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AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL

ORAL HEARING: TOPIC 037: MANA WHENUA: 4 JUNE 2015

POINTS FURTHER TO EVIDENCE OF 4 JUNE:

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Overview The Mana Whenua provisions of the PAUP

1. This memorandum contains the authorities supporting our case that the evidence shows that Auckland Council has acted in contravention of the rule of law in their drafting and implementation of the Proposed Auckland Unitary Plan ("**PAUP**"). In particular:

    a. Many of the provisions are not sufficiently certain or predictable in their effect to be good law.

    b. The cultural impact assessment ("**CIA**") requirements envisage processes that breach principles of natural justice and constitute unlawful interference with property rights.

    c. Sites and places of significance and value to Mana Whenua referred to in the PAUP have been scheduled without the substantiation required by case law.

2. Highlighting the ways in which the PAUP conflicts with fundamental legal principles suggests a straightforward alternative. In our opinion the alternative is what the drafters of the Resource Management Act 1991 ("**RMA**") expected. it would produce a Plan consistent with the RMA and would acknowledge, record and provide for Maori values in a way that respects both property rights and the rule of law.

3. It would involve CIAs only as part of plan development. Instead of imposing a relationship with iwi on every affected property owner, a CIA under this alternative would be part of local government's relationship with iwi. It would dispense with procedures that necessarily pit iwi against their fellow Aucklanders in a relationship fraught with incentives for corruption and abuse.

Fundamental Legal Principles

A. Rule of Law

4. Lord Bridge of Hartwich noted that there is "no principle more basic to any proper system of law than the maintenance of the rule of law itself[1]". But the exact nature and definition of the "rule of law" is the subject of academic debate. An early definition (more succinct than most) is the title of Samuel Rutherford's 1644 treatise, "Lex, Rex.[2]" The law is king. A society that has a rule of law is one where government is according to fixed rules; not arbitrary power.

5. The rule of law is constitutional in New Zealand, as recognised in the Supreme Court Act 2003 which states:

"Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the Sovereignty of Parliament.[3]"

6. Philip A Joseph notes[4], that the rule of law and parliamentary sovereignty, are occasional rivals. Lord Steyn suggests that in exceptional cases "the rule of law may trump parliamentary supremacy.[5]" These sentiments were expressed in Lord Cooke of Thorndon's obiter comment that "some common law rights presumably lie so deep that even Parliament could not override them.[6]"

7. Justice McGrath, in his final Supreme Court sitting speech described upholding the rule of law as "the underlying concept of the judicial function"[7]. Maintenance of the rule of law is the fundamental duty of the courts and the Lawyers and Conveyancers Act 2006, s4(a) makes that a basic duty of all practising lawyers (as officers of the Court and servants of the law). Lord Steyn cautioned that "even in unprepossessing cases, fundamental principles of the rule of law must be upheld. The rule of law requires it.[8]"

B. Uncertainty

8. One such fundamental principle is that of certainty.

I. Uncertainty and the rule of law

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[1] *Bennett v Horseferry Road Magistrates Court* [1994] 1 AC 42, at 67 (HL)
[2] Samuel Rutherford, sometime Professor of Divinity in the University of St. Andrews, *Lex, Rex*, *or The Law and The Prince,* London: printed for *John Field*, and are to be sold at his house upon Addle-Hill, near *Baynards*-Castle, October 7, 1644.
[3] Supreme Courts Act 2003, s 3(2).
[4] Philip a Joseph, Constitutional and Administrative Law in New Zealand (3rd ed, Brookers Ltd 2014), at 152.
[5] Lord Steyn, "The Rule of Law and the Role of Judges", Atlee Foundation Lecture, 11 April 2006, at 20.
[6] *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394
[7] *Final Sitting Speeches for Honourable Justice John McGrath, 6 March 2015, at 21.*
[8] R *(Anufrijeva) v Secretary of State for the Home Dept* [2004] 1 AC 604 at 623

9. If rule is to be by law then the question, "what is a law?" becomes very important. Formally we identify law as pronouncement of judges or rules issued by parliament or under its authority. But if a qualified source were enough the rule of law would never conflict with parliamentary supremacy[9]. Supremacy would end any question. For delegated or subordinate legislation such as the PAUP, courts have developed invalidity mechanisms of interpretation or intervention that do not challenge Parliamentary sovereignty, while upholding rule of law principles. The rule of law test includes principles of law-making that laws must adhere to, to be valid. One is "the need for fixed and predictable rules of law controlling government action.[10]"

10. The leading New Zealand case recognising certainty as a facet of the rule of law is *Hamed v R*[11] where Elias CJ concluded that the police act unlawfully if they intrude on personal freedom without specific statutory authority in part because such a conclusion "meets the rule of law values of certainty and predictability.[12]" Certainty and predictability as aspects of the rule of law make sense given that one commonly cited virtue of rule by law rather than by man, is freedom from arbitrariness.

11. In *The Morality of Law*[13], the legal philosopher Lon L. Fuller identified consistency as one of the eight principles that constitute the "internal morality of law". He noted that the absence of this principle, that is, "unclear or obscure legislation that is impossible to understand[14]", would cause a legal system to fail. Any system where laws could not be understood so as to allow a citizen the ability to predict in advance the results of his or her actions would not be a legal one.

II. Certainty cases

12. There are a number of cases in New Zealand, and similar jurisdictions, where the principle of legal certainty has been applied.

13. In *Brooker*[15] the NZ Supreme Court had to consider the meaning of "disorderly behaviour" and whether the phrase was limited to behaviour that disturbed public order, or would admit a wider interpretation. The court favoured the narrow meaning. In coming to this decision Elias CJ said:

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[9] Fortunately in the present case we do not have to resolve the vexed question of when and how a Parliamentary rule might be invalidated for breach of fundamental rule of law principle.
[10] n 5, at 148. See F A Hayek, *The Road to Serfdom*, London, G Routledge, 1944, ch 6; G W Keeton, *The Passing of Parliament*, London, Benn, 1952.
[11] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305
[12] Ibid, 38.
[13] Lon L. Fuller *The Morality of Law* (Revised ed, Yale University Press, New Haven, 1969)
[14] Ibid, 33–38.
[15] Brooker v Police [2007] NZSC 30, [2007] 3 NZLR 91.

"A narrower interpretation of "disorderly behaviour", anchored in disruption of public order, is also more consistent with the fundamental principle that criminal law must be predictable. That was a consideration which influenced the Supreme Court of Canada in concluding in Lohnes that a public "disturbance" was an overt disturbance of the use of public space, rather than the creation of emotional upset in those present. McLachlin J, for the Court, took the view that the interpretation was driven by the principle of legality 'which affirms the entitlement of every person to know in advance whether their conduct is illegal'. Imprecision in the criminal law which leaves it to judges to identify what is deserving of penalty is inconsistent with the rule of law for reasons also identified by the Permanent Court of International Justice in the Danzig Legislative Decrees case.

A man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and by the judge.

In the same vein, the European Commission of Human Rights was of the opinion that the expression "prescribed by law" (used in art 19 of the International Covenant to indicate how the qualified right to freedom of expression may be restricted) leads to two requirements: first, that the law be adequately accessible to citizens; secondly, that it "be formulated with sufficient precision to enable the citizen to regulate his conduct and foresee with reasonable certitude the consequence which a given action may entail". If it is impossible to know whether conduct expressing a particular view or conveying information constitutes an offence, freedom of expression is inhibited. The more elastic the meaning, the wider the discretion left to enforcement officers and the greater the difficulty of any check for legality after the event.[16]"(our underlining)

14. Elias CJ took a similar approach in *Morse*[17] but expressly extended it past the criminal law when determining whether the words "offensive" and "disorderly" required fixed principles of interpretation or could be treated as "a contextual judgment arrived at after balancing the interests of the appellant against the impact of her expression on the feelings of those present.[18]" The court favoured a strict interpretation. Elias CJ noted:

"While the words "offensive" and "disorderly" are ones in ordinary use, they are elastic concepts which take their meaning from the way in which they are used in the statute and according to the general principles of construction already mentioned. They are not properly left, without more, to be applied in a broad contextual balance, even if subject to a standard of reasonableness in outcome. It is true that ultimately, in application, contextual judgment is inescapable. But that does not mean abdication of the interpretative responsibility to construe s 4(1)(a). The crime contained in s 4(1)(a) is not to

[16] Ibid, 38 -39.
[17] *Morse v Police* [2011] NZSC 45
[18] Ibid, 4.

be left to be described only in application according to a "balance" between the interests of those whose conduct or speech is in issue and the feelings of those exposed to it, as is the effect of the judgments in the Courts below, unless that is the unmistakable effect and purpose of the statute. If it is not, such approach offends against the principle that criminal law and limitations on rights must be capable of ascertainment in advance, touched on in my reasons in Brooker at [38] and [39].(our underlining)

15. In *Antigua and Barbuda*[19] Lord Cooke noted that "*legal provisions which interfere with individual rights must be formulated with sufficient precision to enable a citizen to regulate his conduct and foresee with reasonable certitude the consequence which a given action may entail." (our underlining)*

16. In *Chamberlains v Lai*[20] Tipping J noted "…the need, often emphasised in the human rights arena, for the law to be predictable and sufficiently clear to enable people to order their affairs with confidence.[21]" Thomas J noted that "no one…would deny that, along with justice and relevance to the times, the achievement of greater certainty in the law is a desirable objective.[22]"

17. In *Christian v R*[23] Lord Hoffman said:

"There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done."

