

Taonga Tikanga Tiriti



Regulation options for the access and utilisation by Maori of indigenous organisms considered prohibited plants and controlled drugs.



Introduction

In the absence of the Crown responding comprehensively to WAI262 and not being a signatory to the Nagoya Protocol, most Taonga species – those organisms that are indigenous/native or endemic to Aotearoa – have almost no legal protections from researchers and companies interested in biodiscovery. Ironically however, legislation passed in 1975, the same year as the Treaty of Waitangi Act, means that a small subset of taonga have exclusive control vested, at least in the law of the New Zealand government, in Crown Ministers and agencies.

The Misuse of Drugs Act (MoDA 1975) has an interesting, perhaps surprising, story behind how it came about – this is covered well in the 2011 Law Commission review of MoDA. This report will present a set of regulatory options for ensuring legislation and public policy is consistent with Te Tiriti o Waitangi and emerging global indigenous rights norms.

Te Tiriti o Waitangi and tikanga can no longer be regarded as something to be considered only in the face of a direction to do so or in the context of a Treaty-related issue.

Guidance and direction from the Waitangi Tribunal and from our highest courts has taken us to a place in which te Tiriti and its principles should be taken into account by public bodies (irrespective of a direction to do so in legislation), not only when making particular decisions, but so that they form part of the fabric of our systems and decision-making processes.

The Treaty principles of partnership, active protection, and the right to development options are such that public bodies need to be actively incorporating Te Ao Māori into their frameworks and their way of thinking.

The Waitangi Tribunal summarised the position in its all-embracing Ko Aotearoa Tēnei report¹ in the following way:

What we saw and heard in sittings over many years left us in no doubt that unless it is accepted that New Zealand has two founding cultures, not one; unless Māori culture and identity are valued in everything the government says and does; and unless they are welcomed into the very centre of the way we do things in this country, nothing will change. Māori will continue to be perceived, and know they are perceived, as an alien and resented minority, a problem to be managed with a seemingly endless stream of taxpayer-funded programmes, but never solved.

We adjure those with the power to look to the Treaty of Waitangi for the guidance and vision necessary to avoid this path of failure. It is in the fact that the agreement at Waitangi took the form of the Treaty that we see mutual respect for each other's mana and it is in the Treaty's words that we find the promise that this respect will last forever. That is the essential element of the Treaty partnership confirmed time and again in the courts and in this Tribunal. There are many reasons to take this partnership principle and build it into all of our national institutions. It gives a sense of right and place, grounding us

¹ Wai 262 – Reporting on Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity (2011) – sometimes referred to as the “flora and fauna” claim but deals with subject matter that is considerably broader.

in the traditions of the Pacific and the West at the same time. It provides the centre of gravity around which a multicultural nation can coalesce. It is essentially optimistic in outlook and it relieves both Māori and Pākehā of the burden of a troubled past. It is the precondition for unlocking Māori potential for the benefit of the country as a whole. It is the core of our national identity. And it is unique.

² The marae is in the process of utilising a number of varieties of Psilocybe mushrooms endemic to New Zealand, but Werarōa is a central focus.

This paper will look at the Treaty jurisprudence that brings us to this place, and which, it will be suggested, should guide the regulation of taonga species in Aotearoa. In this regard, it will provide a review of the regulatory framework in Aotearoa New Zealand of traditional medicines and therapeutic products derived from indigenous organisms. This discussion focuses on the regulation of native mushrooms, known to the whānau of Rangiwahō marae as Whare Atua, and to the general public as Psilocybe werarōa, as a case study for the broader regulation of native/taonga species including other indigenous fungi that the Tū Wairua project is working with.²

This paper draws from the Treaty and tikanga jurisprudence developed by the courts and the Waitangi Tribunal to develop a theory about what the regulatory framework should provide in order to be Te Tiriti compliant. It will identify problems with the current regulatory framework in terms of its compliance with Te Tiriti o Waitangi and its capacity to provide for the rangatiratanga aspirations of Māori as they relate to the cultivation and/or use of taonga species such as Werarōa.

The paper then explores possible alternative regulatory pathways that better centre Te Tiriti o Waitangi and tikanga Māori and poses a number of questions in that regard.

Finally, it provides an overview of how those pathways might be pursued through litigation in the Courts or Waitangi Tribunal or through direct negotiations with the Crown.

The structure of this report is as follows:

- a. Overview of current regulatory framework (a fuller analysis of the key legislation is set out in **Appendix A**);
- b. Analysis of Te Tiriti o Waitangi and tikanga as applicable to the regulation of taonga species;
- c. Discussion of possible alternative regulatory frameworks;
- d. Overview of potential pathways to reform;
- e. Concluding comments.

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Current Regulatory Framework

The key legislation that governs psychoactive substances and therapeutic products in Aotearoa is:

- a. The Medicines Act 1981 and Medicines Regulations 1984;
- b. The Misuse of Drugs Act 1975 (**MODA**) and related secondary legislation the Misuse of Drugs Regulations 1977 (**MOD Regulations**);
- c. The Psychoactive Substances Act 2013 (**PSA**); and
- d. The Therapeutic Products Act 2023 (**TPA**). The TPA replaces the Medicines Act 1981, however, its provisions are not yet in force and the Government has recently committed to repealing the TPA.

