THE TANIWHA TAX

BRIEFING PAPER ON AUCKLAND COUNCIL'S NEW MANA WHENUA RULES

TAXPAYERS' UNION
TE UNIANA KAIUTU TĀKE O AOTEAROA

PREPARED BY THE NEW ZEALAND TAXPAYERS' UNION

ENDORSEMENTS

FOREWORD BY JORDAN WILLIAMS

When members of the Taxpayers' Union first brought this issue to our attention, we incorrectly wrote it off as a resource management or a 'one-law-for-all' dispute. But after more emails and enquiries from members came through we began to dig deeper. It became clear that it posed squarely an unnotified and constitutionally repugnant tax issue. We'd had the question of regulatory takings on our long term 'to do' list.

This brought it to the top.

Make no mistake, the Mana Whenua provisions in the Auckland Unitary Plan have enacted a cultural or 'Taniwha Tax', enforceable immediately. The provisions may affect the value of perhaps 18,000 properties, and many more in time. It is a variable and unpredictable capital tax, collected when someone wants to change their property use. Such uncertainty diminishes prospects for economic growth as it does not allow people to plan with confidence.

The Archaeological Association says what Auckland Council is doing is not even necessary to protect heritage because it is already covered under specific legislation.

This briefing paper draws from submissions lodged for, or on behalf of, some of New Zealand's largest corporates, but its points are as applicable to every Auckland homeowner (and potential homeowner). Most of the messages contained are not that of the Taxpayers' Union – we have deliberately repeated what would otherwise go undiscovered in the files of lawyers, planners and Council insiders. Our work is to shine some democratic light onto what has happened.

The organisations quoted or supporting this report would agree Auckland iwi have a special place in the region's planning process but are concerned the Auckland Council has imposed an uncertain and clumsy regime. The organisations have all expressed concerns that the Council has failed to include elementary safeguards to protect owners, the integrity of the planning process, or the public interest in secular equality before the law.

The Taxpayers' Union exists to promote tax efficiency and to publicise government waste. This briefing paper fits squarely into those objectives. Politicians and officials know that their tax and spend powers are constrained by constitutional conventions, specific statutes and procedural protections. Central and local government cannot take Peter's money to pay Paul, without knowing exactly how it will be calculated, and collected under laws that should apply generally without distinctions of class, race, religion or other inequalities (other than deemed ability to pay). Similarly, spending for Paul's benefit must be expressly authorised and accounted for, with multiple requirements for audit and other protections against corrupt diversion of benefits.

Recently politicians and officials have stepped up their use of devices to sidestep these protections. Around the world they are known as regulatory 'takings'.

The United States has a specific constitutional prohibition on taking of property for public benefit without compensation. As a result, there is a large body of case law and legal analysis, exploring the boundaries between legitimate regulations that on the one hand just happen to have a discriminatory impact (and transfer wealth from Peter to Paul), with on the other hand rules that effectively confiscate Peter's rights for the benefit of Paul (or many Pauls).

In New Zealand the Public Works Act 1981 embodies the traditional convention (going back to Magna Carta) that taking private property for public benefit requires fair compensation. But

more recent Acts expressly exclude this principle. Despite the National Party's claims to uphold property rights they have put in place some of the worst provisions. Section 14 (4) of the Heritage New Zealand Pouhere Taonga Act 2014 means the owner of Wellington's Harcourt's building cannot claim for the effective confiscation of the value of his Lambton Quay property by prohibitions on demolishing the earthquake prone facade, which is widely accepted to be a danger to the public. That is despite the owner's intention to rebuild the 'historic' facade with a safe, but visually identical, structure. The National Party also passed the Resource Management Act in 1991 with section 85 which largely excludes compensation when Councils prefer the interests of a particular group, value or cause, to the detriment of those who own the property or had a legitimate expectation to a particular land use.

Though most countries expressly protect property rights as fundamental human rights the New Zealand Parliament has rejected attempts to include them in the Bill of Rights Act. The Human Rights Commission has recently discussed this anomaly.[1]

The Taniwha tax is a particularly inefficient tax. It may damage property values without creating any corresponding benefit to any counterparty. Some economists would argue that a simple transfer of the cultural impact assessment cost or fee from an owner to an iwi representative is not significant, because it is zero sum. One person's loss is the other's gain.

But the right of iwi to impose their cultural and spiritual preferences, or to invent new ones, could diminish the value of land within the designated areas without any corresponding benefit to iwi. The representative might get a fee, and 'psychological benefit', but that may be dwarfed by the uncertainty discount imposed on all the properties that have been made vulnerable.

That value damage is probably more significant than the cost of the iwi assessment process. Disturbingly the auditors of the Auckland Council's evaluation process note that the Council has made no attempt even to calculate the costs and benefits of the scheme.[2]

The Taniwha Tax represents one small, novel, completely uncosted and unconstitutional attempt to create a new category of uncompensated taking, which illustrates the need for a new and principled approach to regulatory takings. Taking rights and value from people with the same or worse economic effect as uncontrolled arbitrary taxation, for the benefit of political favourites alarms us at the Taxpayers' Union. We see this policy as uncontrolled taxation, and the 'spending' of power for politically favoured beneficiaries.

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1 Human Rights Commission, Submission on the New Zealand Bill of Rights (Private Property Rights) Amendment Bill said:
If it is considered appropriate to include property rights in the NZBORA then the Commission considers that the following wording would reflect the international standards:

The right to property

Everyone has the right to own property alone as well as in association with others;
No person shall be arbitrarily deprived of property;
No person shall be deprived of property except in accordance with the law, in the public interest, and with just and equitable compensation;
Everyone has the right to the use and peaceful enjoyment of their property. The law may subordinate such use and enjoyment to the interests of society.

2 See the Harrison Grierson/NZIER audit of the Auckland Council's unquantified purported cost/benefit analysis of the mana whenua provisions, required by section 32 of the Resource Management Act 1991.

The 'justification' for Auckland Council's taking of property rights is alleged benefit from metaphysical and the spiritual value comfort to third party groups. But there is no evidence of any such value. There is only evidence that the groups have said they would like the power.

