Ka mate kāinga tahi, ka ora kāinga rua: Legal barriers and obligations in improving Māori access to dwelling insurance for natural hazards

Research Report for Natural Hazards Commission-Toka Tū Ake

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Table of Contents

Executive Summary

Introduction

New Zealand maintains a comprehensive public or state-sponsored system for insuring against natural hazards damage via the Natural Hazards Insurance Act 2023 ('the Act'). This system is administered by Natural Hazards Commission – Toka Tū Ake. The report addresses:

1. What, if any, legal obligations are relevant to Māori access to residential dwelling insurance for natural hazards under the Natural Hazards Insurance Act 2023;
2. What legal barriers, if any, exist to prevent or obstruct Māori access to such residential dwelling insurance for natural hazards; and
3. What suggestions, if any, can be made to overcome or address any identified issues.

Natural hazards insurance for Māori housing

The Act provides insurance cover for "single household", residential dwellings and their land for natural hazard damage. There are legislative definitions of the cover and limits on the amount of coverage, which differ between buildings and land. The researchers do not have evidence of Māori access to this insurance cover. The report is based on the researchers' knowledge of other aspects of law, insurance and Māori social organisation that, combined, *could* give rise to inequitable treatment. For example, the Earthquake Commission Act 1993 deliberately excluded buildings other than single household dwellings, including marae. The 2023 Act continues this scheme. The Report thus looks at some specific examples and issues relevant to Māori housing.

For housing located *on* marae land, the legislative coverage presents particular challenges, including practical ones such is in relation to making claims where a trust or similar legal entity owns the house and/or the land. It also raises the questions whether a wider range of forms of housing should be covered as dwellings, and whether - and, if so, how - marae should be covered by the scheme. Six examples of alternative housing forms are discussed and whether provision for them could be accommodated via policy changes, or whether legislative change is required.

Remedies for natural hazard damage

The Report identifies five matters relevant to the scheme's remedies for natural hazard damage that might unfairly discriminate against Māori landowners, and/or not accommodate Māori cultural views. These five aspects are: the definition of 'physical' damage, the valuation of Māori land, monetary compensation (as opposed to repair or reinstatement of damaged property), relocation of a residential building, and the use of 'write-off' and salvage.

For example, the market value of a property is relevant to determining what can be paid in respect of any claim for natural hazard damage to land. "Market value" is a problematic measure for Māori land, as there is not normal market for it, and it has statutory burdens placed on it that lower its value compared with general land. The statutory market value cap would thus likely discriminate against collectively-owned Māori land by lowering what can be paid out. A policy should be

developed for how to make decisions on how to settle a claim – such as whether via repair, relocation or write-off – even if only in respect of procedures rather than fixed outcomes.

Examples from other contexts

Where commercial practice and the law do not properly capture Māori social organisation, Māori communities have undertaken their own initiatives to meet their needs. The report outlines two examples: the use of "whata orders", and the use of consolidated or collective insurance products where risk, premiums and administration are pooled, thereby reducing costs. The report also identifies potential issues arising from equitable ownership of dwellings on Māori land.

Other obligations

Legal interpretation of the Act will be conducted in line with a presumption that Parliament means to uphold its obligations under the Treaty of Waitangi (where it is possible to take such an interpretation). The Commission's actions can be the subject of Waitangi Tribunal jurisdiction as a Crown entity and a Crown agent. Therefore, any decisions by the Commission that breach the principles of the Treaty can give rise to a claim against the Crown under that Act. The report thus outlines the fundamental Treaty principles as recognised by Courts, suggests how they might become relevant to decisions under this legislation, and how they might guide law reform or policy development in this area so as to be consistent with Treaty principles.

For example, the Crown has a responsibility to take active steps to protect Māori lands, estates, forests, fisheries and other taonga (Article 2). This includes retaining Māori ownership of and relationships with their land taonga tuku iho. The Privy Council found that where a taonga is more vulnerable, the duty to protect it might be stronger. It has also been expressed as "the protection of the Māori as a people and the assurance to them of equal citizenship rights" (Art 3).

In relation to the Crown's handling of the aftermath of the shipwrecked MV Rena, the Waitangi Tribunal found that the Treaty obligations on the Crown of active protection and partnership, especially the facilitation of consultation, will apply no matter what the process is. This includes commercial negotiations with third parties with an overlay of confidentiality and urgency. Protection also extends to spiritual qualities of land and other taonga within relevant tikanga.

Treaty obligations under Article 3 can also be illustrated by the Waitangi Tribunal inquiries into health and housing policies. As with Article 2 taonga, the duties of consultation and upholding the relevant Māori interests apply. This approach focuses on both process and outcomes.

It is noted that, similarly, interpretations of the law - and thus also policies and actions under it - need to be consistent with tikanga, where that is relevant and possible.

Application of Treaty principles and tikanga findings

As a Crown entity, the Commission would likely be expected to consider how its operations can best uphold the principles of the Treaty and be consistent with tikanga. For example:

Good faith consultation: the Commission needs to become aware of the Māori interests that need protecting through good faith consultation with iwi and/or hapū, as well as with individual policy holders. This would also cover the issues that might affect those interests, and the measures necessary to protect them.

Active protection of Art 2 taonga: Key general requirements include:

- Policies and laws must not undermine the ability of iwi to protect the land.
- Active protection suggests the maintenance of Māori ownership of and relationships with land that is taonga tuku iho.
- Active protection requires more than monetary compensation for a loss.
- Even in multi-party discussions about disaster recovery initiatives involving commercial and other private entities, the Crown is likely obliged to make submissions in protection of Māori interests.
- The Crown should not enter into duties with others which conflict with its duty of good faith to Māori, including to protect Māori interests.
- Active protection may require the Commission to provide better education to Māori communities about natural hazards insurance.

Claims settlement options

- The Crown needs to uphold the principle of keeping land that is currently owned by Māori in that Māori ownership, whether freehold or not. This is relevant to the options for settling claims, particularly in relation to salvage.
- Māori may wish to maintain a presence in a hazardous coastal area due to an ancestral connection; so even where land is damaged preventing repair of the residential building on that site, relocation of the building would normally be preferred.
- Relocation of residential buildings could be expanded to other land taonga tuku iho if that particular landowner's land was no longer suitable.

Taonga: The issue of how to best protect or replace other taonga that are within or attached to buildings that are damaged by natural hazards is discussed. It contains suggestions about their replacement, relevant internal policy guidance, and the potential development of guidance for the insurance industry on better valuation and replacement of Māori taonga.

Mauri: Consideration of the mauri of land owned by Māori will not often arise within matters for decision by the Commission. However, the Report suggests that it should be identified in policy documents so that it is considered appropriately if and when it does arise.

Article 3 principles of equality in relation to natural hazards insurance: To be compliant with principles of the Treaty, the Crown is arguably required to ensure equitable outcomes of having disaster risk insurance in place, not merely leave it to the market. The report identifies specific steps that are arguably required for it to ensure that.

Decision-makers under the Act may thus need additional knowledge in order to better uphold such legal duties. All of these obligations may entail more than decision-makers have previously conceived of as being their duties under the Act. For example, it may require decision-makers to have a deeper understanding of the effects of natural hazard damage and remediation options on

matters such as kaitiakitanga and thus on the kaitiaki and their tikanga about relationships with the land.

Conclusion

The Report identifies aspects of the Act that could be reviewed for its effect on Māori interests. Although the Act creates no deliberate exclusions for Māori among the different forms of housing covered, and so no deliberate discrimination or inequity is intended, it might still operate in a manner that might not be consistent with the unique aspects of Māori social organisation, te ao Māori, Treaty principles, or tikanga.

The law on Treaty principles already provides guidance on duties of the Crown and thus for the Commission in relation to protecting Māori interests. The emerging law on the need to uphold tikanga as a separate source of law in Aotearoa provides additional standards and guidance for a Crown entity in its interpretation of its duties. Some of these aspects are likely not yet factored into Crown decision-making, if only because the legal treatment of tikanga by the courts has evolved only comparatively recently.

As knowledge of climate change increases, along with knowledge of how it will increase the risk of weather-related damage, insurers will gradually treat these as non-random risk events and withdraw from the risk rather than face financial instability. This will mean that fewer people will have coverage even as its importance increases. There will likely be a greater need for state intervention of some sort. Any government scheme for natural hazard insurance needs to be carefully designed to enable all New Zealanders to assess and manage the risks to their homes and communities fairly. What is fair won't be determined by analysis of what is currently legal, but needs to be the subject of a wider discussion.

Recommendations

The report makes 15 recommendations for potential principles and policies to guide future practice and law. Policy review and guidance could address the following topics:

- the consultation and procedural aspects of decision-making;
- the application of existing legal options such as direct insurance;
- guidance on the application of the salvage provisions;
- valuation options for Māori land;
- remediation options consistent with Māori world worldviews;
- the insurance and replacement of different types of taonga;
- application to likely future forms of housing to meet a wider range of needs;
- education of staff about the matters addressed in this report;
- education of Māori about natural hazards insurance generally and in relation to identification and insurance of taonga more specifically;
- guidance on the interpretation of legislation to be consistent with other developments.

A. Preliminary matters

Tuatahi: introduction

Natural hazards in New Zealand

New Zealand is one of the safest countries in the world, and yet it is also fraught with risk from natural hazards.[1] In the North Island thick sheets of volcanic tephra preserve the catastrophes of past millennia in red and brown rock fragments. Each catastrophe is layered, one red and brown fragment on top of the other. In the South Island the remnants of uplift and ice calving - the Southern Alps - cut through Te Wai Pounamu, a testament to the earthquakes, landslides, and ice ages of the recent and deep past. When the earliest Polynesians explorers made landfall in New Zealand they found a country carved from a series of natural catastrophes from volcanic eruptions to earthquakes to flooding to ice ages.

To navigate the new natural hazards the explorers were encountering their Māori descendants fashioned new legal norms within tikanga. Under tikanga - a normative system encompassing the legal as well as the social, economic, and political - rules were developed to control everything from access to hazardous areas under a system of tapu to the management of scarce resources under a system of kaitiakitanga. Tikanga, and the systems of tapu and kaitiakitanga that flow from it, represents the roots of New Zealand's system for regulating and protecting against natural hazards damage. But with the arrival of British colonisation and laws came another tool for regulating and protecting against damage from natural hazards: insurance, public and private.

New Zealand maintains a comprehensive public or state-sponsored system for insuring against natural hazards damage via the Natural Hazards Insurance Act 2023. This system is administered by what was the Earthquake Commission (EQC), now Natural Hazards Commission – Toka Tū

[1] New Zealand ranks highly for both natural disaster risk as well as for natural disaster adaptation and preparedness; it is safer than many other countries with a similar risk profile.

Ake (NHC-TTA). This research report addresses the legislative and regulatory barriers Māori could encounter when accessing or claiming residential insurance under this system. It is particularly concerned with whether the system operates equitably, ensuring access across different forms of Māori social organisation, and recognising different Māori worldviews. It identifies some gaps and potential barriers in the legislation and regulations that could require addressing, some in the law and some in policy. These gaps and barriers involve situations where Māori social organisation functions differently from - for want of a better term - non-Māori social organisations.

Defining insurance

Tikanga does not technically "insure" against natural hazards. Instead, tikanga aims to adapt to and avoid natural hazards, in order to reduce the risk. This approach to natural hazards is often encoded in pūrākau - narratives that encapsulate and transmit empirical information, philosophical ideas or legal rules.[2] Professor Dan Hikuroa explains how pūrākau from the Eastern Bay of Plenty help explain how the Waitepuru stream often changes its course in heavy rainfall events. In the pūrākau the stream is analogised as a lizard with its mouth as the water source, its hand and feet as the tributaries, its spine as the main course, and its tail as the stream mouth. In the local telling, the tail flicks from side to side when it meets the flat Rangitaiki Plains, a former wetland. That tail movement represents how the stream's course changes from time to time, and the risk that movement presents. To accommodate this movement, the pā of the Eastern Bay of Plenty were elevated, away from the flick of the lizard's tail, thereby reducing the risk of physical damage and loss by avoidance.[3]

Contemporary New Zealand society adopts risk reduction mechanisms too, including by avoiding living near a potential hazard. For example, risk avoidance and reduction are considerations in local authority zoning decisions. Contemporary society also adopts another form of addressing risk: insurance. Insurance can address avoidance and reduction of the risk of physical damage and

[2] Carwyn Jones, *New Treaty, New Traditions* (Victoria University Press, Wellington, 2016), at x-xii.
[3] Dan Hikuroa "Mātauranga Māori—the ūkaipō of knowledge in New Zealand" (2017) Journal of the Royal Society of New Zealand, 47:1, pp. 5-10.

loss, such as via pricing and conditions encouraging moving away from hazards; but it is more a mechanism to *compensate for losses* suffered from any physical damage, to better enable recovery after and such damage. Insurance thereby reduces the risk of loss from natural hazards more than reducing the risk of damage itself.

The common law can trace its approach to insurance back to Roman Law. In Ancient Rome, bottomry contracts were a common tool. These were loans granted to maritime merchants on the condition that, if their ship sank, then the loan was no longer repayable. The interest on the loan was set at such a level that it would help cover the loss if the insurable event (e.g. a sinking) eventuated. This is where contemporary insurance begins. As the centuries progressed, "modern" insurance would eventually emerge, with colonisation and international trade taking place from at least the 15th century onward. In imperial London, underwriters were active across the economy in this period. The label "underwriter" came from the act of writing their name underneath the identified risk (e.g. a sinking) that they were willing to insure. The increasing colonial and trade activity across the centuries meant the common law courts were consistently called upon to adjudicate insurance disputes.

Out of those centuries of experience, the English common law courts established a useful working definition of the elements that constitute a contract for insurance. In a famous judgment Channell J articulates those three elements as:[4]

1. A contract whereby, for some consideration (normally a "premium"), the insured secures some benefit on the occurrence of an event;
2. That event must be uncertain in that it cannot be known whether it will happen or not; or if the event will happen, there must be uncertainty as to when; and
3. the event must be adverse to the insured. The adversity is required for the insured person to possess an insurable interest in the subject matter insured.

In plain language, a contract of insurance demands a premium to secure a benefit in the event of an unknown and adverse event. These elements are generally shared across common law jurisdictions. On its face, a contract of insurance shares little in common with tikanga. Under

[4] *Prudential Insurance Company v Inland Revenue Comrs* [1904] 2 KB 658.

tikanga the focus is to avoid the unknown and adverse occurrence in the first place, not secure a benefit if that occurrence comes to pass. Of course, tikanga and insurance can function similarly in that both the insurer and the insured can be incentivised to reduce risk of loss and damage. The higher the risk, the higher the premium for the insured, and the higher the risk, the more likely a benefit is paid by the insurer. Further, if insurance is not available for a particular risk – such as a house built in a particularly risky location - then it may encourage people not to live there. But insurance is a blunt tool for encouraging risk avoidance, certainly when compared with zoning restrictions, for example. And publicly-provided insurance may be an even blunter tool than private insurance.

Te Ao Māori, Tikanga and the Treaty of Waitangi

The Treaty of Waitangi/Te Tiriti o Waitangi is New Zealand's founding document between the Crown and tangata whenua. However, the legal system in Aotearoa NZ is based on parliamentary sovereignty and the supremacy of what can be called Crown law. Parliament ostensibly has the power to make whatever law it wants, including overriding courts and the Treaty of Waitangi. Moreover, the Treaty itself is not directly enforceable in courts.[5] It thus needs to be incorporated in statute - ie, by Parliament – in order to be enforceable.

Despite this supreme power of Parliament, the courts uphold fundamental principles at the base of the legal system that can affect the duties upon government and upon institutions created by statute. These include principles of legality, the separation of powers, and other fundamental principles of the common law. One key finding of the NZ courts is that the Treaty is part of the fabric of our constitution and that it should be upheld where relevant and wherever possible.[6] Courts will thus assume that Parliament means to uphold its obligations under the Treaty and will interpret legislation in line with Treaty obligations where it is possible to take such an interpretation. Thus,

[5] *Te Heuheu Tukino v Aotea District Māori Land Board* [1939] NZLR 107.
[6] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210; affirmed by the NZ Supreme Court in *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801, at [150].

despite the diminished legal status of the Treaty, courts can require the government to uphold Treaty principles in many situations.

Tikanga has a similar status as the Treaty of Waitangi, but not exactly the same. Tikanga is its own autonomous legal system operating independently from 'Crown law'.[7] On the marae, tikanga prevails. But in most other settings and at most other times Crown law prevails, ordering Māori and non-Māori lives alike. Despite the general application of Crown law, New Zealand courts have established that tikanga is a system of indigenous law for Aotearoa that can be referred to as applicable law in appropriate circumstances.[8] It can be used to help interpret legislation, whereby the court will strive to choose an interpretation that is consistent with tikanga where that interpretation is open to it.[9] In 2022, the Supreme Court determined that tikanga could be used more widely, not just in interpreting legislation.[10]

This legal status is significant for all Crown bodies that operate according to legislation: their interpretations of the law, and thus also their policies and actions under it, need to be consistent with tikanga where that is relevant and possible. It thus needs to be considered what knowledge that decision-makers under the NHC-TTA legislation may also need in order to better uphold such legal duties. It may entail more than decision-makers currently conceive of as being their duties under the relevant legislation.

