

TE ARA TIKA: TIKANGA-CENTRIC PROCESSES FOR CLAIMANTS TO RESOLVE OVERLAPPING CLAIMS OF MANA WHENUA IN AOTEAROA'S TREATY SETTLEMENT PROCESS

Morgan Dalton-Mill*

In 2020, the Waitangi Tribunal recommended that the Crown facilitates tikanga-based processes in the Treaty Settlement process to resolve overlapping claims disputes between Māori claimants. This recommendation was in response to the growing number of tangata whenua (people of the land), claiming mana whenua interests in whenua (land) and rohe (regions). It was also in response to the Crown's *Red Book* policy. The Tribunal found the Crown's *Red Book* and separate practices breach tikanga Māori, undermine tino rangatiratanga (full authority) and disregard the Treaty principles that underpin Māori-Crown relations. The Tribunal claimed tikanga-based processes would address Māori claimants' overlapping claims of mana whenua over rohe.

I argue that the Crown's *Red Book* policy for overlapping claims is insufficient. As a result, Māori claimants involved in the Treaty Settlement process should conduct tikanga-centric processes for overlapping claims of mana whenua over rohe. The Crown should contribute information, resources and financial support to these tikanga-centric processes. I argue for tikanga-centric processes because they are grounded in tikanga Māori and uphold te Tiriti o Waitangi 1840.

I propose procedural and substantive features that tangata whenua groups could use in the tikanga-centric processes to address overlapping claims of mana whenua. Regarding the procedural features, I recommend that: a public register is created that displays active and upcoming settlements and relevant rohe; tikanga-centric processes occur early in the Treaty Settlement process; the processes are voluntary and incentivised; and the rangatira (leaders) of each tangata whenua group should be endorsed by their group. Some of the

* Ko Morgan Dalton-Mill ahau. He uri tēnei nō Ngāti Whātua o Kaipara. Ngā mihi nui ki a koe e Jayden Houghton mō tō tautoko me hautū.

substantive features I recommend are that the processes follow tikanga Māori values and utilise a take-utu-ea approach. I apply these features to the Ngāti Whātua o Ōrākei Settlement to reveal the potential for tikanga-centric processes to create tika and durable settlements for Māori claimants in the Treaty Settlement process going forward.

1 Introduction

In 1975, Aotearoa's Parliament (Pāremata Aotearoa) enacted the Treaty of Waitangi Act 1975 (TWA), which established the Waitangi Tribunal.¹ The Tribunal is a permanent commission of inquiry that investigates historical and contemporary Crown breaches of the Treaty of Waitangi principles (Treaty principles) against Māori.² The Tribunal commonly conducts inquiries (related to particular districts or broad national issues) into Crown breaches of the Treaty principles.³ It can assist Māori claimants in direct negotiations with the Crown. For the past four decades, the Tribunal has published reports containing recommendations for Māori and the Crown pursuant to s 6(3) of the TWA. These recommendations focus on restoring the relationship between Māori and the Crown to the position both parties envisioned at the signings of the Treaty of Waitangi and te Tiriti o Waitangi across Aotearoa in 1840.⁴

In 2020, the Tribunal recommended that the Crown facilitates tikanga-based processes in the Treaty Settlement process (TSP) to resolve disputes between Māori claimants regarding mana whenua⁵ over whenua and rohe.⁶ In te ao Māori, territorial boundaries are fluid. Hapū and iwi determine boundaries according to whakapapa and mana.

1 See generally Janine Hayward and Nicola R Wheen (eds) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004).

2 Edward Willis "Legal Recognition of Rights Derived from the Treaty of Waitangi" (2010) 8 NZJPI 217 at 221. See also Hayward and Wheen, above n 1.

3 Treaty of Waitangi Act 1975 [TWA], s 5; and Waitangi Tribunal "Inquiries" (12 April 2021) <www.waitangitribunal.govt.nz>.

4 This article privileges te Tiriti o Waitangi 1840 over the Treaty of Waitangi 1840 because Māori signed te Tiriti. It reflects our understanding of our relationship with the Crown. See Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at ch 6.

5 Part II will address mana whenua and other Māori values in detail.

6 Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2020) [*Hauraki Report*] at xvi. In this article, references to rohe include whenua.

Therefore, multiple hapū and iwi can all have valid interests in a specific rohe. This view contrasts with Pākehā understandings of fixed boundaries and territories. The Tribunal found that the Crown's TSP does not cater to these differing perspectives and, thus, the Crown should facilitate tikanga-based processes.⁷

The Crown formed the TSP in 1992 for Māori claimants to negotiate directly with the Crown about breaches of the Treaty principles.⁸ Often, when the Crown is negotiating with mandated representatives⁹ on behalf of Māori claimants, multiple tangata whenua groups will claim interests in that rohe. The Crown characterises these layered claims to mana whenua over rohe as “overlapping” or “opposing” claims.¹⁰

The Crown employs *Ka tika ā muri, ka tika ā mua* (*Red Book*) policy and separate practices to deal with overlapping claims. The Crown's policy specifies:¹¹

An overlapping claim exists where two or more claimant groups make claims over the same area of land that is the subject of historical Treaty claims ... The settlement process is not intended to establish or recognise claimant group boundaries. Such matters can only be decided between claimant groups themselves.

The Tribunal found that the Crown's *Red Book* policy “damages whanaungatanga” in overlapping claims disputes.¹² It stated that the Crown does not engage with other hapū and iwi groups early enough in the TSP to consult with them meaningfully.¹³ In particular, the Tribunal heard evidence that the Crown ignores other groups' claims

7 At xvi.

8 Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna | Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018) [*Red Book*] at 16.

9 At 29. “Mandated representatives” refers to people who are selected to represent a particular claimant groups' interests throughout the TSP.

10 At 27. In this article, references to overlapping claims include opposing claims.

11 At 53. See also New Zealand Government “What are overlapping interests?” (21 December 2021) <www.govt.nz>; and New Zealand Government “The Crown's understanding of customary interests and associations” (21 December 2021) <www.govt.nz>.

12 Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) [*Tāmaki Makaurau Report*] at 2.

13 See *Hauraki Report*, above n 6, at [2.2.1].

in favour of the mandated group.¹⁴ The Tribunal observed that when disputes arise, the Crown shifts responsibility for resolving overlapping claims disputes to the claimants.¹⁵ Importantly, the Crown does not require overlapping claims to be addressed through tikanga-based processes.¹⁶ This policy suggests the Crown has not facilitated tikanga-based processes consistently. The Ngāti Whātua o Ōrākei Settlement (NWOS) demonstrates some of the critical issues in the TSP in relation to overlapping claims.

In this article, I argue that the Crown's policy for overlapping claims is insufficient. As a result, Māori claimants involved in the TSP should conduct tikanga-*centric* processes to resolve overlapping claims of mana whenua over rohe. The Crown should contribute information, resources and financial support to these tikanga-centric processes. Tikanga-*based* processes — which contain only some tikanga elements (and can often be tokenistic in incorporating tikanga Māori into the process) — cannot uphold te Tiriti and tino rangatiratanga because they are not fully grounded in tikanga Māori. Tikanga-centric processes — in which tikanga is the process or is at the core of the process — prioritise tika ways and te ao Māori values as they stem from tikanga Māori. This article proposes some features that could be present in tikanga-centric processes in the TSP.

Part II of this article defines some of the fundamental tikanga Māori values and provides context to issues present in the TSP. Part III analyses the issues in the Crown's *Red Book* policy and practices for addressing overlapping claims. These issues illustrate the need for a new approach to remedy overlapping claims in the TSP meaningfully. Part IV investigates the NWOS and in doing so, identifies critical problems in the Crown's overlapping claims policy and practices. Part V explains why tikanga Māori is the most suitable approach to resolve disputes about mana whenua between tangata whenua groups. Part VI proposes some procedural and substantive features of tikanga-centric processes that claimants could utilise to address overlapping claims disputes.

14 At [5.2.3.3] and [5.6.1]–[5.6.2]; and *Tāmaki Makaurau Report*, above n 12, at 32, 92 and 101.

15 *Tāmaki Makaurau Report*, above n 12, at 9.

16 *Hauraki Report*, above n 6, at xvi.

Tikanga-centric processes should follow common tikanga Māori values while maintaining flexibility to account for hapū and iwi differences. Ultimately, the tikanga-centric processes should uphold tikanga values. Otherwise, as Tā Joseph Williams states, the process will not be tika.¹⁷ These principles operate as a standard for proposing some procedural and substantive features for tikanga-centric processes in the TSP.

Broadly, this article critiques the role of the Crown in Māori internal affairs, and proposes the Crown adopts a facilitator role in the TSP. The Crown should transfer its power to Māori. Therefore, Māori can make sustainable decisions for and with Māori in accordance with tikanga Māori.¹⁸

II Context

In te ao Māori, “the way forward is modelled on the past”.¹⁹ The mana and actions of Papatūānuku (earth mother) and Ranginui (sky father) in creating te ao mārama (the world of light) provide a basis for resolving disputes between Māori claimants in the TSP. This context, and related tikanga Māori values, influence the features this article proposes for tikanga-centric processes.

A Te Ao Māori

Te reo Māori unlocks the door to te ao Māori. Te ao Māori cannot always be expressed accurately using English words. However, astute Māori tohunga (knowledge experts) who grew up immersed in both te ao Māori and te ao Pākehā have defined tikanga Māori and Māori values in ways that closely capture their meaning in English.

17 Joseph Williams “The Harkness Henry Lecture – Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 3.

18 Although this article refers to the Crown having power, the Crown’s power is illegitimate because it was stolen from us during colonisation. See Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 169–170.

19 Khylee Quince “Māori Disputes and their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, Oxford, 2007) 256 at 292.

1 Tikanga Māori

Tika refers to what is “right” or “correct”.²⁰ Some view tikanga Māori as a form of “social control”.²¹ Another interpretation of tikanga Māori is as an ethical system that an individual or collective practices.²² Tā Hirini Moko Mead defines tikanga Māori as:²³

... the set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or individual is able to do.

Ani Mikaere characterises tikanga Māori as “the “first law of Aotearoa”.²⁴ Tikanga Māori is thus a legal and social system that existed before Pākehā imposed the common law on Māori in 1858.²⁵ Although tikanga Māori is still subject to the effects of colonisation in Aotearoa, it remains fundamental to Māori society today.²⁶

2 Māori values

Tikanga Māori is best understood through its core values.²⁷ Although tikanga Māori and kawa²⁸ vary between and within hapū and iwi, some values are similar across these diverse groups. The main values relevant to this article are: mana, tapu and noa;

20 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, New York, 2013) at 17.