18. In *Yadegary*[24] the Court of Appeal (Baragwanath J) noted that "the rule of law requires that laws be as clear and predictable as practicable…[25]". He also cited Jeremy Bentham as saying "'…the legislator who cannot pass judgment in particular cases, will give directions to a tribunal in the form of general rules, and leave them with a certain amount of latitude in order that they may adjust their decisions to the special circumstances.[26]"

19. This recent case law records three features of the fundamental principle. Firstly, there is extensive authority from the highest courts that uncertainty in law is generally bad.

[19] *Observer Publications Ltd v Campbell 'Mickey' Matthew, The Commissioner of Police, and The Attorney General (Antigua and Barbuda)* [2001] UKPC 11 (PC), 28.
[20] *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7
[21] Ibid, 137
[22] Ibid, 215
[23] *Christian v R* [2006] UKPC 47
[24] *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495
[25] Ibid, 33
[26] Ibid.

Secondly, the rationale is that people must be able to know the law in advance so as to order their affairs. Thirdly, the principle is not confined to criminal law.[27]

III. Delegated legislation

20. The RMA provides a framework for delegated legislation in the form of regional and district plans. The PAUP is delegated legislation under the RMA. Certainty cases dealing with delegated legislation are accordingly salient.

21. *Collector of Customs v Kilburn*[28] confirmed that subordinate legislation (wider than regulations) can be invalid for uncertainty. Fisher J said: "there are various detailed grounds upon which the subordinate legislation may fail, examples being uncertainty…[29]" This was based upon *Transport Ministry v Alexander*[30] in which Lord Cooke, then Cooke JJ said:

"This brings one into the realm of voidness for uncertainty. All five members of the House of Lords in McEldowney v Forde [1971] AC 632; [1969] 2 All ER 1039 recognised that a regulation may be vague as to be invalid or unenforceable.[31]" Lord Cooke went on to say *"We doubt whether there is any distinction in principle in this respect between power to make regulations and other statutory discretions conferred on executive authorities[32],"* and *"…there is a persistent tendency for courts to accept…that in considering regulations claimed to be justified by a particular statutory power the stage may be reached of concluding the regulation is so ambiguous that Parliament cannot have meant the power to cover it.[33]"*

22. There are many further examples of this approach. In *Patel* v *Department of Immigration* Thomas J said "it remains unsatisfactory to make a rule or impose a requirement which cannot be applied literally without difficulty, or at all.[34]" In *JB International Ltd* Heath J noted that "…an uncertain bylaw is not likely to be reasonable.[35]" Lord Cooke suggested in *Transport Ministry v Alexander* (in 1978), ambiguity may have reached the point of being a separately conceived reason to strike down delegated law[36]. The High Court in

[27] See Matthew Smith *The New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) chapter 24 for examples of the principle in contexts such as planning law, rating law, relationship property law, negligence and judicial review.
[28] *Collector of Customs v Kilburn Car Sales Ltd* [2004] NZAR 500
[29] Ibid.
[30] *Transport Ministry v Alexander* [1978] 1 NZLR 306
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] *Patel v Chief Executive of Department of Immigration* [1997] NZAR 264
[35] *JB International Ltd v Auckland City Council* [2006] NZRMA 401 (HC) at 74.
[36] n 31

Ankers v Attorney-General followed *Transport Ministry v Alexander* to affirm that any form of subordinate legislation can be struck down for voidness or uncertainty[37].

23. In *Bitumix Ltd V Mount Wellington Borough Council* the issue was whether the council's ordinances for controlling noise were uncertain and invalid. Davidson CJ found for the council on the basis that:

"I have already dealt largely with the question of certainty in measurement. I do not see that there is any difficulty in knowing how measurements are to be taken nor are there any real problems in actually taking the measurements. Once levels of background noise are ascertained by actual measurement on site or by the use of Table 2 in section 6 of the guidelines, then the level of the noise under investigation can be ascertained by measurement and can be corrected to allow for intermittency, noise character and impulsiveness as set out in section 6.1. There is, in my view, no undue measure of discretion given in arriving at noise level figures up to this stage.[38]"

24. Davidson CJ affirmed however that "…if a council does, in fact, specify conditions there must be some measure of certainty about these conditions otherwise it can hardly be said that they are specified.[39]"

25. In *Stop CRA Pollution* Judge Sheppard said:

Held (dismissing the application):

(1) A clean air licence should use words in their common understanding, not in a specialised meaning. It was even more important that resource consents granted under the Resource Management Act should be expressed so that they could be clearly understood by members of the public, since any person could bring proceedings to enforce compliance with resource consents. Regrettably the condition in the present licence about sulphur dioxide reductions was not expressed so that it could be clearly understood.[40]"

26. It is well established that subordinate legislation must meet standards of clarity and certainty to be valid law. This principle remains true regardless of the type of delegated legislation (regulations, bylaws, plans). Uncertainty is often seen as indistinguishable, as a result of judicial review from saying that a provision is ultra vires the empowering legislation as identified by Lord Cooke in 1978 in *Transport Ministry v Alexander*[41]. An

[37] *Ankers v Attorney-General* [1995] 2 NZLR 595
[38] *Bitumix Ltd v Mount Wellington Borough Council* [1979] 2 NZLR 57
[39] Ibid.
[40] *Stop CRA Pollution (SCRAP) Inc v New Zealand Refining Co Ltd* (1993) 2 NZRMA 586 (PT).
[41] *Transport Ministry v Alexander* [1978] 1 NZLR 306

argument that a piece of delegated legislation is unlawful may therefore be stronger if it can be made with some reference to the specified limits of the empowering legislation.

Uncertainty in the PAUP

27. Many phrases and definitions in the PAUP are not sufficiently certain to allow landowners (or potential land users) to confidently predict in advance the implications of using their property, for example:

27.1 "Intangible values"

27.2 Occurs:

- 5. Mana Whenua, 5.1 Sites and Places of Significance to Mana Whenua; Overlay Description;
- 5. Mana Whenua, 5.1 Sites and Places of Significance to Mana Whenua; Objectives;
- 5. Mana Whenua, 5.1 Sites and Places of Significance to Mana Whenua; Policies (8):
- 5.2 Sites and Places of Value to Mana Whenua; Objective (1):
- 5.1 Sites and Places of Significance to Mana Whenua (1) Activity table:

27.3 Issue: this term is necessarily subjective and it is impossible to know its scope.

27.4 "Values and associations"

27.5 Occurs:

- 5. Mana Whenua, 5.1 Sites and Places of Significance to Mana Whenua; Policies (1):

27.6 Issue: as above.

27.7 "Spiritual values"

27.8 Occurs:

- 5. Mana Whenua, 5.1 Sites and Places of Significance to Mana Whenua; Policies (2):

27.9 Issue: as above.

27.10 "Reflect <u>within the development</u> the <u>relationship</u> of the scheduled site or place of significance within <u>the context</u> of the <u>wider</u> Maori <u>cultural landscape</u>."

27.11 Occurs:

- Mana Whenua, 5.1 Sites and Places of Significance to Mana Whenua; Policies (4):

27.12 Issue: Mysteries include:

(a) what relationship that is to be reflected within the context of the Maori cultural landscape is with.

(b) what is a "reflection" "within" a development; and

(c) what is a "development" for this purpose.
(c) whether "the context" adds or subtracts from the scope of the next words
(d) how "wider" qualifies the final terms
(e) what justifiable meaning should be attached to the ineffable "cultural landscape"

27.13 *"The Sites and Places of Value to Mana Whenua overlay identifies sites and places where the presence of Mana Whenua cultural heritage has been confirmed, and where Mana Whenua have assigned values but their significance has not yet been assessed in detail. The overlay provides a precautionary approach to protecting sites known to be of Māori origin until such time as an appropriate management response for each site or place is determined.*
~~These may include sites and places identified within the New Zealand Historic Places Trust register.~~

Sites and places of value to Mana Whenua have tangible and intangible values in association with historic events, occupation and cultural activities. Mana Whenua values are not necessarily associated with archaeology particularly within the highly modified urban landscape where the tangible values may have been destroyed or significantly modified.

