

LAWS 315 Natural Resource Law Research Essay

The MV *Rena*: A case study in the protection of Maori environmental interests after a maritime disaster

I Introduction

The relationship between Maori and the environment is one of the most important aspects of Aotearoa/New Zealand's natural resource law. For Maori, the environment and its natural resources are tipuna (ancestors), connected to both the current generation of Maori and to generations to come by whakapapa (genealogical) ties. These ties are the basis for whanaungatanga between Maori and Aotearoa's environment, a familial relationship that imparts obligations on Maori to act as kaitiaki (guardians) to protect the mauri (life force) of the environment. Unfortunately for both Maori and Aotearoa's environment, this relationship and the principles that underlie it are poorly reflected in the legal frameworks that govern Aotearoa's natural resources. This is no clearer than in the grounding of the MV *Rena* ("Rena") on Otaiti/Astrolabe Reef ("the reef"). The application of the legal mechanisms utilised to manage the effects of the *Rena*'s grounding on the marine environment and affected parties produced an outcome that was diametrically opposed to the interests of local iwi. This research paper will use the *Rena* disaster as a case study to assess the capacity of environmental law mechanisms to protect Maori interests in the wake of a maritime disaster. In doing so, it will be necessary to analyse both what has actually occurred in the wake of the *Rena*'s grounding and also the means by which Maori may seek further protection for Otaiti in the future.

II Disaster strikes

Few maritime events elicit the kind of public reaction that a near-shore oil spill does. This is no more so the case than in New Zealand, where the pride taken in a pristine marine environment and the relationship of Maori with the natural world exacerbates the impact of environmental disasters on the people they affect.¹ It should therefore come as no surprise that the grounding of the *Rena* on Otaiti/Astrolabe Reef in the Bay of Plenty ("BOP") was the defining moment of the summer for New Zealanders in 2011/2012. The initial grounding was relatively innocuous. Tragically, however, stormy weather then

¹ DR Schiell, PM Ross and CN Batershill "Environmental effects of the MV *Rena* Shipwreck: cross-disciplinary investigations of oil and debris impacts on a coastal ecosystem" (2015) 50 *New Zealand Journal of Marine and Freshwater Research* 1 at 1.

struck and cleaved the Rena in two, sending its cargo into the sea. When the storm settled, a “black tide” of oil and debris was being carried towards the BOP. While it was the arrival of this material, and the thousands of dead or dying sea birds and mammals it brought with it, on the BOP’s beaches that captured the public’s imagination, the most profound impact of the Rena’s wrecking was on Otaiti.² The Rena remained stricken on Otaiti, leaching contaminants into the surrounding seas.³ These contaminants had the potential to cause significant harm to Otaiti’s wildlife and, through the gathering of kaimoana (seafood), to local people. The threat posed to local vessels and citizens by the Rena’s remains was so significant that it forced the BOP Harbour Master to declare a two nautical mile “exclusion zone” around Otaiti.⁴ The issue of the full recovery of the Rena from the reef continues to this day.

Initial reports painted a bleak picture of potential consequences of the grounding for the marine environment in the BOP. The situation could, however, have been considerably blacker. In a testament to the resiliency of the people of the BOP, a volunteer army acted quickly to remove over 1,000 tonnes of oily waste from the region’s beaches.⁵ This was followed by the January 2012 adoption of the Rena Long-Term Environmental Recovery Plan (“RRP”), setting the basis for an ongoing effort that aimed to restore the mauri of the marine and coastal environment to its pre-Rena state.⁶ The efficacy of this clean-up effort was such that the effects of oil on the coast had effectively subsided by 2013.⁷ As a consequence, BOP Mayor Stuart Crosby has stated that, for the average BOP resident, the Rena disaster is simply “out of sight, out of mind.”⁸ Four years on from the Rena’s grounding, the lack of visible reminders of the wreck has caused the Rena to literally sink beneath the waves of the public consciousness. While it may be unseen by the majority of the public, however, the effects of the disaster continue to be felt by Maori.

² Newshub NZ “Rena: 20,000 birds may have died” (15 November 2011) Newshub <<http://www.newshub.co.nz/environmentsci/rena-20000-birds-may-have-died-2011111514#axzz4ANEjvmvr>>.

³ Panel on MV Rena Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [35].

⁴ Bay of Plenty Regional Navigational Safety Bylaw 2010, cl 3.11.