21 At 16.

22 At 17.

23 At 24.

24 Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330 at 330; and see generally Williams, above n 17.

25 Tom Bennion “Introduction” in Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) 1 at 7.

26 Annette Sykes “The Myth of Tikanga in the Pākehā Law” (2021) 8 Te Tai Haruru Journal of Māori and Indigenous Issues 7 at 9.

27 Williams, above n 17, at 3.

28 Kawa refers to “the protocol governing ceremonial conduct on a particular marae and in formal contacts between social groups”. See Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 128.

whanaungatanga; manaakitanga; kotahitanga; rangatiratanga; and utu.²⁹ These values are interconnected and should be understood as a kaleidoscope of principles that underpin tikanga Māori.³⁰

(a) Mana, tapu and noa

Mana is a fundamental tikanga value, and is interlinked with tapu and noa.³¹ Mana is a multifaceted concept that denotes influence, physical and spiritual power, recognised authority and an obligation to lead people.³² Mana guides individual and collective relationships within te ao Māori.³³ Tapu is to set apart. It refers to a sacred thing.³⁴ Tapu holds spiritual and legal connotations.³⁵ It is ever-present in te ao Māori, affecting hapū and iwi cultural practices and Māori identities.³⁶ Noa is a state of balance that often neutralises tapu.³⁷

Different forms of mana exist.³⁸ Mana atua is mana that the gods delegate to certain people to act on their behalf.³⁹ Mana tangata relates to an individual's prestige, charisma and status. It is first established due to whakapapa and can change due to a person's acts and achievements.⁴⁰ Mana moana is the power a hapū or iwi has over its territorial seas.⁴¹ Mana whenua is the authority that a hapū or iwi holds over land.⁴²

29 Debates exist over which tikanga principles are the core tikanga Māori values. See Williams, above n 17, at 3. The listed values are relevant to addressing overlapping claims disputes.

30 Sam McMullan "Reciprocity and welfare" [2010] NZLJ 168 at 169.

31 Quince, above n 19, at 260–262.

32 Benton, Frame and Meredith, above n 28, at 154.

33 Mead, above n 20, at 49.

34 At 52.

35 Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (The Estate of Rev Māori Marsden, Masterton, 2003) at 5.

36 Mead, above n 20, at 51.

37 At 52.

38 Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Melbourne, 1991) at 61.

39 Mead, above n 20, at 50.

40 At 50.

41 Benton, Frame and Meredith, above n 28, at 162.

42 Barlow, above n 38, at 61.

This article focuses on the concept of mana whenua in the overlapping claims sphere of the TSP.

(b) Mana whenua

Some people understand mana whenua as customary authority in a particular area.⁴³ Nin Tomas describes mana whenua as “a concept that combines whakapapa and territoriality”.⁴⁴ Mana whenua is the highest form of authority over rohe. The strongest evidence of having mana whenua in a rohe is usually ahi kā, which involves occupying a rohe for an extended period without interference.⁴⁵ Some sources state that mana whenua was shared among multiple hapū and iwi, demonstrating the fluidity of boundaries in te ao Māori.⁴⁶ In contrast, some accounts express that separating sovereignty between hapū and iwi was impossible.⁴⁷

However, a hierarchy of interests or take (grounds for claims) exist in rohe within te ao Māori. Ahi kā is a fundamental take.⁴⁸ Other forms of take include take tuku, take whenua, take tīpuna, take raupatu and take hoko.⁴⁹ Take tuku refers to the responsibilities a tangata whenua group has based on whenua received by gift.⁵⁰ Take whenua is recognised whenua that provides the basis of a tangata whenua groups’ mana whenua claim.⁵¹ Take tīpuna is where a tangata whenua group demonstrates a whakapapa connection to identified whenua or sites in the whenua.⁵² Take raupatu refers to responsibilities based on whenua gained through conquest or war.⁵³

43 Benton, Frame and Meredith, above n 28, at 196.

44 Nin Tomas “Key concepts of Tikanga Maori (Maori Custom Law) and their use as regulators of human relationships to natural Resources in Tai Tokerau, past and present” (PhD Thesis, University of Auckland, 2006) at 91.

45 Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 49–50 as cited in Mead, above n 20, at 136.

46 Andrew Erueti “Māori Customary Law and Land Tenure: An Analysis” in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 41 at 42; and ET Durie *Custom Law* (January 1994) at 67–68.

47 Benton, Frame and Meredith, above n 28, at 178.

48 Rāpata Wiri “Mana Whenua and the Settlement of Treaty of Waitangi Claims in the Central North Island of New Zealand” (2013) 9 *AlterNative: An International Journal of Indigenous Peoples* 3 at 6.

49 At 6.

50 At 5.

51 At 4.

52 At 7.

53 At 10.

Take hoko is the responsibility arising from an exchange of rohe.⁵⁴ Groups claim responsibilities and connections to land through multiple take.⁵⁵

Mana whenua and other Māori concepts related to whenua, moana and te taiao (the environment) do not align with the Western property system operating in Aotearoa.⁵⁶ Overlaps and pockets of holdings in whenua are common for Māori.⁵⁷ Many groups hold different interests in the same whenua, including political interests. Andrew Erueti claims that historically, one group did not hold all the rights to the land; instead, “different levels of the hapū social order exercised [various use] rights in the same area of land”.⁵⁸ He describes this scenario as a “patchwork of use-rights”.⁵⁹ For example, while an entire hapū had the right to travel across their whenua, only a particular group could cultivate the gardens.⁶⁰

Alan Ward warns against equating mana whenua with ownership because although the authority of a rangatira lies over their territory, they do not have exclusive ownership over the land.⁶¹ Members of the hapū or iwi that the rangatira presides over also have rights and obligations to the land.⁶² A group may hold a strong claim to a rohe through occupation, control, and mana, but that claim does not amount to ownership.⁶³

(c) Whanaungatanga

Another fundamental tikanga value is whanaungatanga. Williams characterises whanaungatanga as the “glue” that holds tikanga together.⁶⁴ Whanaungatanga focuses on relationships and whakapapa.⁶⁵ A person can foster whanaungatanga with people

54 At 6.

55 Bernadette Arapere “Mana Whenua and Tuku Whenua: Ngati Koata Ki Te Tau Ihu” (2004) 1 Te Tai Haruru Journal of Māori and Indigenous Issues 88 at 96 as cited in Wiri, above n 48, at 7–8.

56 Erueti, above n 46, at 42.

57 See, for example, Waitangi Tribunal *Rekohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (Wai 64, 2001) at 260.

58 Erueti, above n 46, at 42.

59 At 43.

60 At 42–43.

61 Benton, Frame and Meredith, above n 28, at 200.

62 At 178.

63 At 200.

64 Williams, above n 17, at 4.

65 Mead, above n 20, at 48.

and the natural world. Within te ao Māori is an expectation that individuals will tend to their kin relationships and support the collective.⁶⁶

(d) Manaakitanga

Manaakitanga stems from mana and is the process of giving and receiving kindness and hospitality.⁶⁷ While whanaungatanga focuses on tending to relationships, manaakitanga is the act of nurturing relationships with people and expressing aroha.⁶⁸ Manaakitanga affects the group that gives manaaki and the group that receives it as manaaki bestows mana on both parties.

(e) Kotahitanga

Kotahitanga is a state of unity or solidarity.⁶⁹ Kotahitanga emerges after whanaungatanga and manaakitanga, where groups or individuals understand each other's differences and bond together for one kaupapa (purpose).⁷⁰

(f) Rangatiratanga

Rangatiratanga means authority or designated rights. The term tino rangatiratanga is interpreted in art 2 of te Tiriti to mean "real" rangatiratanga or "full authority".⁷¹ Most Māori also point to He Whakaputanga o te Rangatiratanga o Nu Tirenī 1835 as the Crown's original recognition of hapū rangatiratanga.⁷²

(g) Utu

Utu refers to reciprocity or the act of responding to something.⁷³ Before the settler government imposed the Westminster legal system on Māori, utu dealt with

66 At 48.

67 Benton, Frame and Meredith, above n 28, at 205.

68 Mead, above n 20, at 49.

69 Benton, Frame and Meredith, above n 28, at 145.

70 Te Aka Māori Dictionary (online ed) at [kaupapa].

71 Benton, Frame and Meredith, above n 28, at 331.

72 See Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 154–155.

73 Benton, Frame and Meredith, above n 28, at 467.

unacceptable behaviour, among other aspects of everyday life for Māori. Utu can result in unfavourable outcomes for some parties.⁷⁴ It can also be positive, such as giving koha while staying on a marae.⁷⁵ Due to whanaungatanga and the collective worldview in te ao Māori, hapū and iwi can be held responsible for an individual's wrongdoing.⁷⁶

At the heart of utu is the concept of ea (settlement).⁷⁷ Mead posits the take-utu-ea framework as a Māori position on dispute resolution.⁷⁸ Take is the cause or reason for the dispute.⁷⁹ Utu is the act of returning something to the way it was before, or providing more than what was lost to restore the issue. Ea is a state of resolution.⁸⁰ This framework can function in low-level disputes among individuals or on a larger inter-iwi scale.

3 Conclusion

These interlinked values lie at the heart of tikanga Māori. They inform the features this article recommends tikanga-centric processes should contain to adhere to tikanga Māori and honour te Tiriti. It is vital that these values are contained in the tikanga-centric processes to enable Māori claimants to address their overlapping claims disputes meaningfully.

B Treaty Settlement Process

It is useful to examine the current TSP to assess whether tikanga-centric processes should be integrated into the TSP. The TSP is fundamentally flawed — it imposes Western ideals of ownership onto Māori and the distinctly Māori concepts of te taiao. This imposition disadvantages Māori and contributes to the issues Māori claimants face in the overlapping claims sphere.

74 See 473.

75 Kassie Hartendorp "Utu and capitalism: a harmful imbalance" (2018) 32 *Continuum: Journal of Media & Cultural Studies* 678 at 679.

