# *The role of the concept of "mana whenua" in resource management regulation in Aotearoa New Zealand*

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## *I Introduction*

'Mana whenua' is a concept steeped in controversy in resource management (RM) regulation in Aotearoa New Zealand. The origins of the term are unusual, while its continued use is complex and criticised. There are a number of potential methods for resolving these issues moving into the future.

## *II Defining 'mana whenua'*

The Resource Management Act 1991 (the Act; RMA) defines 'mana whenua' as "customary authority exercised by an iwi or hapū in an identified area."[1] The term is rarely used in the Act, but importantly is part of the definition of tangata whenua, which "in relation to a particular area, means the iwi, or hapū, that holds mana whenua over that area."[2] The Act's purpose is promoting sustainable management of natural and physical resources.[3] In doing so, "all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to… kaitiakitanga."[4] This is what gives the concept of 'mana whenua' such significance, because Kaitiakitanga is exercised by tangata whenua.[5] Therefore before anybody does anything authorised by the RMA they must identify who holds mana whenua in the relevant area. This is so they can have particular regard to the exercise of kaitiakitanga by the identified tangata whenua, to achieve the Act's purpose. Kaitiakitanga is a key factor in recognising and providing for the section 6(e) matter of national importance. Although mana whenua is a key concept, relevant to all decisions made under the RMA, its actual meaning is highly contested. The statutory definition provided in the Act is widely regarded as inadequate.

Mana whenua is a relatively new term, coined in the mid-1800s as an attempt by Māori to "conceptualise Māori authority in terms of the English legal concepts of imperium and dominium."[6] This is immediately problematic, as the term is not a part of pre-European mātauranga Māori. There is no issue with the creation of new words and phrases, but this concept is in conflict with other key

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[1] Resource Management Act 1991, s 2.

[2] Section 2.

[3] Section 5.

[4] Section 7.

[5] Section 2.

[6] Waitangi Tribunal *Rekohu: A Report on the Moriori and Ngati Mutunga Claims in the Chatam Islands* (Wai 64, 2001) [Rekohu Report] at 28; Catherine Iorns Magallanes "The use of Tangata Whenua and Mana Whenua in New Zealand Legislation: Attempts at Cultural Recognition" (2010) 16 NZACL 83 at 91.

Māori concepts. The root of the issue is the linking of the words mana and whenua.[7] Mana is prestige, authority, and spiritual power, generally engrained in people, not in whenua.[8] Although mana whenua-based claims by iwi need to be "clearly defined by tikanga Māori,"[9] the term has caused conflict and damage to tikanga and mātauranga Māori alike.[10]

Defining tangata whenua with reference to mana whenua is further damaging. Traditionally tangata whenua are the people born on the whenua,[11] not those who hold customary authority over it. This is another example of how mana whenua is at odds with mātauranga Māori. This is a significant issue, which has been criticised by the Environment Court and the Waitangi Tribunal.[12]

'Mana whenua' and 'tangata whenua' are sometimes used interchangeably. Ngāi Tahu kaitiaki define 'mana whenua' similarly to the RMA definition for 'tangata whenua.'[13] These inconsistent definitions complicate this area of law.

Ahi kā is the "long burning fires of occupation."[14] It is the basis for rights to use the whenua according to tikanga. If Māori could not whakapapa to the whenua then they were unable to claim ahi kā over it.[15] Maintaining ahi kā is crucial to allowing groups to retain mana whenua (in the RMA sense) over lands in order to exercise kaitiakitanga over it.[16]

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[7] Rekohu Report, above n 6, at 28.

[8] John C Moorfield "Te Aka Māori Dictionary" (7 October 2022) Te Aka Māori Dictionary <https://maoridictionary.co.nz/>.

[9] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352. at [110].

[10] Rekohu Report, above n 6, at 28.

[11] Moorfield, above n 8.

[12] Magallanes, above n 6, at 92; *Golden Bay Marine Farmers v Tasman District Council* EC Wellington W19/2003, 27 March 2003 at [255].

[13] Bennett, C., Matunga, H., Steyl, S., Borell, P., Dionisio, R., & Hāpuku, A. (2021). Mana whenua engagement in Crown and Local Authority-initiated environmental planning processes: A critique based on the perspectives of Ngāi Tahu environmental kaitiaki. *New Zealand Geographer*, 77 ( 2 ), 63– 75. at 64.

[14] Moorfield, above n 8.

[15] *Ngati Maru* Trust, above n 9, at [16].

