

Reform of the Wildlife Act 1953

# AN OPPORTUNITY FOR TRANSFORMATIONAL CHANGE OF AOTEAROA NEW ZEALAND'S BIODIVERSITY LAW

Appendix B

The Wildlife Act and Te Tiriti o Waitangi



Environmental  
Defence  
Society

*Photo by Bernard Spragg*

## Appendix B

### The Wildlife Act and Te Tiriti o Waitangi

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#### Abbreviations

Aotearoa	Aotearoa New Zealand
CBD	Convention on Biological Diversity
DOC	Department of Conservation
IUCN	International Union for Conservation of Nature
NPSFM	National Policy Statement for Freshwater Management 2020
NPSIB	National Policy Statement on Indigenous Biodiversity
NZTCS	New Zealand Threat Classification System
ODG	Options Development Group
Te Tiriti	Treaty of Waitangi/Te Tiriti o Waitangi Te Tiriti

#### Introduction

Under the Conservation Act, DOC must “give effect to the principles of the Treaty of Waitangi” when administering the Wildlife Act.<sup>1</sup> The question of how to do this is complex, with a range of options that could be effective in different contexts. Although the Waitangi Tribunal in Wai 262 made two specific recommendations relevant to reform of the Wildlife Act (relating to co-management of customary use and ownership of wildlife as addressed below), the question has not been directly tested in the context of the Wildlife Act.

How new wildlife legislation might give effect to the Treaty of Waitangi/Te Tiriti o Waitangi (Te Tiriti) is explored through three issues:

*Issue 1: The Wildlife Act vests ownership of wildlife in the Crown and Māori are required to get permission for customary use on a case-by-case basis*

*Issue 2: The Wildlife Act does not specifically protect taonga species*

*Issue 3: The Wildlife Act does not recognise or mandate mātauranga Māori in decision-making*

In most cases, giving effect to the principles of Te Tiriti will align with conservation objectives. As the Waitangi Tribunal in Wai 262 stated, the survival of species is a shared bottom line for kaitiaki and

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<sup>1</sup> Conservation Act 1987, ss 4 and 6 and Schedule 1 and *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 at [6]

conservationists.<sup>2</sup> Further, greater recognition of Māori values is likely to operate as an important lever to improve the degree of protection and priority of indigenous species, which will lead to positive outcomes. This report traverses some of the more challenging aspects of the interface between wildlife and Te Tiriti. Particularly with respect to customary take of threatened species and protection of introduced species considered to be taonga.

### **Issue 1: The Wildlife Act vests ownership of wildlife in the Crown and Māori are required to get permission for customary use on a case-by-case basis**

The Wildlife Act vests ownership of all wildlife in the Crown.<sup>3</sup> As well as being a form of cultural dispossession, this is contrary to te ao Māori that no one “owns” wildlife.

Ownership of wildlife under the Wildlife Act was to address the complexities of common law. But as the Waitangi Tribunal stated in Wai 262:<sup>4</sup>

*“... in solving this problem the Crown clearly created another by ignoring its obligations under the Treaty to safeguard any Māori rights to control or manage these species. From a kaitiaki perspective, wildlife is not ‘owned’ at all; rather, kaitiaki are bound by obligations towards these taonga. The Crown’s approach has therefore created new grievances and complexities for itself. By adopting ownership as the means of taking control, it has invited those with pre-existing claims to respond in kind. It is control, and not ownership, that is the real issue.”*

Ownership of wildlife does not have to fall to anyone. However, ownership of wildlife brings responsibility and accountability for its loss. As discussed in Appendix A, internationally, a lack of accountability is a significant issue with threatened species laws. A regime whereby no-one owns wildlife would need to be accompanied by clear lines of accountability for protecting, managing and recovering that wildlife.

Māori must obtain permission from the Director-General to catch alive or kill any absolutely or partially protected species.<sup>5</sup> This includes take of their materials, such as feathers. The provision for Māori cultural use under the Wildlife Act (and the Conservation Act, Reserves Act and National Park Act) is set out in Conserving Nature.<sup>6</sup> As reported, these statutory frameworks were not designed with customary use and the needs of Māori front of mind.<sup>7</sup>

The requirement for a permission, to be acquired on a case-by-case basis, has caused significant anguish for Māori seeking to undertake customary activities. Claimants in the Wai 262 case said that it was degrading to have to seek permission for cultural harvesting.<sup>8</sup> In that case, the Waitangi Tribunal recommended that the General Conservation Policy and the General Policy for National Parks provide for Māori customary use subject to appropriate conditions, with a presumption in favour of customary practices rather than case-by-case discretion.