In order for government policy- and decision-makers in Aotearoa to be able to make decisions that uphold both Treaty principles and tikanga in situations where they are required to, that policy and those decision-makers must be cognizant of their contents. That requires basic familiarity with a Māori worldview and fundamental values and concepts. For example, one aspect that is particularly relevant to decisions in relation to handling claims made for damage caused by natural

[7] Matua Moana Jackson distinguishes between tikanga, or Māori law, and Crown law. The latter term describes the legislation, regulation, and case law introduced via British colonisation and sustained by its successor institutions: Parliament, the Executive, and the Judiciary.
[8] Tikanga was first explicitly acknowledged as forming "part of the values of the New Zealand common law" in 2012, in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].
[9] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & ors* [2021] NZSC 127, at [9].
[10] *Ellis v R* [2022] NZSC 115. In this case it used tikanga in the exercise of a judicial discretion, to determine what was in the interests of justice for the purposes of the Supreme Court rules on leave to appeal (r 5(2), Supreme Court Rules 2004).

hazards is the connection between people, their traditional territories and the spiritual world surrounding them. The pūrākau or stories handed down through generations emphasise the role of the atua or gods in creating the natural world and linking it to the people. These stories also emphasise a truly kinship connection whereby natural features such as land and waterways might be seen as ancestors. Those ancestors have their own spirit and soul, and need to be cared for and respected, just as one would care for one's elderly grandparents. The spiritual aspects are important, with spiritual health being entwined with physical health, of both land and people. Obligations of kaitiakitanga rest on people to look after their ancestral territories. Title to territories is maintained through continuous occupation of those territories – ahikaaroa – along with the exercise of kaitiakitanga as mana whenua. Traditional knowledge or mātauranga is both developed and passed on through the maintenance of these traditions. While there is a lot more to know about the fundamental concepts and values of Te Ao Māori than this, just the examples given here are relevant to matters within the jurisdiction of NHC-TTA and its statute. The legal status of the principles of the Treaty and of tikanga in New Zealand law mean that these fundamental concepts of values will need to be upheld and respected by the Crown and its agents as far as possible within the legislative scheme.

Research brief and scope

This research report does not examine risk reduction under tikanga. Instead, its aims are more modest, confining the analysis to Crown law. However, tikanga is relevant to the extent that Crown law needs to be consistent with it (where possible and as relevant, as explained above). This is not to diminish the importance of tikanga more broadly, but to acknowledge that NHC-TTA is a creature of statute, and it operates accordingly existing within the framework of Crown law. With those borders drawn, this report addresses the following:

4. What, if any, legal **obligations** are relevant to Māori access to residential dwelling insurance for natural hazards under the Natural Hazards Insurance Act 2023;
5. What legal **barriers**, if any, exist to prevent or obstruct Māori access to such residential dwelling insurance for natural hazards; and
6. What **suggestions**, if any, can be made to overcome or address any identified issues.

The researchers do not have any evidence of any inequity of Māori access to residential dwelling insurance for natural hazards. For example, there is no data on any disparity in the insurance policies held by Māori dwelling owners, the experience of making and handling claims made, nor on any payouts in the aftermath of natural hazard damage. The comments made in this report are thus based on the researchers' knowledge of aspects of insurance law, Māori worldviews, social organisation, and of the legal status of Māori dwellings that, combined, *could* give rise to inequitable disparities of treatment.

The style of this report is discursive. It does not make definitive findings. Instead, it relies on identifying situations where Crown law might not adequately provide for Māori worldviews and/or social organisation. This report identifies and discusses where and how such issues might arise, and suggests some potential solutions. The report does not necessarily suggest concrete legislative reforms. These questions are for politicians, policy-makers, and te iwi Māori. Instead, it identifies some recommendations for potential principles and policies to guide future practice and law. The later discussion of the principles of the Treaty of Waitangi – both their de minima and de maxima requirements – informs the recommendations.

Tuarua: framing Māori access to insurance

Māori access to general dwelling insurance

In the developing world insurance coverage is low. The cost of insurance is a significant barrier to coverage; therefore the extent of insurance coverage in any given country often depends on its wealth. Perhaps unsurprisingly, as insurance coverage is a function of wealth, with greater wealth implying greater coverage, this finding also applies *within* countries as well. In New Zealand public research identifies worrying disparities in insurance coverage between Māori and non-Māori. In one survey the Retirement Commission found only 32 percent of Māori homeowners took out a home and contents insurance policy while 48 percent of New Zealand households overall did, adding that "Māori have among the lowest rates of insurance of all ethnic groups in

New Zealand".[11] That gap largely holds across insurance categories including car, health, and life insurance. However, it is not clear whether those disparities in coverage are a function of wealth, culture, another factor, or a combination of these.

This paper accepts that wealth is likely a factor contributing to the disparity. In 2018 the gap in median wealth between Māori and Pākehā stood at $108,000.[12] The home ownership rate for Pākehā was double the rate for Māori. The fallout from this wealth gap is striking with Māori - as a general category - being more likely to suffer from poorer educational, health, and labour outcomes. However, it is not clear whether there are any *legal* rules that might bar, obstruct, or even simply discourage Māori from accessing insurance and, in particular, cover for natural hazards under the legislative scheme. The purpose of this paper is to investigate this legal aspect, focusing on obtaining insurance cover for natural hazards under the Natural Hazards Insurance Act 2023.

To state the obvious, there is nothing in whakapapa Māori that prevents a person or household from accessing insurance coverage of one kind or another. There are no legal rules holding that people of Māori descent practically cannot or normatively should not obtain insurance.[13] Instead, this paper investigates whether there may be gaps in insurance coverage for Māori because legislation, regulation, and/or commercial practice does not properly recognise and account for Te Ao Māori – a Māori worldview or Māori social organisation.

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[11] Retirement Commission "Low insurance among Māori" (1 May 2019) Te Ara Ahunga Ora <https://retirement.govt.nz/news/latest-news/low-insurance-among-maori/#:~:text=CFFC's%20Financial%20Capability%20Barometer%20survey,and%2032%25%20had%20life%20insurance>

[12] Pete McKenzie "NZ's perverse ethnic wealth gap" (26 July 2020) Newsroom <https://newsroom.co.nz/2020/07/26/pete-mckenzie-on-the-ethnic-wealth-gap/>

[13] It is noted that the Retirement Commission wondered whether Māori do not feel as much need for insurance as other ethnic groups because they know that their community rallies together to support and manaaki anyone who has suffered a loss, even an insurable loss. This expectation of manaakitanga is a cultural difference that may contribute to the lower uptake of insurance by Māori. Above n 5. This issue is beyond the mandate of the authors and should be investigated by appropriate researchers.

The role of Māori social organisation

Māori society orders itself in three essential units: first, the whānau, second, the hapū, and third, the iwi. This layering, where one unit sits atop and expands upon the other, is an inheritance from the centuries before colonisation, surviving and thriving into the present. But the layering of whānau, hapū, and iwi can contrast dramatically with Pākehā, Western, liberal forms of social organisation that prioritise an individual and their nuclear family, at one end, and at the other are larger groupings typically defined democratically by local, regional and national electoral boundaries as well as by being citizens of the nation. This Pākehā, liberal form of social organisation is both more insular - the nuclear family restricts itself in a way whānau do not - and broader, where the nation constitutes many individuals, communities, and indeed iwi.

These differences are more than theoretical, and they manifest across New Zealand society. For example, a whānau is more likely to be made up of several generations including children, parents, and grandparents; they may be living closely together whether in the same building or in separated units on the same property or complex.[14] This form of family organisation is much less common in typical Pākehā nuclear families. That comparison is not meant as comment on the superiority or inferiority of one family form or another, but more as an example of how social organisation unfolds differently in Te Ao Māori. Those differences can become important in insurance, too, and will be addressed in discussion below.

As an illustration, from a legal perspective, the differences between Māori and Pākehā social organisation - and its consequences for insurance coverage – arise most starkly in respect of marae, which are institutions created by hapū. The hapū is a grouping of whanau that is traditionally the basic political unit within Māori society. They are categorised in English as sub-tribes or clans. Authority as mana whenua – for guardianship and allocation of territory and its resources – was exercised at the level of hapū. The hapū has been described as "the largest effective corporate

[14] Welfare Expert Advisory Group "The changing nature of families" (28 September 2022) <https://www.weag.govt.nz/background/changing-nature-of-families/>

group which defended a territory or worked together in peaceful enterprises".[15] The heart of a hapū was and still is the marae.

In terms of a legal structure, marae tend to organise their affairs as an incorporated society or a private trust. Both structures are capable of entering contracts, and thus are capable of obtaining insurance coverage. However, several fixed aspects of Māori social organisation mean that, in practice, many marae struggle to take out insurance. Perhaps the most important fixed aspect is that marae are tied to the whenua where the marae is an anchor for whānau, hapū, and iwi to their ancestral land. This means that marae are spread across New Zealand in urban areas, provincial towns, and rural areas. Of the approximately 770 marae in New Zealand, almost half of those marae are found in the rural Central North Island and East Coast.[16] Few marae are found in urban areas. For example, only 18 marae are found in the Auckland Council area. Marae thus do not correspond to population density. Instead, the relationship is to the ancestral whenua of a particular place.

This is important in the context of insurance coverage. Any marae that is rural, far from emergency services and council services typically faces a greater risk of damage from hazards generally. If, for example, a marae in rural Tūhoe country is 40-minutes' drive from the nearest fire station - and if it does not enjoy council water supply - then the risk of a catastrophic loss in the event of a fire increases significantly. This is also the case for natural hazards. If the marae is located near an ancestral river, floodplain or eroding coast, and is tied to that area by those ancestral connections, the people and the marae are more likely to stay there despite risks of flooding. This is so even in the face of increased risks of more frequent rainfall events and rising sea levels caused by climate change, for example. The marae accordingly carry increased risks of catastrophic loss.

Currently, insurers do not routinely *deny* marae coverage according to their risk profile, but they do price that risk accordingly. This means that many marae struggle to access *affordable* insurance. If the marae were an ordinary community group, they could decide to move their marae closer to

[15] Ballara, Angela. *Iwi: The dynamics of Māori tribal organisation from c.1769 to c.1945*. (Wellington, New Zealand: Victoria University Press, 1998.), at 19.
[16] Figures calculated from the Maori Maps. See: https://maorimaps.com/

emergency or council services to help manage the cost of their premiums. Community groups often move in and out of different venues according to rent, insurance, and other factors. However, Māori social organisation may not always permit uprooting the marae; it will need to remain anchored to the people's ancestral whenua.

To extend the example above, the Tūhoe people of Rūātoki, a small settlement in the Whakatāne District, can hardly shift their marae to Whakatāne township where Ngāti Awa (a wholly different iwi) exercise mana whenua rights and obligations. From this perspective, then, Māori social organisation raises a series of striking implications and thus issues for insurance coverage. These implications and issues are largely commercial. Insurance companies may be pricing risk in a manner that effectively discriminates against Māori social organisation, even if unintentionally. Further, hapū typically own land and buildings collectively, under regimes and rules particular to Māori land. This can pose difficulties if insurance regimes assume individual ownership in the design of their products, further adding to other difficulties.

Overall, legislative changes and different legal structures can each make it easier or harder for Māori to obtain insurance, at least for community buildings such as marae. The case studies below explore these implications and issues in further detail. It notes how Māori communities may turn to creative legal solutions when commercial decisions fail them, as well as how those communities can turn to commercial solutions where legal solutions are not necessarily available.

This report also notes how some issues arise simply as a result of policy choices made to favour insurance coverage for individual household dwellings. These policy choices may have been made without being aware of the consequences to insurance for Māori community land and buildings, and/or simply to allocate state-sponsored insurance cover regardless of any consequences.

B. Natural hazards insurance and Māori housing

Tuatoru: explaining natural hazards insurance in New Zealand

Natural hazards insurance in North America and Japan

Japan, California, and New Zealand are high income countries and states at extraordinary risk from earthquakes. The boundary between the Pacific and Australian plates cuts through the New Zealand landmass carving a line from the West Coast of the South Island, through Canterbury, and into the Hikurangi Trough to the east of the Wairarapa. The two plates crash against each other with the lighter, oceanic Pacific plate diving under the denser, continental Australian plate. In this subduction zone the Pacific plate reaches tremendous temperatures melting into molten rock and red-hot magma. That magma generates pressure beneath the earth, building until it releases, slowly or catastrophically, as an earthquake or volcanic eruption. From this perspective earthquakes are a safety valve, a necessary expenditure of pressure. But from a societal perspective the impact of earthquakes is devastating, creating threats to life, society, and the economy.

The Pacific plate threatens countries across the Pacific Rim, colliding with plates at its other boundaries. Governments in some countries at these boundaries - notably Japan, the state of California, and New Zealand - organise public, government-provided insurance. This is undertaken, in part, to cover gaps in the private market. For example, when the Northridge earthquake hit California in 1994, damaging up to 40,000 buildings across the state, insurers were on the hook for more than USD $20b in losses.[17] Yet at the same time as insurers were posting losses, demand for insurance coverage against earthquakes was increasing thus exposing those same insurers - assuming ceteris paribus - to future losses from the inevitable earthquakes that the movement of the Pacific plate generates. That left insurers with two very simple commercial choices: retain the status quo, and so bearing the future risks that entails, or review the level - or,

[17] Cuong Nhu Nguyen & Ilan Noy "Comparing earthquake insurance programmes: how would Japan and California have fared after the 2010–11 earthquakes in New Zealand?" (2019) Disasters, 44, pp. 367-389.

indeed, existence - of their earthquake coverage. North American insurers took the latter option, reducing their underwriting for new earthquake coverage and imposing restrictive terms on existing policies.

The result of those reductions and restrictions was systematic under-insurance for earthquake risk. That partial market failure meant that the state took the step of establishing the California Earthquake Authority (CEA). The CEA offers coverage for contents and residential structures. For participating private insurers, 14 percent of the premiums CEA collects is allocated to administering private policies and claims, 30 percent is allocated to purchasing reinsurance and other financial risk transfer products, and the remaining premiums are allocated to reserves. Crucially, participation in the CEA scheme is voluntary, but any private insurers who opt not to participate must provide their own coverage for earthquake damage. The disadvantage of this voluntary scheme, though, is that total coverage against earthquake damage is low with only an estimated 10 percent of Californian households taking out their own policies.[18] This system is similar to the Japan Earthquake Reinsurance (JER) scheme where private insurers enrol in the scheme.[19] Despite the low uptake, the CEA system is important for demonstrating the principle that, where under-insurance does occur, a public policy intervention can take place to help improve coverage or set a minimum standard.

The natural hazards insurance system in New Zealand

In New Zealand public insurance cover for earthquake and other natural hazards is administered by Natural Hazards Commission - Toka Tū Ake (NHC-TTA). The legislation governing this was, until very recently, the Earthquake Commission Act 1993. In July 2024 the Natural Hazards Insurance Act 2023 entered into force, replacing the 1993 Act.

Natural hazards insurance - under both the 1993 Act and the 2023 Acts - covers "single household", residential dwellings and their land for natural hazard damage. It does not cover non-

[18] Daniel Marshall "An overview of the California Earthquake Authority" (2018) Risk Management and Insurance Review, 21(1), pp. 73–116.
[19] Originally, the JER was compulsory; it was made optional from 1979.

residential buildings or land. The definition of "dwelling" in the legislation is detailed and provides for a range of situations.[20] The key requirement is that it must be "self-contained with the facilities necessary for day-to-day living on an indefinite basis (including somewhere to cook, sleep, live, wash, and use a toilet)" and be actually used – or able to be used – as accommodation either as a home or holiday home.[21] It need not be contained in one building, with some "appurtenant structures" also being covered. The residential part of a mixed-use building can be covered, and it may include common property. But "large-scale accommodation" is not a dwelling. If a building "is used to provide accommodation on a scale larger than is typical for use as the home of a single household, and it is not intended by the owner to be used as the home of a single household", then it is not a dwelling.[22] Thus a student hostel would not be covered, but a "large family home that is the home for a single household would be a dwelling even if it has extensive facilities for visitors".[23]

The New Zealand scheme is notable for providing cover for a range of natural hazards rather than solely for earthquakes. As provided in s 4(4):[24]

> Natural hazard cover provides cover for—
>
> (a) damage to residential buildings that is a direct result of an earthquake, hydrothermal activity, a landslide, a tsunami, or volcanic activity or a fire that is a consequence of any of those hazards; and
>
> (b) damage to residential land that is a direct result of any of those hazards or a storm or a flood, or a fire that is a consequence of a storm or flood.

This wide coverage is important for certainty in residential investment and for spreading the burden of risk and the benefits of insurance. Cover is also available for imminent damage; replacement or mitigation costs for residential building or land may not need to wait until damage eventuates.[25] One key restriction is that, for a storm or flood, coverage is only for damage to land, not dwellings.[26]

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[20] See Natural Hazards Insurance Act 2023, s 6, reproduced in full below, at p 23.
[21] Id.
[22] Section 7, Natural Hazards Insurance Act 2023.
[23] Section 7, Example 2, Natural Hazards Insurance Act 2023.
[24] See also the definition of "natural hazard" in ss 23 and 24 Natural Hazards Insurance Act 2023.
[25] Natural Hazards Insurance Act 2023, s 34.
[26] See s 24.

There are legislative definitions of the cover and limits on the amount of coverage, both of which differ between buildings and land. Buildings are generally covered for the replacement of the parts damaged, but only above an excess and up to the legislative maximum or "cap" of $300,000.[27] Land is covered for partial or full "reinstatement" work to support the residential building and/or diminution of its value, also with an excess.[28] The cap is based on the market value of the land (along with some other structures on the land).[29]

Similar to its sister systems in California and Japan, insurance cover for earthquakes or other natural hazards is not compulsory. Households are under no obligation to secure earthquake or natural hazards cover. But what distinguishes the New Zealand system is that it is *functionally* compulsory. Cover pursuant to the legislation is a compulsory aspect of fire insurance policies. Private insurers who offer coverage against fire damage and loss must collect a compulsory levy for natural hazard insurance under the Act.[30] This is crucial because, as a requirement for securing a mortgage or home loan, lenders normally require lendees to take out fire insurance. Thus, natural hazards cover is functionally compulsory for homeowners, even if they are not legally compelled.