76 John Patterson *Exploring Maori Values* (Dunmore Press, Palmerston North, 1992) at 122–123.

77 Benton, Frame and Meredith, above n 28, at 467.

78 Mead, above n 20, at 46.

79 At 26.

80 Benton, Frame and Meredith, above n 28, at 475.

1 Background

The TSP is broadly comprised of the following steps. First, claimants prepare for submitting a historical claim against the Crown.⁸¹ The Crown must “[accept] that there is a well-founded grievance”, and the tangata whenua group meets the large natural groupings (LNG) standard for the claimant to progress.⁸² The Crown prefers that hapū and iwi with a particular claim form LNG to receive a mandate to negotiate.⁸³ If the related community approves the LNG and the mandated representatives, the Crown will assess whether it is an LNG. The pre-negotiation stage begins once the Crown accepts the claimant as an LNG. Together, the parties determine the Terms of Negotiation, which involves determining rohe of interest for redress.⁸⁴

Following the pre-negotiation stage, negotiations occur between the LNG and the Crown. If parties progress through the process, an Agreement in Principle (AIP) is adopted.⁸⁵ Once an AIP is signed, the parties implement the AIP in a Deed of Settlement (DoS). The DoS is signed by both parties once the parties have resolved each term. The DoS includes cultural, financial and relationship redress. Often the DoS will acknowledge the claimants’ particular relationship with whenua or moana. Once Parliament enacts the DoS, the representatives of the LNG establish a Post-Settlement Governance Entity (PSGE) to oversee and manage its redress.

2 Issues

Many Māori claimants involved in the TSP critique the process.⁸⁶ While the TSP was designed to address the Crown’s breaches of the Treaty principles, it creates more grievances than it resolves. The primary issues with the TSP are: the Crown created the

81 *Red Book*, above n 8, at 29.

82 At 29.

83 At 29.

84 At 29.

85 At 29.

86 See Crown Forestry Rental Trust *Māori Experiences of the Direct Negotiation Process: Case studies and personal experiences of various negotiators on the negotiation process with the Crown to settle claims under the Treaty of Waitangi* (2003) at 8, 9 and 14–15.

process with minimal input from Māori; Western views dominate the process; and the process breaches tikanga Māori.

The TSP was predominately constructed “without the effective participation of Māori”.⁸⁷ The Crown allocates resources and funding to mandated representatives in the TSP.⁸⁸ Further, the Crown holds the majority of the power over the process, from the mandate to the implementation of settlement legislation.⁸⁹ The lack of Māori consultation in the formation of the TSP is problematic because Māori claimants are one of two parties in the process. The TSP is meant to acknowledge the Crown’s historical and contemporary breaches of Treaty principles, yet Māori voices are absent from conversations in the process.

As the Crown largely designed the TSP, a Western perspective is embedded in the process. The TSP does not integrate fundamental tikanga Māori values such as mana.⁹⁰ Instead, the TSP aims to uphold set principles approved by the National Government in 2000: good faith; restoration of relationship; just redress; fairness between claims; transparency; and government-negotiated processes.⁹¹ These set principles privilege Western values and undermine the Māori way of addressing disputes. Further, Western views of land ownership imposed on Māori claimants cause inter-iwi and hapū conflict because claimants have to prove they have the predominant interest in the particular whenua over another claimant.

In addition, the TSP breaches tikanga Māori. Carwyn Jones argues that the TSP contributes to the “ongoing colonization of tikanga Māori” in Aotearoa because it does

87 Andrew Erueti “Introduction” in Andrew Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) 11 at 13.

88 *Red Book*, above n 8, at 47.

89 *Hauraki Report*, above n 6, at 31. See also Crown Forestry Rental Trust, above n 86, at 33 and 42.

90 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 147.

91 Nicola R Wheen and Janine Hayward “The Meaning of Treaty Settlements and the Evolution of the Treaty Settlement Process” in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 13 at 20.

not promote Māori tino rangatiratanga.⁹² For example, the Crown “strongly prefers” hapū and iwi with distinct identities and histories to form LNG.⁹³ Prior to colonisation, the primary Māori social organisation was the hapū.⁹⁴ The Crown’s LNG concept is contrary to hapū rangatiratanga. While the Crown’s policy empowers it to make decisions about tikanga — such as affirming the selected representatives of a LNG and allocating redress — the Crown refuses to engage in tikanga-based reasoning to make its decisions. In doing so, the Crown’s actions and omissions breach tikanga Māori.

C Conclusion

The TSP is not fulfilling its aim to address the Crown’s breaches of the Treaty principles against Māori. The TSP upholds Western values and detrimentally impacts Māori claimants, causing overlapping claims and conflict. The TSP breaches tikanga Māori, te Tiriti and Treaty principles. The issues with the TSP exacerbate the overlapping claims context, where Māori claimants not only conflict with the Crown, but also with each other.

III The Crown’s Approach to Overlapping Claims in the TSP

The Crown’s approach to resolving overlapping claims of mana whenua over rohe in the TSP is inadequate. The overlapping claims setting is layered. Māori pursue settlement in the TSP to receive recognition of the Crown’s historical and contemporary wrongs against Māori, and negotiate with the Crown to benefit future generations. However, the TSP should acknowledge mana whenua in rohe according to tikanga Māori. The Crown’s policy for overlapping claims and implementation of that policy produces inter-iwi and inter-hapū conflict and further grievances between Māori and the Crown. I argue that tikanga-centric processes would alleviate some of the key problems with the Crown’s overlapping claims policy and practices in the TSP.

92 Jones, above n 90, at 25.

93 *Red Book*, above n 8, at 39.

94 Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (2nd ed, Penguin, Auckland, 1990) at 64.

A Issues with the Crown's Overlapping Claims Policy

The main issues with the Crown's overlapping claims policy are that the Crown shifts responsibility onto tangata whenua groups to resolve inter-group disputes, and the policy breaches tikanga Māori. Specifically, the Crown burdens Māori claimants with resolving their disputes with other hapū and iwi. During this process, the Crown does not provide information or resources to the claimants in a fair and impartial way. The Crown expects Māori claimants to adhere to Western notions of time during the tikanga-based processes. Further, the Crown utilises a predominance of interests approach contrary to Māori relationships with rohe.⁹⁵

- 1 Policy shifts responsibility of resolving overlapping claims disputes onto tangata whenua groups

A critical problem with the Crown's overlapping claims policy is the burden it places on claimants to resolve disputes about mana whenua and other interest in rohe. The Crown's policy states:⁹⁶

Where interests and associations are disputed by overlapping groups, the Crown does not consider that it can or should determine or adjudicate whether a group has a predominant interest or any exclusive status in an area.

The Crown's role is to support groups to address these issues themselves.

On the one hand, the hands-off approach taken by the Crown to overlapping claims allows claimants to have tino rangatiratanga over their dispute and its resolution. In the resolution process, the claimant group is best placed to understand the overlapping claims situation and evidence (such as whakapapa and histories).⁹⁷ As the

95 Te Arawhiti "How does the overlapping interests process work?" (21 December 2021) New Zealand Government <www.govt.nz> at [22]. Note that, as of December 2021, Te Arawhiti, the Office for Māori Crown Relations, has replaced the "overlapping interests" content at *Red Book*, above n 8, at 53–55 with this online policy statement.

96 Te Arawhiti, above n 95, at [14].

97 Crown Forestry Rental Trust *Aratohu Mō Ngā Rōpū Kaitono: Guide for Claimants Negotiating Treaty Settlements* (November 2007) at 70.

Crown controls the entire TSP process, it should give way to the claimants' approach in overlapping claims settings.

However, the Crown's hands-off approach can be interpreted as indifferent. This indifference fails to adhere to the principle of partnership because it is not engaging in the process with Māori claimants. The Crown is imposing its Treaty obligations on its Treaty partner. On a number of occasions, the Crown has failed to produce relevant information to all of the tangata whenua groups as part of the TSP or produced it only after the mandated group had received it.⁹⁸ This information included redress items available for certain settlements and historical information that mandated representatives relied on for settlement.⁹⁹ These omissions are significant because they affect the strategies other tangata whenua groups employ in negotiations with the Crown, and the redress given to remaining tangata whenua groups. Therefore, the Crown should engage with hapū and iwi during the TSP in a transparent and equitable way.

As a Treaty partner, the Crown does not need to be at the centre of resolving the inter-hapū and inter-iwi disputes, but it should contribute resources and information. This way, claimants could resolve overlapping disputes on their terms and according to their tikanga. The Crown should support these processes by providing resources in a timely and fair manner for all claimants.

2 Policy breaches tikanga Māori

Another significant problem with the Crown's approach to overlapping claims is the adoption of a Western approach to mana whenua claims, which breaches tikanga Māori. First, the Crown imposes Western concepts of time on Māori claimants. In te ao Māori, reaching a state of ea may take a long time. As the TSP involves addressing intergenerational mamae (hurt)¹⁰⁰ and raruraru (problems)¹⁰¹ between

98 See *Hauraki Report*, above n 6, at xvi, [7.1.3] and [7.2].

99 *Tāmaki Makaurau Report*, above n 12, at 26; and *Hauraki Report*, above n 6, at 55 and 57.

100 Te Aka Māori Dictionary (online ed) at [mamae].

101 At [raruraru].

Māori and the Crown, these dispute resolution processes may not conclude during the allocated period. Tikanga processes can take years for parties to reach consensus. The current overlapping claims policy does not account for te ao Māori concepts of time.

Additionally, the Crown utilises a *predominance of interests* approach that is contrary to tikanga Māori. The concept of a predominant interest ignores the patchwork of take and use rights in rohe in te ao Māori.¹⁰² This individualistic approach runs counter to every aspect of tikanga.¹⁰³ The Tribunal criticised the policy as being too siloed because the Crown only addresses one settlement at a time or different Office of Treaty Settlement teams negotiate with different groups, which discounts the multiple interests at play in the rohe.¹⁰⁴ This narrow view of Māori relationships to whenua contravenes whanaungatanga. The Crown's policy focuses on the individual claimant's submissions, but these claims cannot be approached in isolation. Without an interconnected, tikanga-centric approach, claimants will continue to experience overlapping claims issues.

Finally, and most importantly for this article, “[t]he *Red Book* does not require overlapping [claims] to be addressed in accordance with tikanga, nor to go through a tikanga-based process.”¹⁰⁵ The Crown retains discretion to determine overlapping claims without engaging tikanga Māori processes. The policy does not address how tikanga-based processes could operate. Concerningly, it does not indicate how the Crown will treat the outcomes of the tikanga-based processes.

B Issues with the Crown Implementing its Overlapping Claims Policy

Although the Crown promotes the *Red Book* as its overlapping claims policy, it acts contrary to this policy in practice. The Crown prioritises LNG over other tangata whenua

102 Erueti, above n 46, at 43.

103 See Cate Barnett “The Durability of the Treaty Settlement Process: *Ngāti Whātua*, Tikanga, and the Overlapping Claims Policy” (2018) February Māori LR 12.

104 Waitangi Tribunal *The Port Nicholson Block Urgency Report* (Wai 2235, 2012) at [6.2].

105 *Hauraki Report*, above n 6, at 29.

groups and fails to facilitate dispute resolution processes between tangata whenua groups with overlapping claims.