The Options Development Group (ODG) has similarly criticised the Conservation General Policy and National Parks General Policy for only allowing customary use on a case-by-case basis, and only where an established tradition exists. It agreed with the Tribunal that there should be a presumption in favour of Māori cultural use.<sup>9</sup>

<sup>2</sup> Waitangi Tribunal, 2011, 139

<sup>3</sup> Wildlife Act 1953, s57, except for wildlife listed in Schedule 5

<sup>4</sup> Waitangi Tribunal, 2011, 140

<sup>5</sup> Wildlife Act 1953, s53

<sup>6</sup> Koolen-Bourke et al, 2021, 18

<sup>7</sup> Koolen-Bourke et al, 2021, 19

<sup>8</sup> Waitangi Tribunal, 2011, 304

<sup>9</sup> Options Development Group, 2022, 80

To address this issue, the Waitangi Tribunal made two related recommendations:<sup>10</sup>

- The Wildlife Act be amended so that no-one owns protected wildlife, rather there should be a shared management framework in line with the partnership principle; and
- Provision should be made for full, statutory co-management of Māori customary use by the Department of Conservation (DOC) and iwi i.e., they should make joint decisions.

The need to provide for Māori customary use of taonga species is widely recognised in modern environmental policy. For example, *Te Mana o te Taiao* recognises customary use as a principle to be given effect to when implementing the Strategy.<sup>11</sup> Likewise, the proposed National Policy Statement on Indigenous Biodiversity (NPSIB) states that local authorities must allow for sustainable customary use of indigenous biodiversity in accordance with tikanga, and that the effects management hierarchy of the policy statement does not apply to adverse effects arising from that activity.<sup>12</sup> Further, it mandates that local authorities change their policy and plans to provide for the sustainable customary use of identified taonga by tangata whenua in accordance with tikanga and in a manner consistent with the protection of the identified taonga.<sup>13</sup>

It is clear that new wildlife legislation will need to provide for Māori customary use. The conversation to be had is about the circumstances of its provision.

The language of sustainable customary use in the proposed NPSIB reflects that used in the Convention on Biological Diversity (CBD) which requires that signatories “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements” as far as appropriate.<sup>14</sup>

It also reflects the language of the ODG Report on the Conservation General Policy, which proposes that there be a presumption in favour of the authorisation of customary harvest, take, use of and access to plants, animals and materials, provided, *inter alia*, that the preservation and sustainability of the indigenous species at the place is not adversely affected.<sup>15</sup>

While sustainable customary use is undefined in *Te Mana o te Taiao* or the proposed NPSIB, *Te Mana o te Taiao* defines “sustainability / sustainable use” as:<sup>16</sup>

*“The use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations’ (Convention on Biological Diversity).”*

*Te Mana o te Taiao* lists the customary use of biodiversity as an indicator of resilient biodiversity, and that resilient biodiversity can enable cultural practices and mahinga kai. But how should resilient biodiversity be defined? And what is that resilience measured against? Is it resilience to Māori customary use, or to broader threats, such as climate change induced wildfires, floods and heat waves. If the latter, does the species require an additional ‘buffer’ before it can be considered sufficiently resilient so that it can withstand unpredicted climate induced events?

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<sup>10</sup> Waitangi Tribunal, 2011, 147

<sup>11</sup> Department of Conservation, 2020, 44

<sup>12</sup> Exposure National Policy Statement for Indigenous Biodiversity, Policy 3.3(2)(d) and 3.11(5)(c)

<sup>13</sup> Exposure National Policy Statement for Indigenous Biodiversity, Policy 3.19(6)

<sup>14</sup> Convention on Biological Diversity 1992, Article 10(c); Waitangi Tribunal, 2011, 354

<sup>15</sup> Options Development Group, 2022, 102

<sup>16</sup> Convention on Biological Diversity 1992, Article 2

In 1994, DOC transferred guardianship and management of the Motatau Forest to Ngāti Hine. To address decline of the kukupa (kererū) Ngāti Hine declared a rāhui on their taking. At the time, Ngāti Hine leader Kevin Prime declared that taking would resume only when the bird had become a “pest”.<sup>17</sup> The Predator Free 2050 initiative has raised the possibility of Māori customary use once taonga species become “abundant”.<sup>18</sup>



Photo by Joe Lawry

In Wai 262, the Waitangi Tribunal stated that “[j]oint decisions should be made on the basis of the following core principles: first and foremost, the recovery and survival of the species; and secondly, the right of iwi to exercise kaitiakitanga and maintain their culture”.<sup>19</sup> This reflects the hierarchy set in the National Policy Statement for Freshwater Management 2020 (NPSFM), which puts the wellbeing of nature first, above the needs of people. New wildlife legislation might also include a hierarchy of protection which prioritises threatened indigenous species, above the needs of people, thus ensuring the health of biodiversity for the health of people. Practically, this could mean that provision for Māori customary use is linked to the extinction risk of a species, so that Māori customary use is provided for as long as the species is not listed in certain threat categories.