[16] Kawharu, M. (2000). Kaitiakitanga: a Maori anthropological perspective of the Maori socio-environmental ethic of resource management. *The Journal of the Polynesian Society*, 109(4), 349-370 at 362.

Kaitiakitanga is exercised by tangata whenua, and is guardianship over "an area in accordance with tikanga Māori in relation to natural and physical resources," including stewardship.[17] Kaitiaki are members of the tangata whenua (those who hold mana whenua) most actively engaged in taking care of the environment and upholding kaitiakitanga.[18] Kaitiaki aim to protect the mana and mauri (life force) of the environment for the future mana whenua (their definition).[19] Kaitiaki are the only people who can inform the court of the requirements of kaitiakitanga.[20] Therefore the only people capable of informing the court of these requirements are a subset of the tangata whenua who hold mana whenua. This illustrates the importance of the concept, despite its vagueness.

## *III Background*

The "First Law of Aotearoa" existed before European settlement, and had well established frameworks for RM, with concepts such as whanaungatanga highlighting the relationship between tangata and whenua, while kaitiakitanga emphasised the importance of sustainable care in order to preserve resources for future generations.[21] The concept of 'mana whenua' was absent from this system of RM regulation.

The "Second Law of New Zealand" reigned supreme from the signing of the Treaty of Waitangi in 1840 until the establishment of the Waitangi Tribunal in 1975. Tikanga and mātauranga Māori were neglected, and only recognised in order to further subvert them.[22]

Since then, a "Third Law of Aotearoa/New Zealand" has developed.[23] A hybrid system, although initiated reluctantly, is now a celebrated aspect of the nation's legal system. The RMA was the first

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[17] Section 2.

[18] Bennett, Matunga, Steyl, Borell, Dionisio and Hāpuku, above n 13, at 64.

[19] At 64.

[20] *Friends and Community of Ngawha Inc v Minister of Corrections* (2002) 9 ELRNZ 67 (CA) at [29].

[21] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 5; Joe Williams J "Lex Aotearoa: a Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law" (paper presented to Harkness Henry Lecture, Hamilton, November 2013) at 2.

[22] Williams, above n 21, at 10.

[23] At 11.

and remains the most sophisticated example of the incorporation of tikanga into legislation.[24] The concept of 'mana whenua' is central to RM in this hybrid law.

## *IV Current role and criticisms of the concept of 'mana whenua'*

'Mana whenua' and other Māori terms can seem disjointed from the surrounding legal environment, but the Supreme Court has declared "Māori custom according to tikanga is… part of the values of the New Zealand common law."[25] This difficult conceptual transition comes with the Third Law of Aotearoa/New Zealand, and the continued difficulties surrounding mana whenua in RM regulation suggest this transition is incomplete.

The Waitangi Tribunal's main concern about the use of the term 'mana whenua' in RM regulation is it could imply that only a single iwi/hapū can hold mana whenua and represent all Māori in an area.[26] This issue was addressed in 2020, when the High Court confirmed in specific circumstances, consenting authorities had jurisdiction to assess the comparative strengths of competing hapū or iwi relationships under s 6(e) of the RMA.[27] This can include mana whenua claims. The case highlights the difficulties in consulting tangata whenua, as authorities must first decide who actually holds mana whenua. A lack of cultural awareness causes mistakes. For example commemorating a multitude of iwi from across Auckland in a single location undermines the mana and mana whenua of the iwi who exercise mana whenua at that site. There are a wide range of relevant factors for assessing conflicting evidence from tikanga Māori.[28] There is clear parliamentary anticipation of the courts' abilities to consider such issues and use tikanga Māori to resolve them.[29] However the courts may only make such a decision in highly fact specific scenarios with a clear link to a RM consequence, to ensure this power is not used by iwi to attempt to have their mana whenua declared superior to competing iwi.[30]

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[24] At 19.

[25] *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573, at [94].

[26] Rekohu Report, above n 6, at 29.

[27] *Ngati Maru Trust*, above n 9, at [115].

[28] *Ngāti Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvC) at [53]; *Ngāti Maru* Trust, above n 9, at [117].

[29] *Ngati Maru Trust*, above n 9, at [64].

[30] *Ngati Maru Trust*, above n 9, at [115].

The use of the term in the RMA requires iwi and hapū to declare their mana. This is in conflict with tikanga Māori. Such behaviour is only in keeping with tikanga "as a boastful challenge or in contemplation of war."[31] One does not traditionally proclaim their own mana, it depends on how they are perceived by others. This is a significant behavioural shift that the concept of 'mana whenua' requires in the RMA. It indicates the inadequacy of the term, and its failure to incorporate tikanga Māori into this part of the Third Law of Aotearoa/New Zealand.

