n 21, *(Hampton Downs)* at 105.
whether it probatively establishes its existence and relevance in the context of the facts of a particular case. If so, the third is to determine how it is to be recognised and provided for. When, as in the case here, it is alleged that a site is wāhi tapu, it is necessary: first to determine the meaning of wāhi tapu; second to determine whether the evidence probatively establishes the existence of wāhi tapu, and third, if it does, how is it to be provided for.25

In addressing these steps the Environment Court had regard to the following documentary sources:

- Dictionary definitions;
- Reports of the Waitangi Tribunal;
- Definitions of tikanga Maori values in relevant RMA instruments; and
- Other Acts forming part of the statutory scheme.26

Assertions of wāhi tapu have not only been met with evidence from Māori dictionaries but also Māori studies experts who claim that the term wāhi tapu applies to sites which are quite limited in area and associated with some religious or ceremonial event. For example, in Winstone Aggregates the Court recorded evidence of wāhi tapu:

Mr Mikaere stated: ‘the point being that wāhi tapu are very small specified places.’

Mr Rima Herbet, the manager of the Ngati Naho Co-operative Society Limited, gave evidence. He defined wāhi tapu:

‘… as physical features or phenomena, either on land or water, which have spiritual, traditional, historical and cultural significance to our people, Waahi tapu as conceived by Maori may originate from pre-contact history or from post-European history through to the present day. The waahi tapu identified up until recent times by us included cultivation areas and Maori earthworks and burial areas which are all of long-standing importance to the Maori people of our area.’27

Both Mr Wara and Mr Herbet rejected the narrower definition of Mr Mikaere during cross-examination. The reason given for rejecting Mr Mikaere’s interpretation was that he was not from the area. The Court however accepted Mr Mikaere’s definition.

In Hampton Downs, the Environment Court considered similar Maori academic evidence on the nature of wāhi tapu which was paraphrased by the Court:
In traditional Maori society a waahi tapu was a specific place – usually very small – within the tribal rohe or boundary. They were, by definition, strictly set apart from daily life because the tapu or spiritual restriction contained within such places posed dangers to all. Nobody went there or used such places for any purposes. The most authoritative source on the Maori language Williams Dictionary, defines tapu as:

‘… under restriction or superstitious restriction; a condition affecting persons, places and things, and arising from innumerable causes. Anyone violating tapu contracted a hara, and was certain to be overtaken by calamity.’

The definition I [Mr Mikaere] have stated here lies behind the concept of waahi tapu and identifies them as places of high spiritual and religious danger. Because of the nature of their original use; old pa sites, fortifications, earthworks, cultivations and such like cannot be waahi tapu because they are associated with secular rather than religious activities.28

This approach therefore finds that wāhi tapu refers essentially only to urupā (burial grounds) and ceremonial or spiritual sites, and that the term cannot usually cover places associated with purely secular rather than religious activities such as old pa sites, fortifications, earthworks and particularly cultivations.29 This approach applies standard evidential tests.30 In Hampton Downs the Court tested Maori academic evidence by a non-lawyer participant asking questions between Mr Tukiri and Mr Mikaere:

Q: would it be fair comment to say that your expertise comes more from tauiwi (foreigner) than from your own people?
A: which particular area are we talking about?
Q: I am talking about your qualifications from university and qualifications on past mahi (occupation) that you’ve done.
A: The qualifications I hold are no different to qualifications any other Maori people hold issued by [the] same education institution. [I] don’t see why I should be singled out because I am lucky enough to get there. My qualifications in that particular area, if we’re talking about purely in [the] Maori world I’ve outlined my experience and how I obtained that experience in answer to questions put yesterday. I see no reasons to change those responses ...
Q: [Is it] fair to assume [that the] position [you] currently occupied here on behalf of [the] applicant and in the tauiwi world would give evidence today and not as your Maori side?