It is also possible for NHC-TTA to provide cover directly to a homeowner if they do not have any fire insurance policy.[31] However, the uptake of direct insurance has been low.[32]

All natural hazard insurance levies for insurance under the Act are put into what was the National Disaster Fund (NDF), now the Natural Hazard Fund (NHF).[33] These funds are to be used in settling claims under the Act. Private insurers pay these levies to NHC-TTA in bulk, without identification

[27] Section 31, with definition of "replacement cost' in s 32, and proportionate costs for shared, common or joint property in s 33. The replacement cost for imminent damage is provided for in s 34, and the caps provided in sections 35-37.
[28] See sections 39-42 Natural Hazards Insurance Act 2023,
[29] See sections 43-44.
[30] Natural Hazards Insurance Act 2023, s 116(1). It was known as EQCover under the 1993 Act.
[31] Earthquake Commission Act 1993, s 22, and Natural Hazards Insurance Act 2023, s 48.
[32] Earthquake Commission *Briefing to the Incoming Minister Responsible for the Earthquake Commission* (October 2017) at 20.
[33] Natural Hazards Insurance Act 2023. See Part 4 of the Act for the relevant statutory regime.

of individual contracts of insurance, nor even the addresses that are insured.[34] As a result of this, NHC-TTA is unaware of who they insure until a claim is made.[35]

Unfortunately, the 2011 Christchurch earthquake stretched these burdens and benefits to the limit, with the liabilities emerging from that disaster draining the greater part of the (previous) NDF. Despite that and importantly, the NHF - in the event of insufficient funds - can rely on a "Crown guarantee" under s 112 of the Natural Hazards Insurance Act, where the Minister is required to fund any shortfall in EQC's obligations under s 111 (including its obligations to settle claims).[36]

What distinguishes the New Zealand system from its sister systems overseas is its comprehensiveness. The legislation enabling NHC-TTA offers coverage for a broad range of natural hazards rather than earthquakes alone, and its mechanism for collecting public levies - attaching natural hazards coverage to private fire insurance policies - is broad enough to capture almost the entire private residential insurance market. Up to 95 percent of New Zealand households take out a fire insurance policy, meaning those 95 percent enjoy natural hazards cover. In comparison, only 10 percent of Californian households attract natural hazard cover in their jurisdiction. In 2019, researchers applied the Californian system, the Japanese system, and the New Zealand system to disaster recovery and insurance payouts after the Christchurch Earthquake 2011. Their comparisons revealed that the New Zealand system was, first, more comprehensive and, second, significantly more generous than its sister systems, with insurance payouts covering a greater share of the cost of recovery than it would in California or Japan.[37] That is an endorsement of the then Earthquake Commission Act 1993, and an illustration of the advantages of functional or de facto compulsion in the private insurance market.

[34] See, eg, Natural Hazards Insurance Regulations 2024 (SL 2024/24, 24 March 2024), reg's 19 and 20.
[35] Letter from Dr Hugh Cowen (Director Resilience Research, Earthquake Commission) to Catherine Iorns regarding comments on Catherine Iorns' Deep South NSC draft EQC report (26 February 2019).
[36] This is not a blanket guarantee but is subject to some conditions: s 112(2).
[37] Cuong Nhu Nguyen & Ilan Noy "Comparing earthquake insurance programmes: how would Japan and California have fared after the 2010–11 earthquakes in New Zealand?" (2019) Disasters, 44, pp. 367-389.

Coverage of dwellings owned by Māori

While there is 95% coverage of New Zealand residential dwellings, it would be helpful to know who makes up the remaining 5%, and whether there are any gaps or barriers for certain people or classes of people. While 5% sounds low, at June 30, 2024, the estimated number of private dwellings in New Zealand was 2,089,400; that 5% amounts to nearly 105,000 houses.[38] As the Retirement Commission has identified, uptake of all types of insurance is lower for Māori. Anecdotal evidence suggests that Māori have significantly lower insurance coverage then other groups. For example, Wairoa, a town with 70% Māori population,[39] has been said to have only 50% insurance coverage for recent flood damage.[40] More information about what is actually the case in respect of dwelling insurance and natural hazards cover could assist an assessment of what the barriers and gaps are to such cover by Māori.

It is quite possible that under-insurance is at least partly a function of commercial judgements. For example, private insurers may price fire insurance policies at a price that an owner decides is too expensive and/or they cannot afford, such that the owner does not insure their property. In this situation, under-insurance is not a consequence of the legislation.[41] But some under-insurance could be the result of the preference and structure of the legislative cover itself, such as excluding some collectively-owned Māori property from residential dwelling coverage; this would be a result of the legislation.[42]

The previous discussion highlights how, when Māori social organisation differs from the mainstream, then gaps in coverage and/or its application can occur. It is conceivable that there

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[38] Statistics NZ, 'Dwelling and household estimates: June 2024 quarter", 4 July 2024, at https://www.stats.govt.nz/information-releases/dwelling-and-household-estimates-june-2024-quarter/

[39] See, eg, Wairoa community aims to clean up town's image | RNZ News (3 Nov 2021).

[40] Anecdotal comment attributed to the Mayor of Wairoa.

[41] It is suggested that financial reasons are a significant issue in Wairoa, for example:

> "Wairoa has a median income of $21,500 compared to the national figure of $31,800. Less than 30 per cent of combined household earnings topped $70,000. The average house price in 2022 was $362,000 compared to the national average of just over $1m. Wairoa also has an unemployment rate of 7.2 per cent; twice the national average."

Cheer amid the despair: How $10.3m Lotto win brought joy to cyclone-ravaged Wairoa - NZ Herald (9 Sept 2023).

[42] Any such property in this example would not be represented in the 5% identified above as uninsured, because this was only for dwelling insurance. But it is used simply as a clear example of a legislative exclusion.

might be assumptions behind and within the statutory natural hazards regime that disadvantage Māori, including about basic matters such as models of ownership of residential dwellings. For example, collectively-owned Māori land tends to have a lower market value than similar general land held in fee simple, even in the same area, while caps on claims for natural hazard damage to land are based on its (undamaged) market value. Thus any claim payouts for damage to Māori residential land will likely be lower than similar damage to general, fee simple residential land, even if the costs to remedy the damage are the same.

There may also be deliberate gaps in the regime's coverage due to policy preferences for aspects of social organisation that are not Māori. For example, only residential dwellings are covered by the Act. It is possible that it was thought that individual dwellings are the most important thing to insure because of our liberal, individualist social values. Māori might instead prefer that their hapū-based marae were insured over their houses. The public insurance system that was devised might have a policy and legislative cultural blindness to the importance of marae to Māori.

Neither the Earthquake Commission Act 1993 nor the Natural Hazards Insurance Act 2023 reflect nor make explicit space for these differences in social organisation, nor the world views that underly them. The following section explores how the Natural Hazards Insurance Act 2023 may contain gaps that do not provide sufficient cover for residential and other property that reflect Māori social organisation and/or worldviews.

Tuawha: natural hazards insurance and Māori social organisation

The history of Māori and insurance is, in part, a history of exclusion. When Parliament enacted the Unemployment Act 1930, a precursor to the Social Security Act 1938, men over 20 were liable to pay a quarterly levy toward a national unemployment fund. The fund functioned as a form of income insurance paying out a "sustenance allowance" to unemployed men who had contributed their levies. The fund was crucial in carving a path toward a comprehensive social welfare system, but it did contain a significant exclusion: it was compulsory for men over 20 to pay their levies - unless they were "native". Māori men were not automatically liable to pay into the scheme, and thus they were not automatically entitled to their benefits. Instead, Māori men over 20 were required to "voluntarily" enrol in the scheme.[43] Parliament's reasoning was, in part, that Māori - overwhelmingly resident in their traditional kāinga at that time - had communal means to support themselves.[44] From this perspective, then, Māori social organisation was not overlooked; instead, it was taken as a reason to create an exclusion from state support.

Interestingly, the Earthquake Commission Act 1993 deliberately excluded buildings other than single household dwellings. It may not have done so in order to deliberately exclude different forms of Māori social organisation, but it has had the *effect* of such exclusion. It is this scheme that the Natural Hazards Insurance Act 2023 continues.

The residential test

As described above, natural hazard cover is available under the Natural Hazards Insurance Act 2023 for a building that is or contains a dwelling (and its associated land). 'Dwelling" is defined as:

[43] Alex McKenzie "Social Assistance Chronology 1844–2019: A historical summary of social security benefits, war pensions, retirement pensions, taxation measures, family assistance, housing assistance, student support and labour market programmes" (30 September 2023) Ministry of Social Development at p. 37.
[44] Dr Terry Hearn "The Social and Economic Experience of Porirua ki Manawatu Māori" (August 2019) Waitangi Tribunal at p. 235.

6 Dwelling

(1) A building, or part of a building, is a **dwelling** if—

(a) it is self-contained with the facilities necessary for day-to-day living on an indefinite basis (including somewhere to cook, sleep, live, wash, and use a toilet); and

(b) 1 or more of the following apply to it:

(i) it is used by 1 or more persons to live in as their home:

(ii) it is used by 1 or more persons as their holiday home:

(iii) it is capable of being, and is intended by its owner to be, used for a purpose set out in subparagraph (i) or (ii).

(2) A building, or part of a building, is also a **dwelling** if it is used to provide long-term accommodation for the elderly.

(3) A building, or part of a building, that meets the criteria in subsection (1) or (2) is a dwelling even if it is used some of the time to provide temporary or transient accommodation.

. . . .

Some facilities in separate building

(5) A building, or part of a building, may meet the criteria in subsection (1)(a) even if some of the facilities referred to in that paragraph are in an appurtenant structure, provided that they are for the exclusive use of the owners or other occupants of the dwelling.

Example

A holiday home whose toilet is in an outhouse may be a dwelling. A holiday home that is a cabin in a campground, where the occupants rely on a toilet in a shared ablution block, would not be a dwelling.

Dwelling that is not a building

(6) If a vehicle (including a motor vehicle, trailer, boat, or aircraft) or structure (or part of a vehicle or structure) that is not ordinarily considered to be a building is immovable,—

(a) it is taken to be a building (or part of a building); and

(b) is a **dwelling** if it meets the criteria in subsection (1).

Example

A caravan that is permanently fixed to piles and is connected to power, water, and sewerage services, and that is being used on an indefinite basis as a person's home, may be a dwelling.

Large-scale accommodation

(7) A building, or part of a building, is not a dwelling under subsection (1) (even if it meets the criteria in that subsection) if—

it is used to provide accommodation on a scale larger than is typical for use as the home of a single household; and

(b) it is not intended by the owner to be used as the home of a single household.

Examples

Example 1

A university or boarding school hostel that accommodates 100 people in dormitories with communal living and dining areas is on a scale larger than a typical family home, so is unlikely to be a dwelling.

Example 2

A large family home that is the home for a single household would be a dwelling even if it has extensive facilities for visitors.

Example 3
A house where occupants rent an individual room and share communal facilities is also likely to be a dwelling because it is on the scale of a single household home even though it is not currently being used as such.

Excluded property
(8) Property that would otherwise be part of a dwelling is not part of a dwelling if it is excluded property.

Clarifying uncertainty
(9) However, if the regulations state that buildings, vehicles, or structures (or parts of them) of a particular class are or are not dwellings, a building, vehicle, or structure in that class is, or is not, a dwelling (as the case may be).

(10) The Minister must not recommend the making of those regulations unless satisfied that doubt has arisen about whether that class of buildings, vehicles, or structures are dwellings and that it is desirable for regulations to clarify the matter.

(11) To avoid doubt, a building, or part of a building, is not a home or holiday home (and is therefore not a dwelling under subsection (1)) if—

(a) it is used to provide temporary or transient accommodation, being accommodation that is ordinarily provided for periods of less than 28 days at a time (such as a hotel or motel); or
(b) it provides accommodation for persons who are not living there voluntarily (such as a prison); or
(c) it is used primarily for a purpose other than accommodation (such as a hospital or an emergency care facility).

Although whānau units are less likely to correspond to the shape of the nuclear family, a majority of Māori do occupy ordinary residential homes (whether through ownership or renting) in a broadly similar manner to non-Māori. That means those Māori homes, as plainly residential, attract legislative insurance cover (where they have a fire insurance policy). But coverage is not so clear for residential or communal forms that do not neatly correspond to the categories in the legislation.

For example, residential housing units located on a marae, or co-located papakāinga developments, would generally meet the threshold tests under the Act as a *dwelling*.[45] Under s 6(1)(a) a dwelling "is self-contained with the facilities necessary for day-to-day living".[46] This is important because,

[45] See Part 1 of the Act for the relevant threshold tests. Clearly each fact situation would have to be assessed against the statutory definition, but we are thinking here of housing simply located on marae land instead of on separate land.
[46] There is also another requirement in s 6(1)(b) but social organisation would likely not pose a barrier if the first part is met.

in meeting this threshold test, NHC-TTA can confidently assume that there is not a legislative barrier to coverage for these particular forms of Māori social organisation. How the rest of the Act operates in respect of these two forms of dwellings are addressed in the next section below.[47]

In contrast, marae themselves will generally not attract the natural hazards insurance cover because they fail to meet the residential threshold in s 6(1)(b), requiring it to be used or intended as a home. Although the 2023 Act provides categories for mixed-use buildings at s 8 and other "eligible" buildings at s 7, a marae would most likely not meet the threshold test. What particularly distinguishes marae housing from the marae complex itself is that the housing is meant for self-contained, permanent living. The marae itself is usually only meant for temporary living for occasional purposes (such as tangihanga, birthdays, family reunions, work retreats, and hui). Notably, this exclusion of marae from the legislative scheme was a deliberate choice.

Purpose of the scheme

The government that drafted what became the Earthquake Commission Act 1993 explicitly chose to restrict coverage to only residential dwellings. At the time, the Earthquake and War Damage Act 1944 covered *any property* that had a contract of fire insurance.[48] It was this 1944 legislation that originally established a public insurance scheme where levies were tied to private fire insurance policies, paid into Earthquake and War Damage Fund, and managed by the Earthquake and War Damage Commission.

The Explanatory Note to the 1992 Earthquake Commission Bill does not explain why non-residential property would no longer be insured; it simply states that this will be the case.[49] During

[47] And this makes no comment about any under-insurance for commercial reasons.
[48] See the Earthquake and War Damage Act 1944, s 14. Available at: https://www.nzlii.org/nz/legis/hist_act/eawda19448gv1944n15278/
[49] See, Earthquake Commission Bill 1992 (210-1), Explanatory Note: "THIS Bill provides for the insurance of residential property (as defined) against earthquake and certain other kinds of disaster. Non-residential property will no longer be insured after a "phase-out" period. War damage is no longer provided for." Available at: https://www.nzlii.org/nz/legis/hist_bill/ecb19922101247/
This was maintained in the Bill as reported back from Select Committee in 1993: see https://www.nzlii.org/nz/legis/hist_bill/ecb19932102247/

the first reading of the Bill that became the Earthquake Commission Act 1993, the reason given was that:[50]

> the Government's prime concern in the aftermath of a major disaster is a humanitarian concern. Thus, the priority should be the provision of basic, adequate housing and other amenities, and the reestablishment of a basic infrastructure, rather than meeting extensive obligations to those homeowners who are better off, and to business.

This describes the basic purpose of the current regime: to help households recover from disaster.[51]

The 2023 Act includes as a key objective of the reform "to enable better community recovery from natural hazards".[52] The purposes of the legislation are significantly expanded upon in the new Act, but the primary method for reducing "the impact of natural hazards on people, property, and the community" is via "first loss insurance for residential buildings and residential land".[53] Moreover, "The primary purpose of natural hazard cover is to contribute to the replacement or reinstatement of dwellings that suffer natural hazard damage."[54] The extensions to other structures and land are in support of this dwelling.[55] Thus this residential restriction is still core to the regime.

Despite coverage deliberately being restricted to private household dwellings, if a key objective of the reform is to better enable community recovery from natural hazard damage, it must be considered *whether Māori values and forms of community or social organisation are being appropriately provided for in the current regime*. The following sections look at some specific examples and issues relevant to Māori housing.

[50] Hansard (15 December 1992) 532 NZPD 13188.
[51] Letter from Dr Hugh Cowen (Director Resilience Research, Earthquake Commission) to Catherine Iorns regarding comments on Catherine Iorns' Deep South NSC draft report (26 February 2019).
[52] Explanatory Note to the Natural Hazards Insurance Bill, at p 1.
[53] Section 3.
[54] Section 4.
[55] Section 4.

Tuarima: covering Marae housing and papakāinga housing

Coverage of residential land and its incidental impacts

The 2023 Act is difficult to apply cleanly to different forms of Māori social organisation. Where the Act becomes messy is in its application to marae housing and co-located papakāinga housing. This messiness does not necessarily occur in the threshold test for obtaining coverage. Marae housing and co-located papakāinga housing obviously constitute dwellings. Instead, the messiness occurs in the implications for the rest of the Act's application and operation.

For most dwellings, the legislative coverage operates clearly enough. But for housing located on marae it presents particular challenges. For example, under the 2023 Act the 8-metre rule at s 17(1)(b) provides insurance cover for land within 8 metres of the residential dwelling. For many marae homes, co-located as they are on the marae complex itself, that 8-metre rule would almost certainly capture parts of the land from the wider marae complex. The accessway to the dwelling also attracts cover under s 17(1)(c), and for many marae homes the accessway to the dwelling is also the accessway to the marae complex proper.[56]

If, then, part of the land of the marae complex may attract cover *incidentally* - that is, as a result of coverage of marae housing - it must be considered whether that creates an irrationality in the law. For example, it should be considered whether the legislation should continue to exclude the marae complex proper if it can obtain some incidental cover through the insurance of marae housing. This cuts at the heart of the difficulty for policy-makers, raising questions as to their obligations under the principles of the Treaty of Waitangi.