The above approach would not, however, address whether it is appropriate to use species for Māori customary use that are not threatened but which are highly valued by sectors of the community, such as common dolphins. Or whether providing for Māori customary harvest of introduced taonga species (by protecting these species) is appropriate when they pose a threat to indigenous and/or

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<sup>17</sup> Waitangi Tribunal, 2011, 126

<sup>18</sup> Koolen-Bourke et al, 2021, 19

<sup>19</sup> Waitangi Tribunal, 2011, 140

threatened species. Both these matters raise issues of equity among users of wildlife within the wildlife management system. For example, would it be fair to exclude some species from Māori customary use because they are highly valued by the community, but allow fishing to continue catching them as bycatch with little repercussion? Or is it fair to continue allowing populations of browsing herbivores for recreational hunters, but not provide for the introduced but taonga kiore?

Inequities within existing wildlife law could, to an extent, be resolved by a clearer prioritisation of indigenous and threatened species. However, that will only go so far. New wildlife legislation will still need to re-calibrate how it enables the use of wildlife at place across all sectors and domains; customary, social, commercial, and marine and terrestrial.

With respect to decision-making on customary use, partnership is necessary to align with Te Tiriti, to prevent further extinction and to ensure intergenerational sustainable use of taonga species. Settlement legislation has long provided for this partnership in the context of customary use. For example:

- The transfer of management of Tītī Islands to Ngāi Tahu (see below *Spotlight: Customary harvest of tītī*) - Customary harvest of tītī, muttonbirds, is managed by the Rakiura Tītī Committee and the Rakiura Tītī Islands Administering Body who issue permits and enforce rāhui outside the harvesting season.<sup>20</sup> This has been called a “perfect application” of Treaty principles and an example of a biocultural initiative from the grassroots level,<sup>21</sup> while others still criticise the requirement that the islands must be controlled and managed “as if they were a nature reserve”.<sup>22</sup>
- A cultural harvest plan within conservation protected areas on the Waikato River - This is jointly prepared by DOC’s Director-General and the Waikato Raupatu River Trust, and authorises a member of Waikato-Tainui to harvest flora in accordance with the agreed methods and quantities.<sup>23</sup>
- Ngāi Tahu settlement legislation allows for iwi members to possess and transfer wildlife specimens for non-commercial use, and contains specific guidelines, created by DOC and Ngāi Tahu, for making applications.<sup>24</sup> Although permits are only required for marine mammal parts and plant material from conservation land, iwi members must still apply to DOC to retrieve specimens from the cultural materials bank. Te Rūnanga o Ngāi Tahu assess applications, recommend imposed conditions, and determine competing applications. This approach has yet to be adopted in national legislation, despite receiving ministerial approval in 1999.<sup>25</sup>
- Ngā Aitanga ā Nuku agreements are guiding policies under Conservation Management Strategies which are sometimes included in treaty settlements. They create a process for co-designed cultural material management plans where the power to permit customary use of resources from conservation land is devolved from DOC to local whānau/hapū/iwi representatives.<sup>26</sup> Pātaka komiti are panels of local iwi representatives which are used on an *ad hoc* basis by DOC to discuss access to cultural materials within a particular conservancy. The Waitangi Tribunal has advised expanding their advisory role to one of joint decision-making with the regional conservator.<sup>27</sup>

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<sup>20</sup> Ngāi Tahu Claims Settlement Act 1998; Deed of Cession of Stewart Island 1864; Land Act Regulations 1912; Tītī (Muttonbird) Islands Regulations 1978; Tītī (Muttonbird) Notice 2005; Rakiura Tītī Islands Bylaw 2005

<sup>21</sup> Taiepa et al, 1997, 236

<sup>22</sup> Lyver et al, 2019

<sup>23</sup> Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 63

<sup>24</sup> Ngāi Tahu Claims Settlement Act 1998, s 296; Toitū Te Whenua, Te Rūnanga o Ngāi Tahu and Department of Conservation, 2007, *Allocation of cultural materials guideline*

<sup>25</sup> Waitangi Tribunal, 2011, at 359

<sup>26</sup> Department of Conservation, 2016a

<sup>27</sup> Waitangi Tribunal, 2011, 73

- Te Hiku o Te Ika Conservation Board in Northland, made up of 50/50 iwi and community representation, has decision-making power over applications for gathering customary materials.<sup>28</sup>
- In the freshwater space, the customary right to take freshwater fish for non-commercial purposes remains, despite the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.<sup>29</sup> This does not apply however to introduced species, such as trout.<sup>30</sup> Customary use is sometimes still conditional on certain criteria being met, such as with eel fishing in Nelson Lakes National Park.<sup>31</sup>
- In the marine context, commercial fisheries are governed by quotas under the Māori Fisheries Act 1989. However, the taonga status of some marine species are recognised in some settlement legislation.<sup>32</sup> Others recognise the interest in certain parts of the Exclusive Economic Zone to exercise customary use of fish and kaimoana.<sup>33</sup> The Conservation General Policy requires that tangata whenua are invited to participate in planning, establishing, and managing marine reserves, and given a role in the management of dead or stranded marine species. DOC have worked with Ngāti Wai to develop protocols for the recovery of stranded whale carcasses.<sup>34</sup>

### *Spotlight: Customary harvest of tītī*

Tītī (muttonbird/sooty shearwater) are listed in the New Zealand Threat Classification System (NZTCS) as At Risk - Declining, which is the last At Risk threat category before Threatened status. They are listed as a non-endemic marine bird.