28 Supra n 21, (Hampton Downs) at 111. This evidence sought, in part, to rebut the evidence of a Ngāti Naho kaumatua.
29 Land Air Water Association v Waikato Regional Council (A110/01. 23 October 2001. Judge Whiting) and also Winstone Aggregates Ltd & Heartbeat Charitable Trust v Franklin District Council (A80/02. 17 April 2002. Judge Whiting).
A: [There are] several parts to that question, first is that this is a New Zealand rather than tauiwi institution, we are here before this institution because we support the processes of this country, when I am in this world I appear as part of this world so to speak. I cannot entirely put aside my Maori heritage of which I am extraordinarily proud. I believe in being present here, [I] can contribute by bringing some balance to the proceedings by appellants and s 274 interveners I believe that in a number of instances those views are incorrect, they are incorrect in terms of factual accuracy, incorrect in interpretation of traditional tikanga, they do demonstrate evolution and continued evolution of Maori conceptual thinking, somebody needs to bridge the gap and I see that as my role.

The Court ultimately accepted Mr Mikaere’s evidence that the site was not a wāhi tapu and therefore it did not have any particular cultural significance.

Local People Decide

The other approach for claims of wāhi tapu is to leave it up to the local people to determine what the extent of their wāhi tapu is, but to reject any primacy for the concept of wāhi tapu, where to acknowledge it would have the effect of ‘sterilising’ areas of land and preventing development on them. In Winstone Aggregates the Court addressed the contention that ‘as a general principle the identification of wāhi tapu is a matter for the tangata whenua’:

As a general principle this may well be so. However, claims of waahi tapu must be objectively, not merely established. There needs to be material of a probative value which satisfies us on a balance of probabilities. We as a court need to feel persuaded that the assertion is correct.

In Te Rohe Potae o Matangirau Trust v Northland Regional Council Judge Bollard and his colleague Commissioners stated that evidence of kaumatua is frequently helpful, but if challenged, the question is not to be resolved simply by accepting an assertion or belief by kaumatua or anyone else. General evidence of waahi tapu over a wide and undefined area was not probative of a claim that waahi tapu existed on a specific site.

The recent litigation over the Ngawha prison site indicates that these problems are not going away. It suggests that, if anything, the incidence of these value arguments is likely to increase. That case involved substantial expert Māori witnesses

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31 Supra n 21, (Hampton Downs) at 112 – 113.
33 Supra n 25 (Winstone Aggregates) at 63.
both supporting and opposing the development and discussing the effects of the proposal on the ancient pathways of a *taniwha*.\(^{34}\)

**RMA Amendments**

It can also be noted that the Resource Management Amendment Bill, as currently drafted, would require decision-makers to recognise the need to protect historic heritage from inappropriate development, which includes ‘sites of significance to Māori, including wāhi tapu and ancestral landscapes.’\(^{35}\) This is an important issue, not just because of the requirements of the RMA 1991, but also because principles of natural justice require that people are given a fair hearing. Can that occur if the decision-making process (including decision-makers) has insufficient information about the Maori values and evidence presented?

Given such complex issues when attempting to define *tikanga* Maori and values in legislation generally, what are possible options to move towards a better understanding and treatment of these issues?

**Consultation**

One option is more effective consultation. The Environment Court noted that:

> …the reason for consultation with Maori is their special cultural relationship with the natural resources of our environment.\(^{36}\)

This is an area in which many councils are now ‘up to speed’ – at least in terms of the fundamentals. Many local authorities have entered into written memoranda or agreements with local iwi. These have been titled as ‘Partnership Agreement’, ‘Charter of Understanding’, ‘Memorandum of Understanding’, ‘Memorandum of Agreement’, ‘Memorandum of Partnership’, ‘Agreement of Understanding’ and ‘Operating Protocol.’ They have no particular legal status, but do indicate the intent of councils and iwi to work together and to exchange information about applications for resource consents at an early stage.\(^{37}\) That means that issues will be highlighted at an early stage and the potential for misunderstandings reduced.