Framing the question around the other way: it could be considered whether the Marae complex proper should enjoy inclusion in the legislative scheme in order to correct an irrationality in the law. If so, that would deliberately extend cover for the marae complex proper. On its face, that

[56] This is without getting into analysis of whether the wider marae complex is excluded under Schedule 2 or constitutes common, joint or shared property. It is unlikely marae would constitute, for example, common property because a marae is unlikely to meet the threshold test as "mixed-use". These difficult questions are better left to a formal legal opinion rather than a research project.

might create a greater irrationality. The 2023 Act does not contemplate cover for non-residential buildings and land, and even iwi, hapū, and whānau would likely agree a marae is not strictly residential. However, it is a policy choice to prioritise residential cover. It could at least be considered explicitly whether – and if so how best – to address the coverage of marae.

Under tikanga, the status of the marae is clear as a physical expression of ahikaaroa; its physical functions are many and varied, from hosting tangihanga to annual general meetings. Traditionally, "marae" referred to the open space in front of or adjacent to the wharenui or the ancestral house. But in contemporary times marae refers to the complex as a whole: usually the ancestral house and separate dining facilities and - depending on the history of size of the marae - a worship house, kōhanga reo, and other facilities. To reflect this diversity and variation of use, as well as to reflect the importance of marae within Māori social organisation, this paper suggests that further research and discussion should be undertaken about the most appropriate treatment of marae for the purposes of public natural hazards insurance of marae.

This issue of categorising marae is not confined simply to insurance law. Tax law, resource management law, and even district plans distinguish between residential, commercial, rural, and other types of buildings and land, and each area encounters difficulties in appropriately and rationally categorising marae. Parliament recognises this category difficulty, often acknowledging the uncertain status of marae. Law-makers are thus generally cautious in extending the "Crown law" to the marae. Further, where that extension of Crown law does happen, with Parliament reaching into the affairs of the marae, it can result in absurdities.

For example, in 2021 Parliament enacted the Covid-19 Public Health Response Act. The Act made its way through the Parliamentary process with strong support, but one aspect generated tremendous opposition: the Bill conferred the power for Police to conduct warrantless searches of marae to gather evidence or ensure compliance with public health orders. The opposition to warrantless searches was swift and sustained, and the Government abandoned the clause. But what was telling, at least for the purposes of this analysis, was the rationale. The Government argued

that, in clarifying the Bill's application to marae, they were "seeking to provide them with the same protections as dwellinghouses".[57]

That was an interesting argument (strengthening protection for marae by conferring a power to conduct a warrantless search), but it did illustrate the difficulties in categorising the marae. The Government sought to confer the same protections as a dwelling, but as the opponents of that categorisation and its consequences argued: the marae is not a dwelling in the same sense as a home for a nuclear family or whānau. This example demonstrates how, even with the best intentions, the categorisation of a marae as dwelling may introduce an irrationality into the law. That irrationality works as a two-edged sword too. If the Natural Hazards Insurance Act 2023 - or the regulations it enables – were to establish a residential category for marae, it risks the coherence of the Act's residential regime, and perhaps opens the way for a series of other difficult exceptions and inclusions.

To be explicit, we are not recommending that marae should receive public natural hazards insurance cover. We are also not suggesting that, if marae were to receive public natural hazards insurance cover, then it should occur under this current regime. Even if it was decided that they should be covered, that may be more appropriate under a sui generis legislative or regulatory regime. However, we suggest that the coverage of marae needs explicit consideration, partly as a process requirement and partly as a potential matter of consistency with tikanga and/or Treaty principles, such as that of active protection of taonga (discussed below in Part D of this paper) .

How collective ownership might complicate the legislative "claim date"

Thankfully, the application of the Act to marae-based homes and papakāinga housing is easier to determine. Both forms of Māori housing, where homes are co-located on the marae complex or

[57] Professor Khylee Quince "Applying law to marae highlights the difficulty of viewing one culture through the lens of another" (2 October 2021) Stuff.co.nz <https://www.stuff.co.nz/pou-tiaki/126546067/applying-law-to-marae-highlights-the-difficulty-of-viewing-one-culture-through-the-lens-of-another>

other ancestral lands, will most likely attract cover so long as a fire insurance policy is in place. Both forms more clearly meet the residential threshold in the 2023 Act.[58] But within that coverage several other issues might arise that reflect the unique structure of Māori social organisation.

For example, s 54 of the Act provides NHC-TTA with the power to set a claim date. In the interests of efficiency and accuracy, NHC-TTA aims to evaluate natural hazard claims as soon as it possibly can. The nature of an insurance claim for damage is that, the greater the time distance between the event and the claim, the harder it is to investigate whether the claimed damage is a result of an insurable event. NHC-TTA strongly encourages claimants to lodge claims within three months. The 2023 Act also provides for an extended claim date at s 54(1)(c) and exceptions for the extended claim date at s 54(2).

For ordinary claimants this may not amount to issue or a barrier. In a household with one owner or two joint owners they can quickly decide whether to lodge a claim or not, easily meeting the three-month claim date. But for marae housing and papakāinga housing, the claim date could present particular challenges. In many cases, papakāinga homes are not individually nor jointly-owned. Rather, the owner is a legal entity of one kind or another, typically a trust ordering itself according to the structures available under Part 12 of Te Ture Whenua Māori Act 1993 (TTWMA 1993). In the context of insurance, these trust structures are arguably inefficient because, if the trust collectively owns and holds the papakāinga housing, then the trustees who safeguard that ownership make collective decisions, including collective decisions on whether to take out insurance and whether to claim. In practical terms this can result in delays. It might take time to align diaries and achieve a quorum, for example. Under tikanga, too, decisions over land and housing can result in often long, deliberative processes; therefore, the deed, charter or constitution of the trust might formally incorporate those long, deliberative processes.

In such situations, claims might take longer to prepare and lodge than they otherwise would if the home was individually-owned or jointly-owned by very few people (e.g. one or two persons in a

[58] See, eg, https://www.treasury.govt.nz/sites/default/files/2022-01/modernising-eqc-act-consultation-maori-iwi.pdf However, our comments clearly do not constitute legal advice; each fact situation must be considered on its merits against the requirements in s 6.

nuclear family). But for papakāinga housing, individual or joint ownership by natural persons is sometimes out of the question. The qualities that make a papakāinga home are, first, that the home sits above the hapū or iwi's ancestral land and, second, that the collective owns at least the land and sometimes the home itself. Sometimes the collective is a Whānau Trust under s 214 of TTWMA 1993. Such a Trust could include as few as a dozen beneficial interests to as many as hundreds of beneficial interests. Even simple actions - such as lodging an insurance claim - may require consultation with the dozens or even hundreds of beneficial owners. Applying a cost-benefit analysis, consulting so many beneficial owners for an insurance claim is possibly more effort than it is worth. A cost-benefit analysis might recommend disposing of the home, even at a reduced price to reflect the natural hazard damage it sustained. But even alienation requires obtaining the agreement of three-quarters of the owners or 75 percent of the beneficial interests.[59] That is a high bar, as well as typically being culturally inappropriate. For many owner-occupiers of Māori land, it forecloses their ability to "cut their losses" in the event of natural hazard damage or destruction. It also illustrates the difficulty of meeting the statutory time limits for claims.

Collective ownership and an insurance claim for the land

The difficulty of alienating any papakāinga home that has suffered natural hazard damage makes an insurance claim the most likely - if not the *only* - option. But this example needs refinement. The papakāinga home building is often, but not always, collectively owned. Where it is not collectively owned, a natural hazard damage claim on the building *only* is administratively simple. The (likely one or two) homeowners -as the fire insurance policy holders- can lodge a claim without needing extensive consultation with others. However, claims for damage to the residential land are not so simple. What makes the home "papakāinga" is its status of being located on Māori land, not general land; what distinguishes it is collective ownership. Thus it is unlikely that there are only one or two owners of the *land*. This fact - collective ownership - is particularly important where NHC-TTA is assessing its own options in settling any claim. The following section discusses this in more detail.

[59] Section 150C.

Tuaono: Future trends in Māori housing

There is an increasing desire for more housing for iwi and hapū members to be located on ancestral whenua, i.e., on collectively owned Māori land. There is also an increasing push to develop housing for Māori that is more culturally in tune with their forms of social organisation. This might accommodate larger family groupings in the one dwelling – ie, whanau as opposed to the smaller nuclear family. It might also include provision for hosting guests on a regular basis. For example:[60]

> "A Māori house should not only look and feel Māori but, most importantly, meet the functional needs of a Māori whānau and be adaptable to suit cultural practices and living arrangements. Access to warm and sheltered outdoor areas needs to be prioritised, along with generous kitchen and bathroom facilities to cater for large whānau and manuhiri. Manaakitanga is at the heart of Māori living and therefore any alternative housing design for Māori must prioritise being able to host both long- and short-term guests."

To this end, researchers have identified six different types of Marae-based housing that range from Tiny homes on trailers to large housing complexes with significant communal areas.[61] It is important to consider whether and how these new forms of housing might best attract natural hazard insurance cover.

These suggested six different types of housing are:

> "**Whare Manaaki Tāngata** – Based on the Manaaki Tāngata Transitional Housing Programme at Te Puea Memorial Marae, and their plans for a new 50-person purpose-built development designed to accommodate whānau with tamariki for up to three months, prior to transitioning to permanent housing.
> **Whare Tūhono** – A two-to-three-storey kāinga adaptation of the terraced housing typology, with an emphasis on intergenerational / extended whānau needs, and including a central communal laundry, barbecue and lounge area.
> **Whare Roa** – A large intergenerational whānau kāinga with up to nine bedrooms and large communal kitchen, dining and living areas. Kāinga Kaumātua – Emphasising accessibility and shared lounge and kitchen areas, this two-storey building allows for up to 20 occupants, along with a kaitiaki whānau located on the lower or basement level.

[60] Rau Hoskins, Jenny Lee-Morgan, Wayne Knox, Hurimoana Dennis, Lena Henry, Leisa Nathan, Reuben Smiler and Maia Ratana, *Tūranga ki te marae, e tau ana – Reimagining marae-based kāinga in Tāmaki Makaurau: A resource to support urban marae-based housing developments* (Auckland, Ngā Wai a te Tūī Press, September 2019), at 21. Available at: https://www.buildingbetter.nz/wp-content/uploads/2023/08/Hoskins_et_al_2019_Turanga-ki-te-marae-tau-ana.pdf

[61] Hoskins et al, above n 60, at 22.

Whare Āhuru – Building on the traditions of the Department of Māori Affairs Trade Training and modern tertiary student hostel models, this typology is designed to provide an āhuru or 'safe haven' for students moving to larger cities to study, and for those whose existing urban home environments are not able to adequately support their physical and academic needs.
Whare Kāhui – Designed for single individuals, couples or sole parents, this cluster-housing typology builds on both the design of the simple domestic Māori whare and the worldwide trend towards more compact, energy-efficient and affordable tiny homes."

The discussion in this report above of issues relating to natural hazard cover for housing located on collective land also applies here; it will not be repeated here. The structures or the dwellings themselves raise additional issues. They will include temporary housing, buildings with large communal areas shared by more than one nuclear family, buildings akin to a student hostel or boarding house, tiny homes on portable trailers, buildings with guest facilities, and buildings with large, protected outdoor areas. Tiny homes, in particular, are seen as ways for members of iwi and hapū to maintain accommodation on ancestral land that they might return to only on weekends and for other gatherings, e.g., even while living elsewhere for work.

As discussed above, but repeated here, natural hazard cover is available for a building that is or contains a dwelling. 'Dwelling" is defined in the Natural Hazards Insurance Act 2023 as:

6 Dwelling
(2) A building, or part of a building, is a **dwelling** if—
(c) it is self-contained with the facilities necessary for day-to-day living on an indefinite basis (including somewhere to cook, sleep, live, wash, and use a toilet); and
(d) 1 or more of the following apply to it:
(i) it is used by 1 or more persons to live in as their home:
(ii) it is used by 1 or more persons as their holiday home:
(iii) it is capable of being, and is intended by its owner to be, used for a purpose set out in subparagraph (i) or (ii).
(2) A building, or part of a building, is also a **dwelling** if it is used to provide long-term accommodation for the elderly.
(3) A building, or part of a building, that meets the criteria in subsection (1) or (2) is a dwelling even if it is used some of the time to provide temporary or transient accommodation.
. . . .
Some facilities in separate building
(5) A building, or part of a building, may meet the criteria in subsection (1)(a) even if some of the facilities referred to in that paragraph are in an appurtenant structure, provided that they are for the exclusive use of the owners or other occupants of the dwelling.

Example

A holiday home whose toilet is in an outhouse may be a dwelling. A holiday home that is a cabin in a campground, where the occupants rely on a toilet in a shared ablution block, would not be a dwelling.

Dwelling that is not a building

(6) If a vehicle (including a motor vehicle, trailer, boat, or aircraft) or structure (or part of a vehicle or structure) that is not ordinarily considered to be a building is immovable,—

(c) it is taken to be a building (or part of a building); and

(d) is a **dwelling** if it meets the criteria in subsection (1).

Example

A caravan that is permanently fixed to piles and is connected to power, water, and sewerage services, and that is being used on an indefinite basis as a person's home, may be a dwelling.

Large-scale accommodation

(7) A building, or part of a building, is not a dwelling under subsection (1) (even if it meets the criteria in that subsection) if—

it is used to provide accommodation on a scale larger than is typical for use as the home of a single household; and

(b) it is not intended by the owner to be used as the home of a single household.

Examples

Example 1

A university or boarding school hostel that accommodates 100 people in dormitories with communal living and dining areas is on a scale larger than a typical family home, so is unlikely to be a dwelling.

Example 2

A large family home that is the home for a single household would be a dwelling even if it has extensive facilities for visitors.

Example 3

A house where occupants rent an individual room and share communal facilities is also likely to be a dwelling because it is on the scale of a single household home even though it is not currently being used as such.

Excluded property

(8) Property that would otherwise be part of a dwelling is not part of a dwelling if it is excluded property.

Clarifying uncertainty

(9) However, if the regulations state that buildings, vehicles, or structures (or parts of them) of a particular class are or are not dwellings, a building, vehicle, or structure in that class is, or is not, a dwelling (as the case may be).

(10) The Minister must not recommend the making of those regulations unless satisfied that doubt has arisen about whether that class of buildings, vehicles, or structures are dwellings and that it is desirable for regulations to clarify the matter.

(11) To avoid doubt, a building, or part of a building, is not a home or holiday home (and is therefore not a dwelling under subsection (1)) if—

(a) it is used to provide temporary or transient accommodation, being accommodation that is ordinarily provided for periods of less than 28 days at a time (such as a hotel or motel); or

(b) it provides accommodation for persons who are not living there voluntarily (such as a prison); or

(c) it is used primarily for a purpose other than accommodation (such as a hospital or an emergency care facility).

The definition in s 6 appears to be broad enough to cover a fully-self-contained residential building. It should also cover a building that contained only sleeping accommodation, for example, and where cooking, eating, living and bathroom spaces were in another part of a complex, or 'appurtenant structure', where "they are for the exclusive use of the owners or other occupants of the dwelling" (s 6(5)). It is not clear that they would count as a dwelling if the shared spaces were for a number of different families to share; this seems more like a campground, which is explicitly used as an example of something that does not count as a dwelling. It would be similar if the shared spaces were common or joint property: common or joint property does not count as an "appurtenant structure" (s 11(2)), although there may be an exception for a mixed-use building (in s 13(1) and s 14(1)).

The size of the accommodation is also extremely important. An accommodation building is not a dwelling if (a) it is "on a scale larger than is typical for use as the home of a single household; and

(b) it is not intended by the owner to be used as the home of a single household."

This clearly raises questions about what counts as a "single household" – which is relevant to whanau vs nuclear family - and how large it has to be before it is held not to be a single household. Helpfully, the examples rule out hostel-type accommodation as a dwelling, but rule in large houses with visitor accommodation, even including some with room for rent (if they are on a 'single household' scale).

An additional definition and clarification of the application of s 6 to large-scale holiday homes was made by regulation on 1 July 2024:[62]

4A Large-scale accommodation: holiday homes

[62] Regulation 4A: inserted, on 1 July 2024, by regulation 4 of the Natural Hazards Insurance Amendment Regulations 2024 (SL 2024/75). Italics added for emphasis.

(1) This regulation applies for the purposes of section 6(9) of the Act.
(2) A building, or part of a building, is a **dwelling** if ***all*** of the following apply to it, subject to subclause (3):
(a) it meets the criteria in section 6(1)(a) of the Act:
(b) it is—
(i) used by 1 or more persons as their holiday home; or
(ii) capable of being, and intended by the owner to be, used for the purpose set out in subparagraph (i):
(c) it is used to provide accommodation on a scale larger than is typical for use as the home of a single household:
(d) it is not used by any person to live in as their home:
(e) it is not intended by the owner to be used by any person to live in as their home.
(3) The following provisions of section 6 of the Act apply with the modification specified (if any) to the application of the criteria in subclause (2) to a building, or part of a building:
(a) section 6(3), (4), (6), and (11), as if the reference in each provision to section 6(1) of the Act were a reference to subclause (2):
(b) section 6(5), as if the reference in the provision to section 6(1)(a) of the Act were a reference to subclause (2)(a):
(c) section 6(8).

It appears that this definition could accommodate a building for a larger-than-typical-household, as long as it was self-contained with bathroom and kitchen facilities (while this can include some appurtenant structures), and was not for living but was for short, holiday stays, including for wider whanau visits to a rural marae, for example.

In contrast, most tiny homes would be unlikely to be classified as a dwelling. Most tiny homes are built on trailers so as to be able to be transported easily. Section 6(6) classifies these as vehicles and not buildings. Unless regulations are made changing this classification, such tiny homes would need to be made immobile and fixed permanently to the ground in order to count as dwellings as opposed to vehicles.