The right to customary harvest of Tītī is guaranteed by a number of Acts and bylaws.<sup>35</sup> A supervisor, elected at annual permit day hui, is responsible for the fair distribution of permits. Unlike traditional permits, customary harvest permits do not dictate the number of birds that can be harvested by a person or in a particular area or timeframe.<sup>36</sup> Instead, practices such as only harvesting pre-fledgling chicks and restricting harvesting techniques minimise the negative impact on the Tītī population.<sup>37</sup>

A large proportion of the available literature on the Tītī cultural harvest arises from the Rakiura (Stewart Island) Kia Mau Te Tītī Mo Ake Tōnu Atu “Keep the Tītī forever” research program. Those reports document Tītī populations, threats and harvests in the 2000s.<sup>38</sup> In 2009, it was reported that Rakiura Māori muttonbirders were estimated to harvest 360,000 Tītī annually, equivalent to 18 percent of the chicks produced in the harvested areas and 13 percent of chicks in the New Zealand region.<sup>39</sup> Mātauranga Māori of the birders was found to be alive and well, and accurate and valuable.<sup>40</sup> Recent reporting on the Rakiura Tītī cultural harvest is difficult to find, but a Ngāi Tahu kaumātua recently reported that 2021 was probably the best year since 2006.<sup>41</sup>

<sup>28</sup> Office of Treaty Settlements, 2012

<sup>29</sup> Canterbury (Waitaha) Conservation Management Strategy 2016, 25

<sup>30</sup> *Taranaki Fish and Game Council v McRitchie* [1997] DCR 446

<sup>31</sup> Ngāti Apa ki te Rā Tō, Ngāti Kuia, and Rangitāne o Wairau Claims Settlement Act 2014, s119

<sup>32</sup> Ngāi Tahu Claims Settlement Act 1998, s298

<sup>33</sup> Maniapoto Claims Settlement Act 2022, s125

<sup>34</sup> Waitangi Tribunal, 2011, at 301

<sup>35</sup> Ngāi Tahu Claims Settlement Act 1998; Deed of Cession of Stewart Island 1864; Land Act Regulations 1912; Tītī (Muttonbird) Islands Regulations 1978; Tītī (Muttonbird) Notice 2005 and the Rakiura Tītī Islands Bylaw 2005

<sup>36</sup> Kitson et al, 2008, 170

<sup>37</sup> Lyver et al, 2015, 969

<sup>38</sup> Kitson et al, 2008, 161-176; Kitson et al, 2002, 503-521; Lyver et al, 2002, 29-40; Moller et al, 2009, 259-274; Newman et al, 2005, 303-321; Lyver et al, 2015, 969-977; Moller et al, 2009, 243-258

<sup>39</sup> Newman et al, 2009, 314

<sup>40</sup> Kitson et al, 2008, 170

<sup>41</sup> <https://www.stuff.co.nz/environment/300328306/tt-harvest-affected-by-climate-change>

In a 2021 report on the conservation status of birds, Tītī were listed as Declining because they sat within the 'C1' category, meaning they have a very large population and low to high ongoing or forecast decline of 10-70 percent. They are conservation dependent and are threatened by climate change. In an undated report, the Ministry for Primary Industries also recorded that to improve the prospects of Tītī harvests being sustainable, weka populations needed to be eradicated, and around 25 percent of the whānau needed to reduce their harvest pressure to more sustainable levels.<sup>42</sup>

Tītī harvesting is hugely important to Rakiura Māori. In the context of Tītī harvesting in the Marlborough Sounds, traditional harvest is crucial to maintaining connections between iwi, sooty shearwaters and mātauranga Māori, and to Māori reasserting mana and rangatiratanga over the resource. But what might happen if the threat status of Tītī is elevated to Threatened? Would harvesting have to cease, or be adaptively managed down? And how could that be done in a manner that maintains mātauranga Māori?

In 2019, Tītī populations in the Marlborough Sounds were reported as being in danger of local extinction. The authors of that report stated that maintaining mātauranga Māori and traditional conservation management strategies for sooty shearwater populations in the Marlborough Sounds would require the resumption of cultural harvest, even of "very few birds". They suggested a conservation management strategy that reinforces the relationships between Māori and the birds in the area. In this circumstance, is the take of even a few birds appropriate? Is that local Tītī population resilient enough to enable cultural harvest?

A corollary to the above is that the materials gathered for Māori cultural use should be owned by the gatherer. Current Crown ownership of such materials conflicts with a kaitiaki perspective and is seen as a form of cultural dispossession.<sup>43</sup> Although a permit can be sought to transfer cultural material to Māori, this was viewed by claimants in Wai 262 as a limit on tino rangatiratanga.<sup>44</sup> The Waitangi Tribunal recommended that the Wildlife Act be amended so that tangata whenua have lawful ownership of taonga, crafted from natural materials, that sustain and re-enliven culture and tradition e.g., feathers for korowai.