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\(^{34}\) *Beadle & Wihongi v Minister of Corrections & Northland Regional Council* (A74/02, 8 April 2002).

\(^{35}\) Clauses 2 & 3.

\(^{36}\) Supra n 21, *Hampton Downs* at 120.

\(^{37}\) Twenty-five of them are analysed in an interesting article by Grant Hewison, a Manukau City Council officer – see *Maori Law Review* (December 1999 Jan 2000).
However, it still means leaving the local authority as the recipient of the ‘problem’ of Maori values, with Maori watching on as the Council attempts to resolve the issues.

That may change however, if the Local Government Bill 2002 is passed in its present form. A key objective of the new legislation is to clarify the relevance of the Treaty of Waitangi to the work of local government. The legislation avoids a general reference to the Treaty of Waitangi, such as in s8 of the RMA 1991. Instead, the proposal is to set out the situations in which consultation with Māori communities is required, and provides the opportunity for Māori seats on local authorities. Key provisions in this regard are:

- Clause 4 which provides that parts 2 and 5 of the Act (concerned with the role and structure of local government and planning, decision-making and accountability) ‘provide principles and mechanisms to facilitate participation by Māori in local authority decision-making.’ This has been done to ‘recognise and respect the principles of the Treaty of Waitangi, and with a view to maintaining and improving opportunities for Māori to contribute to local government decision-making processes’ (cl 4).
- Part 2 which provides that, among other matters, local authorities must endeavour to ‘provide appropriate opportunities for Māori to contribute to decision-making processes’ (cl 12(e)).
- Part 5 which provides that, in making any decisions, including a decision not to take action, local authorities must follow ‘principles of decision-making’ which include:

  ‘In making significant decisions relating to land and bodies of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga’ (cl 62).

Local authorities must also ‘establish and maintain’ processes to enable Māori to contribute to local authority decision-making processes, and ‘consider’ ways of fostering the Māori capacity to make such a contribution, and provide ‘relevant information’ to Māori for this purpose (cl 63). When undertaking any consultation, local authorities must, among other things, ‘have in place appropriate processes for consulting Māori’ (cl 66(1)(c)). While patiently waiting for this legislation, other avenues exist under the RMA 1991 to obtain a better understanding of Maori values and better ways of dealing with them.

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38 In this respect it follows the New Zealand Public Health and Disabilities Act 2000 – see also Palmer, M “The Treaty of Waitangi in Legislation” [2001] NZLJ at 207.
Iwi Management Plans

Iwi management plans are another source of information about values held by Maori communities. These plans however do not seem to have had the impact that was possibly expected when the RMA 1991 was passed. One sign of this is that there is almost no case law on the issue.\(^{39}\) The requirements of iwi management plans are that regional councils in preparing regional policy statements,\(^ {40}\) regional councils in preparing regional plans,\(^ {41}\) territorial authorities preparing district plans,\(^ {42}\) or changes to such documents ‘shall have regard to’ ‘Any … relevant planning document recognised by an iwi authority affected by the [regional policy statement / regional plan / district plan].’ This has been given the shorthand of ‘iwi management plan.’ There is no definition of that term in the Act however.

‘Iwi authority’ means ‘the authority which represents an iwi and which is recognised by that iwi as having authority to do so.’\(^ {43}\) It is arguable that iwi includes hapu. The Act defines ‘mana whenua’ as ‘customary authority exercised by an iwi or hapu over an identified area.’\(^ {44}\) And ‘tangata whenua’ means ‘in relation to a particular area … the iwi, or hapu, that holds mana whenua over that area.’\(^ {45}\) The Te Puni Kokiri document on iwi management plans, Mauriora Ki Te Ao, also recognises that ‘it is often hapu who deal with environmental issues within iwi.’\(^ {46}\)