These sites and places are protected as they are of Māori origin and ~~may~~ contain Mana Whenua values which ~~must be~~ are recognised and provided for in accordance with the RMA. Where there is sensitive information regarding the values of the sites and places, special protocols agreed with Mana Whenua will outline the management of this information."

27.14 Occurs:

- Sites and Places of Value to Mana Whenua; Overlay description:

27.15 Issue: The description is contradictory. The first paragraph notes that he approach is "precautionary". The second paragraph omits the word "may" to assert that the sites "contain Mana Whenua values". The first paragraph also claims that the overlay identifies sites and places where the presence of Mana Whenua cultural heritage has been confirmed. This is at odds with the evidence (addressed later) of many sites that do not exist or are inaccurately mapped.

The claim that sites and places have been "confirmed" also contradicts the adoption of a precautionary approach. If the approach is precautionary, and the significance of sites have not yet been assessed in detail it is possible that the sites

do not in fact contain Mana Whenua values. A truly precautionary approach could equally or preferably have involved deferring any action or rule imposing costs and uncertainty on property owners until there was some probative evidence establishing, even on a balance of probabilities, that benefit would exceed costs; a proper s 32 assessment, for example.

27.16 *"Maori cultural landscape"* definition:
"Areas encompassing natural or built elements, physical and metaphysical markers and sacred places. These are embedded in the whenua and give meaning and content to Mana Whenua lives and identity, relationships and dependence with turangawaewae on a daily basis. These include iconic mountains, rivers, lakes and harbours. Maori cultural landscapes provide the context, narratives and cultural memory of the sites and places of significance to Mana Whenua indicating an existing or historical Mana Whenua Presence."

27.17 Occurs:

- PAUP Definitions "M".

27.18 Issue: the definition does not define. It piles abstraction on abstraction to leave potential application to a nearly infinite range of human interests, beliefs, prejudices and emotions. Compounding uncertainties with further vague and undefined terms like "metaphysical markers" and "cultural memory" is almost a parody of legal method. Attempts to apply them would confuse and mock the form and processes of legal reasoning and objectivity.

28. The primary cause of uncertainty in the PAUP isn't contained in any one phrase or definition; it is systemic in the process the PAUP establishes. The scheme is designed openly to enable Mana Whenua[42] to use what are nominally procedural rights to wield powers that in effect will often exhaust land users, and prohibit uses they do not like, and at the least materially to influence the use, and potential use, of thousands of properties of other people. Mana Whenua CIA rules and criteria deliberately inject subjective and non-justiciable issues into the procedures. There is scarcely an effort to disguise the transformation of provisions governing the supply of evidence to consent authorities (assumed by the law to be objective) into substantive iwi powers to pre-determine decisions. The PAUP's vague and permissive terms are deliberately framed to cede aspects of the determinative power to Mana Whenua as designated "experts"[43].

C. Property Rights and Natural Justice

[42] Mana Whenua is yet another term incapable of definition or application with the precision that should be a qualifying condition for granting extensive and valuable powers to influence or in fact control land use decisions

[43] See paragraph 55 of this submission.

I. Section 6(e) and the Treaty of Waitangi

29. The PAUP's enabling statute is the RMA. PAUP Ch E 5.1 Sites and Places of Significance to Mana Whenua claims that in the overlay description "Mana Whenua values are recognised and provided for in accordance with the RMA." PAUP Ch G, Cultural Impact Assessment, notes that "the purpose of a cultural impact assessment is to recognise and provide for the relationship of Mana Whenua with their ancestral land, water, sites, wahi tapu and taonga under section 6(e) of the RMA.

30. Section 6(e) of the RMA is a "matter of national importance." Section 6 states that :

"In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection, of natural and physical resources, shall recognise and provide for the following matters of national importance:"

31. Section 6(e) itself is "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga."

32. Waahi tapu, according to the Heritage New Zealand Pouhere Taonga Act 2014 is *"A place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense."* It is well established that protection of Maori spiritual values under the law extends beyond protection of waahi tapu. In *Bleakley*[44] McGechan J concluded "overall I am satisfied the Parliamentary intention was that the reference in s6(e) to 'other taonga' was to include intangible cultural and spiritual taonga in accordance with usual concepts and in accordance with the Treaty.[45]" In *Takamore v Clarke* Elias CJ said that "Maori custom according to tikanga is…part of the values of the New Zealand common law.[46]"

33. However as Baragwanath J noted in *Kruithof*[47] "despite their importance, the section 8 and 6(e) provisions, among others in the RMA which provide for the recognition of Maori values, do not give them the status of trumps." These must often be balanced against competing concerns; and sometimes other concerns will prevail[48]. The courts "appear to have been reasonably pragmatic[49]" in this regard.

34. In the interim judgment of Baragwanath J in the *Kruithof* case[50] the Treaty of Waitangi ("**the Treaty**") is invoked as a way to balance Maori spiritual values with other interests within the framework of the RMA. Baragwanath J quoted section 8 of the RMA:

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[44] *Bleakley v Environmental Risk Management Authority* (HC) [2001] 3 NZLR 213.
[45] Ibid, 65
[46] *Takamore v Clarke* [2012] NZSC 116, [2013] NZLR 733, 94.
[47] *Ngati Maru Ki Hauraki Inc v Kruithof* (HC) [2005] NZRMA 1, at 83
[48] See, *Mahuta & Waikato Tainui v Waikato Regional Council & Waikato District Council & Anchor Products Ltd* (29/07/1998) EC A91/98. F Easdale, PA Catchpole, Sheppard J.
[49] n 42, 68
[50] *Ngati Maru Ki Hauraki Inc v Kruithof and Anor* HC HAM CIV2004-485-330 [11 June 2004]

"In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).[51]*"*

35. He went on to note that "it is sometimes overlooked that the Treaty had purposes other than those stated in the second article…[52]" Baragwanath J identified these other purposes with reference to Sir Hugh Kawharu's translation of the Maori version of the preamble to the Treaty:

"…there are many of [the Queen's] subjects already living on this land and others yet to come. So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness."(our underlining)

Baragwanath J also referred to article 3 of the Treaty, which extended the rights and duties of English citizenship to "all the ordinary people of New Zealand.[53]" On this basis Baragwanath J held that the rights and duties extended by the Treaty are just as protected under the RMA, by virtue of s 8, as are the things recognised in s6(e). He said:

"There is nothing unusual about a conflict between two important public interests - that of Ngati Maru to recognition of their relationship and their culture and traditions with their ancestral lands, recognised by s 6(e) and other provisions of the RMA; and that of Mr Kruithof in simple and timely justice which no less fundamental principle requires shall be neither "denied or deferred" (that is delayed): see Chapter 29 of Magna Carta 1297 *reproduced in the* Reprinted Statutes of New Zealand *volume 30 at p 26.*[54]*"*

36. Baragwanath J held that on the facts the right to justice as contained in Magna Carta, imported for all citizens by the Treaty, overrode section 6(e).

II. Property Rights and the Treaty

37. The same judicial reasoning could uphold property rights against takings by application of Article 2 of the Treaty. In its English version it is an expression of classical English law property rights. It assures Chiefs and all their people of an end to property transfer by right of conquest and feudal seizure by superior status[55]. This is also guaranteed by Magna Carta, in clause 39 of the 1215 version:

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[51] Ibid, 47
[52] Ibid
[53] The Kawharu Translation, http://www.justice.govt.nz/tribunals/waitangi-tribunal/treaty-of-waitangi/the-kawharu-translation, last accessed, 10, 06, 2015.
[54] N 48, 53
[55] There is also a strong argument, that a guarantee of property rights is also explicit in Article 2 of the Maori language version of the Treaty. "Chieftainship" of property in Article 2 is a good summary translation and

"No freeman shall be taken or imprisoned or disseised[56] or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."

38. The right to hold property free from unlawful interference is a public interest capable of being balanced under the RMA against the relationship protected by s 6(e). Like the rights to justice and due process that were balanced in *Kruithof*, property rights are fundamental.