⁵ K Smith, H Hamerton, S Hunt and RJ Sargison “Local volunteers respond to the Rena oil spill in Maketu, New Zealand” (2016) 11 Kotuitui: New Zealand Journal of Social Sciences Online 1 at 9.

⁶ Rena Long-term Environmental Recovery Plan 2011.

⁷ Panel on MV Rena Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [349]

⁸ Jamie Morton “Rena: What to do with a shipwreck” (7 September 2015) New Zealand Herald Online <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11508801>.

III Impact on Maori

While the physical manifestation of environmental damage has subsided along the coastline, the harm caused to local iwi by the wreck has endured. Otaiti sits in close proximity to Motiti Island, the traditional home of two Ngati Awa hapu.⁹ Otaiti and its inhabitants are tipuna to these Maori communities. The corresponding kaitiakitanga relationship that exists between these hapu and Otaiti places matauranga Maori (environmental management) obligations on them to protect the mauri of the reef.¹⁰ A number of iwi and hapu also consider Otaiti to be toka tapū: the first stop for the spirits of their ancestors on their way to Hawaiiiki.¹¹ The reef is therefore a taonga for these iwi and hapu, both as a mahinga kai (traditional food source) and as a wāhi tapu (spiritually significant site).¹² The relationship between iwi and Otaiti is also a source of mana for them.¹³ In pre-colonial period Aotearoa the ability of Otaiti to be a mahinga kai for local Maori and its status as a taonga of regional significance made the relationship they had with the reef highly sought after and respected. This continues to be the case for these iwi and the mana they gain from their relationship with the reef increases the gravity of their kaitiakitanga duty to protect the mauri of Otaiti.¹⁴

The effects of the Rena's grounding on Otaiti have had both a physical and a meta-physical impact on affected iwi. Physically, the Rena's presence on Otaiti has caused a significant disruption to the way that local Maori live their lives. Their ability to gather kaimoana from the reef and, for a shorter period, coastal areas was compromised by the release of contaminants into the marine environment and the presence of the Rena on the reef. This undermined Otaiti's role as mahinga kai for those communities. The physical damage to Otaiti, however, harmed iwi in more ways than just compromising their ability to utilise its natural resources. The relationship between Maori and the wildlife that inhabit environments like Otaiti and the BOP coastline is similar in many respects to their

⁹ Panel on MV Rena Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [552]

¹⁰ K Smith, H Hamerton, S Hunt and RJ Sargison, as above n 5, at 7.

¹¹ Panel on MV Rena Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [637]. Hawaiiiki is the island in the Pacific that Maori travelled to Aotearoa from and is the place that the spirits of Maori go after death.

¹² Panel on MV Rena Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [606]

¹³ Panel on MV Rena Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [626-628].

¹⁴ Carwyn Jones Tino Rangatiratanga and Sustainable Development: Principles for Developing a Just and Effective System of Environmental Law in Aotearoa (2010) 3 *Journal of Maori Legal Writing (Te Tai Haruru)* 59, pp 61-63.

relationship with the reef itself. The deaths and suffering of birds, mammals and other wildlife consequently had a significant impact on Maori.

The greatest harm to Maori inflicted by the wrecking of the *Rena* is meta-physical. The damage caused to Otaiti and the surrounding environment by the *Rena* and its continued presence on the reef is seen from a Maori perspective as an assault on the mauri of the reef.¹⁵ Maori scholars seeking to establish a basis for the assessment of an environmental event like the *Rena*'s grounding on the mauri of a particular environment have formulated a "mauriometer."¹⁶ This mechanism utilises a combined analysis of affected party's worldviews and the impact of an event on indicators like ecosystem health and the ability of Maori to continue customary practices to determine its severity. While not universally accepted as an accurate means for determining the impact of an event on mauri, there has been little dissent amongst iwi from the mauriometer's finding that the grounding and the ongoing presence of the *Rena* have had a significant detrimental effect on the mauri of the reef.¹⁷ For those iwi with kaitiakitanga responsibilities in respect of Otaiti, the diminishing of the mauri of the reef undermines not only a taonga and tipuna that is independently of great significance to them but also their own mana.¹⁸ As kaitiaki of Otaiti it is felt that iwi have an obligation to ensure that the reef is returned to its pre-*Rena* state and this has resulted in the near-unanimous desire of iwi for the total removal of the wreck from Otaiti.¹⁹ The spiritual and cultural harm caused by their perceived failure to achieve this thus far, and therefore uphold their kaitiakitanga, is deeply felt.