1 Crown prioritises LNG

The Crown prioritises LNG over other tangata whenua groups in the TSP because it seeks to create “fair, durable, [and] final”¹⁰⁶ settlements with one group at a time or in isolation. In doing so it does not engage with tangata whenua groups who have interests in the same rohe early on in the TSP.¹⁰⁷ This practice disempowers other tangata whenua groups and, in some cases, alienates them from the process. For example, during the Hauraki settlement, Ngātiwai supported Ngāti Rehua-Ngātiwai ki Aotea in settlement negotiations with the Crown. However, Ngātiwai asserted that it still maintained an interest in Aotea. Ngātiwai made its interest in Aotea well-known from early on in the Hauraki settlement process. Still the Crown did not include it in discussions until much later in the negotiation stage of the TSP.¹⁰⁸

This example is the reality for many tangata whenua groups that have been disregarded in the TSP because they are not a LNG. The Crown’s practice of homogenising groups into LNG is a fundamentally Pākehā approach to mandate and representation because it focuses on what the Crown deems acceptable. As a result, tangata whenua groups are excluded from necessary conversations about redress and uninformed about the Crown’s view of their claim to rohe. This outcome produces further *mamae* and *raruraru* for Māori claimants with the Crown. It prolongs the TSP and results in settlements that are not *tika* or durable.

2 Crown fails to facilitate dispute resolution processes between overlapping claimants

Secondly, the Crown does not facilitate dispute resolution processes between overlapping claimants. The Crown has resources that can assist Māori claimants to resolve their overlapping claims to *mana whenua*. However, the Crown rarely facilitates

106 *Red Book*, above n 8, at 16.

107 *Hauraki Report*, above n 6, at [2.2.1].

108 At [5.2.3.4].

dispute resolution processes between overlapping claimants. Ngāi Te Rangi claimed it consistently sought to resolve its redress disagreements with Hauraki in a process that would ensure iwi could “come together to discuss whakapapa, history, [and] the relative interests claimed, and see whether there was any opportunity to find a way forward”.¹⁰⁹ During settlement, the Crown did not actively facilitate discussions between Ngāi Te Rangi and Hauraki to encourage engagement in a tikanga-centric process to reconcile their overlapping claims.

As most of the Crown representatives do not have the mātauranga (knowledge) to run tikanga-based dispute resolution processes, it is not appropriate for them to do so. However, the Crown is obligated to facilitate dispute resolution processes as outlined in the *Red Book*. Te Tiriti also imposes an obligation on the Crown to ensure Māori claimants receive meaningful settlements that address historical breaches of the Treaty principles and uphold tikanga Māori.

C Conclusion

The overlapping claims setting is complex. However, the Crown’s approach to addressing overlapping claims is inadequate. Examining the Crown’s *Red Book* for overlapping claims and practices in implementing the policy reveals numerous interlinked issues that affect Māori claimants during the TSP. As it stands, the TSP will continue to cause further grievances for Māori claimants. Creating a space for tikanga-centric processes in the overlapping claims sphere is necessary to resolve multiple take to rohe and ensure the TSP achieves its aims.

IV Case Study — The Ngāti Whātua o Ōrākei Settlement

The NWOS is a topical case study that provides further insight into the complexities of the overlapping claims. Through an analysis of the NWOS, I will draw out specific issues with the Crown’s approach to overlapping claims in the TSP. The NWOS illustrates the need for tikanga-centric processes in overlapping claims disputes.

109 At 29.

A Background

The NWOS case study concerns the Crown's direct settlement process with Ngāti Whātua o Ōrākei Trust (the Trust), which negotiated on behalf of Ngāti Whātua o Ōrākei hapū (Ngāti Whātua) for Tāmaki Makaurau (Tāmaki) rohe. An overlapping claims issue arose when other tangata whenua groups, including Marutūāhu and Ngāti Te Ata, claimed interests and mana whenua in the rohe.¹¹⁰ Ten other tangata whenua groups asserted interests in Tāmaki.¹¹¹

The NWOS is a unique overlapping claims situation because of Tāmaki's historical context. Tāmaki means the place contended "by a hundred lovers".¹¹² During the 18th and 19th centuries, Tāmaki was a site of occupation, conquest and shifting ahi kā. The Trust claims that in around 1740, Ngāti Whātua migrated south to Tāmaki. At that time, Waiohua hapū occupied Tāmaki. After decades of fighting over the rohe, Tuperiri and Te Taoū (a hapū within Ngāti Whātua) defeated Waiohua and claimed Tāmaki from them.¹¹³ The Trust asserts that Te Taoū, Ngaoho and Te Uringutu maintained ahi kā throughout the 18th and early 19th centuries across Tāmaki.¹¹⁴ Due to conquest and urbanisation, tangata whenua interests are intertwined to a large extent.¹¹⁵

The NWOS case study involves two stages, which produced different issues. From 2002 to 2012, the Crown predominantly negotiated with the Trust and disregarded other tangata whenua interests. The second stage spans from 2012 to the present. During that time, the Crown settled with Ngāti Pāoa, Marutūāhu and other tangata whenua groups. As a result, the Trust undertook extensive litigation in the senior courts on behalf of Ngāti Whātua. The Trust claimed that the Crown is overriding

110 *Tāmaki Makaurau Report*, above n 12, at 1 and 5.

111 At 13–14.

112 RCJ Stone *From Tamaki-Makau-Rau to Auckland* (Auckland University Press, Auckland, 2001) at 7.

113 Waitangi Tribunal *Report of The Waitangi Tribunal on The Orakei Claim* (Wai 9, 1987) at 19; and Ngāti Whātua o Ōrākei Māori Trust Board and Her Majesty The Queen "Agreement in Principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei" (9 June 2006) [AIP] at Attachment B [C1.1].

114 AIP, above n 113, at Attachment B [B1].

115 *Tāmaki Makaurau Report*, above n 12, at 13.

Ngāti Whātua mana whenua in its decisions to allocate commercial and cultural redress to other tangata whenua groups from Ngāti Whātua rohe.

1 2002–2012

In 2002, the Trust initiated direct negotiations with the Crown.¹¹⁶ The Crown recognised the Trust as holding a statutory mandate to represent Ngāti Whātua in the TSP pursuant to s 19 of the Orakei Act 1991.¹¹⁷ On 2 May 2003, the Trust and the Crown entered the Terms of Negotiation phase.¹¹⁸ Over the next three years, the Trust and the Crown drafted an AIP, which acknowledged Ngāti Whātua’s “cultural, spiritual, historical and traditional association” with Tāmaki.¹¹⁹ It included a right of first refusal (RFR) for Ngāti Whātua over certain areas in Tāmaki.¹²⁰

The AIP stated that the Crown was satisfied overlapping claims interests from the other tangata whenua groups were addressed regarding the RFR and whenua redress.¹²¹ The Crown attended some hui (meetings) organised by the tangata whenua groups.¹²² On 1 July 2003, the Crown distributed a letter to the other tangata whenua groups requesting information from them.¹²³ The Crown’s approach was to resolve Ngāti Whātua’s claim first and then consult with other tangata whenua groups after finalising the AIP with Ngāti Whātua.¹²⁴

On 12 February 2010, the Trust and the Crown drafted a supplementary agreement to the AIP, which amended the RFR proposal.¹²⁵ Subsequently, the parties entered into a

116 At 16, n 25.

117 The Orakei Act 1991 was repealed and replaced by s 100 of the Ngāti Whātua Ōrākei Claims Settlement Act 2012. Section 19 of the Orakei Act was replaced with s 17 of the Ngāti Whātua Ōrākei Claims Settlement Act.

118 AIP, above n 113, at [2].

119 At [23].

120 At [38].

121 At [65(a)].

122 *Tāmaki Makaurau Report*, above n 12, at 16, n 38.

123 At 44.

124 At 52.

125 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 [NWO (SC)] at [12].

DoS on 5 November 2011.¹²⁶ Parliament enacted the Ngāti Whātua Ōrākei Claims Settlement Act in 2012.

2 2012–2021

After settling with the Trust, the Crown turned to negotiate with a collective of hapū and iwi (including Ngāti Whātua) from Tāmaki in 2014 in respect of cultural and commercial redress. These negotiations resulted in a further Treaty settlement, codified in Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.¹²⁷ In July 2011, Ngāti Pāoa and the Crown signed an AIP. On 17 May 2013, the Marutūāhu Iwi Collective settled with the Crown. From 2015–2017, the Minister of Treaty of Waitangi Negotiations (Minister) made three decisions in relation to Ngāti Pāoa and Marutūāhu’s Settlements.¹²⁸

The Trust sought judicial review of all three decisions in the senior courts of Aotearoa. It claimed (and continues to claim) that Ngāti Whātua holds mana whenua in Tāmaki and “seeks declarations as to its rights”.¹²⁹ In addition, Ngāti Whātua claimed the Crown’s policy “that it is unnecessary to resolve ‘overlapping claims’ before it enters into Treaty settlements is wrong in law”.¹³⁰

B Tensions in the NWOS

The NWOS reveals two central tensions. First, in the 2000–2012 period, the Crown negotiated with Ngāti Whātua, but it did not conduct equal negotiations or form an equivalent relationship with the other tangata whenua groups. Secondly, after the Crown and Ngāti Whātua settled in 2012, the Crown offered Ngāti Pāoa and the Marutūāhu Collective whenua within Ngāti Whātua’s RFR area.

126 New Zealand Government “Ngāti Whātua o Ōrākei” (4 June 2021) <www.govt.nz>; and see *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 [NWO (HC)] at Annex [2].

127 At Annex [3].

128 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 183, [2017] NZAR 627 [NWO (CA)] at [1].

129 *NWO* (HC), above n 126, at [1].

130 *NWO* (SC), above n 125, at [69].