The Taniwha Tax is all of:

1. **the cost of the cultural impact assessments (which are uncapped, but from examples described to us to date, costing up to $4,000 for householders and far more for commercial enterprises);**
2. **the delays in determining whether cultural impact assessments are required, and/or in their preparation;**
3. **the uncompensated overnight loss in property values;**
4. **the reduced mana and confidence of the 18,000 owners whose security of ownership is affected by the explicit and implicit assertion of Mana Whenua preferences; plus**
5. **the damage to civic pride and confidence in the consensus of fundamental constitutional values of equality before the law, property rights, fairness and due process.**

The last may be more important than the first four costs to the directly affected property owners. The Council appears to have done a political deal in the closing days before the Unitary Plan was notified, covering 3,661 'cultural' sites (and the areas around them) without even being confident that they exist.

It is a tax and the Taxpayers' Union has prepared this paper to publicise it.

Jordan Williams is the Executive Director of the New Zealand Taxpayers' Union.

> "The auditors of the Auckland Council's evaluation process note that the Council made no attempt even to calculate the costs and benefits of the scheme."

EXECUTIVE SUMMARY

The Mana Whenua provisions of the Proposed Auckland Unitary Plan (PAUP) are a dangerous departure from the former Resource Management Act 1991 (RMA) consenting process. They deserve public scrutiny.

At almost 7,000 pages, the PAUP is so long and complex that there is a risk only legal, planning, and property industry insiders will appreciate its implications. Public engagement will be limited to the issues that are brought to the public's attention as potentially troublesome. Most affected property owners will not become aware of the provisions until they suddenly find there is a site on or near their land or they are told they need to get a Cultural Impact Assessment (CIA) when applying for resource consent.

This briefing paper is on the PAUP's Mana Whenua provisions. These provisions create the potential for certain iwi to apply a cultural tax on particular developments within Auckland. The tax is undemocratic, uncertain, and is an affront to New Zealand's secular public policy. The Mana Whenua provisions create, in effect, a "Taniwha Tax" on Auckland development and housing.

In February 2014, then-Labour Party Maori Affairs Spokesman, Hon. Shane Jones, criticised Auckland Council's proposal. In the New Zealand Herald he is reported as having said[1]:

> **"As someone who was involved in the core group which wrote the Resource Management Act in 1988-1989 never in our wildest dreams did we imagine it would lead to 19 new consent authorities over the Tamaki Makaurau area.**
>
> **The proponents need to balance heritage against the cost pressure of developing housing and land so that the final product is affordable."**

Mr Jones warned that unless the process was handled well, the community could end up having a jaundiced view of Maori heritage.

Mr Jones may be proven right. The Auckland Council has haphazardly declared 3,600 sites as being of value to Mana Whenua without even establishing whether all the sites are genuine, still exist, or are 'of value' to iwi.

Protecting New Zealand's historic and cultural sites is a worthy objective; however there are significant protections already in place. The PAUP, under the guise of protection, creates a whole new level of uncertainty and spiritualisation around these protections.

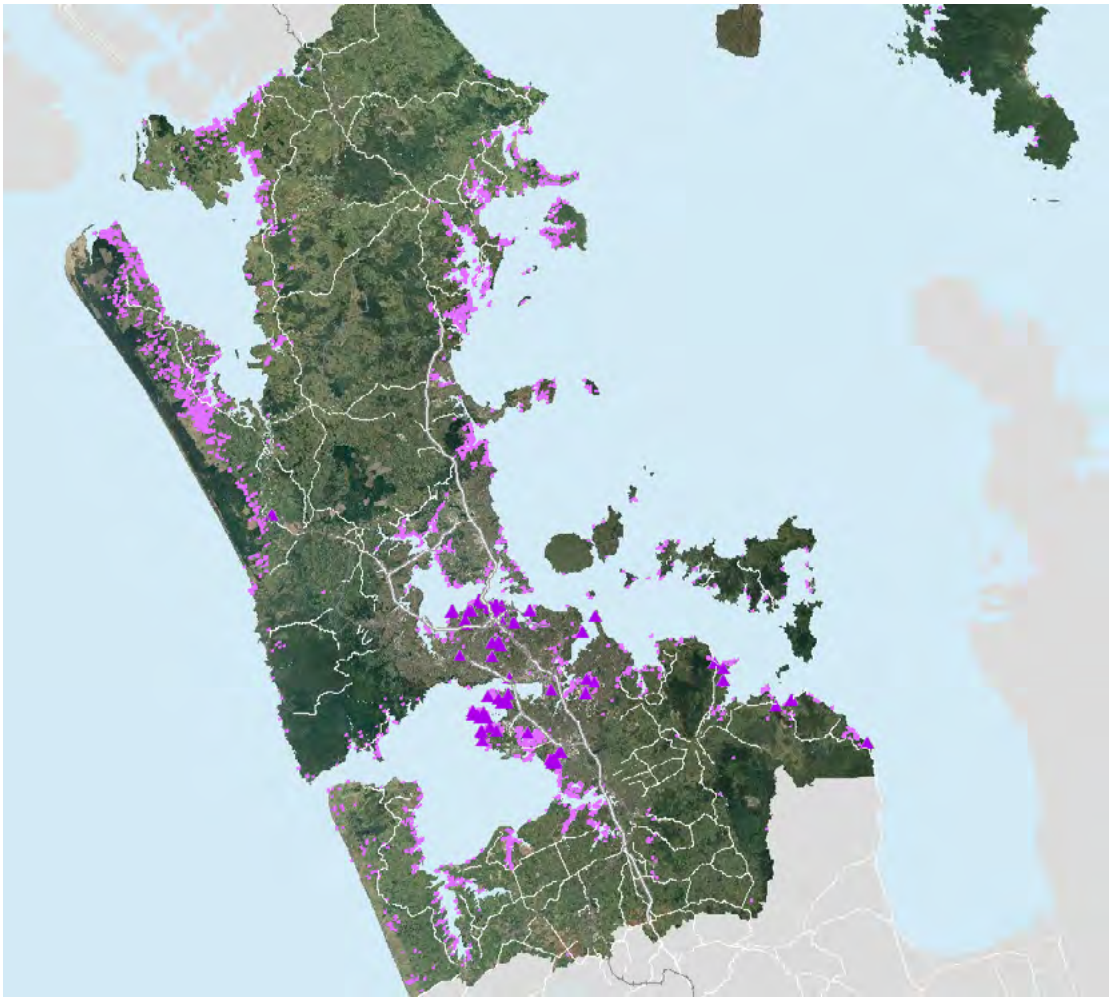
The Mana Whenua provisions create a significant financial obstacle for ratepayers and developers. Despite the Plan taking years to draft and develop, the 3,600 sites were only added in the final days before the Plan was notified and released for consultation. On notification certain provisions came into effect. The timing may suggest that the clauses were as much a political decision to increase the influence of Mana Whenua on resource allocation as a mechanism for protecting sites of genuine historic significance.