39. Belief in the fundamental importance of property rights has deep roots in the common law and in the political theories of classical and democratic liberalism which shaped, and continue to inform, New Zealand's political ideologies. Blackstone's careful study of the common law lead him to state that "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.[57]" This view has been eroded over time; however property is still afforded strong protection by the law. Sir Geoffrey Palmer noted in submission on the Maori Reserved Lands Bill that "there is a strong common law presumption that Parliament will not interfere with private property rights, and if it does so, it will provide adequate compensation.[58]" Further, our law "provides very strong protections against intentional incursions onto a person's land.[59]" These protections are explicit in our tort law[60], and implicit in the judicial tendency to treat incursions onto private property rights very seriously.

40. The Public Works Act Part 5, s60 respects property rights. Heritage New Zealand Pouhere Taonga Act 2014 and its inter relationship with the Local Government Act 2002 show a carefully evolved pattern of procedural and substantive hurdles to casual expropriation of property, even to protect heritage.

41. Because the right to free and undisturbed possession is a Treaty right it must be taken into account under s 8 of the RMA and balanced against s 6 (e) where there is conflict. If delegated legislation is claimed to be required or authorised only by section 6 (e), but

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explanation of the rights and incidents of ownership assured to iwi members. Refer to Appendix for further details.

[56] Note disseised means "to remove (a party) wrongly from real property that is lawfully possessed.

[57] W Blackstone, *Commentaries on the Laws of England* (John Murray, London, 1857) (1765) Book 1, p 125, Book 2, p 2.

[58] Sir Geoffrey Palmer's submission on the proposed Maori Reserved Lands Bill and its effect on West Coast Leases in Taranaki of 26th October 1995.

[59] Bill Atkin, Geoff McLay & Bill Hodge, Torts in New Zealand, 479

[60] For instance that damage is not required for a successful action in trespass; the strict liability of *Rylands v Fletcher*; that liability in nuisance is not extinguished by due care (John G Fleming *The Law of Torts* (9 ed, The Law Book Company, Sydney, 1998) 473.) or by compliance with planning permissions (*Wheeler v JJ Saunders Ltd* [1996] Ch 19 (CA).)

does not attempt to strike a balance between the two that maximises recognition of both values it is *ultra vires* and unlawful.

42. The balancing process in reviewing such legislation could be analogous to the process followed by the courts when reviewing a particular consent proposal under the RMA. In *Te Runanga o Taumarere*[61] a consent application for a sewerage disposal system in Russell was contested by Maori. It was acknowledged that the water leaving the system would pose no threat to health[62], however Maori contented that the water would still lose *mauri* and that "it would offend the mana of the receiving water and the mana of the kaitiaki.[63]" The court acknowledged the "tension and conflict between important public interests.[64]" They found that the District Council could have reasonably investigated alternative disposal options such as "deep bores[65]" and the consent was delayed for them to do so.

43. Similarly, in *Bleakley*[66], a case concerning AgResearch's genetic modification project to produce milk containing human proteins, iwi argued that "interference by genetic modification, particularly human, is irreconcilable with and offensive to the cultural and spiritual values inherent in these taonga…[67]" In this case the court found in favour of the authority decision to permit AgResearch's activities. It was observed that the usual approach of the courts in balancing such interests was pragmatic and that they were "more prepared to protect the spiritual significance of a site where other options were open to the applicant.[68]" Likewise in *Takamore Trustees*[69] a material question the court examined thoroughly before concluding in favour of the applicant was whether the road could have been placed elsewhere to avoid a waahi tapu site.

44. We draw from these cases the principle that Maori spiritual values will be protected to the extent that transgressing them can be reasonably avoided, but where conflict is unavoidable they are to give way to other public interests. If this conclusion is too strong a less simple formulation would reach similar conclusions. The reasonable alternatives requirement can go both ways. An attempt actively to protect Maori spiritual values should, at the least, not conflict with other fundamental norms, such as the rule of law

[61] *Te Runanga o Taumarere v Northland Regional Council* [1996] NZRMA 77 (PT)
[62] Note: the evidence of Claes Tommy Sandstrom on behalf of Auckland Council claims "health benefits" as a consequence of enhancing protection of Mana Whenua values,"an important economic saving to the health system." The evidence of this is scarce, reliance is placed on a paper written by Kate Clark (who has no obvious health qualifications) studying Indigenous Australians.
[63] Ibid, 21.
[64] Ibid, 60.
[65] Ibid, 57.
[66] n 42.
[67] Ibid, 38
[68] Ibid, 68
[69] *Takamore Trustees v Kapiti Coast District Council* (HC) [2003] 3 NZLR 496

imported by the treaty and the right to property, if the values can be protected in a way that is consistent with them. We argue that the RMA can be applied so as to respect both.

III. Natural Justice

45. Another fundamental legal norm is the principle of natural justice. This is protected under the New Zealand Bill of Rights Act 1990. Section 27 offers every person the right:

…to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."

46. One of the two primary rules of natural justice is *nemo ludex in Causa Sua* (no one should be the judge in their own cause). This is effectively a rule against bias, though it extends further than actual bias and prohibits arrangements that give rise to a presumption of bias also[70].

47. The primary test in New Zealand for presumptive or apparent bias comes from *Saxmere;* "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[71]"

48. Where a decision maker has a pecuniary interest the presumption that bias exists is almost unavoidable. In *Auckland Casino Ltd*[72] an irrebuttable presumption where a pecuniary interest exists was upheld so long as the pecuniary interest was more than *de minimi*s.

49. We observe in the Mana Whenua provisions of the PAUP an attempt to erect a set of procedures, presumptions, onuses, and criteria, calculated to create for Mana Whenua a degree of practical influence on certain land use decisions that is effectively decision making. Nominally, the relevant substantive decisions remain with the Council. But a very important procedural decision (whether a CIA is required) is clearly given to unspecified iwi representatives. Courts are entitled (we suggest obliged) to take account of the reality that the cost and delay consequences of procedural decisions (such as whether to notify an application) can be more determinative of whether a land use proposal proceeds than its putative merits.

50. Further, the Council's determined opposition during mediation to narrowing the scope of the delegated status to determine the nature and existence of cultural impact should be taken into account with its disinclination to remove subjective criteria, and to remove provisions appearing to exclude challenge (by the council and probably the applicant) to Mana Whenua assertions of expertise. They are consistent with a true intention (along

[70] Palmer, K, *Local Authorities Law In New Zealand* (Brookers, Wellington, 2012) at 153.
[71] *Saxmere Co Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 122, at [4]
[72] *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, at 10

with express stated plans to exand iwi involvement in decision making) to defer to Mana Whenua in decision-making.In practical effect they signal an intention to subordinate affected consent decisions to the opinions in CIAs.

IV. Cultural Impact Assessments

a. Provisions

51. The sections of the PAUP dealing with CIA's are:

51.1 Chapter E: 5. Mana Whenua, 5.1 Sites and Places of Significance to Mana Whenua; Overlay Description:

"Where there is sensitive information regarding the significance of the sites and places, special protocols agreed with Mana Whenua will outline the management of this information which may include information provided through a cultural impact assessment. "

51.2 Chapter E: 5.1 Sites and Places of Significance to Mana Whenua: 2 Development Controls 4.1:

"a. A cultural impact assessment process is required for all activities requiring resource consent on sites and places of significance to Mana Whenua in the Activity Table
b. The Mana Whenua group(s) that nominated the site or place of significance is identified in Appendix 4.1 and must be engaged in accordance with the cultural impact assessment information in clause G1.X of the general provisions."

51.3 Chapter E: 5. Mana Whenua, 5.1 Sites and Places of Significance to Mana Whenua; Policies (2):

"c. ~~incorporate~~ recognising and providing for the outcomes articulated by Mana Whenua through ~~consultation~~ the cultural impact assessment process and within iwi planning documents."

51.4 Chapter E: 5. Mana Whenua, 5.1 Sites and Places of Significance to Mana Whenua; Policies 11):

"Require a cultural impact assessment process where proposed works may have adverse effects on the values associated with sites or places of significance to Mana Whenua."

51.5 Chapter E: 5.2 Sites and Places of Value to Mana Whenua; Policies (1):

"Require a cultural impact assessment process where ~~the location of sites and places of value to Mana Whenua have been confirmed and where existing information indicates a likelihood of their~~ proposed works may disturb~~ance~~ or create adverse effects on the~~ir~~ values of Mana Whenua with the sites or places."

51.6 Chapter G: General Provisions: 1.XX Cultural Impact Assessment:

"A cultural impact assessment is the documentation of an assessment by Mana Whenua of the actual and potential effects of an activity on Mana Whenua cultural values, including any measures considered appropriate by Mana Whenua to avoid, remedy or mitigate those effects. A cultural impact assessment may be prepared for a resource consent or for a project. The purpose of a cultural impact assessment is to recognise and provide for the relationship of Mana Whenua with their ancestral lands, water, sites, wahi tapu and taonga under section 6(e) of the RMA.