Consultation with holders of mana whenua have been far less successful than the RMA allows for.[32] The Act's provisions allowing for iwi planning instruments are a "dead letter" to Māori, and instead they have had to rely on treaty settlements to achieve results that the Act has been capable of producing since its enactment.[33]

New Zealand Judges continue to struggle to correctly define and apply Māori concepts, although the judiciary is improving.[34] 'Mana whenua' is currently defined in the RMA. Alternative options include retaining the phrase, but removing the statutory definition and allowing it to be determined through the courts; replacing the concept with a different Māori phrase more in keeping with tikanga and mātauranga Māori; or to replace it with an English phrase.

Defining a Māori concept in legislation is beneficial in providing certainty in the law, but Māori "resent" it.[35] It simplifies the legal process, and in theory should reduce the number of disputes in court. However, if the definition of a Māori concept is vague, inappropriate, or in direct conflict with tikanga, then it may cause more harm than good. 'Mana whenua' in the RMA is a prime example of this. The definition is highly disputed between Māori. It undermines their authority to define words from their own culture,[36] as well as failing to align with the principles of Te Tiriti o Waitangi.[37] Despite the nearly universal consensus that the term is poorly defined, the definition is

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[31] Rekohu Report, above n 6, at 261.

[32] Williams, above n 21, at 22.

[33] Williams, above n 21, at 22, 23.

[34] Compare *Ngawha*, above n 20; to sophisticated analysis in *Ngati Maru Trust*, above n 9.

[35] Magallanes, above n 6, at 102.

[36] Magallanes, above n 6, at 98.

[37] Rekohu Report, above n 6, at 260; *Carter Holt Harvey v Te Runanga o Tuwharetoa ki Kawerau* [2003] 2 NZLR 349 (HC) at [27].

inflexible because it is codified in statute. Its continued use poses a risk of the definition becoming accepted as correct, permanently altering mātauranga Māori and the law for the worse.

Retaining the concept of 'mana whenua' but removing its definition is not likely to resolve this issue. It would be an improvement, allowing the courts to determine a more appropriate definition. This aligns with the Law Commission's general opinion that the only reason to define Māori terms in legislation is to give them a "specific meaning for the purpose of that Act; otherwise their meaning might be narrowed (or widened) unintentionally."[38] However due to the concept's conflict with tikanga, issues would persist. The concept of 'mana whenua' is inappropriate and should have no place in RM regulation. The Waitangi Tribunal has recommended the term be removed from the RMA altogether.[39]

'Rangatiratanga' is an alternative suggested by the Tribunal. This describes authority inherent in the people, over the people rather than land.[40] They note the Māori text of Te Tiriti o Waitangi and the drafter's calculated decision not to use the word 'mana.' They recommend the legislature should follow this precedent.[41] If Parliament's intent could have been more clearly explained by English words, or less contentious Māori words, then those words should have been used instead of 'mana whenua.'[42]

Some methods for improving general incorporation of Māori culture into the Third Law of Aotearoa New Zealand include ongoing education for pakeha, and allowing greater ownership by Māori of the RM process.[43] The latter is often prevented by political opposition, as seen in the Auckland Council legislation.[44]

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[38] Magallanes, above n 6, at 84; Law Commission *Legislation Manual: Structure and Style* (NZLC R35, 1996) at [193].

[39] Rekohu Report, above n 6, at 262.

[40] At 262.

[41] At 262.

[42] At 257.

[43] Magallanes, above n 6, at 101.

[44] At 102.

## *V Best practices of mana whenua engagement*

The general poor understanding of the concept of 'mana whenua' in RM regulation has resulted in poor interactions between tangata whenua and officials. Ngāi Tahu Kaitiaki detail their perspective on best practice for officials engaging with them.[45] The authors define ‘mana whenua’ similarly to ‘tangata whenua’ in the RMA.[46]

The Kaitiaki believe authorities are dismissive and disbelieving of the validity of mātauranga Māori.[47] They feel mātauranga Māori is routinely disregarded in favour of Western philosophies.[48] This is mirrored by inequalities in resourcing for engagement with mana-whenua-holding kaitiaki compared to experts in Western Science.[49] They believe this amounts to a failure to meet requirements of engagement with mana whenua under the RMA.