1 Shane Jones slams new iwi approval rule, New Zealand Herald, 28 February 2014, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11211496

This report should serve as a wakeup call to Aucklanders wanting to avoid more regulatory uncertainty, impediments on housing development, and taxes. But the issues covered are not just applicable to Auckland – iwi groups are already in the early stages of developing similar plan changes in Wellington and elsewhere.

It was noted in the recent submission of the Auckland Utility Operators Group, which comprises Vodafone, Spark, Chorus, Vector and others[2]:

> **“These consent processes set in place complex, time consuming and in many cases very costly consenting processes to deliver infrastructure to Auckland.”**



2 Statement of evidence of Christopher Mark Horne for Auckland Utility Operators Groups, Chorus New Zealand Ltd, Vodafone New Zealand Ltd, Spark Trading New Zealand Ltd, Vector Ltd, Vector Ltd, Vector Gas Ltd and Counties Power Ltd in relation to 009 RPS Mana Whenua, 19 October 2014, page 20.

MANA WHENUA PROVISONS

The Mana Whenua provisions in Auckland Council's PAUP came into effect on 30 September 2013 upon the PAUP being publicly notified. Although the Plan is still 'proposed' the Council considers that section 86B of the RMA means that the provisions related to historic heritage, including 'Mana Whenua' heritage, are in effect until the Plan is amended as a result of the current public consultation.[1]

The Plan will shape Auckland's future by replacing the existing Regional Policy Statement and the thirteen district and regional plans from the former local authorities that were amalgamated to form the Auckland Council. It seeks to ensure the various areas of Auckland will operate under the same set of rules and regulations with a degree of consistency across the region.

The Plan covers matters such as what can be built where, how the Council will provide for the competing priorities of rural and urban environments, how to maintain the environment, and how places of cultural or historic significance are protected.

WHICH PROPOSALS MAY HAVE AN ADVERSE EFFECT ON MANA WHENUA VALUES AND WHAT IS NOW REQUIRED?

The Mana Whenua provisions make cultural impact assessments (CIAs) compulsory for certain resource consents 'where a proposal may have an adverse effect on Mana Whenua values'.

Some resource consents, no matter the location, now require a CIA. Where a "proposal may have adverse effects on Mana Whenua values" such as "discharges to water...air...land", "taking of surface water", "drilling to construct a bore", "mineral extractions", and "construction of significant infrastructure" a CIA will be required.[2] The requirement also applies where a "subdivision, use or development may affect Mana Whenua cultural heritage." The use of 'may' is significant. Where there is doubt, the Council will rely on the Mana Whenua groups to determine whether a CIA is required. That alone creates a vested interest, with CIAs likely to create a significant income stream to iwi, who are also able to determine to what extent they are required.

For some locations, merely undertaking earthworks triggers the CIA provisions. The rules apply too for all resource consents within 150 metres of sites and places 'of value' to Mana Whenua.

WHICH PROPERTIES ARE MOST AFFECTED? IS MINE ONE OF THEM?

As outlined above, some resource consents now require a CIA regardless of the proposal's location, but properties that are near sites deemed significant or of value to Mana Whenua are most affected by the provisions. According to the New Zealand Archaeological Association[3]:

> "The extents of the Sites and Places of Value to Mana Whenua have been defined by drawing an arbitrary 200m diameter circle around the centre point of all sites, and then requiring an additional 50m buffer around those circles, with which the rules are applies (i.e. a diameter of 300m, affecting an area of 7ha)."

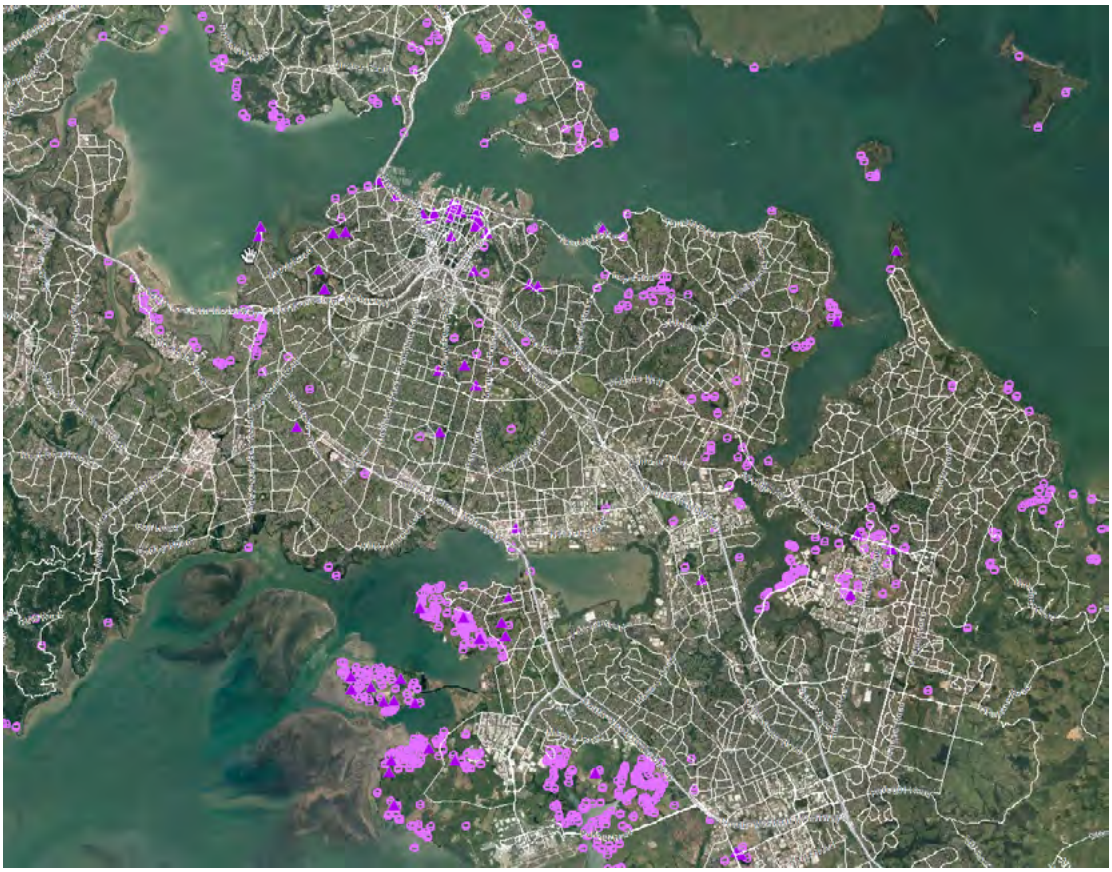
1 Some organisations and legal experts dispute that the Mana Whenua provisions are captured by section 86B, but in any case, without judicial review of the Council's decision, they are being enforced.
2 The full PAUP can be downloaded at http://unitaryplan.aucklandcouncil.govt.nz/pages/plan/book.aspx?exhibit=PAUPHTML
3 New Zealand Archaeological Association Inc., New Zealand Archaeological Association Submission, February 2014 ("NZAA submission"), page 5.