Transitional housing, as per the intended Whare Manaaki Tangata model, may or may not count as a residential dwelling. Under s 6(11), it is not a dwelling if "it is used to provide temporary or transient accommodation, being accommodation that is ordinarily provided for periods of less than 28 days at a time (such as a hotel or motel)". The transitional accommodation under the Whare Manaaki Tangata model is clearly designed to be temporary or transient, while waiting for permanent housing. For the people living there, it is like staying in a hotel or motel (albeit without

charge). Offering it for more than 28 days at a time will not necessarily change that status because the provision only states that it is "ordinarily" for periods of time less than that. Moreover, transitional housing may not fall within the exception for large-scale holiday homes in regulation 4A, quoted above. The transitional housing purpose may not count as a "holiday", and, even if it was, it needs to be intended for the owner's holiday. Therefore, transitional housing may not be eligible for natural hazards cover, if the purpose of such transitional housing was clearly for the short-term stays while waiting for permanent housing. If it was considered desirable to offer natural hazards cover for this kind of accommodation, it would have to be especially provided for, such as by regulation.

Also relevant to determining eligibility for natural hazards cover is the complicated and detailed set of provisions governing whether there is more than one dwelling within one overall building, mixed use buildings, and common, joint, and shared property and infrastructure. Coverage thus depends on the precise set of facts, including the fire insurance policy holder(s). The authors of this report thus won't enquire into this further at this stage, based only on speculation about future forms of housing on Māori land. If further examination was specifically requested, it could be undertaken on the basis of fact scenarios.

Despite not looking at all of the possible details, this brief discussion of these examples shows that natural hazards cover may not be available for all of these suggested options for housing that is more in line with Māori cultural needs. If it is considered that even some such forms of housing should attract statutory natural hazards cover, then clarification of dwelling status could be made via regulation (as described in s 6(9)). However, some – such as the student hostel suggestion – are arguably clearly intended to be excluded by the definition. This would need discussion as to whether natural hazards cover should be provided and how that would fit with the other aspects of the overall scheme, including whether any other changes would need to be made for consistency.

It appears that the new legislation has been drafted with a nuclear family in mind rather than a wider, whanau-based "single household". This is indicated by the use in the example of a reference to "typical family" when referring to "on a scale larger than a typical family home". However, it may still be possible to take an interpretation of the words that stretches them as far as possible to

accommodate a wider whanau. This is possible because of the requirement to interpret words in order to uphold the principles of the Treaty, as well as in line with tikanga (as discussed in more detail below, in Part D). If the cultural values of manaakitanga and whanaungatanga suggest that a student hostel, for example, operates more like a single household than a normal commercial hostel, it may be possible to argue that it should be included. (Especially if there were many fewer than 100 beds.) With such cultural values, as well as being in light of a housing and cost of living crisis, and crisis of isolation and dislocation among youth, an interpretation in line with both Treaty principles and tikanga could potentially see it classed as a dwelling. However, this kind of dispute over insurance shouldn't have to go to court in order to decide. It should be clearer at the outset.

Recommendation:

It is suggested that matters like this be discussed with a possible view to clarification, at least in policy documents about approaches to be taken to interpretation of the legislation, and possibly also in regulation in order to make it even clearer.

Tuawhetu: Remedies for natural hazard damage

What counts as physical damage

Some thresholds in the legislation require 'physical' damage for a claim or a particular remedy. For example, physical damage to land is required for a finding of increased flooding vulnerability (IFV). The remedy for IFV is compensation for reduction in the land's market value. It has been held in *Kraal*[63] that an order prohibiting entry to a building due to an unstable rock face behind it does not count as physical damage, so no compensation accrued. Leaving aside the issue of market value for Māori land, what if a situation such as in *Kraal* resulted in an argued loss of mauri or diminution in the wairua of the land. Under a Māori worldview and tikanga, that would count as damage to the land itself, because of the integration of the physical and the spiritual. But we suspect that no lawyers and judges would interpret 'physical damage' this way under the mainstream, Western worldview where the physical is distinguished from the spiritual.

However, if tikanga were applied to help interpret the statute, along with the principles of the Treaty such as the active protection of the land and other taonga, and of matauranga relating to it, then there is certainly an argument that courts may uphold the Māori worldview. If this could be the case, it raises the issues of what the remedy for that damaged land should be, and how it should be valued.

Under tikanga and Treaty principles, we expect that the remedy could actually be to undertake actions to restore the mauri. This might entail removing any large deposits on the land (such as debris), for example, and removing risks of further dangers to people using the land. Some examples are discussed below in Part D on Treaty principles. Of course, every situation is different so we cannot suggest what the result will be in any given situation. However, NHC-TTA has a responsibility to consider such issues and make decisions and policy that are consistent with tikanga and Treaty principles where possible. This will entail consultation with relevant landowners as a matter of process. This will be needed at least after any claims are made, in order

[63] *Kraal v Earthquake Commission* [2015] NZCA 13, [2015] 2 NZLR 589.

to handle each appropriately. It would also be sensible to consider this more generally beforehand, in order to develop an appropriate policy for handling such issues. It may also entail trying to accommodate a substantive result that is in line with restoration of mauri, for example. Suggesting any legislative reform is premature at this stage, but a policy discussion should at least be started.

Market value

The market value of a property is relevant to determining what can be paid in respect of any claim for natural hazard damage to land. As per s 39(2), the "land claim entitlement is the lesser of the actual loss suffered… and the land cover cap" (minus the excess). The actual loss suffered is in turn calculated by using the reinstatement cost or diminution of value or a combination of both, (where it "can be reasonably quantified" using those methods).[64] In deciding whether to use reinstatement, it must be considered whether it "would be disproportionately expensive compared with the diminution of value if the land were not reinstated".[65] Further, the Act caps a claim for damage to residential land according to its market value.[66] Another place where we see market value used is in respect of compensation for increased flooding or liquefaction vulnerability of land, because it may be not technically feasible to reinstate the land; this compensation will be based on diminished market value of the land. As a general principle, the use of market value is reasonable, as it ensures that the Crown is not made liable for disproportionate, unfair or irrational settlement outcomes. However, for Māori land, "market value" is a problematic measure.

The purpose of TTWMA 1993 is to promote the "retention" of Māori land. In simple terms, the very point of Māori land is that it never enters the market. Even where it does enter the market (for example, in a mortgagee sale, as discussed in the case study below), the price that land achieves is *significantly lower* than the price an equivalent parcel of land would receive. This is not a result of any systemic defects in Māori land. Instead, the lower market price is a result of the requirements in TTWMA 1993. If, for example, a non-Māori buyer acquires Māori land in a mortgagee sale then that non-Māori buyer can only utilise the land according to TTWMA 1993.

[64] Section 40, 'Actual loss suffered'.
[65] Section 40(3)(a)(iii).
[66] See, eg, s 39, 'Land claim entitlement', s 40, s 43, "Land cover cap", along with s 44 'Assessed market value'.

In short, even a non-Māori owner of Māori land is bound by TTWMA 1993. That is a significant administrative and statutory burden. The market for Māori land - so far as it exists – prices in that burden with Māori land achieving a much lower sale price than an equivalent block or parcel of general land. That makes the "market price" cap problematic for Māori owners. It would be expected that any settlement offer to collective owners would be at a much lower price than for an equivalent block with the status of general land. The statutory cap would thus likely discriminate against collectively-owned Māori land. Even where NHC-TTA works to prevent the discriminatory or inequitable application of its enabling legislation, the land cover cap provision is clear so it would need to be followed and applied.

Repair or reinstatement vs monetary compensation

In settling a claim, NHC-TTA has a range of methods available to it, including electing to pay out damage to land instead of repairing or reinstating it.[67] As discussed above, Māori landowners could be worse off if paid monetary compensation, due to both the formula for calculating the land value, and the fact that that Māori land has a lower market value than other land.

As a practical matter under the previous (similar) legislation, it was noted that EQC has accounted for land in need of extensive remediation as a percentage of the area land lost from the total. For example, 5% of a section worth $200,000 may be lost, entitling the owner to $10,000, whereas the full cost of repairing or securing the section could be over $100,000.[68] In such situations, it is likely that – not unreasonably - NHC-TTA would elect to make a payment rather than to reinstate, based on the comparison of cost and value. As this example shows, if only a proportion of the land is damaged, the lower the market value, the less likely it is that any repair or reinstatement would be chosen. However, for Māori land, or any ancestral land that was taonga tuku iho, even if in fee simple title, repair or reinstatement may be of overriding importance. This may be particularly so

[67] Section 61, Natural Hazards Insurance Act 2023.
[68] This example is from Paul Michalik and Christopher Boys *Insurance Claims in New Zealand* (LexisNexis, Wellington 2015) at 19.4.

if it was a matter of upholding and/or restoring mauri that might have been diminished as a result of the damage (such as due to debris and/or inundation).

In respect of the equivalent provisions in the1993 Act, The High Court in *Earthquake Commission v Insurance Council* noted that, first, the Act has an emphasis upon repair and reinstatement[69] and, secondly, that EQC ought to take into account the reasonableness and proportionality of repair costs when deciding how to settle a claim.[70] These provisions were meant to allow EQC to make a payment for the diminution of value when repair costs were out of proportion but were still under the statutory cap. There is no reasonable interpretation of the section which allows for payment in excess of the land value. Within this framework, the HCt also said that EQC could not always discharge its obligations by simply compensating for loss of market value,[71] because the specification of three settlement options (payment, replacement and reinstatement) suggested that repair and reinstatement costs must be available in "appropriate cases".[72] The Court stated that "the appropriate indemnity response will be a question of fact to be determined in the particular circumstances of each case".[73]

Recommendation:

We suggest that a survey could be undertaken by NHC-TTA to assess how these provisions have been applied to Māori-owned land. It could be examined to see if repair or remediation options were reasonably open to be taken and whether they were actually chosen or not. It could be considered to what extent there is policy discretion available when making this choice, to be more consistent with Treaty principles and tikanga such as in relation to protecting the taonga tuku iho, including its mauri where appropriate and possible. Consideration could be given to issuing policy guidance to decision-makers to ensure that decisions on the methods chosen to settle claims are appropriately consistent with such requirements, within the parameters of the Act.

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[69] *Earthquake Commission v Insurance Council of New Zealand* [2014] NZHC 3138, [2015] 2 NZLR 381, at [111].
[70] *Earthquake Commission v Insurance Council of New Zealand* [2014] NZHC 3138, [2015] 2 NZLR 381At [122].
[71] *Earthquake Commission v Insurance Council of New Zealand,* At [108]-[110].
[72] At [110]: "The Act contemplates that the Commission may settle claims for natural disaster damage to residential land by meeting repair or reinstatement costs in appropriate cases. The Commission's option of replacing or reinstating damaged property, instead of paying the amount of the damage, applies to all insured property, including residential land."
[73] At [122].

Relocation

Relocation of a residential building is also a potential method for settling a claim for damage to a building.[74] In 2018/2019, we gather that EQC did not have a policy on the use of relocation: for example, EQC did not have a presumption in favour of relocation of buildings for properties that suffered landslip damage, or where recurrent flooding, cliff/hill instability, or sea-level rise threat was a significant issue.[75] The location of residential sites on land that is taonga tuku iho may have high cultural significance. The development of a relocation policy for Māori-owned land could thus be considered, even if only in respect of procedures rather than fixed outcomes.

Options for relocation of dwellings could perhaps be expanded to other land taonga tuku iho if the particular claimant's land was no longer suitable. This would need to be considered with a wider discussion than just with the landowner post natural hazard damage, such as involving the hapū or other owners of relevant land taonga tuku iho. Section 65 of the Act already enables a residential building to be relocated to another site. It could perhaps be considered how the two requirements in s 65(4) are best implemented in respect of Māori landowners and land taonga tuku iho:

> If property is relocated under subsection (1)(b),—
> (a) the Commission must ensure that the insured person is given an estate or interest in the new site that is equivalent to, or greater than, their estate or interest in the original site; and
> (b) the land at the original site is then salvageable property for the purposes of sections 82 to 85.

Recommendation:

We suggest that this be further discussed within NHC-TTA, with consideration being given to developing relevant policy on this, and/or whether a regulation or law change is necessary. Comments on the second requirement in relation to salvage, in particular, follow below.

[74] Section 61(1)(d).
[75] See, eg, V James, Catherine Iorns and J Watts, *The extent of EQC liability for damage from sea-level rise* (Deep South National Science Challenge, 2019).

Salvage

This (inequitable) application of the Act could flow through to impacting operational decisions as well. For example, in exercising the right to salvage under s 82, NHC-TTA could inadvertently breach its obligations to Māori by acquiring the title to Māori land as "salvage" under s 84, which sets out the rules for salvage by acquisition of title to land. The salvage provisions exist to help ensure NHC-TTA can recover some value where a write-off was granted and paid out, but a re-sale value exists in the remaining dwelling or land.

Unfortunately, when NHC-TTA is making the decision to settle a claim via repair or write-off, the legislation does not explicitly require the decision-maker to take into account whether there is an obligation to maintain ahikaaroa. If there is such an obligation, then it would be expected that consistency with both tikanga and the application of Treaty principles would at least require this to be taken into account in respect of marae homes, papakāinga homes or Māori land. The Public Inquiry into NHC-TTA reinforces this point, writing that "tangata whenua responsibilities to look after and stay on the land and remain in a whānau home also need to be taken into consideration in EQC's processes".[76] In other words, the obligations of ahikaaroa are relevant in operational decisions whether regarding repair, write-off, salvage or any other matter.

We suggest that such consistency may also go further and *prevent* the use of salvage. First, salvage conflicts with TTWMA and the need to retain Māori land in collective Māori ownership. Second, interpreting the Act in line with Treaty principles and tikanga require the active protection of Māori land and its retention in Māori ownership. Sections 84 and 85 only provide a discretion to exercise salvage; they do not mandate that it be used. It is thus possible to take an interpretation that upholds the Treaty principles and tikanga, to say that in such situations salvage should not be used. There are certainly very good legal arguments that this discretion would be limited by a Court. It is preferable to not have to go to Court to find this out; we thus recommend that such a direction probably should be issued as a matter of internal NHC-TTA policy.

[76] *Report of the Public Inquiry into the Earthquake Commission* (Public Inquiry into the Earthquake Commission, March 2020) at p. 181.

C: Examples from other contexts

This report has identified several *complications* within the 2023 Act. Although the Act creates no deliberate exclusions among the different forms of housing covered, and so no deliberate discrimination or inequity is intended, it might still operate in a manner that does not capture the unique aspects of Māori social organisation. This includes dealing with marae and the collective ownership of housing and land.

The following case studies describe situations where commercial practice and the law do not properly capture Māori social organisation. The first case study examines "whata orders", a legal innovation where Māori landowners convert the status on their land in order to secure a mortgage. The second case study examines iwi that negotiate consolidated insurance products for their tribal marae. What each of these case studies share in common is an innovation when commercial practice and the law lag behind the needs of the community. These case studies aim to illustrate how, in the absence of reform, Māori communities undertake their own initiatives to meet their needs. The third example in this Part summarises some issues that have been identified in the Māori Land Court to do with ownership of Māori land.

Tuawaru: case study - turning to "whata orders" when the law lags behind commercial practice

The common law courts often understand their roles as primarily adjudicative, not determinative. Commentators often deride judges - and judges are known to deride themselves - for "discovering" law as if the principles of justice wait patiently atop the mountain eager for an enterprising judge to reveal their meaning.[77] That exalted stereotype is decades out of date, at least in commercial matters where the courts, rather than taking a determinative role, often fall back on their adjudicative functions. In the words of the late Lord Goff, the common law courts "are there to

[77] See: https://www.jstor.org/stable/3143421

help businessmen, not to hinder them: we are there to give effect to their transactions, not to frustrate them: we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil."[78] This principle, where the courts seek to facilitate commerce, travels well. In the Māori Land Court the bench often seeks to do just that. The following case study examines why and how.

Te Ture Whenua Māori Act 1993 balances two sometimes contradictory objectives: first, to promote the "retention" of land in the hands of its Indigenous owners; and second, to "facilitate the occupation, development, and utilisation of that land for the benefit" of those same Indigenous owners.[79] The Act balances those objectives well protecting Māori land from alienation while providing mechanisms for owners to lease, build or otherwise develop their land as they see fit. But a significant result is that owners often struggle to access private finance to build or develop their land.

One of the distinguishing features of Māori land is that it is not easily sold. If an owner or owners seek to alienate their interest in Māori land, they must first offer that interest to what the Act terms a "preferred class of alienees".[80] This class includes:

- The children of the alienating owner;
- whānaunga of the alienating owner who are associated with the land in accordance with tikanga Māori;
- other beneficial owners of the land who are members of the associated hapū; and
- descendants of any former owner who are or were members of the hapū associated with the land.

When any other owner seeks to sell their general land, they can enter the open market as they see fit. But the purpose of Te Ture Whenua Māori Act 1993 is to promote the *retention* of Māori land and so, to reflect that purpose, the Act creates a series of statutory thresholds before any owners of Māori land can alienate their interests. Commentators acknowledge that colonisation, and the

[78] Rt Hon Sir Robert Goff "Commercial Contracts and the Commercial Court" [1984] LMCLQ 382.
[79] Te Ture Whenua Māori Act 1993, Preamble.
[80] TTWMA 1993, s 4.

confiscations and other alienation of lands that define it, has resulted in only 6 percent of New Zealand land retaining the status of Māori land. This means that it should all be retained as Māori land and be protected from alienation as far as possible (absent an overwhelming reason to the contrary). Yet these statutory thresholds generate a difficulty that the Act's drafters may not have foreseen: the protections against alienation mean private financiers - including banks - are wary to accept Māori land as a form of security for home or business loans.