Cultural impact assessments are identified as a special information requirement for activities that require resource consent and are likely to have adverse effects on Mana Whenua cultural values associated with wahi tapu and taonga, including discretionary and non-complying activities associated with the following activities:

a. discharges to land, air, water or the CMA
b. diversion, taking or using of surface water, ground water, coastal water or geothermal resources
c. damming of water and associated damming structures
d. drilling to construct a bore
e. structures and disturbance affecting river beds and the CMA
f. reclamations
g. mineral extraction
h. removal of mangroves
i. landfills, clean fills, recycling plants, waste treatment or hazardous waste infrastructure and bio waste infrastructure and deposition of biosolids
j. removal of scheduled trees of significance to Mana Whenua
k. land disturbance or vegetation clearance in the following overlays:
i. Outstanding Natural Features overlay
ii. Outstanding Natural Landscapes overlay
iii. Outstanding and High Natural Character and Significant Ecological"

51.7 Chapter G: General Provisions: 1.XX Cultural Impact Assessment:

"1. Prior to lodgement of an application for resource consent the applicant is encouraged to contact the representatives of the iwi authority from the relevant Mana Whenua group (or groups where there is more than one potentially affected

iwi or hapū) to provide information on the application and seek confirmation from Mana Whenua as to whether a cultural impact assessment is required."

51.8 Chapter G: General Provisions: 1.XX Cultural Impact Assessment:

"Note: A cultural impact assessment must be prepared by an iwi authority or a person or entity nominated by the iwi authority with confirmation of this nomination provided in writing by the relevant iwi authority representative (or representatives where there is more than one potentially affected iwi or hapū).Where multiple Mana Whenua groups require a cultural impact assessment a single assessment that coordinates the issues and recommendations is encouraged."

51.9 Chapter G: General Provisions: 1.XX Cultural Impact Assessment: Part 4 – Definitions:

"Consequential changes to the relevant sections of the plan to identify where activities requiring resource consent may require a cultural impact assessment as specialist information. The following sections of the plan are identified as requiring consequential changes:"

b. Analysis

52. CIAs violate the rule of law's certainty principle, fundamental property rights guaranteed by the Treaty, and natural justice.

53. "Chapter G: General Provisions: 1.XX Cultural Impact Assessment: 1", encourages applicants to "seek confirmation from Mana Whenua as to whether a cultural impact assessment is required." Where a consent is for a discretionary or non-complying activity listed a. to k. in 'Chapter G: General Provisions" a CIA is a special information requirement. This means it is *prima facie* required and Mana Whenua can then elect whether one is needed in any particular case. Likewise, for sites and places of significance or value a CIA is *prima facie* required for certain proposed works; and Mana Whenua have the final say.

54. While the Auckland Council has established the framework under which a CIA process may be triggered, Mana Whenua make the decision under the PAUP as to whether a CIA is required in a given case.

55. This can create immense uncertainty for a private property owner who is contemplating a use covered by the requirement. "Chapter G: General Provisions" notes that CIAs document "the actual and potential effects of an activity on Mana Whenua cultural values." As noted in the PAUP's definition of "Mana Whenua values", "Mana Whenua are

recognised as the experts in the interpretation of their values in an RMA context.[73]" These values are not exhaustively defined in the PAUP and only guided by broad subjective terms such as "Holism, Mana, Mana atua, collective responsibility, mauri, taonga[74]"et al. Because Mana Whenua are "experts" on these matters and because "these values and concepts differ between Mana Whenua groups[75]" (our underlining) it follows as a matter of formal logic that the values are necessarily incapable of certain definition.

56. It may be argued that the resource consenting process is always to some extent indeterminate and unpredictable. In other consenting matters however, such as a potential hydrological or geological concern a potential applicant may seek expert advice to help the applicant decide where it is worth seeking resource consent. The unknown is theoretically knowable, but usually at disproportionate cost. Expert opinion is an economical way to take into account the likely state of what is unknown, where certainty and cost rise together. If the matter does not go in favour of the applicant he or she may appeal and bring more evidence or employ experts with inferred opinions to refine understandings of the contested facts. A court will evaluate the conflicting evidence and opinions. An aberrant Council decision can be overturned with more precise or accurate information. A level of certainty is thus attainable.

57. The CIA process is different. An applicant has no way of knowing in advance what subjective cultural concerns Mana Whenua may find in the application, or whether any will be found at all. There are expressly stated to be no experts that can be appealed to other than the relevant Mana Whenua group or groups themselves. If an applicant wishes to challenge the evidence of Mana Whenua the PAUP does not show how it will be assessed. Because the CIA process can have a material effect on the consenting process, it is impossible where a CIA may be required, for an applicant to proceed with any certainty. It is also impossible to be sure of consistency in outcomes for similar applications over time. Multiple iwi are attributed with diverse authority, each in respect of their 'values'. The PAUP expressly set out to entrench a validity and authority for subjective matters of preference.

58. CIAs conflict with fundamental property rights. They have an impact on a wide range of activities and uses that private property owners may wish to involve their property in. The applicant must pay for the provision of a CIA[76], yet they provide the applicant no value. Nor are they meant to. As noted in "Chapter G: General Provisions" the purpose of a CIA is to provide for Mana Whenua relationships in accordance with s6(e) of the RMA.

[73] This statement is highly contestable, as is demonstrated in the cases cited under "Maori values and rules of evidence" below.
[74] PAUP Definitions Table "M": "Mana Whenua Values"
[75] Ibid.
[76] See Statement of Claes Tommy Sandstrom dated 23 April 2015, for council's (in our view conservative) estimate of CIA costs.

CIAs are therefore an interference with the use and enjoyment of a property owner in the form of uncertainty and delay, as well as direct tax on their use in order for the Council to satisfy its own deliberately biased formulation of its duties.

59. S 6(e) applies only to persons exercising functions and powers under the RMA. The PAUP purports to extend these powers in practical effect to persons not authorised to exercise them who would be disqualified by natural justice.

60. Answers to the question whether Mana Whenua in exercising a public function are a public authority susceptible to court jurisdiction, or whether any liability they attract is sheeted back to the Council, is outside the current enquiry but will be touched on briefly.

61. Mana Whenua have the power to influence a person's legally recognised rights and, furthermore, they have a direct pecuniary interest in their decision whether or not to exert that influence.

62. Auckland Council have through the PAUP set up a broad framework that triggers CIAs and left the discretion as to whether one is required entirely to Mana Whenua. The PAUP is too vague and permissive to place any sort of constraint on Mana Whenua discretion, and the potential activities that give rise to CIAs are too wide to demonstrate any attempt on the part of Auckland Council to limit the consents affected by this discretion to ones that touch on genuine Maori interests.

63. In the evidence of Claes Tommy Sandstrom on behalf of Auckland Council, he notes that "just over 1% of triggered consents required the preparation of a CIA." In the other 99% of cases private property owners have been subject to Mana Whenua discretion needlessly.

64. The language of the PAUP connotes that Auckland Council have decision making input in the CIA process. In chapter G it is noted that a CIA will only be required for one of the listed activities "where the proposal may have adverse effects on Mana Whenua activities." At least one planner has argued that the question of whether the proposal may have adverse effects is one for Auckland Council[77]. In the evidence of Iain McManus however, Auckland Council note in email correspondence that "it is not Council's role to make the determination about whether an application may have an effect on Iwi values – as they do not know this themselves – Iwi are the only groups who can make this assessment.[78]" As a result, wherever a CIA is triggered by the PAUP the only decision makers as to whether it occurs are Mana Whenua.

Maori values and rules of evidence

[77] Statement of primary evidence by Iain McManus for the Roman Catholic Bishop of the diocese of Auckland et al. 8 May 2015
[78] Ibid.

I. Case Law

65. It is established that intangible Maori values may be taken into account under s 6(e) of the RMA[79]. There is a spectrum of precedent however as to what standard of evidence is required before the existence of these values are established.