There are 61 sites of significance and 3,600 sites of value to Mana Whenua throughout the Auckland region. The Council has estimated that up to 18,000 properties are affected.[4]

There are currently 3,661 sites of cultural significance or value in the Unitary Plan. Many of these sites contain multiple properties. For example, one near Mt Albert Road contains 41 titles. In addition to the properties in these areas, any property within the 7ha area may also be captured by the provisions. All of the properties in these areas will be affected, as well as any property within the 7ha area.

Some iwi groups believe as little as 1.6% of potential Maori cultural heritage has currently been scheduled.[5] On this estimate, there would be as many as 183,000 areas in the Auckland region that could be deemed places of either significance or value to Mana Whenua.

Purple circles or markers on Auckland Council's electronic map represent some of the 3,600 sites of value and 61 sites of significance to Mana Whenua.



CHECK WHETHER YOUR PROPERTY IS AFFECTED
WWW.TAXPAYER.ORG.NZ/PROPERTYCHECK

4 Letter from Roger Blakeley, Chief Planning Officer, Auckland Council to Lee Short, 23 October 2014 ("Blakeley Letter"), at paragraph A22.
5 Te Ara Rangatu O Te Iwi O Ngati Te Ata Waiohua Submission, February 2014, paragraph 4.38.

What sort of sites are they? Have they been verified by the Council?

While the 61 sites of 'significance' have been verified as being of importance to Mana Whenua, the 3,600 sites of 'value' have not. The Council has confirmed it never verified the existence or importance of these sites prior to the Plan being introduced or determined whether they were of value to iwi. Responding to a question on this point, the Council's Chief Planning Officer, Dr Roger Blakeley, has said the inclusion reflects a 'precautionary approach' and is 'strongly supported by most Mana Whenua groups'. Dr Blakeley claims that the implicit support indicates that the sites are considered to be 'of value'.[6]

The process for selecting the 3,600 sites has been questioned by the NZAA in their submission. The Association points out that the overlay includes many sites that no longer exist, or whose presence has never been confirmed. Some of the sites included within the 3,600 sites of value do not even relate to Maori settlement.

Many of the sites are likely to be shell middens, most of which do not appear to have any associated settlement remains.[7] A midden (also known as a 'kitchen midden' or 'shell heap') is an old dump for domestic waste. According to the New Zealand Archaeological Association shell middens generally hold little significance to Mana Whenua, who are generally more interested in pa, urupa and kainga.[8]

Shell middens are usually very small. To date, the Council have been unable to provide any justification why, for example, a neighbour some 200 metres away may have the ability to develop their land curtailed due to an ancient site for shell remnants which may only be a metre wide.

How were the sites selected? Have they always been sacred or special sites?

We have been unable to reconcile answers from Council officials with the Council's 'section 32' Report, which is an evaluation report required by the RMA to consider certain matters before a proposal is put out for consultation. The Report refers to directions by the Council to "use robust information" to inform the development of the list of sites and places of Maori origin. To the contrary, the final list was developed at the last minute (with nearly half the sites removed because the locations were not available) and was never subject to a section 32 report.[9]

The Council's identification of the sites was last minute. We understand 3,600 sites of value were pulled from an original list of 6,000. Despite the significant financial burden on ratepayers, including the potential decrease in property values as a result of the PAUP provisions, the sites were included in the last weeks of the two years that led up to the PAUP being released for public consultation.

6 Statement of evidence of Sarah Diana Mary Macready for The New Zealand Archaeological Association in relation to 009 RPS Mana Whenua, 29 October 2014, ("NZAA Statement of Evidence"), page 3.
7 ibid, page 10.
8 ibid.
9 The Taxpayers' Union is aware of legal advice that suggests that the Council is vulnerable to judicial review on this point. To date however, no applicant has challenged the Council's failure to obtain a report covering the list of sites that was put in the PAUP.

The New Zealand Archaeological Association took issue with the way in which the Council had gone about listing the 3,600 sites as being of value to Mana Whenua without proper investigation[10]:

New Zealand Archaeological Association

> "...we have serious concerns relating to the proposed rules for archaeological sites and their surrounds within the overlay, as the sites have been effectively scheduled without any prior assessment and in many cases without confirmation of the presence, exact location and extent of the sites."

In October, One News reported on a public meeting concerning the Mana Whenua provisions included an acknowledgment from Ngati Whatua spokesman, Ngarimu Blair, that the sites needed to be identified more precisely and the Council had done this in a clumsy manner.[11]

Is the Council sure all the sites even exist?

No. The Council's Chief Planning Officer has acknowledged[12]:

> "It is possible that some of the sites no longer exist. However, the Council is unable to confirm this without a site visit, and it is not in a position to undertake site visits in respect of 3,600 sites."

Council's Chief Planning Officer, Dr Roger Blakeley

The Plan allows Council to require property owners within the 7ha circle around a site to seek the approval of Mana Whenua to develop their land, even when they are not confident anything exists.

It is likely that in many cases investigation of the sites by Mana Whenua may return no evidence of the site holding significance to anyone. But no one knows – even the Council hasn't visited the sites!

In order to determine whether a marked site even exists, property owners (or those nearby) may need to buy a CIA. Removing a site from the Unitary Plan will require a plan change, and public notification/submission process that can only happen once the hearing process is complete and the Council has decided on whether to make any changes to the Plan. That means that even if they deem a site of no significance now, new significance could arise later when subsequent assessments are required.