IV Protecting Maori interests

A Salvage and liability

The Governance Board's decision to effectively leave the restoration of Otaiti itself out of the RRP was, in essence, an election to wait until the extent of the *Rena* owner's liability, and therefore the extent of the salvage and restoration operation they were in the process of conducting, had been determined. The two statutes principally involved in determining the extent of the owner's liability were the Maritime Transport Act 1994 ("MTA") and

¹⁵ Panel on MV *Rena* Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [611]

¹⁶ Tumanoko Ngawhika Fa'au and Te Kipa Kipa Brian Morgan "Restoring the mauri to the pre-MV *Rena* state" (2014) 3 Mai 3 at 6.

¹⁷ Panel on MV *Rena* Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [611] and [616]

¹⁸ Panel on MV *Rena* Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [595]

¹⁹ Radio New Zealand "Bay of Plenty hapu furious with its iwi board" (25 June 2015) Radio New Zealand < <http://www.radionz.co.nz/news/te-manu-korihiki/277201/hapu-furious-with-iwi-board-over-rena-deal>>.

the Resource Management Act 1991 (“RMA”). Immediately after the *Rena*’s grounding was reported, the Director of MNZ (“the Director”) issued notices under sections 100A and 248 of the MTA declaring the *Rena* and the surrounding debris field to be a hazard to navigation and a hazardous ship.²⁰ As a consequence, the owner of the *Rena*, Daina Shipping Company (“DSC”), was deemed to be liable for the cost of the removal of the wreck from Otaiti and of remedying the hazard caused by the grounding.²¹ DSC subsequently appointed salvagers who began the long and arduous removal process necessary to comply with MNZ’s notices.

While the salvage process was ongoing a number of legal proceedings were brought both by and against DSC in New Zealand courts. This was a result of the parties affected by the *Rena*’s grounding attempting to recover the costs of the disaster or, in the case of DSC, to limit liability for those costs. DSC was potentially liable for damage caused by the *Rena* disaster under three key statutory provisions. Two of these, section 344 of the MTA and section 314 of the RMA, related to DSC’s liability to compensate the Crown for its expenses in responding to the disaster.²² In contrast, section 345 of the MTA provides for general liability on the part of a ship owner for pollution damages.²³ The scope of a potential award was, however, limited. The critical legal mechanism in this respect was section 85(2) of the MTA, which provided that as a ship owner that was not at fault DSC could limit their liability in respect of any claim for loss or damages to just over 11 million dollars.²⁴ DSC successfully petitioned the High Court to allow it to place this money into a limitation fund from which claimants could be compensated.²⁵ Criminal proceedings were also brought against DSC under section 338(1B) of the RMA. DSC

²⁰ Panel on MV *Rena* Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [8]

²¹ Panel on MV *Rena* Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [9], Maritime Transport Act 1994 ss 248(2)(a) and 248(4)(b)(iv).

²² Robert Makgill, Joanna Mossop and Karen Scott “Liability and Limits for the *Rena* Pollution Incident” (2011) 172 *New Zealand Lawyer* 16 at 17.

²³ Maritime Transport Act 1994, s 345.

²⁴ Maritime Transport Act 1994, s 85(2). This section has now been repealed by the Maritime Transport Amendment Act 2013. The limitation was worked out by the application of the formula in s 86 of the MTA. Section 86(3)(d) of the MTA stated that this limitation applied in respect of any claims for compensation for loss or damages, be they under common law, the MTA, the RMA or any other enactment.

²⁵ Neil Beadle “The *Rena*’s cautionary tale: limitation of liability in marine claims in New Zealand” (28 June 2013) DLA Piper <<https://www.dlapiper.co.nz/news/rena%E2%80%99s-cautionary-tale-limitation-liability-marine-claims-new-zealand>>.

was found to be strictly liable under section 15B for the discharge of harmful substances into the sea from a ship and was subject to a fine of \$300,000.²⁶

For Maori, neither the mandatory salvage process nor the prospect of making a claim for damages was sufficient to protect their interests. Pollution damage under the MTA is defined in s 342 and, insofar as it relates to damage to the environment, is limited to the costs of the restoration of the environment and to losses of profits as a result of environmental impairment.²⁷ The scope for iwi to claim for the costs of restoring the environment was limited as the both the coastal clean-up and wreck salvage efforts had been funded by the Crown or DSC. Loss of profit claims would also be limited to situations where Maori were able to show the requisite causation between the damage to the environment and any lost income.²⁸ Neither of these claims could result in damages purely on the basis of the detriment to Otaiti and the marine and coastal environment. Both the MTA and the RMA fail to recognise and allow Maori to claim for damages in their role as kaitiaki for the detrimental effects on the environment itself.