1 Unequal treatment of tangata whenua groups

During the pre-negotiation phase of the TSP, the Crown focused on forming its relationship with Ngāti Whātua. Therefore, it ignored relationships with other tangata whenua groups in Tāmaki. The Tribunal concluded that the Crown's *Red Book* policy and practices during the 2000–2012 period were unfair to the other tangata whenua groups.¹³¹ In particular, the Crown met with Ngāti Whātua every fortnight from 2003 to 2006. However, it only attended a few meetings with other tangata whenua groups.¹³² Although the tangata whenua groups disclosed their interests in Tāmaki to the Crown, it only responded on one occasion with a letter requiring the groups to provide evidence of their interests. It did not facilitate hui between Ngāti Whātua and the other tangata whenua groups. The Crown engaged with tangata whenua groups only after drafting the AIP with Ngāti Whātua. Thus, the Crown formed a stronger relationship with Ngāti Whātua compared with the other tangata whenua groups.¹³³

Another aspect of the NWOS case study that illustrates an imbalance in treatment between Ngāti Whātua and the other tangata whenua groups is the AIP between the Crown and Ngāti Whātua. The AIP did not refer to the other tangata whenua groups' interests in Tāmaki. The Tribunal found the AIP affected the mana of Tāmaki tangata whenua because it impliedly suggested that no other hapū or iwi apart from Ngāti Whātua had valid interests in Tāmaki.¹³⁴ Following the AIP, the Crown confined their interactions with tangata whenua groups to addressing Ngāti Whātua's claim, rather than their claims for mana whenua and Treaty breaches in Tāmaki.¹³⁵ Ultimately, the Crown's *Red Book* policy and practices from 2000–2012 disregarded the tangata whenua groups.

131 *Tāmaki Makaurau Report*, above n 12, at x.

132 At 14 and 16, n 38.

133 At 7.

134 At 69.

135 At 18.

2 Crown offered Ngāti Pāoa and Marutūāhu whenua from Ngāti Whātua’s RFR area

The second principal tension with the Crown’s conduct during the NWOS is that from 2015–2017, it offered Ngāti Pāoa and Marutūāhu whenua from the settlement of Ngāti Whātua without consulting Ngāti Whātua. Ngarimu Blair stated that “the Marutūāhu Collective settlement include[d] the transfer of properties from within the heartland of Ngāti Whātua Ōrākei, without consultation or recognition of its mana whenua rights”.¹³⁶ The Crown also offered whenua within Ngāti Whātua RFR area to Ngāti Pāoa.

Instead of acknowledging the patchwork of interests in Tāmaki, and adhering to the DoS agreed upon in 2012, the Crown allocated cultural and commercial redress to the Marutūāhu Collective and Ngāti Pāoa without discussing the option with Ngāti Whātua. While the nature of interests in Tāmaki are particularly unique, the Crown failed to recognise tikanga Māori in reconciling multiple take in Tāmaki. Also, the Crown did not facilitate a tikanga-based approach between the relevant tangata whenua groups. The Crown applied a Pākehā, individualistic approach to an issue that required a broader, te ao Māori worldview grounded in tikanga Māori and Māori values.

C Conclusion

The NWOS case study highlights significant roadblocks in the NWOS that the TSP should have resolved. First, Ngāti Whātua did not want to negotiate with the other tangata whenua groups, which contributed to the Crown’s unequal treatment of the relevant tangata whenua groups in Tāmaki. Secondly, the AIP was implemented without input from the other tangata whenua groups. Thirdly, the NWOS involved minimal recognition and use of tikanga Māori.

The NWOS case study illustrates that the Crown’s overlapping claims policy is inadequate for resolving overlapping claims between Māori claimants. The TSP needs to adopt a new approach to addressing overlapping claims of mana whenua over rohe. If the TSP does not implement a new approach, it will continue to divide hapū and iwi.

136 Ngāti Whātua Ōrākei Trust “Ngāti Whātua Ōrākei welcomes Tribunal findings against Hauraki settlement” (press release, 17 December 2019).

Māori will still experience grievances against the Crown. The current approach could also invite litigation against its decisions, as the NWOS shows. My proposal for tikanga-centric processes will address these specific tensions and roadblocks using tikanga Māori, tikanga values and Māori dispute resolution principles.

V The Importance of Including Tikanga Māori in the TSP

Including tikanga Māori in the overlapping claims context in the TSP is the most beneficial measure to address the Crown's inadequate approach to resolving overlapping claims. Tikanga Māori is the worldview of most Māori claimants. The NWOS exemplifies four reasons why tikanga Māori should underpin the dispute resolution processes for overlapping claims in the TSP: the current approach is inadequate; there is growing recognition of tikanga Māori in the law; Māori endorse tikanga Māori dispute resolution processes; and a tikanga-centric process will uphold the tino rangatiratanga of Māori, thus adhering to tikanga Māori and te Tiriti.

A The Current Approach is Inadequate

Shifting from a Western process and implementing tikanga-centric processes will begin to address issues with the TSP that the NWOS highlights. The individualistic Western perspective is illustrated in the NWOS.¹³⁷ The Crown dealt with the settlement claim from Ngāti Whātua first and disregarded other tangata whenua claims. Further, the Crown's approach to redress was individualistic because the Crown offered redress in Ngāti Whātua's RFR area to other tangata whenua groups, such as Marutūāhu, without consulting Ngāti Whātua. The current approach fails to align with te ao Māori.¹³⁸

I argue that the future approach should reflect the claimants' worldviews. Almost all the tensions in the NWOS related to the Crown breaching tikanga Māori. Utilising a tikanga-centric process for resolving overlapping claims would address those issues

137 See Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 33.

138 See generally Erueti, above n 46, at 42.

by positioning tikanga Māori and Māori values at the core of the dispute resolution process.

B Increased Recognition of Tikanga Māori in Aotearoa's Legal System

Another justification for implementing a tikanga-centric approach in the overlapping claims sphere is to align with the increased recognition of tikanga Māori in Aotearoa's legal system. In the wake of recent legislative, policy, and case law developments, it is clear that "[Aotearoa] is in a period of transformative recognition of tikanga Māori in the law".¹³⁹ In *Ngāti Whātua Ōrākei Trust v Attorney-General*, Elias CJ remarked: "Rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation."¹⁴⁰

Characterising tikanga Māori as 'legal rights' in some circumstances is a step forward from acknowledging tikanga Māori as "part of the values of the New Zealand common law".¹⁴¹ The Supreme Court recently granted leave to hear a posthumous appeal despite the common law tradition that rights of appeal expire on death,¹⁴² after submissions were made that a person's mana continues after death for both Māori and Pākehā.¹⁴³ Natalie Coates, counsel for the Pākehā appellant, submitted that tikanga can be relevant to the development of the common law generally.¹⁴⁴ Cooke J in *Mercury NZ Ltd v The Waitangi Tribunal* held that "tikanga [Māori] will be the law" in some situations, "rather than merely being a source of it".¹⁴⁵ These decisions indicate

139 Chapman Tripp "Tikanga Māori increasingly prevalent in New Zealand law" (12 February 2020) <www.chapmantripp.com>. See also *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025 at [272]–[295] for a recent summary of the relationship between tikanga Māori and the common law.

140 *NWO (SC)*, above n 125, at [77].

141 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

142 But see *R v Saxton* [2009] NZCA 61, [2009] 3 NZLR 29 where an appeal was heard and determined despite the death of the appellant, as the judge found scope in r 45 of the Court of Appeal (Criminal) Rules 2001 to do so in exceptional circumstances.

143 *Ellis v R* [2020] NZSC 89. The reasons for granting leave to appeal, and for the substantive appeal itself, are forthcoming.

144 Natalie Coates, Kingi Snelgar and Chris Merrick "Tikanga and State Law: The Peter Ellis Case" (Aotearoa New Zealand Centre for Indigenous Peoples and the Law Seminar, Auckland, 15 October 2020).

145 *Mercury NZ Ltd v The Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 at [103] (emphasis in original).

that the recognition of tikanga Māori goes further than sporadic incorporation. Rather, they identify tikanga Māori as adding value to the common law.

A trend has also emerged of including tikanga Māori values in legislation. The Resource Management Act 1991 was characterised as “the first genuine attempt to import tikanga in a holistic way into any category of the general law”.¹⁴⁶ The Act refers to mana whenua, mana and kaitiakitanga.¹⁴⁷ Further, the term “mana whenua” is contained in multiple statutes such as the Fisheries Act 1996.¹⁴⁸ It is problematic to codify definitions of Māori values in English because of the difficulties of translating te reo Māori into English proficiently. However, these statutes signal that tikanga Māori occupies an important position in the formation of the “third law” — Aotearoa’s law — going forward.¹⁴⁹

It is important to note that tikanga Māori continues to operate in Māori communities, separately from state law. Māori hapū and iwi continue to follow tikanga practices, rituals and processes. A traditional ritual maintained in Māori communities is placing a rāhui (prohibition) in rohe.¹⁵⁰ A rāhui is a restrictive measure that someone of high rank implements to separate people from tapu. In Whakatāne, a rāhui was placed along the Ngāti Awa coastline after the Whakaari eruption occurred on 9 December 2019.¹⁵¹ Notably, non-Māori adhered to the rāhui.¹⁵² This is an example of tikanga Māori validly operating independent from Aotearoa’s legal system.

Due to the increasing recognition of tikanga Māori in Aotearoa’s legal system, tikanga Māori should be embedded in the TSP. Tikanga Māori is part of the law in Aotearoa

146 Williams, above n 17, at 18.

147 Resource Management Act 1991, ss 2 definitions of “kaitiakitanga”, “mana whenua” and “tangata whenua” and 7.

148 Fisheries Act 1996, s 2 definitions of “mana whenua” and “tangata whenua”.

149 See generally Williams, above n 17, at 32.

150 Te Aka Māori Dictionary (online ed) at [rāhui].

151 Māni Dunlop and Te Aniwa Hurihanganui “What the rāhui in place after Whakaari erupted mean and why they are important” (12 December 2019) RNZ <www.rnz.co.nz>.

152 Dunlop and Hurihanganui, above n 151.

and, in some cases, it can be the law. Tikanga Māori should be present in the overlapping claims context because the claimants are Māori, but also because tikanga Māori is a legitimate legal system in Aotearoa.

C Māori Endorse Tikanga Māori Dispute Resolution Processes

The third reason why tikanga Māori should be embedded in the TSP to address overlapping claims is that Māori endorse tikanga Māori dispute resolution processes. In the NWOS, Ngāti Whātua and Ngāti Pāoa formed a kawenata (covenant) regarding their interests and status in Tāmaki.¹⁵³ The Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) pūkenga selection process and the wānanga in *Ellis v R* showcase how effective tikanga Māori dispute resolution processes are. These processes are successful because Māori participants validate them.