This approach was approved by the Minister of Conservation in 1999 (following a 1997 Conservation Authority report on Māori customary use<sup>45</sup>), but has never been legislated. As noted above, such a provision already features in the Ngāi Tahu Claims Settlement Act.<sup>46</sup>

## **Issue 2: The Wildlife Act does not specifically protect taonga species**

While the Wildlife Act is premised on absolute protection of wildlife, it makes no specific provision for the heightened protection or prioritisation of taonga species. As defined in *Te Mana o Te Taiao*, taonga is a treasure or something that is prized. The term can be applied to anything that is considered to be of value, including socially or culturally valuable objects, resources, phenomena, ideas and techniques.

DOC already has lists of taonga species, including those threatened with extinction, which include 29 marine species and 10 freshwater fish and invertebrates. The proposed NPSIB requirement that

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<sup>42</sup> Ministry for Primary Industries, 'Overview of Rakiura Titi Harvesting' <https://www.mpi.govt.nz/dmsdocument/8749/direct>

<sup>43</sup> Waitangi Tribunal, 2011, 141

<sup>44</sup> Waitangi Tribunal, 2011, 306

<sup>45</sup> New Zealand Conservation Authority, 1997, *Maori Customary Use of Native Birds, Plants and Other Traditional Materials*, Wellington, <https://www.doc.govt.nz/Documents/getting-involved/nz-conservation-authority-and-boards/nz-conservation-authority/maori-customary.PDF>

<sup>46</sup> Ngāi Tahu Claims Settlement Act 1998, s296



indigenous taonga species, populations and ecosystems be determined and protected as far as practicable by local authorities will build on this national database.

### *When is a species taonga?*

In Wai 1130, the Te Kāhui Maunga: National park district inquiry report, it was submitted that trout had become a “customary fish” or “kind of taonga”. While the Waitangi Tribunal recognised that indigenous fish populations had been eroded and that in the absence of that resource, trout provided a means to provide food and undertake traditional fishing practices, it held trout did not qualify as taonga.<sup>47</sup>

Similarly, while recognising that horses, pigs, deer and dogs, introduced in the 19th century, were incorporated in the culture and lifestyle of Te Urewera people, that these species have cultural importance and that customary rights, law and practices were applied to them, the Waitangi Tribunal in the Te Urewera claim held that these species are not taonga, in contrast to native species like tuna and kererū.<sup>48</sup>

In contrast, kumara, a species that arrived with Māori, has been ruled a taonga despite not being endemic to Aotearoa New Zealand (Aotearoa).<sup>49</sup>

The Waitangi Tribunal acknowledges that taonga species are not easily defined, but that whether a species is a taonga species can be tested.<sup>50</sup> The Tribunal has noted a number of factors indicative of taonga, including whether the species has mātauranga Māori in relation to them and whakapapa able to be recited by tohunga. In essence, “a taonga species will have kōrero tuku iho, or inherited learnings” that can be tested,<sup>51</sup> and iwi or hapū will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. Some taonga are emblematic of community or cultural identity and have mystical or spiritual functions.<sup>52</sup>

An aspect that appears central, at least from the perspective of the Waitangi Tribunal, to the determination is whether the species is indigenous to the relevant region, predates European contact, and originates in Aotearoa or arrived with migrating waka alongside Māori.

In contemporary Aotearoa, it is important to recognise that Māori cultural use relationships have formed with introduced species, particularly where use of indigenous species has been prevented. For some whānau, hapū, iwi, there is kōrero tuku iho associated with use of introduced species, particularly in relation to mahinga kai.

### Kaimanawa Wild Horses:

In 1996, protection in place for the Kaimanawa wild horses was controversially lifted when a Wildlife Order moved them to Schedule 5 “unprotected wildlife”. The removal of protection was prompted by concern at the horses’ impact on rare plants, including six species of sedge, three forget-me-nots, three daises, two orchids and a number of native grasses. A Kaimanawa Wild Horses Management Strategy was also issued under the Wildlife Act.

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<sup>47</sup> Waitangi Tribunal, 2013, 1050

<sup>48</sup> Waitangi Tribunal, 2017, 3103

<sup>49</sup> Waitangi Tribunal, 2011, 134

<sup>50</sup> Wai 2180, # 3.3.85 at [249]

<sup>51</sup> Waitangi Tribunal, 2011, 114-115

<sup>52</sup> Waitangi Tribunal, 2011, 117

Local hapū, already contesting Crown designation of Māori land for defence purposes, sought to preserve their historical relationship with the horses, which had been present in the area for more than 150 years. Local Māori had built up a relationship to the horses which they viewed as part of the land and tikanga and as a taonga. Disputes over the land and management of the horses led Ngati Whitikaupeka (of Ngati Tuwharetoa) to register a claim with the Waitangi Tribunal (Wai 588) regarding the impacts of Crown acts and omissions on the land designation and Kaimanawa wild horses. That claim would become part of a broader Wai 2180 claim, ‘the Taihape inquiry’.