Regardless of the nature of the damages available, the number of parties affected by the wrecking of the *Rena* meant that the limited amount of funds in DSC's compensation fund was insufficient to fully compensate all claimants.²⁹ It therefore had to be divided amongst those who were deemed to have a valid claim.³⁰ This would both diminish the amount of potential compensation available to Maori claimants should they pursue compensation and again fail to acknowledge the special relationship of Maori with the environment by placing them on the same footing as a claimant seeking compensation for economic loss or other pollution damage.

The criminal fine provided a semblance of *utu* (reciprocity) to Maori for the damages caused by the *Rena*. The capacity of the fine to function as redress was, however, limited by its minute scale and the fact that it was payable only to the Crown.

The notices issued by the Director, while on their face requiring the total removal of the wreck from Otaiti, were later altered to reflect the terms of a settlement between DSC and

²⁶ *Maritime New Zealand v Daina Shipping Company* (Unreported, CRI-2012-070-001872, District Court of Tauranga, Wolff J, 26 October 2012) (*Daina Shipping Company*) at [17].

²⁷ Maritime Transport Act 1994, s 342.

²⁸ Bevan Marten "Pollution, liability and the *Rena*: Lessons and opportunities for New Zealand" (2013) 3 VUWLRP 48 at 56-57.

²⁹ Marten, above n 28, at 53.

³⁰ *Daina Shipping Company v MV Rena Claimants* [2013] NZHC 3450.

the Crown. The settlement provided the Crown with \$27.6 million in lieu of its ability to claim damages against DSC.³¹ It also included, however, provision for a further \$10.4 million in compensation to the Crown and the cessation of the removal obligation if a resource consent application by DSC to leave the remainder of the Rena on Otaiti was granted. DSC filed this resource consent application, undermining the ability of the notices to force them to fully recover the wreck. The consent process consequently became the key battleground for the assertion of Maori interests.

B Consent application

In June 2014 DSC applied to the Bay of Plenty Regional Council (“BPRC”) for resource consent to abandon the remnants of the wreck on Otaiti and for consent for any future discharges of contaminants from the wreck.³² Resource consent decisions are governed by the RMA, which requires decision makers to have regard to the effects on the environment of allowing an activity.³³ Part 2 of the RMA sets out the overarching purpose of the RMA: sustainable management.³⁴ When considering whether an application is consistent with this purpose, decision makers are presented with matters of national importance and other matters that must be incorporated into their decisions to varying extents. Of particular relevance to the Rena disaster’s effects on Maori is the requirement that decision-makers must provide for the preservation of the natural character of the coastal environment and the relationship between Maori and taonga natural resources, have regard to kaitiakitanga, and take into account the principles of the Treaty of Waitangi.³⁵

Section 104(1) of the RMA mandates that decisions also be consistent with plans and policy statements, which implement these high level considerations in a more specific, localised manner.³⁶ The hierarchy of planning documents that applies in respect of a maritime disaster begins with the New Zealand Coastal Policy Statement (“NZCPS”), which provides in its policies that decision makers must avoid adverse effects on natural character.³⁷ These policies are reiterated in the BOP Regional Coastal Environment Plan

³¹ The Waitangi Tribunal *The final report on the MV Rena and Motiti Island claims* (WAI 2391 and WAI 2393, 2015) at ch 3.

³² Resource Management Act 1991, ss 15A and 15B.

³³ Resource Management Act 1991, s 104(1)(a).

³⁴ Resource Management Act 1991, s 5.

³⁵ Resource Management Act 1991 ss 6(a), 6(e), 7(a) and 8.

³⁶ Resource Management Act 1991, s 104(1)(b).

³⁷ New Zealand Coastal Policy Statement 2010, policies 13(1)(a) and 15(1)(a).