66. The authority that best supports PAUP's approach of allowing iwi to nominate sites and places of significance and to adopt a "precautionary approach[80]" is *Takamore Trustees.*[81] This case involved a proposed road that crossed an area of land that was waahi tapu due to the potential existence of koiwi (human bones). The Environment Court rejected evidence from a kaumatua on the existence of koiwi on the basis that the evidence was "cryptic and assertive[82]", "sparse[83]" and had no backup history or tradition to support it. The court also found that the evidence was not geographically precise. The High Court found the Environment Court had erred. They said:

"Those in the iwi entrusted with the oral history of the area have given their evidence. Unless they were exposed as incredible or unreliable witnesses, or there was other credible and reliable evidence which contradicted what they had to say, accepted by the Court, how could the Court reject their evidence. The Court complained it was bereft of "evidence" and had "assertion" only of the presence of koiwi. The evidence was given by kaumatua based on the oral history of the tribe…The fact no European was present with pen and paper to record such burials could hardly be grounds for rejecting the evidence. Nor could the kind of geographical precision apparently sought by the Court be reasonably expected. The claim of burials is within a defined area."[84]

67. *Takamore* is in some conflict with the leading non-Maori case in New Zealand on spiritual values, *Dawsons*. In this case evidence supporting the belief of hypothetical Chinese customers in feng shui was rejected on the basis that it was "vague and ephemeral[85]" The evidence appeared to be the testimony of a Ms Ong, Mr Chu, and Mr Wong about Chinese spiritual belief.

68. *Bleakley*[86] is a mixed case. On the one hand the court found that the intangible can be protected under the RMA just as much as the tangible. On the other hand, the court did not appear to apply its own reasoning because while it accepted the evidence that genetic modification of cows was offensive to genuinely held cultural and spiritual values they examined the *effects* of the beliefs being infringed, namely whether the relevant

[79] N 42.
[80] See PAUP "Sites and Places of value to Mana Whenua Overlay Description"
[81] N 67
[82] Ibid, 41
[83] Ibid, 58
[84] Ibid, 68
[85] *Dawsons Solicitors v Manukau City Council* [2004] NZRMA 212, 11
[86] N 42

Maori in the case would experience adverse health outcomes. The fact that the infringement of the belief had no tangible effect on the health of the believers formed part of the reason for allowing the activity[87]. It should be noted however that while the Order in Council the case concerned directly mentioned "risk to the relationship of Maori and their culture and traditions[88]" it had a health focus. The case may be an example of the courts being willing to acknowledge intangible concerns in theory but reluctant to believe in them to the extent of affecting the rights and interests of others in the absence of objective evidence.

69. In *Heybridge*[89] the High Court quashed an Environment Court decision on the basis that the iwi bore the onus of establishing, based on evidence, that a waahi tapu existed. "An honest belief that it existed was not enough."[90]

70. *Ngati Hokopu*[91] is another case where evidence was required to establish the existence of spiritual values. The court found that spiritual values were non justiciable but that:

"the 'rule of reason' approach if applied by the Environment Court, to intrinsic and other values and traditions, means that the Court can decide issues raising beliefs about those values and traditions by listening to, reading and examining (amongst other things):

- *Whether the values correlate with physical features of the world (places, people);*
- *People's explanations of their values and their traditions;*
- *Whether there is external evidence (e.g. Maori Land Court Minutes) or corroborating information (e.g. waiata, or whakatauki) about the values. By 'external' we mean before they became important for a particular issue and (potentially) changed by the value-holders;*
- *The internal consistency of people's explanations (whether there are contradictions);*
- *The coherence of those values with others;*
- *How widely the beliefs are expressed and held.*[92]*"(our underlining)*

71. The factors Judge Jackson identifies in this case express the practical sense of an experienced judicial officer. Courts and other law-makers are not excused for credulity or unrealistic expectations of human nature, simply because the subject matter has been treated by some as ineffable. Many cases between competing Maori interests shows a healthy scepticism about what may sometimes be claimed under the rubric of Maori

[87] Ibid, Goddard J at 22.
[88] Ibid, 10
[89] Heybridge Developments Ltd v Bay of Plenty Regional Council HC Tauranga, CIV-2010-470-585
[90] See: Bangma, Warren, and Lanning, Gerald, "Maori Cultural Values and the Environment Court" Resource Management Bulletin [96].
[91] *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111
[92] Ibid, at 20

spirituality and oral history. Particularly telling is the criterion in the decision that external evidence be evidence from a source detached from the proceedings and that it predate the time when the issue became live. The obvious danger is the potential for beneficiaries of claimed values to invent or extend them under the influence of self or group interest. That may or may not need expectation of pecuniary benefit.

72. *Te Tumu*[93] is a case where spiritual values have been determined in a planning overlay context. It suggests that with regards to overlays, the law in *Heybridge* and *Ngati Hokopu* is the relevant law. This case involved a dispute over an area designated in a district plan overlay as a Significant Maori Area. The Regional Council supported the identification of the site. The regional policy was that "only tangata whenua can identify their relationship and that of their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.[94]" Further the relevant tangata whenua, Ngapotiki said they did not "wish to engage in an argument over the exact location of the Te Tumu Pa, but prefer a precautionary approach to the area that is protected.[95]"

73. The Court in *Te Tumu* did not explicitly state that to find that the site should be a Significant Maori Area in the overlay there needed to be proof beyond the assertion of tangata whenua that the area was significant to Maori. Nevertheless, the approach taken by the Court tacitly endorses the approach in *Heybridge* and *Ngati Hokopu*.

74. The Court ultimately decided that the area should remain a Significant Maori Area on the overlay. The Court looked at a number of evidentiary factors including the geography of the site, historical information, proximity to flax plantations, and signs of occupation. The Court did not simply find that the area was significant on the basis of tangata whenua assertions.

II. The PAUP overlays

75. While the case authority is not conclusive it appears that assertions by iwi concerning metaphysical values often require further evidence before the courts will accept them. A realistic evidentiary requirement of that kind is particularly important for the PAUP overlays because:

    (a) They invite assertions from a range of people.

    (b) The PAUP expressly avoids specifying qualifications or tests for conflicts of pecuniary interest, or objective expertise requirements of such people.

[93] Te Tumu Landowners Group v Tauranga City Council [2014] NZEnvC 38, 2014 NZRMA 317.
[94] Ibid, 9
[95] Ibid, 14

(c) The PAUP provides no mechanisms for resolving contradictions between the assertions of competing Mana Whenua.

(d) It is not denied that many overlay sites may have no tangible evidence of significance, thus inviting the invention of unsupported assertions.

(e) a perverted application of a so-called precautionary principle has created sites which are know to have no comment supporting evidence.

76. Further while a consent application affects one decision, a designation of a site as significant or valuable to Mana Whenua may affect many landowners. It might be argued that the distinction between the sites and places of significance and value overlays and a specific consent, is that the overlays just contain potential triggers; they are not a determination of use rights. That relies on a formal distinction that the PAUP sets out to dissolve in practical effect. Where a property is covered by the overlays that landowner may already have suffered loss of value due to the perceived restrictions associated with Mana Whenua sites, and the requirement to pay for a CIA will automatically be triggered by a range of potential activities the landowner may wish to engage in. In other words uses are subordinated to indeterminate restrictions yet to be asserted or perhaps invented.

77. The PAUP's definition of "Mana Whenua values" asserts that "Mana Whenua are recognised as the experts in the interpretation of their values in an RMA context. [96]" The case law cited above calls this statement into question.

78. That purported "recognition" cannot be an objective statement of fact. At the time of 'legislating' (promulgating the PAUP) it is not possible to know who would be the nominated Mana Whenua experts.

79. It can only be intended to take effect as a deeming provision. Mana Whenua are deemed to be the experts. It is uncertain how far that declaration goes to fetter Council decision-making power. At the least it signals prejudgment of one of the most important things the consent authority should turn its mind to – the credentials and credibility of a purported expert and the quality of expert evidence. It is designed to exclude such testing of the probative or evidentiary value of the expert evidence. It signals clear bias on the part of the consent authority, and credulity.

80. Many submitters have given evidence that demonstrates the current overlay cannot have resulted from a robust evidentiary process. The following are examples:

80.1 Statement of evidence by Cedric & Dianne McLeod [undated]:

[96] n 71

"The CHI reports are inaccurate and cannot be relied upon. We have identified two sites wrongly (i.e. non-existent) marked on our property:

CHI #7828 actually belongs to a neighbouring property…what's more in the mid 1980's there was considerable excavation work on the adjacent property to which site CHI #7828 belongs so it is doubtful that this site still remains." [2]

"CH #7843… Some years ago an Auckland Council archaeologist on a site visit could not find this site on our property."[2]

80.2 Statement of evidence by David Neilson on behalf of Drinkrows Industrial Estates Ltd dated 8 May 2015:

"DIEL has twice had to obtain consents for works within a SVMW. In both cases this related to final earthworks on industrial sites which had already been earth-worked for development. In both instances, Nghai Tai Ki Tamaki Tribal Trust confirmed that a Cultural Impact Assessment was not required.