The original proposal for these plans was that they would generally provide guidance to authorities on the meaning of kaitiakitanga and the law could require them to be taken into account where plans or policy statements were made or where resource consents were granted. It was also envisaged that they would provide detailed guidance on preferences for the use of iwi land in each district and would in effect become a district plan for iwi land, and would be treated as a proposal for a plan change. It also seems that the reference to ‘any … relevant planning document recognised by an iwi authority,’ rather than a stricter definition, was an attempt to

\(^{39}\) There appears to be for example, only one case in which the Environment Court has suggested that an iwi management plan might be appropriate – and that is in an area entirely owned by Maori - Whakarewarewa Village Charitable Trust v Rotorua District Council (W61/94).

\(^{40}\) Section 61(2)(a)(ii) RMA.

\(^{41}\) Ibid, section 66(2)(c)(ii).

\(^{42}\) Ibid, section 74(2)(b)(ii).

\(^{43}\) Ibid, section 2.

\(^{44}\) Idem.

\(^{45}\) Idem.

\(^{46}\) Te Puni Kokiri Mauriora Ki Te Ao (Ministry of Maori Development, Wellington, 1993) at 7.
recognise that such plans could be created in different ways and take different forms from district to district.⁴⁷

There are several reasons why they have not perhaps been as prominent as might have been expected:

- There is no procedure set out in the Act for producing such plans. This is in contrast to the extensive procedures for producing district and regional plans and policy statements. This alone would make the courts cautious about placing great weight on iwi management plans.

- While regional policy statements and plans and district plans must not be ‘inconsistent’ with other plans, there is no similar provision regarding iwi management plans. Consequently, a district plan can be inconsistent with an iwi management plan.

- The phrase ‘shall have regard to’ means that iwi management plans must be given consideration, but any rules and policies in the document do not necessarily have to be followed.⁴⁸ A local authority does not have to consult until a consensus is reached with an iwi over any planning matter.⁴⁹ In the event of any direct inconsistency between a regional policy statement or plan or a district plan and an iwi management plan, the former would win out.

- Iwi management plans inform the statutory planning process, but beyond that are not referred to in the legislation. There is for example no requirement to consider an iwi management plan when determining whether a resource consent should be issued. (Although consent authorities may consider ‘Any other matters the consent authority considers relevant and reasonably necessary to determine the application - s104(1)(i)). Nor is there any requirement to consider iwi management plans when a notice of requirement of a designation is being considered.⁵⁰

There is a proposal in the Resource Management Amendment Bill to change the requirement to ‘have regard to’ iwi management plans in each instance to ‘take into account’ – which would definitely give them greater status as planning documents. However, on controversial topics (i.e. where they conflict with district or regional plans) one can still imagine that they will be treated with caution, as not coming through the full planning processes in terms of participation.

⁴⁸ Marlborough Ridge Ltd v Marlborough DC (1997) 3 ELRNZ 483, Winstone Aggregates Ltd v Papakura DC A96/98.
⁴⁹ Ngati Kahu v Tauranga DC A72/94
⁵⁰ See ss168 and 171 RMA.
Maori Hearing Commissioners

One obvious way to better inform decision-making where Maori values are raised is through the use of Maori commissioners. Commissioners are generally used when the Council has a particular interest in the application and the specialist environmental subcommittee of the Council is not suitable. Legislative requirements may also require a commissioner hearing (e.g. s223CA Local Government Act 1974 dealing with water permits required by the council’s water supply body). They may also be used where a council believes that specialist knowledge is required, or sometimes on request from an applicant for resource consents who perceives a possible council conflict over the project.

One issue that has limited the use of Māori commissioners until now has been a concern about actual or perceived bias. The dilemma is how to obtain the most knowledgeable people in a region without picking people whose local tribal links and knowledge are such that they may appear to be biased. The very expertise for which a Maori commissioner might be sought will often consist of their close links to and understanding of iwi, hapu or whanau of the area. People of standing who might be used as Maori commissioners usually have significant kinship or whakapapa links to several iwi in the region – this is partly how their standing arises. Among iwi/hapu/whanau themselves there may be a concern about apparent bias.