(“RCEP”). RCEP requires that the natural character of an environment be restored if it is degraded.³⁸ Combined, this slew of purpose provisions and plan policies seems to militate against the granting of a consent to DSC. Indeed, the decision stated that the proposal was neither consistent with the strong directions to Maori contained in Part 2 of the RMA nor with the majority of the purpose provisions in ss 6, 7 and 8 and the corresponding policies in the NZCPS and the RCEP.³⁹

Despite the proposal’s abject failure to align with Maori interests, on 26 February 2016 a panel of hearing commissioners (“the Panel”) appointed by BPRC issued a decision granting the consent. The crux of the Panel’s decision was that the array of monitoring and restoration obligations imposed on DSC by the conditions of the consent would mitigate the harm to both Maori and the environment to a sufficient extent.⁴⁰ Critical to this reasoning was their lack of jurisdiction to order the removal of the wreck, had that been their preference.⁴¹ This potentially meant that, in the absence of consent, the wreck would have remained on Otaiti without any of the harmful effects being addressed at all.⁴² This decision flew in the face of the 46 submissions to the panel by Maori that strongly opposing leaving the remains of the Rena on Otaiti.

The Panel’s decision to grant the proposal is indicative of the weakness of the RMA’s consent process when it comes to protecting Maori interests in the wake of damage to the marine environment. The Supreme Court in *Environmental Defence Society v New Zealand King Salmon* held that the courts could give effect to “environmental bottom lines” where the provisions of planning documents were sufficiently directive as to the way the purpose of the RMA should be implemented.⁴³ The effect of this finding is, however, limited to plan change decisions. This is due to the difference in the wording of the relevant provisions of the RMA, with decisions in relation to resource consents being subject to Part 2 but with decision-makers only being required to have regard to planning documents as opposed to giving effect to them.⁴⁴ As a consequence, the “overall broad

³⁸ Bay of Plenty Regional Coastal Environment Plan 2011, policy 4.2.3(g)

³⁹ Panel on MV Rena Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [756-757]

⁴⁰ Panel on MV Rena Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [776]

⁴¹ Panel on MV Rena Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [768-770]

⁴² Panel on MV Rena Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [777-779]

⁴³ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 41.

⁴⁴ Resource Management Act 1991, s 104(1)(b).

judgment” approach that was overruled in *King Salmon* in respect of plan changes remains the operative approach to resource consent decisions.⁴⁵ This allowed the Panel to award a consent to DSC despite the harmful effects for Maori and the environment on the basis that it was, on balance, the preferable way to exercise their broad judgment discretion.

While it proved to be so in this case, a broad judgment approach is not necessarily disadvantageous to Maori interests. All things being equal, it would be just as possible for a decision maker to exercise their broad judgment discretion to make a decision that favoured Maori interests over other considerations. The issue with this, however, is that the weight that is given to Maori interests is often less than they deserve, with non-quantifiable cultural or spiritual matters particularly prone to undervaluing.⁴⁶

C Moving forwards

While a number of submitters to the Panel are appealing the decision in the Environment Court, the focus for many iwi has shifted towards ensuring Otaiti’s protection in the future. The implementation of the exclusion zone around the reef has led to the flourishing of marine life in an area that was previously subject to intensive commercial and recreational fishing.⁴⁷ This has, however, been endangered by the lifting of the exclusion zone as a result of the *Rena* no longer posing a hazard to navigation.⁴⁸ To protect Otaiti from having its newly regenerated marine life whisked away by returning fishers, the Motiti Rohe Moana Trust have applied for a two year rahui (customary fisheries closure) over the reef under s 186A of the Fisheries Act 1996. The Minister for Primary Industries is able to grant such an application where a rahui would improve the availability of marine life in the area in question.⁴⁹ Whether this would in fact be the case is highly contested, with over 250 submissions being made to the Minister in relation to the proposal. A rahui is, as a consequence, far from a certainty.

⁴⁵ Paul Beverley and David Allen “Implications of the New Zealand King Salmon Supreme Court decision” (30 July 2014) Buddle Findlay < <http://www.buddlefindlay.com/insights/implications-of-the-new-zealand-king-salmon-supreme-court-decision/>>.

⁴⁶ *Wakatu Incorporation v Tasman District Council* [2012] NZEnvC 75. Panel on MV *Rena* Resource Consent Applications *Astrolabe Community Trust* (February 2016) at [441].

⁴⁷ Sonya Bateson “Astrolabe open for fishing and diving” (5 April 2016) Bay of Plenty Times <http://www.nzherald.co.nz/bay-of-plenty-times/news/article.cfm?c_id=1503343&objectid=11616801>.

⁴⁸ New Zealand Herald “*Rena* wreck no longer a hazard” (4 April 2016) New Zealand Herald <http://m.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11616536>.

⁴⁹ Fisheries Act 1996, s 186A(2)(a).