³ Medicines Regulations 1984, sched 2, fm 1 and Psychoactive Substances Act 2013, pt 2, sb pt 1, cl 13.

The latter three statutes are ultimately the focus of this paper and full summaries are set out in **Appendix A**.

Medicines that are also “controlled drugs” are controlled under the Medicines Act and associated Medicines Regulations as well as MODA and associated MOD Regulations. In the event of any conflict between the provisions in the two sets of legislation, MODA takes precedence (as referred to in s 109(4) of the Medicines Act).

In summary, Werarora is controlled as follows:

- a. Werarora, as a fungus of the genera *Psilocybe* from which a controlled drug can be produced or which contains a controlled drug, comes within the definition of a “prohibited plant” under MODA. In order to cultivate Werarora, a licence must be obtained from the Director-General of Health pursuant to s 8 of the MOD Regulations.
- b. The chemical compound, psilocybin, which is derived from *Psilocybe* species, is categorised under MODA as a Class A drug. It is therefore a controlled drug under MODA.
- c. Any person seeking to undertake research into certain controlled drugs under MODA (including psilocybin extracted from Werarora) must obtain a licence to possess controlled drugs pursuant to s 9 of the MOD Regulations.
- d. A licence granted by the Director-General of Health is therefore currently the only avenue available to lawfully cultivate and possess *Psilocybe* species in Aotearoa.
- e. Licences to manufacture medicines and deal with controlled drugs are also required to develop a therapeutic product (such as for human use in a clinical trial).³

- f. The TPA then regulates how approved therapeutic products are manufactured, tested, imported, promoted, supplied, and exported but it does not change the current regulatory arrangements governing medicinal drugs controlled under MODA, or psychoactive substances controlled under PSA.
- g. The extent to which controlled drugs may be approved for use is largely limited to medicinal use (and clinical study/research for that purpose).

Te Tiriti o Waitangi and The Treaty Principles

The principles of te Tiriti o Waitangi are fundamentally derived from the original articles of Te Tiriti that were signed in 1840. In summary:

Article One: In te reo Māori, this article gave Queen Victoria “kāwanatanga” – or governance – over the land. In English, it gave her sovereignty. One of the problems that faced the original drafters of the te reo Māori text of the Treaty was that “sovereignty” had no direct equivalent in the context of Māori society. Rangatira (chiefs) exercised full authority (“mana”) over land and resources on behalf of the wider community. The term used in the te reo Māori version, “kāwanatanga”, was a transliteration of the word “governance”, which was then in current use.

Article Two: In the reo Māori version, this article guaranteed Māori “tino rangatiratanga” or chieftainship over the lands, villages and “taonga” (treasured things). This recognises Māori power and authority to continue to make decisions over their people and in respect of their lands. It emphasises status and authority. The English version of the Treaty gave chiefs “exclusive and undisturbed possession” of lands, forests, fisheries and other property. This text emphasises property and ownership rights. Both versions also gave the Crown the right to deal with Māori over buying land.

Article Three: By this article, the Crown promised to Māori all the benefits of royal protection and full citizenship. This emphasises equality for Māori alongside others.

The differences between the reo Māori and English texts have been the subject of much debate and controversy. The phrase “the principles of the Treaty of Waitangi” (a source of contention itself) is a mechanism intended to reconcile the differences. The approach taken by the Waitangi Tribunal to Treaty interpretation is to recognise that, although neither text is superior, considerable weight should be given to the Māori text given that almost all Māori signatories signed that version.

Treaty Principles: Jurisprudence from the Courts and the Waitangi Tribunal

The Waitangi Tribunal (the Tribunal) and the Courts (beginning with the Lands case) have provided considerable guidance on the principles of the Treaty. Commentary from the Courts and the Tribunal provides a solid starting point when considering the principles of the Treaty. However, as Justice Cooke observed in 1990, the Crown's Treaty obligations are ongoing and will evolve from generation to generation as conditions change; they are not a set of principles etched in stone or frozen in time.⁴

Moreover, the Courts are looking increasingly to Te Tiriti far more broadly; in ways that would not have been considered justiciable or possible some decades ago.⁵ They are seeing the Treaty as being a part of the fabric of New Zealand society.

Te Tiriti o Waitangi allowed the Crown to exercise *kāwanatanga*, whilst protecting the right of Māori to exercise *tino rangatiratanga*.⁶ Perhaps at the highest level, the Courts have found that the Treaty signifies a partnership between Māori and the Crown, requiring each to act reasonably towards the other and with the utmost good faith.⁷ In a related way, it has been recognised that inherent in the Crown's obligation to act in good faith is a need to make informed decisions on matters that affect Māori interests.⁸ This concept of partnership engages the constitutional relationship between the Crown and Māori, the interplay between Articles I and II of the Treaty of Waitangi, Māori citizenship rights and notions of equity under Article III and, in this particular context, the regulatory framework for taonga species.