As part of that broader claim, the Waitangi Tribunal considered the relationship of local Māori to the Kaimanawa wild horses, rights arising out of that relationship, and whether the horses constituted a taonga.<sup>53</sup> The Tribunal stated:<sup>54</sup>

*“The Waitangi Tribunal has noted that taonga species are not easily defined, and accepted for the purposes of the Wai 262 inquiry that taonga species were what claimant communities said they were. However, the Tribunal further noted that does not mean such claims are unaccountable or unreviewable. Whether a species is a taonga species can be tested. As discussed above at [27], taonga species have mātauranga Māori in relation to them, and have whakapapa able to be recited by tohunga. The Tribunal further observed that certain iwi or hapū will say that they are kaitiaki in respect of the species, and their tohunga will be able to say what events in the history of the community led to that kaitiaki status, and what obligations this creates for them. The Tribunal stated: “In essence, a taonga species will have kōrero tuku iho, or inherited learnings, the existence and credibility of which can be tested.”*

Although some evidence was given that the horses had assumed a spiritual function, including whakapapa in relation to them, the Crown’s view was that the available evidence did “not support the position that the horses are a taonga species.”<sup>55</sup>

There is likely to be high alignment between science and mātauranga Māori when identifying the need to protect threatened indigenous taonga species. Deeper thought will be required when considering the protection and management of indigenous but not threatened taonga species or introduced taonga species. The latter is the most challenging because some introduced taonga species can have a negative impact on indigenous threatened species. This has the potential to create tensions between the protection of threatened species and the protection of taonga species.

The proposed NPSIB’s application to only indigenous species has excluded any possibility of protecting non-indigenous taonga species through that policy. However, this remains a live issue for new wildlife legislation if it is to retain its current application to all species. *Te Mana o te Taiao*, which also covers all indigenous and non-indigenous species, describes the situation as follows:

*“Introduced (or non-indigenous) biodiversity is an ecological reality in Aotearoa New Zealand that is neither ‘all good’ nor ‘all bad’, with the benefits or impacts of introduced species to their surrounding environment often depending on the situation. In Te Mana o te Taiao – ANZBS, we recognise and prioritise the special responsibility we have towards indigenous species, while still recognising the recreational, economic and cultural benefits and human sustenance of valued introduced species.”*

The tension between conservation of indigenous species and provision for introduced taonga species is most stark in relation to the kiore/Polynesian rat (see below *Spotlight: Kiore or Pacific rat* -

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<sup>53</sup> Wai 2180, #3.3.85

<sup>54</sup> Wai 2180, #3.3.85 at [249]

<sup>55</sup> Wai 2180, #3.3.85 at [247]

*Rattus exulans*). Recognition of poaka/wild pig as a taonga species is another example (see below *Spotlight: Wild pigs, poaka*).

#### *Spotlight: Kiore or Pacific rat - Rattus exulans*

Kiore were introduced to Aotearoa by Māori (either accidentally as a stowaway or intentionally, it is not clear) and are a recognised taonga species,<sup>56</sup> valued as a source of meat and pelts for korowai.<sup>57</sup> As omnivores, kiore eat a wide range of plants and animals, and can have a significant impact, particularly on large flightless invertebrates such as land snails or weta.<sup>58</sup> As such, DOC consider them to be invasive species.<sup>59</sup>

Once widespread throughout the country, kiore were pushed to the brink of extinction with the introduction of much larger European rodents, with whom they struggle to compete. Today, with the exception of a small number of off-shore islands, kiore are only found on Rakiura and in the south-west of the South Island.

The cultural value of the kiore and its scarcity (compared to historical ranges) has made the eradication of kiore from off-shore islands highly controversial and disputed by local iwi/hapū.<sup>60</sup> This is particularly so given arguments that kiore may impact indigenous species less than other introduced species, and that its longstanding presence has provided local flora and fauna time to adapt.<sup>61</sup> Conversely, in other instances iwi have viewed their eradication as necessary, for example as part of the Tuatara Recovery Plan.<sup>62</sup>

The cultural value of kiore to Māori is currently recognised by DOC when planning eradication programmes for invasive species, and requires a nuanced consideration of the risks, impacts and cultural implications. For example, a sanctuary has been established on two islands of the Hen and Chickens group, where kiore is both contained (the rats are poor swimmers) and yet preserved as part of the cultural heritage of Ngātiwai.