When banks will not extend loans

When TTWMA was passed, Parliamentarians and the Government were aware that the strong protections against alienation made financing difficult for reasons of security. Private financiers would not accept Māori land as security if the Act drew tight boundaries around who could purchase the land in an event of a default on the loan and a subsequent mortgagee sale. Under the Act a mortgagee sale must occur among the preferred class of alienees *first*. In effect, the Act would force the lender to offer the land to a class of people that could include the defaulters. It was a paradox, but Parliament was aware of its perverse consequences. No lender would ever offer finance against Māori land if they had no prospect of recovering their money in a mortgagee sale on the *open market*. For that reason the government attached an important qualification to the Act: for the purposes of the Act, a mortgagee sale is not an alienation.

The hope was that this qualification to the meaning of an alienation, excluding a mortgagee sale, would function as a guarantee to private financiers: if you take Māori land as security, and a default occurs, you can initiate a mortgagee sale on the open market. Yet this legislative change did not offer private financiers enough reassurance to calculate that the risk of lending to Māori landowners was low enough to proceed; there are very few private financiers taking Māori land as security for loans.

The ability to initiate a mortgagee sale when a default occurs means that there are no legislative barriers that would cause a lender to withhold finance. However, there are notable commercial and practical barriers that occur *after* the point of sale. The most significant barrier is that a purchaser

who acquires Māori land in a mortgagee sale is *still subject to TTWMA 1993*. That means the purchaser in a mortgagee sale can only dispose of or on-sell the land to the preferred class of alienees under s 4. The circularity of the Act - or the controlling purpose in the form of retention - asserts itself again. For example, if a Pākeha farmer acquires a block of Māori land in a mortgagee sale, and the requirements of TTWMA 1993 frustrate their development plans and they decide to sell it, then that farmer can only dispose of the land to the preferred class of alienees who may have lost it in a default in the first place. The consequences of this are dire for lenders. Even though the lender can insist on their security in the event of a default - ie offering the Māori land in a mortgagee sale on the open market - the price that land achieves on the open market will likely be less than for similar land, and perhaps not enough to recover the balance of the loan. The price is lower because buyers on the open market are purchasing on the understanding that the land retains the status of Māori land, meaning it retains certain administrative burdens and bars on alienation. That drives down the price achievable at a mortgagee sale.

Māori landowners and the Courts have instead turned to whata orders. Under s 164, Māori landowners can apply to the Māori Land Court to convert their land to the status of general land in order to secure finance. If Māori landowners enter a lending agreement after converting the status of their land to general land, then lenders can, in the event of a default, insist on their security and sell it in a mortgagee sale at market price. The reason the land is more likely to achieve market price is because the subsequent buyer is no longer bound by Te Ture Whenua Māori Act 1993 – ie the buyer now is purchasing general land, not Māori land, and so they can on sell it without first offering it to a preferred class of alienees.

The danger of a whata order is that it transfers risk to the Māori land owners. If they satisfy the terms of their loan, they can apply to the court to reconvert their land to Māori land at the end of the loan term. But in the unlikely event of a default, the Māori landowners risk losing their land entirely. In the absence of the whata order, the lender takes on the greater burden of risk, accepting that Māori land may not achieve the same price at a mortgagee sale as general land. But the whata order redistributes this risk, transferring the greater part to the Māori land owners. They are the party who risk losing their land, possibly forever, in the event of a default.

For many owners, even the unlikely risk of losing their land in a mortgagee sale is intolerable, and they will not take the risk. That intolerance for risk is not an innate part of the Māori character but simply reflects the history of colonisation, where Māori lost approximately 95 percent of their land to confiscation or sale. The 5 percent that remains is precious – a "taonga tuku iho".[81] Yet the whata order remains an example of how creative but risky solutions may be found where statutory rules are not mindful enough of real-world commercial considerations.

Tuaiwa: case study - consolidated insurance products where risk is priced too highly

The whata orders discussed in the previous section provide an example of how Māori, with assistance from the courts, can leverage legislative provisions to create their own commercial solutions. Whata orders help Māori landowners secure private finance, temporarily converting their land to general status for the term of a loan or mortgage. But the risks of turning to a whata order are immense.

The cynic could argue that whata orders exist to overcome the problem of collectivity. But Māori groups, in both historical and contemporary times, rightly identify their collective social, political, and economic structures as a *strength.* This strength unfolds across Māori social and economic life and has produced creative solutions to housing and insurance. For example, several post-settlement governance entities (PSGEs) offer shared equity schemes to help their members into their own home; other PSGEs subsidise health insurance for their members. This turn to collectivity aims to reverse the disparities in home ownership and health outcomes that impact Māori. The same turn also applies to insurance schemes where Māori - principally through their Marae - struggle to obtain the necessary cover.

[81] Te Ture Whenua Māori Act 1993, preamble.

The Reserve Bank reports that marae tend to bear the burden of "extremely high insurance premiums".[82] This is not necessarily because marae are subject to greater risks than other customers. For example, the marae is not inherently more risky than the community hall. Instead, the high premiums are typically a function of history and geography. The majority of marae are rural or provincial. That means a significant number of marae do not enjoy access to council water supplies, relying instead on their own supply, and many are unacceptably distant from the nearest fire station or difficult for fire appliances to access. Additionally, many marae are coastal or flood prone; for example, Ngāi Tahu count all of their marae as coastal or riverside, meaning climate change will produce compounding risks. Several hapū are in various stages of managed retreat, removing the bones of their ancestors or their ancestral meeting houses as the sea or more frequent floods encroach on banks and floodplains.[83] For marae subject to these interlocking risks - remoteness and a changing climate - insurance premiums are sometimes unacceptably high.

On its face, this is a commercial problem. Insurance companies are undertaking commercial judgements, weighing risk and pricing it according to their own ordinary methods. Of course, part of the problem is contained within those methods, such as the difficulty in pricing the irreplaceable heirlooms of the wharenui. But the greater part of the problem is contained within colonial history and geography and the magnified risks that marae face because of it. This is where the extremely high premiums are sourced. In response, iwi and hapū are increasingly turning to their own commercial solutions, assessing risk and responding accordingly. For example, several iwi, in partnership with insurance companies themselves, offer consolidated or collective insurance products for the marae that whakapapa to their PSGE or trust board.

The consolidated product is straightforward: insurance cover for multiple marae is organised into one policy. That consolidation offers administrative efficiency for the participating marae. For example, under Waikato-Tainui's scheme, the PSGE covers the premiums and organises the claim process on behalf of marae. It also offers risk pooling benefits for the insurer; this is where the insurer pools similar risks, which decreases the margin of uncertainty (as aggregate claim costs

[82] Roanna McLeod and Victor Lam *Māori Financial Services Institutions and Arrangements* (Reserve Bank, 2021) at p. 6.
[83] For example: "Climate change 'the challenge of our lifetime': Ngāi Tahu" (1 October 2023) Otago Daily Times <https://www.odt.co.nz/news/national/climate-change-challenge-our-lifetime-ng%C4%81i-tahu>

generally become more predictable as the number of risks rises) and passes on those improved margins in the form of cheaper premiums. According to the Tūwharetoa Māori Trust Board, participating marae in their consolidation scheme made an 18 percent savings on their original, unconsolidated premiums in 2014.[84] To date, several major iwi offer their marae consolidated products, including Te Rūnanganui o Ngāti Pōrou and Te Pūmautanga o Te Arawa Trust.[85]

On this analysis it would seems as if iwi - or at least their PSGEs - were resolving the issue of poor insurance coverage for marae. The Tūwharetoa Māori Trust Board, for example, covers the premiums for all of the marae of their iwi. But consolidation implies scale. The greater the scale - or the more policies pooled into one - the greater the reduction in premiums. But several iwi are yet to settle, meaning their mandated iwi organisations - the precursor to PSGEs - lack the cash flow and the capitalisation to cover the cost of premiums. In 2019 the annual cost of insurance premiums for the 27 Marae of the Tūwharetoa Māori Trust Board was $288,000 covering a total asset value of $71m. For iwi who are yet to settle with the Crown, so yet to receive financial redress, this may present an insurmountable barrier.

There is an additional and perhaps more obvious point: few iwi are as large as Ngāti Tūwharetoa (or Waikato-Tainui, Ngāti Porou, Te Arawa or the other iwi offering consolidated marae insurance). The majority of iwi count only a few thousand members and a handful of marae. Ngāti Hinerangi of the Matamata region, one of the more recent iwi to settle, counts only four marae and 1320 members. Ngāti Rangitihi of the Eastern Bay of Plenty, another recent iwi to settle, counts only one marae and 2,298 members. As per its Red Book, the Crown prefers to settle with "large natural groupings", meaning a good number of iwi PSGEs will achieve the scale required for consolidation benefits to accrue. But the definition of large can vary between 1000 (Ngāti Hinerangi) and 100,000 (Ngāpuhi), and anywhere in between. For smaller iwi, the benefits of scale and consolidation simply will not apply. It's unlikely that Ngāti Hinerangi, with its very modest financial quantum, could significantly benefit from consolidating only four policies.

[84] McLeod & Lam *Māori Financial Services Institutions and Arrangements,* above n 82, at 30.
[85] Idem.

This reinforces the fact that, where there is uncertainty, Māori will find creative ways to achieve their ends. With whata orders, landowners leverage legislative provisions to help access private finance. With consolidated insurance products, marae leverage existing commercial practices to overcome historic, geographic, and financial barriers. In each case study a general solution is lacking. Whata orders imply a high degree of risk, and an unacceptable loss where a default occurs. But there are few other options for many landowners wishing to access private finance. Similarly, consolidated insurance products work where there is scale and resource. But there has not yet been any solution when that scale and those resources are absent.

From the outside, consolidated insurance may not appear as a strictly "legal" solution. But on one view it is a form of contracting, and thus a "legal" tool deployed in service of a commercial solution. It is not, however, a general legal solution to the challenges that marae encounter when attempting to access insurance. This point leads into the report's later discussion of the role of the Crown in developing general solutions.

It is also unclear whether and how consolidated insurance may be used in the context of natural hazard cover. For example, it may be a helpful tool to encourage Māori residential dwelling owners to obtain insurance if they do not currently. But it would first have to be ascertained that Māori residential dwelling owners were indeed not obtaining insurance due to the high cost of premiums. Second, if it was only a matter of natural hazard insurance, a more direct solution would be utilising the option of obtaining insurance directly with NHC-TTA itself instead of obtaining a more comprehensive fire insurance policy.[86]

[86] Natural hazards cover may be obtained directly from TTA-NHC, without a fire insurance policy: s 48, Natural Hazards Insurance Act 2023.

Tekau: equitable ownership of dwellings on Māori Land

One of the bedrock rules of Māori land law is that, where an owner in a collectively-owned block builds a home or structure affixed to the land, then the collective owns that home or structure.[87] This is the rule in *Tohu - Te Horo 2B2B2B* where the Māori Appellate Court finds that a dwelling, if affixed to the land in question, forms part of the title to that land. In plain language that means every owner to the title to the land also owns the dwelling.[88] But there is also an exception to this rule: the Māori Land Court maintains an equitable jurisdiction to award the title in a dwelling to the person who built or occupies it.[89] That equitable jurisdiction recognises that, in some cases, the general rule could create an injustice; so the Court reserves the right to take several considerations into account when deciding whether to exercise its equitable jurisdiction, from the length of occupation of the dwelling to the payment of rates and insurance. In *Herewini - Maungaroa* the Court did just that, exercising its equitable jurisdiction to award ownership of the dwelling to the applicants (as opposed to the land owners at large); this reflects how the applicants were maintaining ahi kaa, were not excluding other owners, and were investing in improvements.

Importantly, equitable ownership is not the same as legal ownership. Equitable interests are "engrafted on to, not carved out of, the legal estate".[90] For Māori land, legal ownership (or legal title) confers the right to control the land in accordance with TTWMA 1993 and the law generally. Equitable ownership (or other equitable interest) confers the right to enjoy the benefits that come with the ownership of property despite the equitable title holder *not* necessarily being the legal titleholder. This means the equitable owner can enjoy the benefit of occupying a dwelling, but that owner cannot dispose of the dwelling or land or otherwise make controlling decisions.

The legislative scheme provides natural hazard cover for residential buildings as well as residential land. In ordinary circumstances this twin approach to coverage is likely uncontroversial. The homeowner (whether the home is individually, jointly or corporately-owned) is usually also the

[87] Tohu – Te Horo 2B2B2B (2007) 7 Whangārei Appellate Court MB 34 (7 APWH 34).
[88] In the same proportion as their ownership to the title to the land.
[89] Herewini – Maungaroa 1 Sec 23K (Keterau) (2013) 85 Waiariki MB 141.
[90] *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 at [311].

land owner. But for claims arising from dwellings affixed to Māori land the ownership structure is not so clear cut. The equitable dwelling owner might maintain the fire insurance policy, meaning their policy and premiums secure a benefit for the dwelling and the land in the event of an insurable event, yet that equitable owner is not necessarily the *legal owner*. The legal ownership would reside with a Trust or Incorporation under TTWMA 1993 or with multiple individuals. In this situation it needs to be clear who secures the benefit of cover after an insurable event.

At first, this appears simple. Where the equitable owner of a dwelling affixed to Māori land is the policyholder then that policyholder is, at contract, entitled to the benefits their premiums secured. The equitable owner, then, is entitled to their insurance settlement in relation to the dwelling. But typical private insurance policies do not necessarily cover the residential land, even though the natural hazards legislative scheme does. Thus, in relation to the residential *land*, the natural hazard cover benefits the equitable owner that is secured in the form of their fire insurance policy, and a claim is not payable to the legal owners - whether a trust, incorporation or multiple individuals. Under the 2023 Act the "insured person" - in this example, the equitable owner with the fire insurance policy - is entitled to the benefit of natural hazard cover. This distinction is quite clean. But in real world situations the distinction could break down. Where the equitable owner's insurance company is required to undertake remedial work to the residential land in order to repair the insured dwelling, the insurance company might seek an assignment of benefit of the natural hazards insurance for the appurtenant residential land so that it can properly repair the dwelling. This occurred following the Christchurch earthquake 2011. In this situation the equitable owner secures the necessary repairs to the dwelling if the legal owners agree to an assignment of their benefit to natural hazards insurance for residential land. But what happens if the different legal owners dispute the assignment? It could be unfortunate if the equitable owner makes a natural hazards insurance claim to the dwelling *and* the land, and then NHC-TTA settles the residential land claim with the equitable owner rather than the legal owner.

This remains speculative. The researchers have not found any cases involving Māori land and natural hazards cover before the Māori Land Court. Several cases do often turn on the payment of

insurance premiums and the right to occupy or maintain an equitable interest[91], but the distribution of the benefits of natural hazards cover in relation to Māori land appears to remain untested. It is thus posed as something for internal discussion by NHC-TTA, possibly with a view to developing a policy on procedures and/or substantive matters where claims arise involving Māori land.

D: Tikanga and Treaty principles

Tekau mā tahi: Tikanga

As discussed above, tikanga is its own autonomous legal system operating independently from 'Crown law'.[92] As stressed above, the legal system in Aotearoa NZ is based on parliamentary sovereignty and the supremacy of what can be called Crown law. Parliament ostensibly has the power to make whatever law it wants, including overriding courts and tikanga. However, despite this general priority of Crown law, New Zealand courts have established that tikanga is a system of indigenous law for Aotearoa that can be referred to as applicable law in appropriate circumstances.[93] It can be used to help interpret legislation, whereby the court will strive to choose an interpretation that is consistent with tikanga where that interpretation is open to it.[94] In 2022, the Supreme Court determined that tikanga could be used more widely.[95]

This legal status is significant for all Crown bodies that operate according to legislation: their interpretations of the law, and thus also their policies and actions under it, need to be consistent with tikanga where that is relevant and possible. It thus needs to be considered what knowledge

[91] See: *Eru - Awanui Haparapara 9 Block* (2019) 211 Waiariki MB 103; *Tawera v Tawera – Waitangi A1A2* (2014) 39 Tairawhiti MB 45 (39 TRW 45).
[92] See above pp 5, 8-9.
[93] Tikanga was first explicitly acknowledged as forming "part of the values of the New Zealand common law" in 2012, in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].
[94] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & ors* [2021] NZSC 127, at [9].
[95] *Ellis v R* [2022] NZSC 115.

that decision-makers under the NHC-TTA legislation may also need in order to better uphold such legal duties. It may entail more than decision-makers currently conceive of as being their duties under the relevant legislation.

A brief introduction to the content of tikanga that could be relevant to decision-making under the Natural Hazards Insurance Act was provided in the Introduction to this paper.[96] Some observations have been made about issues arising in relation to insurance that illustrate potential places where tikanga could be relevant and helpfully considered in decision-making under this Act. Matters of tikanga that could be relevant include:

- kaitiakitanga and practices around upholding the mauri and wairua of taonga;
- practices around upholding the mana of the kaitiaki.

Upholding these may require a lot more procedural and active substantive protection than appears to be undertaken currently. For example, the Supreme Court in *Trans-Tasman Resources Ltd* commented on how kaitiakitanga goes beyond simple guardianship and incorporates whanaungatanga between the kaitiaki and the natural world.[97] The Court acknowledged that kaitiakitanga is both a principle and practice: it "manifests itself in an activity".[98] Moreover, this was protected under "the guarantee in art 2 of the Treaty of tino rangatiratanga".[99] This may have implications for decision-makers, in requiring them to have a deeper understanding of the effects of natural hazard damage and remediation options on matters such as kaitiakitanga and thus on the kaitiaki and their tikanga about relationships with the land.

Consideration of tikanga by courts is relatively new. However, consideration of tikanga is likely to have similar substantive results as the application of Treaty principles would in many applications, at least of statutory interpretation. Treaty principles have been considered by New Zealand courts for more than 30 years; the findings from that is thus discussed in much more detail in the next section.

[96] See above, pp 4-5, 8-9.
[97] *Trans-Tasman Resources Ltd*, above, at [154], n 243, referring to Williams, , at 3; and to Waitangi Tribunal, at 13.
[98] *Trans-Tasman Resources Ltd*, above, at [155].
[99] At [154].