If these sites are of genuine importance, why are they not catalogued with details of precisely what the importance is?

10 NZAA Submission, page 30..
11 Auckland ratepayers protest iwi approval, One News, 18 October 2014, http://tvnz.co.nz/national-news/auckland-ratepayers-protest-iwi-approval-video-6110733
12 Blakeley Letter at paragraph A16.

What's a cultural impact assessment? Who does them? How much do they cost?

A Cultural Impact Assessment, or CIA, is "a report which documents Mana Whenua cultural values, interests and associations with an area or a resource, and the potential impacts of a proposed activity on these values. It offers solutions to address these impacts."[13]

The Council has told Democracy Action that currently the public is being charged between $1,500 and $4,000 for CIAs, but we understand that commercial parties are paying far more. There is no limit on how much Mana Whenua groups can charge for them[14] nor does there appear to be any recourse for property owners who think they are being ripped off. There is no ability to refuse to pay, review, or challenge the amount charged; or use an alternative verification mechanism.

The Council has said[15]:

> **"The Iwi themselves will determine who will undertake any CIA that might be required, in accordance with the Council's recognition that Mana Whenua are specialists in determining their values and associations with their cultural heritage."**

Mana Whenua exercise a monopoly on determining if a site is of cultural significance or value to them. The Taxpayers' Union is concerned that charging for CIAs is likely to create a 'cultural charge' - a tax on affected developments.

The New Zealand Archaeological Association noted in its submission that the competing interests of each Mana Whenua group over particular sites are also likely to create problems for the PAUP:

> **"We note that while the PAUP states a single cultural impact assessment is required, in practice several may be needed."**

For most sites multiple Mana Whenua groups claim a spiritual or cultural connection. CIAs may be required from up to 19 Mana Whenua groups for the same project.

It has been noted by the Auckland Utility Operators Group (AUOG) submission that the cost and content of CIAs vary significantly between Mana Whenua groups, with little in the way of detail regarding time taken or disbursements to make up the cost.[16]

While a significant number of sites of value are on public land, utility operators will face increased costs that will ultimately be passed on to consumers of phone lines, electricity and even water. The AUOG submission contends that even once a utility operator is granted Mana

13 Part 5 Definitions, PAUP.
14 Blakeley Letter at paragraph A39.
15 Blakeley Letter at paragraph A38.
16 AUOG Statement of Evidence, pages 18-19.

Whenua consent it will only be on a project-by-project basis. Subsequent uses of the land by the utility provider, or other providers, will require additional CIAs.[17]

CIAs may propose conditions on consents to mitigate cultural concerns. As is explained below, the Council has a limited ability to reject proposed conditions of a resource consent.

How long will it take to have a CIA completed?

There is no prescribed time frame for how long Mana Whenua groups should take in order to complete a CIA. The AUOG submission highlights a Chorus project which required a submarine cable within the Waitemata Harbour. The sign-off for this particular CIA took four months, leading to significant delays for a large and important infrastructure project.[18]

If a development obviously has no cultural ramifications, is a CIA still required?

It is up to the Mana Whenua groups providing CIAs, not the Council, to determine whether a CIA is required if the work or site is captured by the PAUP provisions. A CIA can be avoided if certification that one is not required is obtained (or purchased) from the Mana Whenua group (or a representative thereof).

A New Zealand Herald piece by Sir Bob Jones, published in September, described a difficult to believe scenario where a property developer was required to seek the approval of 13 Mana Whenua groups to re-establish a window in a modern 17-storey Auckland CBD office building.

As the building was located close to a site listed as a Mana Whenua site of significance, the resource consent required consultation with 13 iwi. Without the consent, the Council made it clear to the property owner that the window could not be put back. The process involved considerable staff time, and added $4,500 to the cost of the consent.

In responding to questions posed by lawyers acting for Democracy Action, a ratepayer group, the Council's Chief Planning Officer confirmed the requirements outlined in the article were correct. Ignoring the requirements, even for something as mundane as reinstalling a shop window, is illegal and risks prosecution by the Council.[19]

What protections does the Plan provide to property owners?

The Unitary Plan is extraordinarily permissive for Mana Whenua groups. It allows land to be scheduled as significant to Mana Whenua on the basis of vague criteria such as "metaphysical and spiritual importance", and places of "architectural or educational significance." Mana Whenua are to work with council to decide whether enough criteria are met to justify scheduling.

What happens when Mana Whenua and the Council disagree? The Plan recognises Mana Whenua as the 'specialists' in making these determinations. It follows that the Council will have to defer to their opinion.

17 ibid.at page 18.
18 AUOG Statement of Evidence, page 18.
19 Bob Jones: Bureaucrats wallowing in cultural correctness, New Zealand Herald, 9 September 2014, http://www.nzherald.co.nz/bob-jones/news/article.cfm?a_id=250&objectid=11321027

What limits are there on conflicts of interest, abuse of process or worse?

Mana Whenua groups are not merely membership associations for people sharing a bloodline and culture. They are large commercial organisations. Several Mana Whenua groups command portfolios in excess of several hundred million dollars, having significant commercial and property interests in Auckland.[20] There is a real risk that Mana Whenua groups are able to dictate the conditions of development for their commercial competitors.

Despite the obvious risk, the Council has no formal process to ensure Mana Whenua do not have a conflict of interest in preparing CIAs.[21] Further, there does not appear to be any avenue of recourse for property owners or developers who feel as though a Mana Whenua group's objections to a development are being driven by a commercial rather than cultural reason.

Abuse of RMA processes for competitive advantage may sound unlikely, but the Government has been forced to make changes to the RMA in the past as a result of precisely that. In an article by Simpson Grierson, a law firm, the problem is given some historical context[22]:

> **"A person is currently free to use any of the tools that the RMA provides in order to pursue a competitive advantage, subject only to the potential sanction of costs. This has led to the "supermarket circus", a situation where an individual, organisation, or company uses the mechanisms of the RMA for the competitive advantage in delaying the introduction of a competing activity into the marketplace.**
>
> **The use of planning legislation and processes for trade competition purposes has long been identified as an issue both under former town and country planning legislation and then under the RMA."**

Household brands, supermarkets, service stations and mega-store companies have regularly used the RMA to stifle competition. Why would, or should, corporate iwi not use the PAUP Mana Whenua provisions for the same?