This approach necessitated acceptance that the rats' presence would come at a cost to some of the indigenous species present.<sup>63</sup> Providing for the kiore is likely to increase the impacts on native biota on the islands that are classified as Nature Reserves for the value of their flora and fauna. It is also an imperfect solution, the island is not very accessible for iwi and it is unclear whether the habitat will be sufficient to sustain a kiore population to the health and numbers necessary to sustain harvest.<sup>64</sup>

The incompatibility of providing for kiore within conservation legislation is symptomatic of the system-wide failure to recognise and provide mechanisms that protect Māori interests and values. It also stands in stark contrast to the accommodation made for the use and protection of highly valued species introduced by European settlers, such as trout. A 2021 article on this issue suggested that there is a need to consider new, Māori culturally based, designations, such as cultural reserves'.<sup>65</sup>

<sup>56</sup> Wehi P et al, 2021, 432

<sup>57</sup> Peltzer D et al, 2019, 426

<sup>58</sup> <https://www.doc.govt.nz/nature/pests-and-threats/animal-pests/rats/>

<sup>59</sup> Wehi P et al, 2021, 27, 432-441

<sup>60</sup> An example was the eradication of kiore from Little Barrier Island

<sup>61</sup> See discussion in New Zealand Conservation Authority, 1997, *Māori customary use of native birds, plants and other traditional materials. Interim report and discussion paper*

<sup>62</sup> <https://www.doc.govt.nz/globalassets/documents/science-and-technical/tsrp09c.pdf>

<sup>63</sup> <https://www.nzherald.co.nz/kahu/rare-rats-off-the-hook-as-doc-gives-them-island-sanctuary/>

<sup>64</sup> Wehi P et al, 2021, 432-441

<sup>65</sup> Wehi P et al, 2021, 439

### *Spotlight: Wild Pigs, Poaka*

Like most introduced species, wild pigs (Poaka) can have a significant impact on indigenous biodiversity. The control of these animals is seen as important to the eradication of Kauri Dieback disease and the protection of kauri forests. This is because pigs carry dirt around the forest and their foraging and rooting behaviours facilitate the dispersal of the disease. Kauri are both a taonga and ecological keystone species. However, pigs are also an important species for Māori and non-Māori.

For example, a 2017 study found that for communities Te Tai Tokerau, hunting Poaka is valued for time out with the whānau, outdoor education, connection to whakapapa (people, places, land), fulfilment of wairua, tikanga ā iwi (cultural practice), ngā hiahia o te taiao (needs of the environment), and ngā hiahia o te ohaoha (economic needs). Whether Pākehā or Māori, hunter or non-hunter, all participants in the study recognised the significant hunting presence in Aotearoa. While there was a preference for indigenous over introduced species, there was also an understanding that Poaka have been co-existing with humans in Aotearoa for over 250 years. Participants agreed that managing populations of Poaka for conservation values does not necessarily mean eradication, but that adaptive management could be preferred.

The National Pest Management Plan for the control of Kauri Dieback disease navigated the complexity of these competing needs through a highly proscribed spatial planning approach. Areas critical for kauri survival (“kauri land”), as well as areas where there was a local pig hunting resource, were identified and mapped.<sup>66</sup> This enabled consideration of the implications of an eradication approach for kauri land and the impacts on both recreational and subsistence hunting.<sup>67</sup>

Assessment of the cultural impacts on tangata whenua was complex; it was difficult to quantify in economic terms and required consideration of the impacts of the loss of kauri, which was recognised as a taonga, but also from the blanket closure of the forests (so restricted access) and loss of access to pigs, a traditional food source. Alternatively, taking no action to protect kauri was also considered a breach of Treaty principles.<sup>68</sup>

It was also recognised that “management of a pathogen that affects a taonga species must be done in partnership with Māori”.<sup>69</sup> On this basis an independent governance structure with co-chairs representing the Crown-Māori relationship was established. The management plan also drew upon knowledge and tools drawn from both science and mātauranga. Implementation funding has also been earmarked to enable mana whenua activities; to ensure on ground operations provide for kaitiakitanga. The regime enables authorised mana whenua to undertake enforcement action.

Mātauranga-ā-iwi, mātauranga-ā-hapū, mātauranga-ā-whānau (local place-based knowledge that is held within tribal groupings) relating to particular taonga species can only survive if kaitiakitanga can be carried out for those taonga; which in turn requires exercising rangatiratanga.<sup>70</sup> As evidenced in the kiore and poaka examples, bespoke and highly placed based responses have resolved tensions associated with protecting these species. Responses have directly recognised and considered the value of the taonga species and Māori connections to taonga, and how conservation objectives could be achieved while ensuring those connections were provided for.

As the Waitangi Tribunal in Wai 262 stated, shared decision-making is an “urgent and important part of the process of building effective partnerships and implementing section 4 of the Conservation

<sup>66</sup> Ministry for Primary Industries, 2021

<sup>67</sup> Ministry for Primary Industries, 2021, 7

<sup>68</sup> Ministry for Primary Industries, 2021, 26

<sup>69</sup> Ministry for Primary Industries, 2021, 24

<sup>70</sup> Department of Conservation, 2020, 26

Act”.<sup>71</sup> Co-management of wildlife is likely to assist in resolving a lot of the tensions set out above. New wildlife legislation will need appropriate governance structures to ensure that happens. However, legislative direction will be equally important to help decision-makers navigate the challenges discussed.