Tekau mā rua: the principles of the Treaty of Waitangi

The Treaty of Waitangi/Te Tiriti o Waitangi is New Zealand's founding document between the Crown and tangata whenua. 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 section summarises the Treaty principles and their application to NHC-TTA. It then turns to relevant claims made to the Waitangi Tribunal and summarises 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 about natural hazards damage as well as risk management and to the interpretation of the responsibilities of NHC-TTA.

The legal status of the Treaty of Waitangi

As mentioned above in the introduction, the Treaty itself is not directly enforceable in courts.[100] It thus needs to be incorporated in statute - ie, by Parliament – in order to be enforceable. Despite this supreme power of Parliament, the courts uphold fundamental principles at the base of the legal system that can affect the duties upon government and upon institutions created by statute. These include principles of legality, the separation of powers, and other fundamental principles of the common law. One key finding of the NZ courts is that the Treaty is part of the fabric of our constitution and that it should be upheld where relevant and wherever possible.[101] Courts will thus assume that Parliament means to uphold its obligations under the Treaty and will interpret

[100] *Te Heuheu Tukino v Aotea District Māori Land Board* [1939] NZLR 107.
[101] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210; affirmed by the NZ Supreme Court in *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801, at [150].

legislation in line with Treaty obligations where it is possible to take such an interpretation. Thus, despite the diminished legal status of the Treaty, courts can require the government to uphold Treaty principles in many situations.

Many New Zealand statutes include 'Treaty clauses': sections specifying exactly how the Crown is required to uphold its obligations under the Treaty.[102] However, whether they are broadly worded or more specific and focused, the courts have held that statutory provisions for giving effect to the principles of the Treaty of Waitangi should not be narrowly construed.[103] Instead,[104]

> "… 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 intention is made quite clear."

Thus, even if the requirement is to merely 'take into account' the effects of an activity on an existing interest, decision-makers must do it "in a manner that recognises and respects the Crown's obligation to give effect to the principles of the Treaty".[105] This means that it will be harder to simply consider relevant Treaty principles but then find them routinely outweighed in the resulting decision. The Supreme Court reinforced that the Treaty of Waitangi is part of the fabric of New Zealand's constitution and thus constitutional law, even where they are not referred to in legislation;[106] there will be greater willingness of courts to infuse these principles throughout decision-makers' obligations.[107] 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.

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[102] For example, s 4 of the Conservation Act 1987 provides that the Act "be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi". Section 8 of the Resource Management Act 1991 requires decision-makers to "take into account the principles of the Treaty of Waitangi". There is a wide range of Treaty clauses, with later ones being much more specific as to the Crown's duties. See, eg, Local Government Act 2002, s 4, and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s12.

[103] See, eg, *Ngai Tahu Maori Trust Board v D-G of Conservation* [1995] 3 NZLR 553, at 558, per Cooke P; *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801, at [151].

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

[105] *Trans-Tasman Resources Limited,* above, at [149].

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

[107] As per *Huakina*, id.

The Earthquake Commission Act 1993 had no Treaty clause nor other requirement on its face to require decision-makers to take any Treaty-based interests into account. Nor does the Natural Hazards Insurance Act 2023. However, any interpretation of the provisions of these Acts by a Court will be conducted in line with previous decisions and with the principle that the Treaty is part of the fabric of our constitution. Any Court will thus assume that Parliament means to uphold its obligations under the Treaty and will interpret the legislation in line with Treaty obligations (where it is possible to take such an interpretation).

Further, the Commission is a Crown entity for the purposes of section 7 of the Crown Entities Act 2004,[108] and a Crown agent listed in Part 1 of Schedule 1 of that Act. As such, its actions can be the subject of Waitangi Tribunal jurisdiction under the Treaty of Waitangi Act 1975. Therefore, any decisions by NHC-TTA that breach the principles of the Treaty can give rise to a claim against the Crown under that Act. It is thus necessary to examine what the Treaty principles are, how they might become relevant to decisions under this legislation, and how they might guide law reform or policy development in this area.

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.[109] The courts have in turn 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 and 'progressively' in the future.[110] It is notable that these minima are still more than

[108] Section 126, NHI Act 2023.

[109] 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 Schedule 1 provided the two texts for the Tribunal to derive the principles from.

[110] 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. For example, Carwyn Jones argues that Treaty principles serve as a distraction which dilute the actual intended effect of Te Tiriti. Carwyn Jones "Tāwhaki and Te Tiriti: a principled approach to the constitutional future of the Treaty of Waitangi" (2013) 25 NZULR 70 at

is explicitly required by the legislation that currently governs NHC-TTA decision-making. It is also worth noting that both the Waitangi Tribunal and the courts draw on additional materials as aids to developing and applying the Treaty principles, including drawing on tikanga.[111]

Further, 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 developments that better uphold tikanga within New Zealand common law, it is likely that more duties to uphold Māori values and tikanga will emerge from both the Waitangi Tribunal and our courts in the future. A summary of the fundamental Treaty principles that have been accepted by courts follows.

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".[112] 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.[113] 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 a focus on iwi or hapū.[114] 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.[115] The right of the Crown to govern is very important and cannot be constantly

704. Ani Mikaere also criticises the use of them as a “misguided attempt to reconcile the irreconcilable” and as “judicial rewriting” of Te Tiriti: Ani Mikaere *Colonising Myths – Maori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 83 and 57 respectively. Despite these criticisms, this is the approach that parliament and the courts have taken.

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

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

[113] See the discussion on "good faith" below.

[114] 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).

[115] It is accepted that this is only specified in the English version of the Treaty, but that is the position in New Zealand Crown law today.

hampered by "unreasonable restrictions".[116] 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 links with the partnership duties of consultation established in *New Zealand Māori Council v Attorney-General* (*SOE Case*).[117]

3 Reciprocity

Reciprocity is an overarching principle that guides the interpretation of other Treaty principles.[118] 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.[119]

4 Active protection[120]

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 all Māori interests under the Treaty are protected. The Waitangi Tribunal "presents the principle of protection as a theme fundamental to the entire document"[121] and is linked to the honour of the Crown.[122] What

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[116] *SOE case*, above n 112.
[117] *SOE case*, at 683.
[118] *SOE case*, at 663.
[119] *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 560.
[120] *SOE case*, above n 112, at 663.
[121] *He Tirohanga o Kawa ki te Tiriti o Waitangi [He Tirohanga],* available at: https://www.waitangitribunal.govt.nz/assets/Documents/Publications/WT-Principles-of-the-Treaty-of-Waitangi-as-expressed-by-the-Courts-and-the-Waitangi-Tribunal.pdf , at p96.
[122] Idem.

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".[123] In case law, such duties have been described as honourable conduct and fair process, and have required historical promises to be fulfilled.[124] Sometimes active protection has been held to amount to mere consultation rights for Māori.[125] However, in other circumstances, the Crown is required to allow Māori to continue to protect those things that are sacred to Māori.[126] But the overriding duty on the Crown is still to take active steps to protect those Article 2 lands, estates, forests, fisheries and other taonga.[127] This includes retaining Māori ownership of and relationships with their land taonga tuku iho.

Taonga are things that are central to the identity of Māori, including language, places, skills, resources, and mātauranga. 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";[128] 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".[129] The Privy Council found that where a taonga is more vulnerable, the duty to protect it might be stronger.[130] 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.[131] Active protection of taonga may

[123] *SOE case*, above n 112, at 663.
[124] 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
[125] *Ngai Tahu*, above n 119, at 560.
[126] Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims* (Wai 2391, 2015), at 13.
[127] 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.
[128] Waitangi Tribunal *Ngawha Geothermal Resource Report* (Wai 304, 1993) at 20.
[129] 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.
[130] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517.
[131] Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims: Stage One* (Wai 1200, 2008) vol 4 at 1234.

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.[132]

In addition to active protection of things covered by Article 2, the Crown also owes a duty of active protection of the Māori people as referred to in Article 3.[133]

> "The Tribunal has elaborated the principle of protection as part of its understanding of the exchange of sovereignty for the protection of rangatiratanga, and has explicitly referred to the Crown's obligation to protect Māori capacity to retain tribal authority over tribal affairs, and to live according to their cultural preferences. Later Tribunal reports also place emphasis on the Crown's duty to protect Māori as a people, and as individuals, in addition to protecting their property and culture."

It has also been expressed as "the protection of the Māori as a people and the assurance to them of equal citizenship rights".[134] This protection under Article 3 has seen matters such as health and child welfare policy subject to assessment as to whether Crown law and policy in these areas breach the principles of protection. It has also seen "a Treaty obligation to protect and facilitate Māori representation".[135]

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".[136] It is a particular role of the Crown to act in good faith to Māori.[137]

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[132] See *Ngai Tahu*, above n 119, 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.

[133] "The Principles of the Treaty as Expressed by Courts and the Waitangi Tribunal", in *He Tirohanga o Kawa ki te Tiriti o Waitangi,* above n121, at p93; available at. As summarised by the same text (citations omitted):

> 'The Preamble records the Queen's desire to "protect the chiefs and subtribes of New Zealand" (in the English translation of the Mäori text) and to "protect [tribal] just rights and property and to secure to them the enjoyment of Peace and Good Order" (in the English text). By Article III of the English text, the Queen extends her "royal protection to the Natives of New Zealand", and in the translation of the Mäori text, the Queen promises to "protect all the ordinary people of New Zealand".'

[134] Te Whänau o Waipareira Report (1998), cited in *He Tirohanga*, at p99.

[135] *He Tirohanga*, at p95.

[136] *SOE case*, above 112, at 663.

[137] *SOE case*, above 112, at 665.

A key sign of good faith as well as partnership is consultation; the Crown should not make decisions without the input of tangata whenua.[138] Moreover, consultation must be meaningful. As held in the case of *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.[139] There can be a proposal, but only 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:[140]

> "… 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".[141]

The nature of consultation with tangata whenua under RMA case law has been summarised as:[142]

(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

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[138] *SOE case*, above 112, at 663.
[139] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA).
[140] *Wellington International Airport Ltd,* at 676.
[141] *Wellington International Airport Ltd,* at 676.
[142] *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].

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.[143] Sometimes significant consultation is required; other times, less is required on the basis that it might "hold up the processes of Government in a way contrary to the principles of the Treaty".[144]

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, for decisions under the RMA, who is consulted depends more on the RMA context.[145] (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.[146] 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.[147] This includes the ability to develop and modify traditional practices, such as to take advantage of scientific developments and modern technologies, for

[143] 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 Catherine Iorns *Treaty of Waitangi duties relevant to adaptation to coastal hazards from sea-level rise* (Deep South National Science Challenge, Wellington, 2019), at Part VI 2.
[144] *SOE case*, above n 112, at 666.
[145] *Beadle v Minister of Corrections* [2002] NZEnvC 124 at [627]–[630].
[146] See for example *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.
[147] *SOE case*, above n 112, at 655–656 per Cooke P.

example, and to uphold the Treaty principle of mutual benefit.[148] 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".[149] As a result, "[t]he Crown is obliged to offer reasonable protection to Maori in the exercise of the rights so guaranteed to them".[150]

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.[151] 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.[152] Any redress is thus made via a Treaty settlement between the claimant and the Crown.[153]

The principle of redress requires the Crown to restore the integrity and mana of the status of Māori.[154] 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).[155]

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

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[148] 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.
[149] Waitangi Tribunal *Muriwhenua Fishing Claim*, above n 148, at 195.
[150] Waitangi Tribunal *Ngai Tahu Sea Fisheries Report* (Wai 27, 1992) at 274.
[151] *SOE case*, above n 112, at 694.
[152] Treaty of Waitangi Act, s 6(3). While there is a facility for some binding recommendations, this is not exercised often.
[153] 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.
[154] *SOE case*, above n 112, at 694.
[155] Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016), at 101.

is not fungible and should not simply be replaced by other land of comparable economic value, for example.[156]

Treaty Principles Relevant to the Handling of a Disaster

The Waitangi Tribunal has only decided one claim in relation to the Crown's handling of a disaster, and that was not a natural disaster: the claim by Motiti Island kaitiaki in relation to the Crown's handling of the aftermath of the shipwrecked MV Rena.[157] The details of this claim and its decision are summarised and discussed in Prof Iorns's work on Treaty duties entailed in decision-making on climate adaptation measures.[158] The Waitangi Tribunal found that the key relevant Treaty duties on the Crown were to:[159]

- Identify the relevant Art 2 taonga that might be affected by the disaster;
- Identify which hapū and iwi have interests in the affected taonga;
- "identify the nature of the relationship of these hapū and iwi to [the taonga] 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 disaster has affected the 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".

The Crown was held to have a good faith duty to protect the Art 2 taonga, even during confidential, commercial negotiations with third parties. Where negotiating positions and suggested outcomes changed, the Crown had a duty to undertake further consultation with those whose interests were

[156] See, eg, *SOE case*, above n 112, at 674, per Richardson J.
[157] Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims* (Wai 2391, 2015).
[158] See, eg, Catherine Iorns, "Treaty of Waitangi Principles Relevant to Adaptation to Coastal Hazards from Sea-Level Rise", (2022) 53 VUWLR 563-610, at 585-594.
[159] Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims* (Wai 2391, 2015), at [2.4].

affected, in order to make an informed decision on the appropriate course of action.[160] Where consultation timeframes were overly tight, and where those with relevant interests were unable to participate due to lack of resourcing, the Tribunal found the Crown to have failed in their duties.[161]

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.

In the Environment Court proceedings, the issue was over remedial measures necessary after the disaster, specifically whether to grant a resource consent to allow the wreck to remain on the reef. A key focus of the evidence and of the Court's decision was the protection of the taonga reef. For the Motiti Island kaitiaki, the reef was their ancestor and the place from which the spirits of their deceased tribal members departed. Protection of the reef thus was not only about its physical state, but its mauri or spiritual state, which in turn affected the mauri of its kaitiaki and their ability to exercise their kaitiakitanga. Active protection of the taonga thus extended not only to the physical state of the environmental feature itself, but to its spiritual qualities within relevant tikanga.

In the Environment Court and its decision, there was extensive discussion of the evidence showing that the physical state of the reef had been restored, with all taonga species having returned. There was a functional, biodiverse ecosystem, despite the remains of the wreck still lying on the reef. There was still disagreement over what the best course of action was in terms of restoring the mauri of the reef. For Ngai Te Hapū, as Motiti Island kaitiaki, it was not intact as long as the wreck remained there.[162] However, the overwhelming evidence was that more physical damage would be done by removing it (as well as that being too much of a risk to the life of those who would undertake that removal). Further, the tikanga of other iwi and hapū suggested that the mana and

[160] Waitangi Tribunal *The Final Report on the MV Rena and Motiti Island Claims* (Wai 2391, 2015), at [3.4.2(1)].
[161] Waitangi Tribunal *Interim Report on the MV Rena and Motiti Island Claims* (Wai 2391), at 57.
[162] See, e,g, *Ngāi Te Hapū v. Bay of Plenty Regional Council* [2017] NZEnvC 073, at [96].

mauri of the reef can be fully returned with the physical recovery of the reef's ecosystem and species and the appropriate ritual karakia.[163]

Treaty principles relevant to social justice in housing and/or insurance

As mentioned above, a key aspect of Treaty obligations is "the protection of the Māori as a people and the assurance to them of equal citizenship rights".[164] Treaty duties thus apply not only to the active protection of physical and natural taonga, but to people, their wellbeing and the social systems designed to further that. For example, the Waitangi Tribunal has found that the Crown is responsible for ensuring equitable health policy outcomes and for the active protection of Māori health and well-being.[165] It also found that, for a wide range of reasons, the Crown has not delivered those outcomes and has breached the principles of te Tiriti.[166]

Perhaps of key relevance to this project's subject of earthquake insurance for housing is that the Waitangi Tribunal is currently undertaking a wide inquiry in relation to Māori housing.[167] In May 2023 the Tribunal released its report into the first stage of this inquiry: *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness.*[168] All remaining housing policy topics are currently under inquiry.[169] After this housing inquiry, other Kaupapa claims to be progressed include ones on 'Social services and social development' and on 'Economic development'.[170]

While it is too early to suggest what might be found in these Kaupapa inquiries, the report into the health inquiry is instructive and provides some suggestions for ensuring Crown compliance with its obligations. This is so even in an area such as natural disaster insurance where outcomes are at

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[163] See, eg, *Ngāi Te Hapū v. Bay of Plenty Regional Council* [2017] NZEnvC 073, at [98]-[101]. As noted by the Court, and its "expert in tikanga Maori, Commisisoner Prime", " 'Kua hokimai to mana ki a Tangaroa' (the mana has been returned to Tangaroa—the Maori deity of the sea)". At [105].
[164] Te Whänau o Waipareira Report (1998), cited in *He Tirohanga*, above n 121, at p99.
[165] Waitangi Tribunal , *Hauora: Report on stage one of the health services and outcomes inquiry* (WAI 2575, 2019).
[166] Waitangi Tribunal , *Hauora: Report on stage one of the health services and outcomes inquiry* (WAI 2575, 2019). For a helpful summary of the findings and arguments about what to do about them, see, eg, Heather Came, Dominic O'Sullivan, Jacquie Kidd, and Timothy McCreanor, "The Waitangi Tribunal's WAI 2575 Report: Implications for Decolonizing Health Systems" Health Hum Rights. 2020 Jun; 22(1): 209–220.
[167] The Housing Policy and Services Inquiry (WAI 2750).
[168] Available at:
https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_197630281/Kainga%20Kore%20W.pdf]
[169] See, eg: https://waitangitribunal.govt.nz/inquiries/kaupapa-inquiries/housing-policy-and-services-inquiry/
[170] See https://waitangitribunal.govt.nz/inquiries/kaupapa-inquiries/

least partially determined by private commercial choices and transactions. As with Article 2 taonga, the Crown needs to:

- "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".