There is also the risk of corruption. Without the procedural safeguards of appeal, judicial review, democratic oversight, and legal restraints applicable to officials (but not to iwi as private organisations) the Council has created a public law regime fraught with risk.

20 Property push: Iwi's big plan for lasting wealth, New Zealand Herald, 13 May 2013, http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10883212
21 Blakeley Letter at paragraph A41.
22 The "Supermarket circus" – Trade Competition under the RMA, Simpson Grierson, 9 September 2009, http://www.simpsongrierson.com/naturally-resourceful-the-supermarket-circus/

But aren't these measures necessary to protect Auckland's heritage?

According to the New Zealand Archaeological Association - no. The Association's submission on the Mana Whenua provisions was damning of several aspects of the plan relating to the identification of sites.

They found that the PAUP essentially doubled-up with the provisions of the Historic Places Act 1993 (HPA):

> **"...we do not see value in plans under the RMA undertaking blanket protection of archaeological sites as this can only cause confusion with the HPA and frustration for all parties involved. The blanket protection role of the HPA does not need to be duplicated in plans under the RMA."**

What are the costs of these provisions?

The Mana Whenua provisions will drive up the cost of development and housing in Auckland. That could keep the heat turned up on the Auckland property market. Without a complete rewrite the cost of the provisions will be determined by the iwi groups who are left to decide the scope of the cultural 'protections' and nature of conditions the groups seek to impose on resource consents.

CIAs also represent a pernicious example of an extractive institution. Extractive institutions reflect power structures that allow politically connected elites to rig rules in their favour and extract wealth from the politically unconnected. Such a vicious circle foments uncertainty where businesses and individuals cannot plan effectively and take the investment decisions necessary to generate economic growth and prosperity.

In their 2013 book, Why Nations Fail, Daron Acemoglu and James A. Robinson explain the dangers of extractive economic institutions which

> **"[extractive institutions] do not create the incentives needed for people to save, invest, and innovate. Extractive political institutions support these economic institutions by cementing the power of those who benefit from the extraction."**

Regarding CIAs, iwi appear to have gained political favour with the Auckland Council, who in their Proposed Auckland Unitary Plan have introduced a regime nominally concerning cultural taonga which in reality supports each iwi's ability to extract wealth from Auckland property owners.

Will iwi have the ability to block or veto resource consents?

The Council will have final authority to give or deny consent, but its new Unitary Plan says that Mana Whenua values should be protected from subdivision, development or use that may result in their loss or degradation; and that adverse effects on the values of sites and places of value to Mana Whenua should be avoided. This means that if Mana Whenua claim the proposal will have negative effects on their values, the Council will be in a risky legal position if they allow consent. It may have to grant it subject to expensive modifications (even if those values are entirely spiritual in nature).

Why are the provisions in effect when the Unitary Plan is still 'proposed'? Why is there not more public outcry?

Section 86B of the RMA deems provisions relating to historic heritage to come into effect upon public notification, in other words, at the beginning of any consultation process. Because, in the Council's view, the 'Mana Whenua' provisions are about protecting heritage, they are in effect until the Plan is amended as a result of the current hearing process. Legal experts have said the process could take up to two years to complete and there is no guarantee the Hearings Panel will recommend changes in this area.

We do however understand the provisions are being lightly enforced.[23] It is possible Council officials are sensibly ignoring the law. But that is unsustainable. Once the Plan is confirmed, Mana Whenua groups will have no reason not to force the Council to comply with the provisions. Common sense may be sacrificed, especially where commercial interests are at stake.

The PAUP is also incredibly complex. The plan itself is some 7,000 pages. The Council received more than 9,400 submissions, more than 1,300 of which opposed the Mana Whenua provisions (which are only contained in a few pages of the Plan). The consultation process has its own dedicated website, including a YouTube video just for lawyers and planning experts assisting clients with the hearing process.[24]

The Panel have set up a process that will make genuine public engagement with non-expert concerned citizens very difficult to achieve. For this briefing paper the Taxpayers' Union has had to consult with, and rely upon, numerous RMA, legal, and planning experts. We were amazed that the Hearing Panel's chairman recently told the New Zealand Herald that submitters do not need their lawyers to submit for them.

Didn't Councillors agree to these provisions though? Why didn't they prevent this?

According to Waitemata and Gulf Ward Councillor, Mike Lee, the Unitary Plan was "rushed through Council last year with extraordinary speed."[25] Little or no time was given to consider a significant amount of feedback from the public. Mr Lee also claims scrutiny of the document by Councillors was obfuscated by Council officials, who claimed it was "confidential to management".

These claims from such a long-serving Councillor raise some serious concerns with the degree of oversight granted to Auckland's elected representatives by Council management.

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23 Even the Council's Chief Planning Officer has acknowledged that his officials are ignoring more awkward provisions. Refer to Blakeley Letter at paragraph A14.
24 Auckland Unitary Plan submitter hearing process, Auckland Council, 22 October 2014, https://www.youtube.com/watch?v=bfmOsxiJ4LQ&list=UUg_Du2aJ-cIlbiANjDKrzwQ
25 Mike Lee email, 4 June 2014.

Are the provisions legal?

Associate Professor Kenneth Palmer of Auckland University believes the provisions are vulnerable to legal challenge:

> "The conventional method of recognising historic heritage and the relationship of Maori to ancestral lands (which includes lands no longer owned by Maori), is to list in the plan the buildings or sites of heritage significance which includes cultural heritage. The cases decided by the Environment Court indicate that a listing must reach a threshold for inclusion."

He goes on to say in his summary of submission:

> "The policies and rules relating to sites and places of value to mana whenua, inserted at the last minute in the Proposed Auckland Unitary Plan, which lists 3600 sites of value, is a substantial extension of the power of regulation, which does not have any precedent in earlier district plans or unitary plans in New Zealand.
>
> As a precondition of making any policy or including any rule in a proposed plan, section 32 of the RMA requires the council to carry out an evaluation as to whether or not the proposed provisions are the most appropriate way to achieve the purpose set out. The evaluation must have regard to efficiency and effectiveness, and other methods which may be appropriate, and include a benefit and cost analysis of the proposal and possibly the risk of acting or not acting where there is insufficient information available.
>
> The section 32 analysis carried out by Auckland Council contains extensive repetitive rhetoric justifying partly on a precautionary basis the inclusion of the new provisions relating to places of value to mana whenua. The analysis does not include any assessment of the individual 3600 sites, which is essential to comply with an adequate and complete assessment under s 32. This failure to provide any details of the qualifications of each of the 3600 sites can be the subject of submissions in respect of the proposed unitary plan, and that is what is happening at the present time."