If these issues were resolved, mana whenua engagement would be sufficient from a kaitiaki perspective. Authorities acting in accordance with wider tikanga would increase the satisfaction of the mana whenua. Examples of this are following hui protocol and maintaining relationships beyond formal discussions, including ongoing contact rather than sporadic engagement.[50] These practices will be relevant in the future regardless of whether the phrase ‘mana whenua’ is still used, or if it has been replaced by another concept.

## *VI Resource Management Review Panel*

The RMA is being replaced. The Resource Management Review Panel made several comments about the role of 'mana whenua' in RM regulation. Their recommendation was the concept of 'mana whenua' still had a place in RM regulation, in the Natural and Built Environments Act. However they recommended redefining it as “an iwi, hapū or whānau that exercises customary authority in an identified area.”[51] This is analogous with the definition used by Ngāi Tahu kaitiaki,[52] and the

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[45] Bennett, Matunga, Steyl, Borell, Dionisio and Hāpuku, above n 13.

[46] At 64; RMA s 2.

[47] At 69.

[48] At 68.

[49] At 71.

[50] At 71, 72.

[51] Resource Management Review Panel *New Directions for Resource Management in New Zealand* (June 2020) at 112.

[52] Bennett, Matunga, Steyl, Borell, Dionisio and Hāpuku, above n 13, at 64.

definition of ‘tangata whenua’ in the RMA.[53] It departs from the Waitangi Tribunal’s preference of removing the concept  from RM regulation.[54]

Although the panel admits the possibility of excessive engagement requirements, it concluded this can be avoided by only engaging with mana whenua to a degree appropriate for the issue in question,[55] which is vague. They believe it will improve opportunities for direct mana whenua engagement, and clarify who should be consulted.[56] However it seems adopting the position of the Waitangi Tribunal and removing the concept altogether would have more guaranteed benefits.

### *VII Natural and Built Environments Bill*

The Natural and Built Environments Bill (NBEB) consultation draft has been released, and the importance of the concept of 'mana whenua' is severely diminished. This is an early draft, so aspects will likely change, but it gives insight into the role the concept of 'mana whenua' may play in the future. The new purpose is to enable “Te Oranga o te Taiao to be upheld,” and the new phrase “incorporates… the intrinsic relationship between iwi and hapū and te taiao.”[57] This is a more ecocentric purpose than the RMA.[58] ‘Taiao’ refers to the environment, nature, Earth and other similar English concepts.[59] NBEB s 5(3)(b) is comparable to the definitions of 'mana whenua' and ‘tangata whenua’ in the RMA. But relating iwi and hapū to te taiao is closely aligned with tikanga and mātauranga Māori. This indicates the concept of ‘mana whenua,’ at least in its current RMA sense, is due to be removed from RM regulation. This would be a welcome move, as it would end the conflict with tikanga and mātauranga Māori.

There is also a lack of reference to 'mana whenua' in the environmental outcomes and implementation principles of national planning frameworks.[60] Schedule 3 of the Bill does mention

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[53] Section 2.

[54] Rekohu Report, above n 6, at 262.

[55] Resource Management Review Panel, above n 51, at 113.

[56] At 113.

[57] Natural and Built Environments Bill Consultation Draft 2021, s 5.

[58] Trevor Daya-Winterbottom “Natural and Built Environments – The Devil is in the Details” (2021) Resource Management Bulletin 1, at 1.

[59] Moorfield, above n 8.

[60] Natural and Built Environments Bill Consultation Draft 2021, ss 8, 18.

'mana whenua' in regard to planning committees.[61] There is no indication as to why the concept was used. Perhaps it is merely a place holder until a replacement term is confirmed. It is unclear whether it will change. If it remains, the surrounding words imply the concept is to be interpreted in keeping with the Resource Management Review Panel's recommended redefinition. Whether or not the concept is completely absent from the future of RM regulation, it is clear the current RMA definition will no longer be used. To remove the term completely would probably be the best resolution.

## *VIII Conclusion*

The concept of 'mana whenua' in RM regulation has been complex and troublesome for decades. It has been blatantly in conflict with tikanga and mātauranga Māori, and has confused the definition of kaitiakitanga. It has caused poor interaction between RM authorities and Māori. Looking to the future, it seems that the concept will either be removed completely from RM regulation, or be undefined in the statute, allowing the courts to adopt a definition in keeping with tikanga and mātauranga Māori. Both options should put an end to the issues that the concept has caused in the past, and improve the quality of Aotearoa New Zealand's RM regulation.

[61] Schedule 3.

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