### ***Issue 3: The Wildlife Act does not recognise or mandate mātauranga Māori in decision-making***

Aotearoa has a rich blended knowledge tradition that has been dominated by structures of so called ‘Western’ or ‘Eurocentric’ ontologies and epistemologies since European colonisation. More recently, amidst broader Māori rights claiming and cultural resurgence, mātauranga Māori, the distinctly Māori knowledge tradition, has become much more prominent in discourse. Its principles and practices, however, have always prevailed on marae.

The discourse about mātauranga Māori often centres on its utility to complement, or be woven into, more scientific methods. However, the dichotomous notions of science and mātauranga unnecessarily constrain thinking, with some often referring to Māori science to reflect the fact that rigorous observation and measurement of phenomena are integral parts of the practice of mātauranga Māori.

Dan Hikuroa (2017) and Georgina Tuari Stewart (2022) provide a contemporary understanding of mātauranga as a knowledge tradition and how it relates to science as a knowledge tradition.<sup>72</sup> Taken together, the authors paint a picture of mātauranga Māori as a broad knowledge tradition that includes the philosophical element as well as the application of the scientific method. The antiquity of the Wildlife Act means that it does not reflect modern approaches to decision-making which recognise mātauranga Māori and science as two knowledge systems that can be used together to generate new approaches and ways of understanding. *Te Mana o Te Taiao* describes this approach as He Awa Whiria, which refers to braided rivers that comprise multiple connections that change and move over time.

*Te Mana o Te Taiao* states that biodiversity management decision-making should be evidence-based, transparent and informed by the best available information, including mātauranga Māori and science. There appear to be multiple ways in which that could be achieved in practice. For example, a framework could be created whereby the two knowledge systems stand separately and provide input into decisions as relevant. This would avoid questions about the weight and importance of each knowledge system, which may arise if the starting point for decisions was one or the other.

For example, in the development of the NPSFM, scientific advice and Māori advice were received from two separate specialist groups. Each group had cross-over members in common. When dealing with broad ecological problems there was a lot of synergy between the two groups. Ministry for the Environment policymakers integrated all of the advice.

Manaaki Whenua Landcare Research’s experience using the framework He Waka Taurua – ‘the double-hulled canoe’ at Whakatāwai Station is another informative example of collaborative partnership to co-produce outcomes based on science and indigenous knowledge.<sup>73</sup>

A process would be required to address situations of conflict between the two knowledge systems. Principles such as prioritisation of threatened and indigenous species, and the need for a precautionary approach, could help resolve any differences.

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<sup>71</sup> Waitangi Tribunal, 2011, 358

<sup>72</sup> Hikuroa D, 2017, 5-10; Stewart G.T, 2022, 18-24

<sup>73</sup> <https://www.landcareresearch.co.nz/publications/innovation-stories/innovation-articles/building-te-ao-maori-thinking-into-science-knowledge-systems/>

Whatever approach is adopted, it should provide for more informed and robust decision-making than each knowledge system could individually achieve.

*Spotlight: How two knowledge systems could inform species assessments*

Currently, extinction risk assessments of species in Aotearoa and internationally is science led (based as they are on (IUCN) quantitative criteria). Canada has deviated from that approach with a system that attempts to incorporate indigenous knowledge. However, it is limited to ‘tangible’ indigenous knowledge, such as local knowledge about population numbers and species range. ‘Intangible’ indigenous knowledge, such as the spiritual importance of a species, is considered irrelevant to extinction assessments.

Mātauranga Māori incorporates both tangible and intangible aspects. As described in *Te Mana o Te Taiao*, it is the body of knowledge originating from Māori ancestors, including the Māori world view and perspectives, Māori creativity, and cultural practices. The proposed NPSIB defines it as Māori customary knowledge, traditional knowledge, or intergenerational knowledge.

In this context, how can mātauranga Māori best inform extinction risk assessments?

There is emerging discussion in Australia around the need for two parallel systems whereby one lists and protects threatened species (based on scientific knowledge) and one lists and protects culturally significant species (based on indigenous knowledge). But this approach risks important indigenous knowledge being excluded from threatened species decision-making. For example, in Canada, local indigenous knowledge was influential in the extinction risk assessment of the polar bear because locals were able to better advise on the species’ range and its adaptation to threats like sea ice melt. Further, cultural indicators might help overcome uncertainty when there is insufficient scientific knowledge about a species.<sup>74</sup>

In light of the above, could a single mātauranga Māori assessment of a species inform both the extinction risk of that species (and therefore its threat classification either nationally, regionally or at place) and its cultural significance (and therefore whether it needs to be protected for its cultural value)? Under this system, species at the brink of extinction and common but culturally significant species could be afforded a higher degree of protection and management than other species.

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<sup>74</sup> Wehi et al, 2021 at 1116

## Appendix B

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