Professor Palmer also believes that the Council has acted outside its powers:

> Presently the rules transfer the burden of investigation from the council to an applicant for a resource consent. The applicant is required to obtain a "cultural impact assessment", and by terms of the rules the owner may be obliged to contact one or more iwi or hapu. The rules prescribe extensively the cultural considerations that must be addressed. These essentially require a comprehensive consideration of tikanga, which is the cultural view taken by the particular tribe, iwi or hapu. This obligation raises broad and indeterminate values which in the context of traditional RMA regulation could well be seen as unreasonable due to vagueness, uncertainty as to outcomes, and cost to the applicant.
>
> Furthermore the rules specifically require that the applicant consult with mana whenua as part of this process. This obligation of consultation appears to be contrary to an amendment to the RMA in 2005, inserting section 36A. Section 36A states that an applicant for a resource consent does not have a duty to consult with any person about the application. This amendment was specifically intended by Parliament to remove a legal uncertainty as to whether applicants were required to consult with iwi. Unfortunately the Council may have the power to require further information if the cultural impact report is not produced.

Is Te Tiriti o Waitangi justification for disturbing Aucklanders' property rights?

No. The Crown is currently engaged in a settlement process to resolve the historical claims of iwi, many of whom wrongly saw their land alienated by Crown action. The justification for settlement is consistent with New Zealand's inherited English common law system under which Maori were entitled to respect of their property rights which would not inhibit the rights of other New Zealanders. Background information on The Office of Treaty Settlements' website underlines this idea in a frequently asked questions section[26]:

26 Office of Treaty Settlements, Healing the Past, Building a Future, page 165. Supporting information accessed from http://nz01.terabyte.co.nz/ots/DocumentLibrary/RedBookSupportingInformation.pdf on 4 March 2015.

> English common law, which New Zealand inherited, recognises the customary rights and aboriginal title of indigenous people. The Treaty of Waitangi also recognised such rights. Recognition of such rights is therefore consistent with a legal system which itself recognises such property rights, and does not conflict with the general principle of equality under the law.

Through its actions in the 19th century the Crown wrongly failed to recognise the property rights of Maori. The Treaty of Waitangi recognised the equality of all New Zealanders under the law consistent with New Zealand's common law framework. Cultural impact assessments ignore this important principle and do not fully recognise the property rights of Auckland property owners. Just as the Crown was wrong not to recognise the property rights of iwi under the Treaty, Auckland Council is wrong not to recognise the property rights of local property owners.

Why aren't others resisting the Taniwha Tax?

More than 1,100 people submitted against the Mana Whenua provisions in the Council's formal process, but understandably others are fearful of a public campaign that risks being seen as unsympathetic to Maori interests.

Some organisations appear to be too reliant on the Council for funding. For example the Employers and Manufacturers Association (Northern) should be leading this campaign, but we can only assume that it has not been vocal because Auckland Council, and its subsidiaries, wield significant financial power over the lobby group. The Council may be preventing campaigning on matters the Council is politically vulnerable on. The EMA (Northern) did say in its submission to the Unitary Plan (which it does not appear to have publicised), that:

> EMA agrees in principle with the concept of Cultural Impact Assessments. After all, we do not want people digging up and accidentally destroying sites that may be of significance to the Tangata Whenua. However the set of proposed rules set out in Part 3, Chapter G.2.7.4. falls far short of the mark. The problem is that the whole proposed rules structure is half baked, showing obvious signs of having been prepared in haste and without adequate thought as to the possible implications and perverse outcomes that such rules could cause. For instance the scope of the requirement for CIA's is so broad and ill-defined as to possibly require a CIA for every resource consent. Part 4 (I) requires a CIA when there is "construction of any significant infrastructure" without reference to where such infrastructure is being constructed! Then again the rules require a Local Board to require consultation with every Iwi within

> its area even though the proposed development may be only within the territory of one Iwi and have no relevance to the other Iwis in the local board area. I could go on and on but the point is this- This whole discussion needs to be removed from the Unitary Plan and taken off line for progress in a different forum. Yes- it does need to be done- but by the Unitary Plan is the wrong vehicle for a discussion such as this that is still in its early formative stages. Let the matter be reintroduced at a later date as a variation to the unitary plan-but let it be thoroughly discussed and consulted on first. Undue and indecent haste will serve the interests of no-one least of all the Tangata Whenua. ”

The Property Council, which also expressed major concerns with the Mana Whenua provisions in its submission, but is also reliant on the Council's CCOs for financial support. We can only assume that is the reason it has not, to date, supported this group's efforts to expose the Taniwha Tax.

CASE STUDY: AUCKLAND RAIL LOOP

In 2011 Auckland's Maori Statutory Board raised objections to the City Rail Link tunnel due to the presence of the taniwha, Horotiu. The entity lives in an ancient creek running past the Town Hall and down Queen Street.*

The Council's own maps indicate that there are several sites of significance to Mana Whenua throughout the CBD that could prove problematic for the City Rail Link project.

* Taniwha in the way of Auckland rail loop, Fairfax, 8 June 2011, http://www.stuff.co.nz/national/5114496/Taniwha-in-the-way-of-Auckland-rail-loop

APPENDIX: WHAT HAVE OTHERS SAID ON THE ISSUE?

AUCKLAND UTILITY OPERATORS GROUP, WHICH COMPRISES VODAFONE, SPARK, CHORUS, VECTOR AND OTHERS

Quotes are from the AUOG PAUP submission:

- *"The UFB rollout is substantially affected by extensive areas of Auckland subject to Sites and Places of Significance and Value to Mana Whenua, and Extent of Heritage Place (Maori origin) overlays, including the buffer areas around these features."*

- *"My experience on this project has been that the ability of some iwi to adequately engage and respond in consenting processes under the Unitary Plan is very mixed due to the extensive volume of applications now requiring their attention, which many iwi are not adequately resourced for. It can also be a very costly and time-consuming process for applicants in a process where there is largely no control over costs or timeframes."*

- *"My opinion is that the situation that currently exists due to these provisions does not achieve the outcome sought by B5.1; that is, meaningful engagement in accordance with Treaty principles."*

"The delays that have been experienced with CIAs to date can represent a considerable time delay and cost implication on resource consent decision-making. These time delays and costs can also be experienced where ultimately there is no need to obtain a CIA. Hence in this case it is not effective or efficient."