In terms of practice, Maori commissioners have been used by the Wellington Regional Council, when it was considering water supply issues on the Kapiti Coast and on the Whanganui River. Most recently, a Maori commissioner was one of the commissioners who turned down discharge consents for the Ngawha prison – subsequently overturned.51

Section 33 Transfers of Powers

Section 33 RMA was hailed as a significant section when it was introduced. A sign of this is the fact that the New Zealand Coastal Policy Statement 1994 noted that, where characteristics have been identified of special value to tangata whenua, the local authority should consider:

51 See Beadle & Wihongi v Minister Of Corrections & Northland Regional Council (A74/02. 8 April 2002).
(a) The transfer of its functions, powers and duties to iwi authorities in relation to the management of those characteristics of the coastal environment in terms of s33 ... and/or

(b) The delegation of its functions, powers and duties to a committee of the local authority representing and comprising representatives of the relevant tangata whenua ... in terms of s34.52

However, to date, no transfers have occurred (at least in the North Island as far as the author’s are aware). A reason for this situation is because of the requirements of the legislation which set up preconditions and procedural requirements which are onerous. The essential elements of s33 are that a local authority (i.e. a regional council or a territorial authority) with ‘functions, powers, or duties’ under the RMA 1991, may transfer them to another ‘public authority’ which includes an ‘wi authority,’ government department, or statutory authority, as well as other local authorities. The transferor local authority and the transferee public authority must agree that the transfer is desirable because it is:

- Efficient, and;
- The public authority has technical or special capability or expertise, and;
- The public authority ‘represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty.’

The requirement that an appropriate community of interest must be represented and that the transfer is ‘efficient’ suggests that transfer to an iwi authority would probably need to be in relation to a limited physical space rather than some general authority over a part of a district or region. If the iwi owned a place or resource the requirements for a transfer would be more easily satisfied. There is no requirement to provide resources with the transfer but that could be a matter of agreement between the authorities however.

In terms of the procedure, the local authority must notify the Minister for the Environment of the proposal to transfer. The local authority must use the ‘special consultative procedure specified in s716A Local Government Act 1974. The special consultative procedure requires that the proposal to transfer powers must be publicly notified, and public hearings held at which submitters may be heard. Copies of all submissions received must be made available to the public.53 The local authority must

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52 Policy 2.1.3
53 Section 716A Local Government Act 1974.
give proper consideration to the submissions, but is not bound to follow them.\textsuperscript{54} There is no formal appeal process in the RMA if a local authority refuses a request for a transfer.

Even after functions and powers are transferred, the local authority remains responsible for their exercise.\textsuperscript{55} This suggests that the local authority have to keep a close eye on the activities of the transferee. It will want to avoid actions being taken against it, and costs being incurred from poor decisions. A transfer of powers may be changed and withdrawn at any time by the local authority, or relinquished by the public authority. The above points indicate most of the reasons why transfers of powers to iwi authorities have not been advanced.

One can foresee other problems. Where an iwi or hapu group has taken a view over a particular proposal then it will not be possible to propose a s33 transfer of powers to the group in relation to that proposal, since they are already a party with a particular view on the proposal.\textsuperscript{56} If an iwi authority has in the past taken a particular view on how that resource should be used, would that make it more difficult to transfer powers over that resource to that authority?