A rahui around Otaiti is intended to be the first step towards achieving a higher level of protection for the reef. The preference of iwi is for Otaiti to be given full marine reserve status in the long term.⁵⁰ This would allow the reef to be preserved in its natural state, protected from fishing and other damaging activities such as mining and drilling. This may, however, be difficult under the current legal framework. The recognition of Otaiti as being of outstanding natural character suggests that it meets the requirement that its continued preservation is in the national interest.⁵¹ The purpose of that preservation, however, must be for scientific study, not for the protection of the Maori cultural values that would drive an application for protection of Otaiti.⁵² Marine reserve status may therefore be unsuitable for Otaiti. This may all be immaterial if the government enacts the proposed Marine Protected Areas Act (“MPAA”). The MPAA consultation document suggests that marine reserve status may be obtained for the purpose of preserving areas in their natural state for the conservation of marine biodiversity, a requirement ideally aligned with a diverse marine environment like Otaiti.⁵³

In the absence of the MPAA there are a number of other, more limited, environmental protection mechanisms that could be utilised by iwi for the preservation of Otaiti. Recognition and protection of customary rights through taiapure-local fishery restrictions or the awarding of wahi tapu status to the area surrounding Otaiti have the capacity to place some limits on fishing activity around the reef. While both mechanisms apply to areas that have customarily been of significance to Maori, the species, quantity, time, size and method of taking fish can be regulated within a taiapure-local fishery.⁵⁴ Wahi tapu conditions cannot restrict the rights of fishers to take their allocated quota of fish, making it less effective at providing the kind of wildlife protection sought for Otaiti.⁵⁵

Iwi may also seek to protect their interests in respect of Otaiti through one of the co-management mechanisms within the RMA. A joint-management agreement with the BOP Regional Council could allow Maori to have a role in the exercise of council powers,

⁵⁰ Roger Grace “Application for temporary closure at Otaiti” (2 February 2016) Whangateau Harbourcare <https://whangateauharbour.org/2016/02/02/application-for-temporary-closure-at-otaiti/#_Toc432694061>.

⁵¹ Bay of Plenty Regional Policy Statement 2014, appendix I. Marine Reserves Act 1941, s 3(1).

⁵² Marine Reserves Act 1971 s 3(1). Ministry for the Environment *A New Marine Protected Areas Act: Consultation Document* (Ministry for the Environment, January 2016) at 17.

⁵³ Ministry for the Environment, as above n 52, at 17. Otaiti is home to a number of rare species of fish in greater numbers than surrounding marine environments.

⁵⁴ Fisheries Act 1996, s 185(1).

⁵⁵ Marine and Coastal Area (Takutai Moana) Act 2011, s 79.

such as decisions on consent applications, where they affect Otaiti.⁵⁶ While yet to be enacted, the iwi participation arrangements provided for in the Resource Legislation Amendment Bill could lead to a similar power sharing arrangement with the Council, albeit one in relation to the making and changing of policy statements and plans.⁵⁷ This kind of arrangement would allow iwi to have a hand in setting the legal frameworks that govern the exercise of council powers discussed above.

Unfortunately for Maori seeking to establish protection for taonga that are damaged in a maritime disaster on the basis of their cultural value, none of the mechanisms canvassed here are ideally suited for that purpose. Customary fishing restrictions are based on cultural significance but are too limited in their scope and don't provide the recognition of mana that is necessary for taonga like Otaiti. Contrastingly, marine reserves provide adequate protection and have a high-mana status but are focussed on scientific study. Co-management options are a different kind of mechanism, allowing iwi to be involved in decisions that affect the marine environment in order to protect it. As a consequence, however, they are more useful for preventing or planning for the event of harm caused by maritime disasters than they are for responding to them.

V Conclusion

The grounding of the Rena displayed the inability of existing legal mechanisms to protect Maori interests in the wake of a maritime disaster. There is some scope for iwi to seek compensation for damages under the MTA. This will, however, often be too limited to provide meaningful redress and is unavailable in respect of the most significant damage suffered by Maori in such circumstances: cultural and spiritual harm caused by damage to marine environments in respect of which they are kaitiaki. Similarly, the non-existence of bottom lines in terms of harm caused to Maori in RMA resource consent decisions compromises the ability of those processes to adequately protect Maori interests. While there are other means through which Maori groups may achieve protection for marine areas, their purpose is not to be utilised as such. They are, as a consequence, largely insufficient to achieve the type and extent of environmental protection sought by Maori.

⁵⁶ Resource Management Act 1991, s 36D.

⁵⁷ Resource Legislation Amendment Bill (101), s 58K.