◆

"From the extensive hui with iwi I have been involved with throughout the Chorus UFB consenting programme, I understand that many of the iwi are seeking that substantially more Sites and Places of Significance and Value be added to the Unitary Plan."

◆

"Sites and Places of Value to Mana Whenua are in my experience more related to recorded archaeology such as middens or pits."

◆

"The Sites and Places of Value in particular have had a substantial impact on the Chorus UFB programme as they include a 200m diameter buffer circle centred on where best information indicates the archaeological feature is located, with a further 50m buffer around the buffer circle, resulting in a 300m diameter circle. This is effectively a buffer on a buffer. As the Commissioners can no doubt appreciate, this affects a substantial area, which in many cases is well away from the recorded feature, including a substantial number of roads and private adjacent sites where customers will require connections."

◆

"Aside from the timeframe, cost and logistical issues for Chorus to work through such a process, as I will outline later many Mana Whenua groups are simply not resourced to deal with the volume of work, particularly when combined with requests by other applicants across Auckland."

◆

"In my experience, the ability of iwi to respond in a timely manner to Chorus in terms of attendance at hui, reviewing consultation information provided and responding to requests to sign off specific designs has been very mixed, which is reflected in the variable resources available to Mana Whenua. The regime set up in the Unitary Plan as notified is placing an extremely onerous burden on both applicants and Mana Whenua."

◆

"Since notification of the Unitary Plan, I have been involved in a number of projects where Mana Whenua groups have wanted to prepare a CIA. In one instance, on a Chorus submarine cable project within the Waitemata Harbour that I have been involved with, it took approximately four months for a CIA to be delivered, which resulted in significant delays to being able to lodge the application. In that instance it was resourcing that delayed the delivery of the CIA, rather than the scale of any issues associated with the project."

◆

"I have also found the costs and contents of CIAs to be highly variable, with limited, if any, detail provided on time and disbursements to make up the cost."

"The way the current Unitary Plan regime is being implemented by the Council can result in multiple Mana Whenua groups wanting to prepare CIAs independently of each other for the same works, and does not appear to contemplate an independent third party drawing together the issues raised by multiple groups into a single independently prepared assessment."

◆

"In addition to the issues with CIAs per se that I have just outlined, there are also time and cost implications for even determining if a CIA is required due to the quite inflexible requirements of the Unitary Plan that do not take into account the nature of the works and likelihood of issues."

◆

"While only a small and urgent job to address service issues with a Vector customer, the consent processing took an additional approximately 12 working days (over and above the standard 20 working day processing timeframe) while the Council's Cultural Impact Facilitator contacted the relevant iwi representatives to confirm that a CIA was not required. No iwi representatives requested a CIA. Given the extent of the Sites and Places of Value to Mana Whenua around Auckland, I would expect these issues are likely to arise very frequently for small scale routine infrastructure works in formed road corridors, even where well away from the actual feature being protected."

◆

"No CIAs were ultimately requested, but this still required attendance at an on-site meeting by iwi representatives and resulted in additional time and cost to the project."

◆

"However, I have had one experience with a Chorus project in Auckland where a deployment method agreed with an iwi as part of an RMA consent process is at odds with how Heritage New Zealand would like the work deployed, and they are also not satisfied with the approved discovery protocol agreed with iwi and consented by the Council for that project."

◆

"These consent processes set in place complex, time consuming and in many cases very costly consenting processes to deliver infrastructure to Auckland."

New Zealand archaeological association

Quotes are from the New Zealand Archaeological Association PAUP submission:

- *"To require both a resource consent under the RMA and an authority under the HNZPTA in relation to thousands of unevaluated and unscheduled sites will place an unnecessary burden on landowners and others."*

- *"In summary, they impose cultural and archaeological impact assessment requirements (with the potential for multiple cultural impact assessments from different iwi groups) over large buffer areas where no archaeological sites are known to be present; they restrict even minor earthworks for infrastructure purposes, again over large buffer areas where no archaeological sites are known to be present; and they restrict archaeological testing for assessment purposes, which would work against rather than for the identification and protection of unrecorded archaeology."*

- *"This approach did not take account of the fact that a number of sites with accurate GPS locations would have been recorded immediately prior to or during development and would subsequently have been destroyed, in many cases under authority from Heritage New Zealand (formerly the New Zealand Historic Places Trust)."*

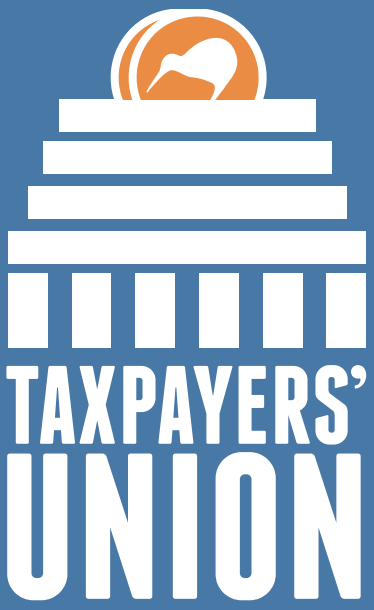
- *"However, places without archaeological remains cannot be described as archaeological sites, which are defined by their physical evidence. Hence this does not apply to the [Sites and Places of Value to Mana Whenua], all of which are "archaeology of Maori origin."*

- *"It is not appropriate for thousands of unscheduled sites that have undergone no such evaluation to be subject to consent requirements in addition to the statutory requirements of the HNZPTA."*

- *"The extensive creation of dual processes would place a significant and unnecessary burden on land owners, land managers and other and would ultimately risk undermining public support for the protection of archaeological sites."*

- *"The costs to landowners and land managers or applying the proposed rules relating to SPVMW are not assessed of quantified in any way. It is merely stated that there will be costs."*

- *"However, I do not support the use of statutory methods in respect to the thousands of unscheduled archaeological sites on the [Sites and Places of Value to Mana Whenua] overlay which have not been evaluated or in many cases confirmed, and in respect to large areas around those sites which are not known to contain any archaeological remains and in most cases are unlikely to do so."*



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