Finally, under the present regime, would iwi even want such a transfer? If an iwi authority has a s33 transfer of power in relation to a resource, it will have to act judicially – that is, fairly and impartially and in accordance with the RMA and relevant plans - when it considers any applications relating to that resource. For example, it will have to weigh Maori concerns in balance with other matters of national importance. It will also be bound by decisions of the Environment Court and other courts on the way in which Maori interests are to be considered under the RMA, even if it disagrees with the approach and result of those decisions.\textsuperscript{57} And its decisions may be appealed to the Environment Court. Given the criticism by the Waitangi Tribunal in the \textit{Whanganui River Report} and other reports that the RMA 1991 generally does not given Maori interests sufficient priority, an iwi authority given powers under the RMA over a resource which it does not own may find its task a difficult one.

\begin{itemize}
\item[54] \textit{Urlich v Wellington CC CP174/96.}
\item[55] Section 33(3) RMA.
\item[56] \textit{Otaraua Hapu of Te Atiawa v Taranaki Regional Council W129/96}
\item[57] For example, \textit{Watercare Services Ltd v Minhinnick} [1998] NZRMA 113 considered below.
\end{itemize}

17
Changing the Judges

There is also the controversial suggestion from the Privy Council that the pool of decision-makers at the Environment Court level ought to include people able to deal appropriately with Maori values.58

Counsel for the appellants made the point that at present there are no Maori Land Court Judges on the Environment Court and only one Maori Commissioner out of five. In a case such as the present that disadvantage may be capable of remedy by the appointment of a qualified Maori as an alternate Environment Judge or a Deputy Environment Commissioner. Indeed more than one such appointment could be made. Alternate Environment Judges hold office as long as they are District Court or Maori Land Court Judges; Deputy Environment Commissioners may be appointed for any period not exceeding five years. It might be useful to have available for cases raising Maori issues a reserve pool of alternate Judges and Deputy Commissioners. At all events their Lordships express the hope that a substantial Maori membership will prove practicable if the case does reach the Environment Court.

That case concerned a designation across Maori freehold land. There is no indication that the government has determined to act specifically on this issue however.

Against this we may contrast the Court of Appeal approach in Watercare Services Ltd v Minninnick,59 where that court was asked to support the notion that, when considering whether the piping of sewage over wāhi tapu was ‘… offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.’ The appropriate test was what the ordinary Maori person would find objectionable. The Court of Appeal rejected that view, finding that the relevant test was that of the ‘ordinary person, representative of the community at large’ – presumably no matter how ignorant that community might be of Maori values, or, more importantly, its own hidden assumptions and prejudices.

Testing the Evidence – Te Matapunenga Project

Resorting to dictionaries and documentary sources to prove or disprove the existence, extent and scope of tikanga Maori in a particular area tends towards the academic and away from the determinative spiritual and cultural context of Maori. As Metge notes:

59 [1998] NZRMA 113
To come to grips with Maori custom law, it is necessary to recognise that Maori concepts hardly ever correspond exactly with those Western concepts which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation – the direct reference – is substantially the same, the connotations are significantly different.\textsuperscript{60}

Hence those qualified to articulate the values and practices inherent in \textit{tikanga Maori} are Maori, especially kaumātua. But as illustrated above in this paper, what happens when kaumātua slightly or even diametrically disagree about what constitutes ‘authentic’ \textit{tikanga} or the details and scope of a group’s \textit{tikanga} and values?

The work of Te Matahauariki Institute at the University of Waikato may be of some assistance here.\textsuperscript{61} One of the key projects of Te Matahauariki Institute is the assembling of a collection of references to the concepts and institutions of Maori customary law to explore ways in which the legal system of Aotearoa/New Zealand could better reflect the best of the values and principles of both major component cultures. The Director of the Institute, Judge Michael Brown, in consultation with the Institute’s Advisory Panel, accordingly initiated \textit{Te Matapunenga} which is an attempt to traverse the existing historical materials with a view to bringing together such references to customary concepts and institutions as appeared to come from an influential or authoritative source and/or to exhibit explanatory insight.