Tikanga Māori underpins the process of selecting a pūkenga pursuant to s 99(1)(b) of the MACA. A pūkenga is an independent advisor that provides specialist information to the court (the Māori Land Court or the High Court).¹⁵⁴ The MACA pūkenga selection process started in 2021. Section 99(1)(b) outlines that a pūkenga must be someone with “knowledge and experience of tikanga”. The current process involves an appointed judge hearing submissions concerning who parties want to be nominated as pūkenga. The court then determines which applicant is the pūkenga. After the selection process, the court will ask the pūkenga to provide submissions on questions where important issues of tikanga are identified.¹⁵⁵

Initially, experienced Māori lawyers such as Annette Sykes criticised the pūkenga selection process.¹⁵⁶ However, parties that have undertaken pūkenga selection, such as Whakatōhea hapū, have shown support for process.¹⁵⁷ Although the mechanism is

153 Ngāti Whātua Ōrākei Trust, above n 136.

154 Marine and Coastal Area (Takutai Moana) Act 2011, s 99(1)(b).

155 *Re Edwards (Whakatōhea)* CIV-2011-485-817, 8 July 2020 (Minute No 18) at [18].

156 Sykes, above n 26, at 25.

157 Ben Leonard “‘Judgment for the decade’ in landmark foreshore and seabed case” (17 May 2021) Newsroom <www.newsroom.co.nz>.

relatively new, more than 200 applications from hapū and iwi have been filed to address their marine coastal area title according to tikanga Māori.¹⁵⁸

In the *Ellis v R* proceedings, the parties engaged in a two-day wānanga to determine the tikanga of the particular case together. Counsel for the Crown (including non-Māori solicitors) and the defence, interveners and tohunga in tikanga Māori collaborated on the tikanga that would apply to the case. The wānanga progressed on the basis that all parties agreed tikanga is part of the common law.¹⁵⁹ The two-day wānanga shows how effective tikanga Māori processes are because these parties came to a consensus about tikanga Māori instead of going through an adversarial process.

These examples demonstrate that tikanga Māori dispute resolution processes help reconcile disputes between Māori regarding te taiao. As seen in *Ellis v R*, tikanga Māori processes can achieve consensus on important matters of tikanga for Māori and non-Māori. Tikanga Māori dispute resolution processes are a viable option for the TSP to implement instead of the current approach.

D Tino Rangatiratanga

The final justification for utilising tikanga Māori in the TSP is that it is an exercise of tino rangatiratanga for Māori claimants. Grounding tikanga Māori in the dispute resolution process for overlapping claims allows Māori claimants to determine their destinies without Crown intervention. Using tikanga in the TSP will be an exercise of self-determination for Māori pursuant to art 2 of te Tiriti.¹⁶⁰ Māori claimants will be able to have control over the process. The process will also reflect each claimant's interests and result in more durable outcomes for the claimants if they agree. If Māori claimants do not agree, then tikanga Māori can guide claimants to deal with disagreement through utu and acts of muru (ritualised compensation).¹⁶¹

158 Leonard, above n 157.

159 Coates, Snelgar and Merrick, above n 144.

160 Amokura Kawharu "Arbitration of Treaty of Waitangi Settlement Cross Claims Disputes" (paper presented to AMINZ-ICCA International Arbitration Day, Queenstown, April 2018) at 15.

161 Erueti, above n 46, at 48, n 31.

Using tikanga-centric processes in the TSP is also logical because the dispute concerns Māori relationships with whenua and people. Tikanga values such as mana whenua, ahi kā and take are relevant to this setting. As Amokura Kawharu notes in the arbitration context, “[t]he choice of tikanga ... was the obvious choice, because ... the issues in dispute relate to customary ownership”.¹⁶² Tikanga is relevant to the dispute resolution process for overlapping claims and is crucial in resolving the complex disputes.

Matua Moana Jackson warned against blindly incorporating tikanga Māori into legislation because it is part of the “colonizing ethic” exercised to disadvantage Māori further.¹⁶³ Jackson’s concerns can be applied broadly to incorporating tikanga into any Western structure. However, upholding Māori tino rangatiratanga in the TSP is the antithesis of the colonising ethic. While the tikanga-centric processes will still be part of the TSP, they will contain tikanga values that uphold te ao Māori. The law operating in these processes will be tikanga, and claimants will be able to choose their appropriate tikanga to use in the resolution process and have tino rangatiratanga over decisions regarding their rohe.

E Conclusion

The TSP must be grounded in tikanga Māori. Tikanga Māori is recognised throughout Aotearoa’s legal system as part of the values of the law and is the law in some cases. Processes such as the MACA pūkenga selection process and the two-day wānanga for *Ellis v R* demonstrate tikanga Māori can assist in resolving competing views in Māori society. Finally, the use of tikanga Māori in the TSP promotes tino rangatiratanga, which Māori and the Crown agreed Māori retained in the Treaty of Waitangi and te Tiriti in 1840.

162 Kawharu, above n 160, at 11.

163 Moana Jackson “Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality” in FWM McElrea (ed) *Re-Thinking Criminal Justice: Justice in the Community* (Legal Research Foundation, Auckland, 1995) vol 1 33 at 34 as cited in Quince, above n 19, at 277.

VI Possible Features of Tikanga-centric Processes in the TSP

Tikanga-centric processes should be implemented into the TSP to address issues in the existing process. While the Tribunal recommends that the Crown facilitates tikanga-based processes, I propose possible features of tikanga-centric processes in the TSP. An approach fully grounded in tikanga Māori is appropriate for resolving overlapping claims of mana whenua to rohe because it supports tino rangatiratanga and upholds te Tiriti.

Adopting tikanga-centric processes in the TSP could produce enduring and tika outcomes for claimants seeking to address their respective interests and take to rohe. This article does not rely on established dispute resolution frameworks such as mediation or arbitration, because those frameworks follow te ao Pākehā conceptions of resolution. This framework should be centred in tikanga Māori to ensure Māori exercise full authority over the process. As there is a lack of scholarship on this kaupapa, this article offers a proposal as a starting point to initiate kōrero (discussion) about what a tikanga-centric process in the TSP should look like. This article encourages further scholarship to support, challenge or rethink this proposal.

A Features

Dispute resolution has whakapapa to te ao kōhatu (traditional Māori society). This whakapapa originates at the point of Creation with Papatūānuku and Ranginui.¹⁶⁴ In the beginning, disputes emerged between ngā atua (the gods) regarding how Papatūānuku and Ranginui should be separated. Ever since the original dispute, Māori have developed common principles to address disputes. These principles underpin the features this article proposes the TSP should contain. First, this article addresses the procedural framework for tikanga-centric processes and then the substantive framework using the NWOS.

¹⁶⁴ Quince, above n 19, at 257.

1 Procedural features

Procedural features relate to how the tikanga-centric process is formed and who controls the process. In te ao Māori, it is important that participants subject to the process are part of designing the process.¹⁶⁵ The process of resolving the dispute is as important as the outcome.¹⁶⁶ This article argues that the main procedural features of the TSP should be that: a public register is created to display the active settlements and related rohe; the tikanga-centric process occurs early on in the TSP; the process is voluntary; and the rangatira of the tangata whenua groups should be endorsed by their group. Tikanga Māori values should guide the process and parties should agree on the tikanga for their process together.

(a) Public register

When a claimant engages with a tikanga-centric process in the TSP, they need to be aware of all the parties interested in the same rohe. This information could be provided to claimants through a public register detailing the upcoming and active settlements and related rohe. The Crown could oversee this process and publish the register on the Te Arawhiti website. The Crown would receive claims from mandated representatives. Once a claim is accepted, it would display on the register. The process could resemble the public notice system set out in the MACA. Until 3 April 2017, hapū and iwi groups could apply under s 100 to the court for a recognition order.¹⁶⁷ Pursuant to s 103 of the MACA, applicants were required to provide public notice of the application within 20 days after filing the application with the court.

For this register, an applicant would have a recommended maximum period of two years to apply for recognition of their interests.¹⁶⁸ The claimant would refer to a

165 At 286.

166 Law Commission, above n 12, at [56]; and *Hauraki Report*, above n 6, at 90.

167 Marine and Coastal Area (Takutai Moana) Act, s 100(2).

168 This is recommended because sometimes these processes will take longer than a prescribed period of time. Also, s 100(2) of the Marine and Coastal Area (Takutai Moana) Act has attracted criticism by iwi such as Te Kapotai for unilaterally imposing a restricted period of time for iwi and hapū to apply under the section, particularly when over the last 200 years the Crown (in one form or another) has stolen Māori whenua, moana and coastal areas. See Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) at 1, 12 and 15.

particular rohe in their application and apply to the Crown instead of the courts. However, the function of the public register would be similar to the MACA public notice process. The register could also draw on aspects of the Resource Management Act notification process.¹⁶⁹ The Crown and its representatives could consult with applicants about their interests in the relevant rohe. Notifying the public about the particular claim would create a more transparent process. It would inform iwi and hapū about the status of a claim and ensure that the Crown accounts for all interests. In that consultation process, the Crown could raise the possibility of engaging in a tikanga-centric process with them.

If a public register was in place during the NWOS, when Ngāti Whātua received mandate from the Crown, their identified rohe would have been displayed on the register. Tangata whenua groups would have had the opportunity to apply to the Crown to recognise their interests. This register would have informed the Crown about the overlapping claims in the NWOS from the beginning. This would create transparency around overlapping claims and hold the Crown accountable for dealing with the overlapping claims. A public register would level the playing field between mandated representatives and tangata whenua groups.

(b) Voluntary and incentivised

After a claimant's application has been posted on the public register, the Crown would be required to tell mandated representatives and tangata whenua groups that tikanga-centric processes are available to resolve their overlapping claims. Tikanga Māori processes are usually not compulsory.¹⁷⁰ Tikanga-centric processes should be voluntary for claimants. The Tribunal recommended that tikanga-based processes should not be triggered by the Crown.¹⁷¹ It also suggested that an effective tikanga-based process should incentivise claimants to engage in it.¹⁷² This feature would involve the Crown

169 See generally Resource Management Act, pt 6.

170 Mereana Hond "Indigenous Rights – Treaty of Waitangi: Resort to Mediation in Maori-to-Maori Dispute Resolution: Is it the Elixir to Cure All Ills?" (2002) 33(3) VUWLR 155 at 160.

171 *Hauraki Report*, above n 6, at 90.

172 At 90.

offering the process as an option, rather than triggering the process. The Crown could incentivise claimants to initiate tikanga-centric processes by outlining in the *Red Book* that the Crown would fund these processes.¹⁷³

In the NWOS, this feature would have encouraged tangata whenua groups, including Ngāti Whātua, to engage in a tikanga-centric process. By the time the Crown and Ngāti Whātua had established an AIP in 2006, Ngāti Whātua was no longer incentivised to negotiate with other tangata whenua groups about Tāmaki.¹⁷⁴ This roadblock halted negotiations with the tangata whenua groups until after the AIP was signed. In the preparation phase, the Crown and Ngāti Whātua could have identified the relevant tangata whenua groups in Tāmaki using the public register. If at that stage Ngāti Whātua knew about the option to engage in a tikanga-centric process supported by the Crown, that may have motivated Ngāti Whātua and other tangata whenua groups to engage in it.