Additional costs were incurred by the applicant in having to address this matter when it was quite evident due to the history of the site that there were no values to mana whenua existing." [3]

80.3 Statement of evidence by Rodney Edward Clough (Heritage) on behalf of Drinkrows Industrial Estates Ltd (DIEL) dated 8 May 2015:

"The Proposed Auckland Unitary Plan (PAUP) Sites of Value to Mana Whenua (MVMW) overlay shows five sites within the Drinkrows Industrial Estate Landholdings. The land covers the former East Tamaki Quarry which has now been developed into an industrial park. The archaeology on the property was recorded and investigated prior to the bulk of quarrying or industrial development and is no longer present.

Some of the sites were not of Maori origin and all have been removed by quarrying and subsequent industrial development of the land. None of the sites had accurate GPS coordinates." [1]

80.4 Statement of evidence by Richard Gardner for Manaia Properties Limited [undated]:

"To illustrate the inaccuracy of the mapping of Sites and Places of value to Mana Whenua, the pa shown on the historic heritage place overlay is outside the "purple circle" which, presumably, is intended to protect that resource." [2]

"As to the remainder of the "purple circles", they are largely around the homestead and the nearby Mataia stream. The area is highly developed. The family knows nothing of these purported sites despite having maintained close connections with the local iwi over several generations." [2]

80.5 Statement of evidence by Graham Painter for OBC dated 8 May 2015:

"Of the 8 in the North Omaha settlement, 5 are no longer intact as a result of erosion of the steep sandbank in which they are located. Another location is in the 18th fairway of the Omaha Beach Golf Club golf course, and would have been destroyed during its construction. The remaining 2 were located on the Whangateau harbour edge, and in order to reconstruct the sea wall in this location, the Auckland Council obtained a modification consent (Authority 2011/315), and these sites were destroyed during the sea wall construction." [1]

Re Omaha South:

"…A number of midden sites were identified for preservation and protection [via an archaeological survey]. *The sites were located by survey and recorded on individual certificates of title for the residential sections where part or all of the midden area to be protected was located. The protection mechanism has been faithfully followed throughout the development of the Omaha South residential settlement. Imposing an arbitrary additional "buffer area" on an apparently random selection of the protected cultural sites serves no purpose."* [1, 2]

"…he states that there have been only 10 requests for applicants to prepare a CIA as a result of the SVMW overlay. I am aware of at least 3 requests at Omaha and a further 2 that were instructed to lodge a CIA but which was avoided by sensible and pragmatic administrative resolution. It is surprising that there were only another 5 applications where a CIA was requested for the rest of the Auckland region…" [8]

"I am aware of several instances where the potential sale of a property has been affected by the perceived negative effect of the overlay compared with a property that is unencumbered." [8]

Proposal

I. Background

81. The evidence from submitters shows that the current sites and places of significance and value overlays are not accurate and that sites have been recorded without proper evidence. According to the statement of primary evidence of Keita Sarah Kohere, Auckland Mana Whenua groups have already requested an additional 418 sites be added to the sites and places of *significance* overlay[97]. Ms Kohere gives her opinion as to how the request for additional sites should be assessed against the criteria of the PAUP regional policy statement:

"For the purposes of assessing nominated sites in my opinion it is appropriate to apply a Kaupapa Maori methodology to the assessment of additional site requests against the

[97] Statement of primary evidence of Keita Sarah Kohere on behalf of Auckland Council (Heritage), 23 April 2015, p 9.

RPS criteria. The sites are of value to Mana Whenua and it is appropriate that the methodology reflects tikanga and matauranga Maori.

The key elements or principles of Kaupapa Maori research and assessment, as developed by authority in Maori and Kaupapa Maori research, Professor L Smith, and described in her publication Decolonising Methodologies[98], are:

> *(c) Tino Rangatiratanga – The Principle of Self-determination: The notion of Tino Rangatiratanga asserts and reinforces the goal of Kaupapa Maori initiatives: allowing Maori to control their own culture, aspirations and associations with their sites and landscapes.*
>
> *(d) "Taonga Tuku Iho" – The Principle of Cultural Aspiration: This principle asserts the centrality and legitimacy of Te Reo Maori, Tikanga and Matauranga Maori. Within a Kaupapa Maori paradigm, these Maori ways of knowing, doing and understanding the world are considered valid in their own right. In acknowledging their validity and relevance it also allows spiritual and cultural awareness and other considerations to be taken into account.*
>
> *(e) Kaupapa – The Principle of Collective Philosophy: the 'Kaupapa' refers to the collective vision, aspiration and purpose of Maori communities. Larger than the topic of research alone, the kaupapa refers to aspiration of the community. The research topic or intervention systems are therefore considered to be an incremental and vital contribution to the overall 'kaupapa.[99]"*

82. These elements or principles are incomprehensible as a "methodology." They provide no objective method to include or exclude sites.

83. We submit that Auckland Council and the PAUP have become infused with theories that are incompatible with and hostile to the rule of law. We have explored some of Professor Linda Tuhiwai Smith's writing to see whether it can reduce the uncertainty and room for arbitrary assertion of power to interfere with applicant's plans.

84. It offers no reassurance. Instead her writing expands on the anti-rule of law philosophy which prevails in the Mana Whenua provisions of the PAUP. Writing about "Decolonising Methodologies" she said:

To the colonized, the term 'research' is conflated with European colonialism; the ways in which academic research has been implicated in the throes of imperialism remains a painful memory. This essential volume explores intersections of imperialism and research –

[98] Smith. L. T (1999) *Decolonising Methodologies: Research and Indigenous Peoples,* Zed Books, London.
[99] n 94, 7.

specifically, the ways in which imperialism is embedded in disciplines of knowledge and traditions as 'regimes of truth.' Concepts such as 'discovery' and 'claiming' are discussed and an argument presented that the decolonisation of research methods will help to reclaim control over indigenous ways of knowing and being.[100]

85. The PAUP is written by people who either do not recognise the validity of law and the basic rules of logic or reject them if they do recognise them.We submit that the Panel (and a Court) should expressly reject this philosophy. Within the Auckland Council it has lead to the PAUP's deference to poorly defined and vague notions of Maori spirituality. Ignoring questions as to the validity of such philosophy, such anti-empiricism is antithetical to law. The legal system is fundamentally tasked with eliciting or creating certainty and order. They are to be created even when underlying conditions are inimical and chaotic. Plans and policies and the law exist to impose order, clarity, certainty and predictability where they do not previously exist. The axioms the system relies on to do so are empiricism and logic.

86. Further, decolonisation or the righting of colonial wrongs is for Treaty negotiation between the Crown and iwi. It should not be a 'citizen to citizen' process under the cudgel of a Council (as consent authority) that has openly decided in advance to supplant legal principles. But even as between the Crown and iwi, settlements do not transgress article 3 of the Treaty and its conferral of English law for all the people of New Zealand. As noted in *Ngati Maru*[101] a balance is required.

87. In our submission this balance is best struck by recognising and accommodating Maori values within the legal framework to the extent that they do not undermine the principles of evidence on which that framework is based.

88. As discussed above at [44] it would be consistent with case law to favour an approach to these issues that only allows conflict between Maori spiritual values and other fundamental norms where no other options are available. The proper approach would balance the competing interests in the Plan.

89. The PAUP currently creates an unresolved conflict. It sets up permanently arising conflict at the individual level with no tools to ensure a balance. The principles of certainty, natural justice, and private property rights are each severely compromised by deference to Mana Whenua. There is no evidence that any attempt to balance or mitigate this conflict was made.

90. We submit that alternatives exist that can better mitigate the conflict. These can be recommended by the Panel and should be explored.

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[100] http://www.zedbooks.co.uk/node/20909 accessed, 11, 06, 2015
[101] n 48

II. A better balance

a. Overview

91. A site or place of significance or value should only be scheduled after a proper assessment of the evidence for its existence has been carried out according to a rational methodology such as that in *Ngati Hokopu*. As in *Te Tumu* a precautionary approach may be taken and the existence of the thing of value or significance need not be confirmed in all cases but there should be sufficient evidence to establish its existence, location, and (for historical events) occurrence on the balance of probabilities or to some other fixed standard of proof.

92. The potential uses and activities that are likely to be problematic to Mana Whenua should be identified, and publicly notified along with their activity status, at the time the site or place is scheduled. Consultation between the council and Mana Whenua should take place at this point to comply with s 6(e) of the RMA, but uses and activities should only be notified where Mana Whenua assertions as to impact on intangible values are supported by independent evidence. Consultation at this stage should replace mandatory CIAs in the consenting process.