This approach focuses on equity of outcomes, not merely of processes. Specific implications of this for NHC-TTA are discussed below.

Tekau mā toru: Application of Treaty principles and tikanga findings

As a Crown entity, NHC-TTA would likely be expected to consider how its operations can best uphold the principles of the Treaty and be consistent with tikanga. Some suggestions follow.

Good faith consultation

There are requirements of good faith consultation in relation to *who* is consulted, *when* they are consulted, and over *what*.

Who:

The Treaty relationship is one with Treaty partners and is founded in constitutional law, rather than deriving from contracts with policy-holders. It thus might reasonably be expected that this therefore requires good faith consultation with iwi and/or hapū, not simply with individual policy holders. However, we expect that this would necessarily be a joint exercise, with policy holders and hapū/iwi. That is possibly the biggest mindset shift in envisaging the relevant relationship.

As the jurisdiction and focus of NHC-TTA is normally on an individual policyholder, it might be expected that consultation would best occur with hapū at the community level, rather than with larger iwi bodies. However, in the post-governance settlement framework, most such liaison

bodies are established at the iwi level. We assume that this is something for NHC-TTA to discuss, and also that the Crown would assist NHC-TTA to identify the relevant iwi and hapū representative bodies.

When:

It is expected that consultation would be required both before natural hazards eventuate, and afterwards when dealing with claims and decisions on what to do. For example, consultation would be expected if/when considering widespread compensation/acquisition arrangements, along the lines of what occurred after the Canterbury earthquakes.

It is presumably helpful that any consultations in advance of natural hazard damage be undertaken with wider Treaty partners, because NHC-TTA does not currently know who its policyholders are until a claim is made.

What:

As with the summary above of previous findings about duties of consultation:

- The first duty is to make yourselves aware of the Māori interests that need protecting through such consultation.
- The second would be consulting on the identification of issues that might affect those interests.
- The third would be consulting on the measures necessary to protect them.

Coordination with others:

Clearly some of these consultations will also cover topics that overlap with the duties of other Crown entities and representatives; indeed, others will have arguably even greater duties to undertake such good faith consultation, especially in relation to planning for climate adaptation and resilience. It could thus reasonably be expected that any consultation could be undertaken in conjunction with other government agencies, as well as local and regional councils.[171]

[171] We note that there is no widespread mapping of nor information about Māori land or other taonga tuku iho that is vulnerable to natural disaster damage, let alone recovery plans. There is a lot of work to do in this area. See, eg, Catherine Iorns, "Treaty of Waitangi Principles" (2022), above n 158, at 596-597.

NHC-TTA arguably first needs to see what information it has and then what it will need to supplement that, in order to achieve the results for its own work that might be expected under these Treaty duties. Second, thought should be given by NHC-TTA to when it can best and most usefully be involved in consultation with such other bodies. We acknowledge that the mandate for NHC-TTA is not as expensive as other such agencies. But it does have a crucial role to play in natural disaster recovery, so needs to see itself as part of the wider Crown commitment to upholding Treaty duties.

Active protection of Art 2 taonga

Natural hazards will create risk for damage to many taonga at once. Not all property of significance will be able to be spared from such hazard damage. But NHC-TTA will need to be paying particular attention to the active protection of things that are protected by Article 2 of the Treaty.

Key general requirements include:

- The Crown must not create policies and laws that undermine the ability of iwi to protect the land.
- Active protection suggests the maintenance of Māori ownership of and relationships with land that is taonga tuku iho.
- Active protection requires more than monetary compensation for a loss.
- There may be a greater duty to Māori than to the general population because of the special nature of their relationship with their land taonga tuku iho.[172]
- This entails the protection of the tikanga and mātauranga Māori that underpin it.
- Mātauranga Māori can assist not only understandings of what needs protecting but how best to protect and recover from natural hazard damage.[173]

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[172] 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. See, eg, *Grace v Minister for Land Information* [2014] NZEnvC 82.

[173] For example, in one study, in conjunction with a Māori community, "the maintenance of close relationships with the land and sea were acknowledged by a number of interviewees as crucial to understanding, and dealing with,

- Even in multi-party discussions about disaster recovery initiatives involving commercial and other private entities, the Crown is likely obliged to make submissions in protection of Māori interests.
- The Crown should not enter into duties with others which conflict with its duty of good faith to Māori, including to protect Māori interests.
- Active protection may require NHC-TTA to provide better education about natural hazards insurance.

Claims settlement options

- The Crown needs to uphold the principle of keeping land that is currently owned by Māori in that Māori ownership, whether freehold or not.[174] This is relevant to the options for settling claims discussed above, particularly in relation to salvage under 'Tuawhetu' above.[175]
- Māori may wish to maintain a presence in a hazardous coastal area due to an ancestral connection; so even where land is damaged preventing repair of the residential building on that site, relocation of the building would normally be preferred.
- Relocation of residential buildings could be expanded to other land taonga tuku iho if that particular landowner's land was no longer suitable; this was discussed further under 'Tuawhetu' above.[176]

Taonga

The issue has been raised with us – the authors of this report – of how to best protect or replace other taonga that are either within or perhaps attached to buildings that are damaged by natural hazards. This issue may be most relevant for private insurers (such as in relation to the valuation of artworks). However, if it arose for NHC-TTA, and there was a question about the use of claim

local hazards and environmental risks". 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 7.

174 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.

175 See p 44 of this report.

176 See p 43 of this report.

settlement monies to replace damaged taonga (perhaps they were part of a building itself), consideration should be given to how to best achieve a result in line with Treaty principles and tikanga. If the legislation could be interpreted to allow replacement through the *act of replacement* rather than the *purchase of an item*, it may be that building settlement money could be allowed to be used to pay for community carving/weaving/building workshops to replace the taonga. This would both produce the result and contribute to continuity of the culture and mātauranga. It may be that this approach could apply not only to taonga but also more generally, including to the replacement of ordinary residential dwellings.

This approach of enabling the *act of replacement* rather than simply the purchase of a replacement would also contribute to the Treaty principle of increasing iwi and hapū capacity as mana whenua. It could be conceived of as part of the NHC-TTA role in recovery post natural hazard damage, whereby NHC-TTA could help encourage and develop options for residential building, for example, that were more in line with Te Ao Māori and Māori forms of social organisation. This could fit within at least the research and education role of NHC-TTA, as well as the claims settlement function.

Relevant policy guidance could also be developed for replacement of taonga and/or residential buildings along these lines. If it was considered that this was not possible to achieve simply by interpreting the legislation generously, then consideration could be given to law reform.

It may be that NHC-TTA could develop *guidance for the insurance industry* on better valuation and replacement of Māori taonga. This could be outside its normal statutory role but if it had the capacity and could assist the private sector, that could be considered as within its role as Treaty partner.

Mauri

The discussion of the mauri of the reef after the Rena grounding illustrates some key matters of relevance to remedial measures for damage to land:

- that the protection of a natural taonga includes protection of its mauri;
- that upholding kaitiakitanga may require upholding the mauri of the damaged land;

- that what is required to protect mauri may differ according to different tikanga;
- that what is required to protect mauri may require more measures than expected or are considered reasonable in financial terms;
- mauri may be considered restored if a functional ecosystem and taonga species have returned, even if the physical damage itself has not been fixed;
- In the choice of remedial works, active protection of taonga can require that decision-makers consider the protection of the tapu and mauri of the place, and how that will be best facilitated and not diminished.[177]

We assume that the consideration of mauri of land owned by Māori will not often arise within matters for decision by NHC-TTA. We suggest that it simply needs to be identified in advance – such as in policy documents – so that it is considered appropriately when it does arise.

However, it is an interesting thought as to whether mauri could be considered more widely in respect of other land, not just that owned by Māori. E.g., as a matter of tikanga (which is a source of New Zealand law), all land has its own mauri, no matter who owns it. So it makes us wonder how far this could go, and to what extent it might be applied in the future. However, for now, as a matter of what law has already required of the Crown today, mauri would only be considered where it would be a matter of upholding particularly Māori rights, and only where that was possible to do within the interpretation of the legislation. For example, where there is a clear statutory cap based on market value, then no one is suggesting that such remediation of mauri could change the interpretation to require that more money be spent over the cap.

[177] For an example in relation to wider climate adaptation measures, 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 nor 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. See Catherine Iorns, "Treaty of Waitangi Principles" (2022), above n 158, at 597-8.

Article 3 principles of equality in relation to natural hazards insurance:

To be compliant with principles of the Treaty, the Crown is arguably required to:

- Ensure equitable outcomes of having disaster risk insurance in place, not merely leave it to the market; this will require the Crown via NHC-TTA to:
    - Collect information on who has disaster risk insurance in place;
    - Investigate the barriers to such insurance;
    - Design solutions;
- Design bespoke instruments/mechanisms to ensure that dwellings on Māori collectively-owned land can obtain disaster risk insurance; perhaps assist private providers to ensure that they are delivered;
- Engage and involve Māori in the design and evaluation of such policy and mechanisms (good faith consultation and partnership); involve them early and often;
- "embed equitable and non-racist practices in policy development, delivery, and evaluation";[178]
- ensure that the handling of claims in terms of both process and outcome does not disadvantage collective owners of Māori land. (This may affect time limits, and approach to valuation of loss and payout amounts, and assignment of claims, for example, as discussed in this report.)

[178] Heather Came, Dominic O'Sullivan, Jacquie Kidd, and Timothy McCreanor, "The Waitangi Tribunal's WAI 2575 Report: Implications for Decolonizing Health Systems" Health Hum Rights. 2020 Jun; 22(1): 209–220, above n 165.

E. Conclusions and Recommendations

Final comments

This report has identified several aspects of the 2023 Act that could be reviewed for its effect on Māori interests. Although the Act creates no deliberate exclusions for Māori among the different forms of housing covered, and so no deliberate discrimination or inequity is intended, it might still operate in a manner that might not be consistent with the unique aspects of Māori social organisation, Te Ao Māori, or tikanga. This ranges from classification of what counts as a dwelling, to the options available for handling claims under the Act, including what even counts as damage to land.

We suggest that the law on Treaty principles already provides excellent guidance on duties of the Crown and thus for NHC-TTA in relation to protecting Māori interests. While this report summarises the Treaty principles and their potential application, the courts and the Waitangi Tribunal provide extensive jurisprudence on what Treaty principles require of the Crown more generally. We also suggest that the emerging law on the need to uphold tikanga as a separate source of law in Aotearoa provides additional standards and guidance for a Crown entity in its interpretation of its duties.

Some of these aspects are generally not yet factored into Crown decision-making, particularly because the legal treatment of tikanga by the courts has evolved only comparatively recently. For example, the integration of spiritual and physical property considerations is certainly not widespread on the part of the Crown, even if individual staff within an organisation may be intimately familiar with it as a key element within Te Ao Māori, tikanga and mātauranga. It is that kind of implication of the legal framework that needs to be considered further within NHC-TTA, such as consideration of mauri as an aspect of damage to land for the purposes of the legislation. We suggest that it is something that needs to be considered internally, if only in order to not be surprised by a court's finding to this effect later.

Future risks

Risks of natural hazard damage challenge how insurance currently operates due to their non-random nature. As knowledge of climate change increases, along with knowledge of how it will increase the risk of weather-related damage, insurers will gradually treat these as non-random risk events and withdraw from the risk rather than face financial instability. Insurers internationally and locally have already withdrawn from covering some areas. For example, since Hurricanes Katrina and Sandy, USA insurers have shifted relevant risks onto state and federal insurance schemes, as well as to individual property owners. In Aotearoa, where insurers have retreated, it appears to have been a complete retreat and they do not even offer a solely fire-risk policy, for example. This means that more and more householders will not have insurance for natural hazard damage, as the current scheme is tied to private fire insurance policies.

One would expect that our state insurance scheme will be even more important in the climate-changed future. However, the irony is that private insurance retreat will mean that fewer people will have coverage even as its importance increases. There will likely be a need to either look at other options for coverage, or simply to encourage and use the option of direct insurance more widely.

Overall, any government scheme for natural hazard insurance needs to be carefully designed to enable all New Zealanders to assess and manage the risks to their homes and communities fairly. What is fair won't be determined by analysis of what is currently legal, but needs to be the subject of a wider discussion.

Recommendations

The focus of at least most of the following recommendations are policy considerations and changes rather than legislative reform. The recommendations are designed to address the three main aspects covered in this report:

- to better accommodate the unique aspects of Māori social organisation including collective-ownership of land and property;
- to better reflect Māori world worldviews including ahikaaroa and mauri,
- and to implement the Crown's duties to uphold the Treaty principles as well as tikanga, where that is possible within the wording of the Natural Hazards Insurance Act 2023.

The authors accordingly recommend the following matters for consideration by NHC-TTA:

Māori social organisation

Recommendation 1: that in considering exceptions to the legislative claim date, NHC-TTA specifies in policy that collective-ownership of Māori land and the unique legislative and tikanga requirements of consensus decision-making are taken into account in the granting of exceptions.[179]

Recommendation 2: that in calculating the market value of land NHC-TTA develop policy that takes into account the unique circumstances of land under Māori title and the impact of Te Ture Whenua Māori Act 1993 in reducing the market value of Māori land.[180]

Recommendation 3: that NHC-TTA comprehensively consider the incidental coverage of marae under the Act and determine whether incidental coverage under the current Act applies or should apply, and/or whether a separate, comprehensive regime should be developed for marae outside of the current public natural hazards insurance framework.[181]

[179] See discussion of the claim date above on pages 29-31.
[180] See discussion of market valuation above on pages 40-41.
[181] See discussion of marae above on pages 27-29.

Recommendation 4: that NHC-TTA consider future trends in housing that respond to Māori social organisation and whether the application of the Act to any such examples needs need to be clarified, such as via a policy document or regulation, or whether it needs to be the subject of law reform.[182]

*Recommendation 5***:** that in considering the application of repair, reinstatement or write-off, NHC-TTA decision-makers specifically incorporate considerations of the obligation to maintain ahikaaroa in their decision-making.

*Recommendation 6***:** that in considering the application of repair, reinstatement or write-off, NHC-TTA decision-makers specifically incorporate considerations of the obligation to restore the mauri of the whenua in their decision-making.

Recommendation 7: that in considering the application of the salvage power in the Act, and in particular the provision providing for the acquisition of title to land, NHC-TTA decision-makers consider the retention of Māori land as a specific consideration in their decision-making.[183]

- NHC-TTA could go further and adopt a policy presumption that salvage of Māori land is never appropriate; nor is salvage of dwellings on Māori land appropriate, especially on marae or papakainga. This is even where full market value may have been paid out in a claim for natural hazard damage to the land.

Recommendation 8: that internal NHC-TTA policy direction be issued about making such decisions in line with Treaty principles of consultation and active protection when considering whether to exercise powers under the Act in relation to any Māori-owned land taonga tuku iho (i.e., whether this can apply to land not subject to TTWMA but owned in fee simple title).

Recommendation 9: consider where Māori social organisation and worldviews could affect other areas and policies throughout the application of the legislation by NHC-TTA.

[182] See discussion of Future housing above on pp 32-38.
[183] See discussion on salvage above on p 44.

Tikanga

Recommendation 10: devise a plan to assess how best to uphold tikanga within the organisation's substantive work on handling claims.[184]

- This might include steps such as a strategy for understanding how natural hazard damage can affect kaitiakitanga and tikanga; asking claimants about any relevant tikanga, and trying to uphold claimant tikanga in relation to land with natural hazard damage.

Recommendation 11: consider what else might be required of the organisation in relation to upholding tikanga as a source of law. (We suggest this because NHC-TTA knows its work and sphere of responsibility better than the authors do.)

Treaty principles

Recommendation 12: devise a plan to assess whether the various Treaty duties identified in this paper are being upheld and, where not, to adopt a strategy to undertake work to uphold them.[185]

Recommendation 13: consider in particular what might be required of duties under Treaty article 3 such as in relation to equity of outcome in public insurance provision.[186]

a. This will likely require the Crown (via NHC-TTA) to collect information on who has disaster risk insurance in place, investigate the barriers to such insurance, and design solutions to any issues identified.
b. it may require outreach, education and encouragement of direct insurance with NHC-TTA

Recommendation 14: consider what else Treaty principles might require of the organisation, whether in relation to consultation and liaising with relevant Māori groupings, and active

[184] See discussion on tikanga above on pages 55-56.
[185] See section Tekau mā toru at pp 70-76 for a summary of these duties.
[186] See above p 76 for the detail of this discussion.

protection of taonga. (As with Recommendation 11, we suggest this because NHC-TTA knows its work and sphere of responsibility better than the authors do.)

Recommendation 15: consider adopting best practice policy guidelines that might go beyond established Treaty principles, such designing accountability mechanisms to ensure accountability to Māori in some way for the delivery of services in accordance with Treaty principles.

Summary of matters for internal policy guidance

Most of the above recommendations could be achieved through internal policy changes and/or guidance that do not require law reform. Of the issues discussed and the suggestions made in this report, policy review and guidance could address the following topics:

- the consultation and procedural aspects of decision-making (as long as they meet statutory deadlines and other requirements);
- the application of existing legal options such as direct insurance;
- guidance on the application of the salvage provisions;
- perhaps valuation options for Māori land;
- Remediation options consistent with restoring mana and mauri;
- the insurance and replacement of different types of taonga;
- application to likely future forms of housing to meet a wider range of needs;
- Education of all staff, including those processing claims, about te ao Māori, mana and mauri, taonga, and obligations of kaitiaki to land;
- education of Māori about natural hazards insurance generally and in relation to identification and insurance of taonga more specifically;
- guidance on the interpretation of legislative requirements generously in order to uphold Treaty principles and to be consistent with tikanga as a source of New Zealand law, as far as is possible within legislation.