(c) Early on in the TSP

The hypothetical claimant should initiate the tikanga-centric process early on in the TSP. This will mean the Crown has not yet engaged with one party for longer or promised a particular form of redress, allowing claimants to start on the same footing in the TSP. Preferably, claimants will start the tikanga-centric process in the preparation or pre-negotiation phase of the TSP. As the Tribunal noted:¹⁷⁵

It is too late for a tikanga-based process once a party has received and accepted a Crown redress offer. It is certainly too late once a deed has been initialled, let alone signed.

173 The Crown would want to fund the tikanga-centric processes because the current process does not work and these processes are more likely to result in durable settlements. See *Red Book*, above n 8, at 16 and 24.

174 *Tāmaki Makaurau Report*, above n 12, at 4.

175 *Hauraki Report*, above n 6, at 90.

Additionally, if the option to engage in a tikanga-centric process emerges too late in the TSP, parties will have less incentive to participate in the process as they would have received offers of redress or settlement.

The NWOS reveals the importance of starting the tikanga-centric processes early. As the Crown negotiated with Ngāti Whātua before engaging with other tangata whenua groups, Ngāti Whātua received an AIP before those tangata whenua groups' interests were considered. Ngāti Whātua did not have an incentive to kōrero with the other tangata whenua groups about their overlapping claims because its settlement was progressing. Ngāti Pāoa and the other tangata whenua groups maintained their stake in the process because the Crown had not offered to negotiate with them at that point. If the tangata whenua groups engaged with each other earlier in the process, then the overlapping claims issues may have been resolved before Ngāti Whātua and the Crown reached an AIP.

(d) Representation

After initiating a tikanga-centric process, the claimant would need to determine their representative(s) for hui. A key issue in the TSP is that sometimes the mandated representatives for a claimant group do not represent its interests.¹⁷⁶ In te ao kōhatu, rangatira would enter into binding agreements with other hapū and iwi rangatira.¹⁷⁷ They aimed to maintain the integrity of the whakapapa line, tend to whanaungatanga and to uphold and extend the mana of the group.¹⁷⁸ For a process to result in durable outcomes, those with grievances had to be properly represented. Thus, the rangatira in the tikanga-centric processes should be endorsed by their community.¹⁷⁹

176 *Tāmaki Makaurau Report*, above n 12, at 38.

177 Quince, above n 19, at 266.

178 At 268–269.

179 At 290–291.

This feature was not an issue for Ngāti Whātua.¹⁸⁰ However, future tangata whenua groups may encounter this issue because of the Crown's preferred LNG standard, which often results in representation that does not reflect Māori social structures.

(e) Tikanga Māori values and Māori dispute resolution norms

Following rangatira selection, hypothetical tangata whenua groups would hui about the tikanga Māori values and dispute resolution norms that would underpin their distinct process. A process that breaches tikanga values is not tika.¹⁸¹ The principal values that could be present in tikanga-centric processes are mana, whanaungatanga, manaakitanga, rangatiratanga, kotahitanga, utu and ea. However, parties should choose the tikanga values that form the basis of their distinct tikanga-centric process and the weight to give each value.

Mana and tapu form the foundations of tikanga Māori.¹⁸² Groups extend their mana to rangatira, empowering and disempowering rangatira as they negotiate on a group's behalf.¹⁸³ Any Māori dispute resolution process must incorporate fundamental aspects of tikanga, including "whakapapa, mana, tapu and collectivity".¹⁸⁴ Aroha and atawhai (support) also underpinned mediated settlements in te ao Māori before Pākehā laws.¹⁸⁵ Tikanga-centric processes should recognise the individual and collective obligations on Māori, and prioritise balance.¹⁸⁶ Tikanga values will aid claimants in resolving overlapping claims because the claimants approach the dispute from te ao Māori, rather than conflicting Western concepts in te ao Pākehā.

The Māori dispute resolution norms that should be present in the tikanga-centric process are spirituality (including through the use of karakia), inclusiveness, harmony,

180 However, it may have become an issue if the tangata whenua groups started the tikanga-centric processes and had to select representatives for each of them.

181 Williams, above n 17, at 3.

182 Quince, above n 19, at 282.

183 At 282.

184 At 280.

185 At 272.

186 At 281.

respect, peace and unity.¹⁸⁷ True inclusiveness allows each participant to involve themselves and be held accountable throughout the process.¹⁸⁸ These norms are optional and dependent on the claimants involved.

While the tikanga-centric process should contain tikanga values and Māori dispute resolution norms, the parties participating in the tikanga-centric process should also act tika themselves.¹⁸⁹ Ultimately, a tikanga-centric process should grant claimants the opportunity to address all aspects of the dispute, including their relationships with each other. Khylee Quince describes this process as guiding the parties on “te ara tika” (the right path).¹⁹⁰

This feature could have been integrated into the preparation phase in the NWOS, which would have transformed the process. If the claimants agreed on the principles guiding the dispute resolution process, it is more likely that the parties will reach agreement because they all be on the same page. All parties will understand each other’s perspective and work to resolve their dispute from that point. Ngāti Whātua could have reached out to hui with the tangata whenua groups in Tāmaki. Depending on the hapū and iwi opinions, all tangata whenua groups could have held a hui to discuss the kaupapa of the tikanga values and tikanga dispute resolution principles that applied to this dispute. Tangata whenua groups would have determined the values and principles guiding their reconciliation process. Alternatively, if tangata whenua groups sought to negotiate on an iwi to iwi basis, then claimants could have engaged in individual hui to determine the values guiding their resolution of their particular take in Tāmaki. Despite this feature, if Ngāti Whātua received consensus from the other parties in the hui, they could have implemented their specific tikanga process for overlapping interests (as they did with Ngāti Pāoa).

187 Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase – An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002) at [56]; and Kawharu, above n 160, at 11.

188 Quince, above n 19, at 287.

189 *Hauraki Report*, above n 6, at 90.

190 Quince, above n 19, at 293.

(f) Agreed upon tikanga Māori

After claimants agree on their tikanga values and dispute resolution principles, the claimants could determine the tikanga that governs the dispute. Interlinked with that process is tikanga itself, which will govern the way parties reach their decision about whose tikanga directs the tikanga-centric process. Tikanga Māori is extremely useful in overlapping claims disputes because mana whenua and take will be tested by ahi kā and other whakapapa relationships. These concepts should be understood within a tikanga framework. If the tangata whenua groups have their own procedure to decide whose tikanga Māori should apply, that approach should take priority.

In the NWOS, Ngāti Whātua conducted its tikanga process with Ngāti Pāoa. That process resulted in a kawenata. This kawenata illustrates the effectiveness of a tikanga-centric process where the tikanga is agreed on both sides. Due to the process, Ngāti Pāoa supported Ngāti Whātua's claim for declarations regarding their mana whenua over rohe as far as they were consistent with the kawenata. However, Ngāti Whātua did not initiate tikanga-centric processes with other tangata whenua groups. If they had, determining the tikanga that governed the hui about take and mana whenua over Tāmaki would have been useful for meaningful agreements. These tangata whenua groups could have followed an *Ellis v R* approach and participated in a wānanga that focused on tikanga and how it would apply to each step of the tikanga-centric process. This feature would have required the tangata whenua groups to collaborate and decide on the tikanga that will help resolve their overlapping claims issues.

(g) Conclusion — procedural features

These proposed procedural features for tikanga-centric processes allow Māori to design and participate in the TSP, carving out a space for rangatira to exercise tino rangatiratanga. These features ground the tikanga-centric process in te ao Māori. A tikanga-centric process would have addressed major roadblocks in the NWOS, such as the Crown failing to treat tangata whenua groups fairly compared with their treatment of mandated claimants and the lack of tikanga Māori utilised in the TSP.

2 Substantive features

This article also proposes some substantive features claimants could include in tikanga-centric processes. These substantive features will make the overall tikanga-centric process tika because they privilege te ao Māori, stem from Māori values and uphold tino rangatiratanga. This article recommends that the tikanga-centric processes should be kanohi ki te kanohi, held on a marae and te reo Māori should be the dominant language spoken during the processes. The tikanga-centric processes should ensure that the parties reach consensus on the issues in the dispute. Finally, the processes should utilise the take-utu-ea framework, which is grounded in tikanga values. If claimants struggle to reach a state of ea, the tikanga-centric processes should also include an independent tikanga expert or panel to assist in reconciling the parties.

(a) Kanohi ki te kanohi

After implementing some or all of the procedural features, the hypothetical claimant would meet with the tangata whenua groups in person to generate a tikanga-centric process. In te ao Māori, it is important to negotiate kanohi ki te kanohi because it maintains the bonds of whanaungatanga. Kanohi ki te kanohi is a “principle of [Māori] dispute resolution which is encouraged by Māori custom”.¹⁹¹ Being physically present in the process — where practical — is also important because it will avoid any potential misinterpretation.

In Ngāti Whātua and Ngāti Pāoa’s tikanga process, the parties negotiated in person. That approach would have shifted the focus away from the dispute, to the value of relationships. For an approach to be tika, it should be kanohi ki te kanohi to foster new relationships and tend to the relationships already established. Tangata whenua groups would have been able to manaaki others and bring the conversations back to the kaupapa at hand. Had Ngāti Whātua engaged in tikanga-centric processes with the tangata whenua groups, they would have been held kanohi ki te kanohi to ensure the resolution is made with whanaungatanga at the forefront.

191 Kawharu, above n 160, at 4.

(b) On a marae

The hypothetical claimant would then host or attend a hui on a marae or multiple marae. The wharenuī represents a particular hapū or iwi's tīpuna (ancestor).¹⁹² The marae environment is a state of ea that disputing parties desire to reach.¹⁹³ Traditionally, the dominant space to hold Māori dispute resolution processes was the marae. A marae would be the most ideal setting for hosting tikanga-centric processes. Depending on the parties' interests, multiple marae could be used to host tikanga-centric processes.

Holding tikanga-centric processes on marae centres tangata whenua groups in te ao Māori. If Ngāti Whātua and the other tangata whenua groups held their tikanga-centric process on Ōrākei marae, then Ngāti Whātua would have provided manaaki to their guests. During the pōwhiri, the groups would have been able to exercise kotahitanga and even wero (challenge) each other where absolutely necessary.¹⁹⁴ Further, resolving a dispute within the wharenuī reminds tangata whenua groups about the purpose of the hui, which is to reconcile disputes about certain rohe.