The Te Matahauariki researchers have started with a list of \textit{tikanga} terms, concepts, and institutions found to be in use in historical and contemporary Maori discourse selected with the assistance of kaumātua. The researchers have searched a wide range of records for entries which have been listed in chronological order under each title. Each entry consists of a sourced statement or explanation relevant to a particular title together with an explanatory preface intended to supply a context for the statement or explanation. The purpose of the context is to enable the reader to understand the circumstances in which the statement or explanation arose, and to judge its credibility and authority. As noted by Lord Cooke in \textit{McGuire} (in reviewing House of Lords authorities on interpreting legislation): ‘In law, he [Lord Steyn] has said elsewhere, context is everything.’\textsuperscript{62}

The researchers have not set out to determine what is or is not ‘true custom’, or authentic \textit{tikanga} Maori but rather to record what has at various times and in

\textsuperscript{60} Metge, J \textit{Commentary on Judge Durie’s Custom Law} (Unpublished Paper for the Law Commission, 1996) at 3.

\textsuperscript{61} See the Te Matahauariki Institute website at www.lianz.waikato.ac.nz.

\textsuperscript{62} Supra, n 58 (\textit{McGuire v Hastings District Council}) at 561.
various circumstances been claimed to be custom. Accordingly, part of a Te Matapunenga entry looks like this:

**Maoritanga:** Literally, ‘Maoriness, circumstances or qualities of being Maori’

*Etymology:* māori (stative) [from Proto-Polynesian ma(a)qoli ‘true, real, genuine’] ‘normal, usual, ordinary; native, belonging to New Zealand, Māori (the use of this word to denote Māori people dates from the early part of the 19th Century) + -tanga (nominalising suffix). Note that an older use of the term māoritanga denotes ‘meaning, explanation.’

a) A search of 19th Century ‘Maori Newspapers’ reveals the use of the term Maoritanga as early as 1844 in the Governor’s newspaper, *Te Karere o Niu Tireni.* Complimenting the alleged many Maori who want their children educated in the ways of the Pakeha, the paper notes:

> ‘Ka maiengi ratou i roto i to pukohu o te Maoritanga.’ ['They will rise out of the shrouds of Maoriness’] (Vol 3, July 1, 1844, No. 7, at 33).

b) There are numerous references to Maoritanga in the newspapers during the later half of the 19th Century. A discernible theme of the period is that Maoritanga as the cultural traits and practices of the ancestors, are antithetical to progress and civilisation. In a report on a Government council in Auckland in 1864 where a major subject of deliberation was ‘rebellious’ activity amongst the Maori population, it was asserted:

> ‘Te mahi a ena tangata he whakararuraru i nga iwi, he tuku pouritanga ki runga ki te whenua. E kore e noho pai i tona kainga ka whai pea ki nga ritenga totika. Tana i pai ai he whawhai, he tutu, he hoki ki nga ritenga o te maoritanga.’ ['What those people do is cause trouble for the people and misery over the land. He will not reside peacefully on his homestead and pursue law-abiding endeavours. What he prefers is conflict, mischief and to return to the customs of Maorihood.]

( *Te waka Maori o Ahuriri,* Issue 2, No. 40, 24 December 1864, at 1).

c) By the turn of the century, there was ambivalence amongst many Maori towards the desirability of the total assimilation of the Maori people and the loss of Maori identity. At a hui at Te Kuiti in 1911, leading Maori rangatira from around the country gathered to discuss what was meant by the term ‘Maoritanga.’ The gathering moved the following motion:

> ‘E kotahi ana te whakarero a tenei hui, kua tae tenei ki te wa e tika ana kia whakapua te whakarero o nga iwi Maori katoa o nga motu nei, ki te whakakotahi i a ratou ki runga ki tetahi tikanga tapu, i runga i te kaupapa o te Maoritanga motuhake, kaore nei ona tikanga e taupatupatu, ki te Ture ki nga hui ranei me nga tikanga motuhake o ia iwi o ia iwi.’ ['This gathering is of one mind, the time is now right for all Maori tribes of the land to give real thought to uniting themselves around a sacred term, around the idea of a special Maorihood, its cultural traits not conflicting with the Law, religions and the individual cultural practices of each tribe.’]