93. The broad set of activities potentially giving rise to a CIA in chapter G should be deleted. Alternatively, instead of stating that "cultural impact assessment are identified as a special information requirement for activities that require resource consent *and are likely to have adverse effects on Mana Whenua cultural values…*", chapter G should specify for each activity exactly what forms of the activity would be likely to have adverse effects on exactly what values. This should be done in consultation with Mana Whenua and should conform to the same evidentiary requirements discussed above. These additions to chapter G would replace the CIA requirement.

a. How it would work

94. When a site is proposed for scheduling a CIA (or something similar) would be done prior to it being scheduled. This would be made publicly available and affected property owners and the public would be able to object to it.

95. The following steps would occur:

- The council would have a list of iwi authorities and the areas of Auckland they have an interest

- When a new site is notified for scheduling, the Council would check whether it is already protected under the Heritage New Zealand Pouhere Taonga Act 2014 – if so it would decide whether there is also a need for a CIA;

- Using their list of iwi authorities, the council would make enquiries as to whether any iwi authority considered a CIA was necessary; if so:
- The CIA would be prepared by an iwi authority or a person or entity nominated by the iwi authority with confirmation of this nomination provided in writing by the relevant iwi authority representative.
- The CIA would be done using:
    - Reference documents;
    - Engagement with Maori in the area;
    - Hapu or iwi planning documents
    - Cultural values assessments
    - Treaty Settlement documents and related legislation
    - Maori Land Court Records
    - Historical publications
    - Archaeological assessments already done
    - Any other relevant information
- The iwi together with Council specialists would:
    - Describe the consultative process used in preparing the report
    - Identify the extent of the geographical area where the site could be adversely affected by activities requiring resource consents:
    - Delineating the areas where there is a high risk, moderate risk, and low but appreciable risk to these values.
    - Identify the activities requiring resource consents that would be likely to have an adverse effect on the site;
    - Explain why the activity would be likely to have this effect;
    - Estimate how serious this effect would be in correlation to the extent of the activity; and
    - Propose ways in which the effect could be mitigated or avoided.
- The CIA would be the Council's product. It would be a part of the Plan setting out clearly what cultural values are affected, and why. More importantly it would

indicate clearly what activities would be incompatible with them, and how cultural offence would be mitigated.

- The CIA would be part of the plan notification of the new site. This would be publicly notified and property owners in the surrounding area would be specifically notified. The public and property owners would be able to object to the site being scheduled and/or the content of the CIA.

- The Council would cover any costs in doing the CIA.

- The Council (or the Environment Court on appeal) would be the final decision-maker on whether or not the site is scheduled and whether the CIA (or multiple CIAs) is attached.

- There would need to be some flexibility to take into account new evidence found after the scheduling. For example there could be new evidence showing the site is more fragile than first thought and more likely to be damaged by work on a neighbouring property. Or the neighbouring properties could change from being a rural area to being a built up industrial area.

- When there is opposition to resource consent application from Tangata Whenua on grounds of adverse cultural impact the opposition shall be disregarded if the likelihood of impact has not been fairly disclosed in the cultural impact assessment notified in respect of the site or place except in extraordinary circumstances

- Where there is any ambiguity in a cultural impact assessment and it is relevant to a resource consent application, there would be a rebuttable presumption to resolve it in favour of the applicant.

96. The requirement for consent application CIAs in various parts of the PAUP should be removed. Requiring resource consent applicants to consult with iwi is contrary to s 36A of the RMA which makes it clear an applicant does not have a duty under this Act to consult any person about the application.

97. If a CIA process (or something similar) was done at the planning process or prior to the scheduling of each site this would:

- Ensure private property owners are not impacted unnecessarily

- Allow affected property owners and the public a chance to object to the CIA at the time it was scheduled

- Give more certainty to property owners as to what they can't do with their properties

- Be available to a potential purchaser of a property before they buy the property

- Avoid protecting a site which is already sufficiently protected under the Heritage New Zealand Pouhere Taonga Act 2014.
- Avoid requiring resource consent applicants to consult with iwi contrary to s 36A of the RMA
- Achieve consistency in terms of requiring a robust evidence based methodology
- Avoid issues with corruption or conflicts of interests by iwi authorities doing CIAs who have an interest in the property
- Be done on a case by case basis
- Be more efficient in terms of:
    - not requiring a large buffer zone when there is no need
    - save resource consent applicants in terms of cost and stress of getting a CIA and any delays caused by it
    - save Council and iwi time and money as they would not need to consult each time a resource consent is near a site
- Allow the Council and iwi authorities to specify suitable conditions to better protect sites of significance
- Be more in line rule of law principles on clarity and certainty
- Allow the Council to meet its duties under Part 2 of the RMA and Policy 2 of the NZCPS

98. Another alternative would be to retain the requirement that an applicant in all cases where a CIA is currently required notify Mana Whenau of the consent application, and that Mana Whenua have a right when notified to provide a CIA, but that this must be provided at Mana Whenua expense if they chose to do so.

Conclusion

99. The PAUP was notified on 30 September 2013.

100. Since notification the council has deemed that the rules pertaining to Mana Whenua cultural heritage have legal effect. They have done so in reliance on s 86B (3) of the RMA that states a rule in a proposed plan has immediate legal effect if it "protects historic heritage." In the 21 months since notification Auckland Council has been alerted to the problems with the PAUP's Mana Whenua provisions. Democracy Action group has been making the arguments expressed in this document since early 2014.

101. Auckland Council, following standard consultative norms, has recognised that the degree of weight given to rules generally increases throughout the planning process[102].

102. Despite this, Auckland Council has been actively enforcing the CIA requirement since notification.

Conclusion

103. The PAUP is bad law.

104. As delegated legislation it breaches the principle that delegated legislation should be certain and predictable to be valid law. This uncertainty is systemic as well due to specific unduly vague phrases.

105. As legislation subject to the RMA s 6(e) and s8 it creates a potentially unnecessary conflict between competing public rights, including important Treaty rights, and does not provide a balance between the rights in a way supported by precedent.

106. The CIA provisions allowing Mana Whenua *carte blanche* to decide whether to force a landowner to engage them in work for which the landowner must pay (with no laws limiting what Mana Whenua may charge for this work) breach of natural law. They create an irrebuttable presumption of bias.

107. The sites and places of significance and value overlays have not been created through an evidence based methodology as precedent suggests is required, and there is good evidence that they are inaccurate and contain sites of dubious value.

108. We have suggested alternatives to the status quo which in our opinion would address these concerns.

109. We urge the panel use its powers as an urgent interim step to:

(a) Apply for directions as necessary as to whether it should continue to work on or consider provisions that are unlawful; or

(b) Commission expert advice as to the lawfulness question with a view to an early practical indicator to all parties of a likely recommendation against the Mama Whenua provisions in anything like their current form.

He waka eke noa

He ture eke noa

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102 http://www.aucklandcouncil.govt.nz/EN/planspoliciesprojects/plansstrategies/unitaryplan/Documents/Key%20topics%20in%20detail/upkeytopicslegaleffect.PDF , accessed, 11, 06, 2015.

APPENDIX

In Sir Hugh Kawharu's translation Article 2 states:

"The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.[103]"

The article extends to "all the people of New Zealand" the "unqualified exercise of their chieftainship over their lands…" There is much controversy over what "unqualified exercise of chieftainship", or *tino rangatiratanga* in the Maori text, means. It is accepted that it was a missionary constructed neologism, designed to convey the essence of a new concept. Recently activists have advocated an interpretation of "absolute sovereignty." The problem for that approach is that "unqualified chieftainship" was extended not just to the Maori chiefs but to "all the people of New Zealand" according to Sir Hugh Kawharu's translation; and to the "chiefs and tribes and their respective families and individuals."

It is obvious that if article 2 gave "unqualified chieftainship" to people who were not chiefs, it must have had a less literal meaning- Further, it extended to "all the people of New Zealand".It cannot be the basis for asserting an absolute sovereignty vesting only in Maori. If the English text is relied upon, what is conferred is directed to Maori alone. But even then, given that sovereignty inasmuch as it existed in New Zealand was exercised by *rangatira* (the chiefs), it would be extraordinary to hold that they believed they were asking the Queen to guarantee absolute sovereignty, *tino rangatiratanga*, an idealised intensification of their own authority, to every Maori individual.

This guarantee makes sense however when it is considered that this was only over the specific "lands, villages and all their treasures" that each individual or collective possessed. The use of "'chieftainship" to represent the notion of free power to determine the use and disposition of property against all comers is familiar in English thought and legal tradition; "a man's home is his castle."

This interpretation of a term new to the Maori language - "chieftainship" as comprising rights of property under classical property law is reinforced by the fact that the English version of section 2 uses the phrase "full and undisturbed possession"; the heart of English property rights[104].

[103] n 51

[104] For more on of the argument that Article 2 guarantees property rights see: Franks, S *"The Treaty of Waitangi and property rights"* [2002] NZLJ 259.