(c) Te reo Māori

During the tikanga-centric processes, the hypothetical claimants would predominantly speak te reo Māori. Te reo Māori should be the dominant language in the tikanga-centric process because it expresses tikanga best and reflects te ao Māori values.

Where a marae is the site for the dispute resolution process, te reo Māori should be the medium of discussion. The parties should express themselves in te reo Māori, particularly in relation to their mana whenua claims. Kawharu claims that panel members in the arbitration space should be fluent in te reo Māori and knowledgeable on matters of tikanga.¹⁹⁵ Te reo Māori will assist the process because parties will be able to explain their claims from a te ao Māori perspective, using concepts that may

192 Quince, above n 19, at 269.

193 At 269.

194 Te Aka Māori Dictionary (online ed) at [wero].

195 Kawharu, above n 160, at 4.

not easily be translated into English. However, to maintain inclusivity, the tikanga-centric process should contain interpreters for Māori who cannot speak te reo Māori fluently, Pākehā and tauwiwi (non-Māori).¹⁹⁶

A high proportion of urban Māori live in Tāmaki. In the 20th century, many Māori moved to urban centres such as Tāmaki due to colonisation, which disconnected Māori from te ao Māori and dislocated Māori from their tūrangawaewae (place to stand).¹⁹⁷ If the NWOS initiated tikanga-centric processes with tangata whenua groups, they would have needed to engage te reo Māori interpreters. An interpreter would ensure the process is inclusive, aligns with kotahitanga and can benefit as many Māori as possible.

(d) Consensus

The aim of a tikanga-centric process would be to reach consensus. In te ao kōhatu, the main aim was consensus. The tikanga-centric processes should not have time restrictions. This is to ensure that consensus is formed according to tikanga Māori and without Western time constraints.

A key issue in the NWOS was that the Crown imposed Western timeframes on Ngāti Whātua. If Ngāti Whātua engaged in a tikanga-centric process, it would have been crucial for the Crown to allow tangata whenua groups to work out their mana whenua claims without pressure to resolve their dispute. For tangata whenua to reach consensus about particular group's mana whenua over rohe, parties would have had to test whakapapa evidence, territorial boundaries evidence and histories about Tāmaki.¹⁹⁸ This process could take years. Consensus overrides any need for an expedient process because if consensus is not established, the agreement is likely to fail.

196 Te Aka Māori Dictionary (online ed) at [tauwiwi].

197 See Richard S Hill "Maori Urban Migration and the Assertion of Indigeneity in Aotearoa/New Zealand, 1945–1975" (2012) 14 *IJPS* 256 at 259.

198 *Hauraki Report*, above n 6, at 90.

(e) Take-utu-ea framework

Claimants could follow a take-utu-ea framework in the tikanga-centric process. There are five tests in the process: the tapu aspect; the mauri aspect; the take-utu-ea aspect; the precedent aspect; and the principles aspect.¹⁹⁹ Mead states that certain aspects of the tests can be utilised and still provide a Māori position on the issues.²⁰⁰ Take-utu-ea is the most relevant test for the overlapping claims context in the TSP because it focuses on producing reconciliation.

Take-utu-ea consists of tikanga values that form “an analytical template for examining behavioural issues”.²⁰¹ Take concerns the breach of tapu that needs resolution and the cause of the breach. Parties aligned with the wrongdoer and the wronged groups meet and agree on the take. All parties must agree on the take as a legitimate cause of the dispute.²⁰² Utu is the “appropriate cultural response” to remedy the take.²⁰³ It ensures that parties reach a solution they are satisfied with. After utu is enforced, and all parties are content, the parties have reached the state of ea.²⁰⁴ Resolutions that emerge from the take-utu-ea process are durable.

If the NWOS implemented a take-utu-ea approach, the relevant tangata whenua groups would participate in a kōrero about the take. The original take in this context could be interpreted as the Crown’s historical Treaty breaches. In particular, the Crown’s raupatu of whenua. The Crown’s acts breached Ngāti Whātua’s and other tangata whenua groups’ connection with the whenua. This discussion would be important because it requires groups to discuss why this breach occurred and the histories behind each of the Crown’s respective breaches against the groups. Also, in the NWOS, take could relate to hapū actions too because Marutūāhu and Ngāti Pāoa accepted whenua that Ngāti Whātua claims is its mana whenua rohe.

199 Benton, Frame and Meredith, above n 28, at 468–485.

200 At 467.

201 Mead, above n 20, at 46.

202 Benton, Frame and Meredith, above n 28, at 466.

203 Tai Ahu, Rachael Hoare and Māmari Stephens “Utu: Finding a Balance for the Legal Māori Dictionary” (2011) 42 VUWLR 201 at 204.

204 Mead, above n 20, at 52.

In the NWOS, it is likely utu would have involved deciding who has valid interests in the rohe. Utu would involve returning whenua to the mana whenua rohe and the groups with specific interests. However, utu may need to involve more than returning the rohe to the tangata whenua group or declaring who has particular mana whenua and take in rohe. Potentially, a kawenata could have been formed between tangata whenua groups regarding the ability to use other whenua or moana for customary activities like fishing. Once utu has been agreed to and implemented, the dispute will become ea. Mead's take-utu-ea framework would have helped address some of the roadblocks in the NWOS because it tests the tangata whenua interests to rohe from a Māori position, prioritises Māori values and is focused on reconciliation.

(f) Independent tikanga expert or panel

Where tangata whenua cannot agree on certain aspects of the process (such as what the tikanga values should be) an independent tikanga expert or panel might be required. An independent tikanga expert may remedy any imbalance between the tangata whenua groups. For example, where a tangata whenua group is an iwi that is powerful in the rohe, another tangata whenua group may not have the same resources or recognition to have their perspective heard. Utilising a tikanga expert or panel might address the power imbalance. The approach to hearing take and mana whenua claims would not be based on the Crown's LNG concept. Instead tangata whenua groups' respective claims would be grounded in tikanga Māori. Where the parties cannot decide on an independent expert together, the Crown could play a role in assigning an independent tikanga expert or panel.

Had Ngāti Whātua triggered tikanga-centric processes with the tangata whenua claimants, an independent tikanga expert or panel could have been engaged for substantive issues. The Crown could have played a role in the tikanga-centric processes where parties could not resolve disputes about certain kaupapa, such as the tikanga underpinning the dispute. However, the Crown's presence in tikanga-centric processes, besides as a facilitator, should be the last resort.

(g) Conclusion — substantive features

The proposed procedural features and substantive features will assist tangata whenua groups in determining multiple take and mana whenua claims over rohe. These features will ensure tikanga-centric processes uphold tikanga Māori. Māori claimants will have tino rangatiratanga over their disputes and rohe. In the context of tikanga-centric processes in the TSP, claimants will have agreed on who holds mana whenua and the take interests in the rohe. The tikanga-centric processes are likely to influence the TSP — where claimants agree — in particular Crown decisions regarding redress, because the claimants will have agreed on who holds mana whenua and what the take interests are in the rohe. As the tikanga-centric processes will not be binding on the Crown, they are likely to still have influence on what the Crown offers in redress and to who the Crown offers redress to. That is because the tikanga-centric processes will be focused on (most likely) who has mana whenua (or the extent of mana whenua) in particular rohe. Therefore, that decision will likely influence the rest of the process (which involves who has mana whenua, what redress parties should receive – if any – and Crown recognition of any wrongdoing to particular iwi/hapū). Not only will Māori claimants hold tino rangatiratanga in the tikanga-centric process stage, but potentially in the rest of the TSP too.

VII Conclusion

Since 2003, the Waitangi Tribunal has recommended that the Crown facilitates tikanga-based processes in the TSP for overlapping claims of mana whenua over rohe.²⁰⁵ This article argues that Aotearoa needs to implement tikanga-centric processes in the TSP because the current approach does not work. A tikanga-centric approach aligns with the trend of acknowledging tikanga Māori in Aotearoa's legal system and the

205 *Hauraki Report*, above n 6, at xvii.

emergence of tikanga dispute resolution processes in MACA regarding whenua and moana. This approach will give effect to te Tiriti because it will enable Māori to exercise tino rangatiratanga in overlapping claims disputes regarding whenua.

Examining the Crown's *Red Book* in the overlapping claims context reveals a number of fundamental issues with the policy. The Crown constructed the TSP without sufficient consultation with Māori and te ao Pākehā understandings of te taiao dominate the TSP. Therefore, when dealing with overlapping claims, the Crown shifts the wero of resolving overlapping claims disputes to Māori claimants and imposes Western concepts of time on the claimants. This approach runs contrary to tikanga Māori. As the Crown prefers LNG over Māori social organisations, tangata whenua groups that have not been mandated or are smaller in size receive less time with the Crown discussing their interests in the rohe. The final and most significant problem in the Crown's approach is that it has not encouraged the use of tikanga-based processes for Māori claimants.

The NWOS demonstrates the complexities of the overlapping claims setting. The substantive litigation in relation to the NWOS could have been avoided had a tikanga-centric process occurred during the NWOS. Influenced by te kōhatu and NWOS, this article proposes procedural and substantive features for tikanga-centric processes to address issues in the TSP. Establishing a public register for active settlements and implementing the processes at the preparation phase of the TSP would address the procedural issues in the overlapping claims context. Grounding the processes in Māori values, determining the tikanga for resolving the dispute, following a take-utu-ea framework and engaging an independent tikanga expert or panel where required would ensure any agreements formed during these processes will be durable, meaningful and tika. The Crown's role in these processes will differ depending on the claimants. Nevertheless, the Crown should fund the processes, provide claimants with relevant information and allocate independent tikanga experts where necessary.

A whakataukī that encapsulates the heart of the disputes in the overlapping claims context is:²⁰⁶

Nōku te whenua o ōku tīpuna.

Mine is the land of my ancestors.

The process of determining who has mana whenua over rohe should be guided by this whakataukī. It is up to Māori. Māori have the mātauranga and dispute resolution processes available from te ao kōhatu and tīpuna. Māori can create durable agreements that adhere to tikanga and uphold te Tiriti. In the overlapping claims sphere, the Crown needs to give the power over the tikanga-centric processes to Māori. Only then can Māori produce tikanga-centric processes that address multiple claims to mana whenua and interests in rohe. Resolving these issues in the overlapping claims context of the TSP will produce beneficial outcomes for current claimants and future generations.

206 Robert KJ Wiri “A History of Te Whāiti-nui-a-Toi in the Western Urewera Mountains of New Zealand” (PhD Thesis, University of Auckland, 2001) at 34 as cited in Wiri, above n 48, at 4.