d) There was a growing assertion that Maori must retain their Maoriness. One of the leading advocates was Sir Apirana Ngata’s father, Paratene Ngata, who in a letter to the Maori newspaper, *Te Toa Takitini* in 1920, lamented the state of the Maori language as part of a wider neglect by Maori of their Maoriness:

‘He Maori tonu te tangata ko ona whenua i heke mai i roto i tona taha Maori, ka haere ki te tono ki te Kooti kia kiia ia he tangata pakeha ko ona whenua kia whaka-pakehata. He tohu enei hei kitenga iho ma tautou ko te Maori ano kei te takahi i tona *Maoritanga* me ona take Maori.’ [‘A Maori person whose lands he inherited from his Maori side goes and requests the court to declare him or her a European and to Europeanise his/her lands. These are signs that show us Maori that Maori themselves are transgressing their Maoriness and Maori concerns.’] (*Te Toa Takitini* Number 3, 1920 at 4).

e) Sir Apirana Ngata writes that a hui in 1920 at Te Kuiti, Sir James Carroll urged his audience to:

‘*Kia a mau ki tou Maoritanga.*’ [‘Hold on to your Maoriness.’] (‘Tribal Organisation’, in Sutherland, I.L.G (ed.), *The Maori People Today: A General Survey* (Wellington: Whitcombe & Tombs, 1940, at 177.). This statement by Carroll has generally been credited with being the coinage of the term Maoritanga and is located within the climate of the first Maori renaissance. (See Toon van Meijl, ‘Historicising Maoritanga: colonial ethnography and the reification of Maori traditions’ in *Journal of the Polynesian Society* Vol. 105, no. 3, at 311.).

f) In a chapter on the tribal makeup of Maori society, Ngata commented on Carroll’s catch cry, ‘*kia a mau to koutou Maoritanga*’ and offered his own definition:

‘It means an emphasis on the continuing individuality of the Maori people the maintenance of such Maori characteristics and such features of Maori culture as present day circumstances will permit, the inculcation of pride in Maori history and traditions, the retention as far as possible of old-time ceremonial, the continuous attempt to interpret the Maori point of view to the pakeha in power.’ (‘Tribal organisation’ in Sutherland, I.L.G (ed) *The Maori People Today: A General Survey* Whitcombe & Tombs, Wellington, 1940 at 177-178.).

The Te Matapunenga project therefore may prove useful to the judiciary and wider public because of its authoritative and well audited research that will assist with contributing to *tikanga* Maori debates but even more important for reflecting on the best customary concepts and values of both of New Zealand’s major component cultures.

**Conclusion**

While Maori values and *tikanga* have now re-entered the legal system, there is evidence that the system may not yet have the tools, or have developed a sufficiently informed approach, to dealing appropriately with those values. This article has
highlighted some of the complexities that the Environment Court is facing when attempting to incorporate Maori values and to define *tikanga Maori* in legislation. That is without even mentioning epistemological, translational, pedagogical and ontological complexities. We have, however, highlighted briefly a number of possible options to move towards a better understanding and treatment of these issues in New Zealand, including:

- More effective consultation with Maori communities;
- Iwi Management Plans;
- The use of Maori Hearing Commissioners;
- The effective use of section 33, RMA Transfer of Powers provision to Iwi authorities;
- Changing the Judges, and
- The more extensive use of authoritative and well-audited *tikanga Maori* reference works such as Te Matahauariki’s *Te Matapunenga Work*.

There still appears to be a potential for the values of the dominant society to be ‘regularly applied in the assessment of proposals without a thought as to their origin.’ However, perhaps sufficient tools now exist which can be applied to address that situation and the inclusion of Maori values and *tikanga*.

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63 Supra, n 15 (*Manukau Report*) at 78.
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