Stemming from the fundamental principle of partnership, other principles identified by the Courts and the Tribunal are of particular relevance here:

- a. Active Protection: the Crown has a duty to actively protect the interests of Māori specified in the Treaty.
- b. Equity: the Crown has a duty to treat Māori and non-Māori equally.
- c. Development: Māori have the right to develop resources that exist pre and post-1840 and the right to develop their culture, language, and social and economic status using whatever means are available.
- d. Options: Māori have the right to choose their own social and cultural path in accordance with *tikanga* Māori.

4 Te Runanga o Muriwhenua Inc v Attorney-General, [1990] 2 NZLR 641, at 655.

5 See for example Takamore v Clarke [2012] NZSC 116, [2013] and Ngāti Whātua Ōrākei Trust v Attorney-General [2018] NZSC 84.

6 Waitangi Tribunal, The Report on the Aotearoa Institute Claim concerning Te Wānanga o Aotearoa, (Wai 1298, 2005) p. 35. The Waitangi Tribunal observed that "the point has been made by many Tribunals".

7 New Zealand Maori Council v Attorney-General [1987] 1 NZLR at 662, 673, 693, 703, 714.

8 New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 at 683.

Each of these principles are considered below.

The principle of partnership

The cession by Māori to the Crown of kāwanatanga under article 1 of the Treaty gives the Crown a right to determine social policy in accordance with the principles of good government and for the benefit of all New Zealanders.⁹ Kāwanatanga however, also involves the active protection of tino rangatiratanga as guaranteed under article 2 of the Treaty.¹⁰ The principle of partnership involves the balancing of these two things: kāwanatanga and tino rangatiratanga.

In Te Whanau o Waipareira Report, the Tribunal observed that “most of all the concept of partnership serves to answer questions about the extent to which the Crown should provide for Māori autonomy in the management of Māori affairs and, more particularly, how Māori and the Crown should relate to each other that such issues might be resolved”.¹¹ The Tribunal reported the following findings:¹²

1. The Treaty requires the protection of Māori in the exercise of their rangatiratanga. Those who deliver most effectively to Māori people are Māori communities who provide integrated services and utilise Māori holistic strategies; and
2. The quality of the Crown’s kāwanatanga is not enhanced by a piecemeal application of the policies and practices of various Crown agencies; in fact this is detrimental to the Treaty relationship.

In the Napier Hospital and Health Services Report, the Tribunal concluded that partnership in the provision of healthcare means enabling the Māori voice to be heard and Māori perspectives to influence the type of health services delivered to Māori people and the way in which they are delivered.¹³

In recognising spheres of authority there is a particular need for the Crown to recognise that the historical inequities in the expression of partnership and reciprocity have created current day disparities between the partners. Moving forward partnership and reciprocity will therefore require greater effort on behalf of the Crown.

9 New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641; Waitangi Tribunal, The Report on the Aotearoa Institute Claim concerning Te Wānanga o Aotearoa, p. 35.

10 The Report on the Aotearoa Institute Claim concerning Te Wānanga o Aotearoa, p. 35, the Waitangi Tribunal observed that “the point has been made by many Tribunals”.

11 Waitangi Tribunal, Te Whanau o Waipareira Report, 1998, p. 30.

12 Te Whanau o Waipareira Report, pp. 235-237.

13 Waitangi Tribunal, Napier Hospital and Health Services Report, p. 59.

The principle of active protection

The Tribunal in its Manukau Report said, “the Treaty of Waitangi obliges the Crown not only to recognise the Māori interests, but actively to protect them”.¹⁴

The Court of Appeal held in the Lands case that the duty of the Crown is not merely passive, but that it must act as a protector of Māori people, particularly in the use of their lands, waters and taonga to the fullest extent practicable.¹⁵ In *Ririnui v Landcorp Farming Limited*, the Supreme Court supported the Court of Appeal’s finding in the Lands case that the Crown’s duty of active protection is a “well established” principle of the Treaty. Moreover, it confirmed that the Crown’s Treaty obligations to Māori are not confined to righting historical wrongs but are continuing and forward-looking.¹⁶

The Napier Hospital Tribunal found that three general obligations flow from the Treaty duty to actively protect Māori health:¹⁷

- a. protection against the adverse effects of settlement;
- b. protection of Māori as a group against the abnormal vulnerability to disease;
- c. the promotion of Māori wellbeing as part of the community of citizens;
- d. where Māori in general suffer significantly poorer health than non-Māori, individual Māori are entitled to rely on the Crown to take active protection steps to address the disparity.¹⁸ Such action has commonly taken two forms:
 - (i) allocating health resources for remedial purposes; and
 - (ii) using information and advocacy, such as health education aimed at changing lifestyle habits.

The Napier Hospital Tribunal considered that, if Māori were guaranteed the right to their own culture, protecting it also placed an obligation on the Crown to ensure that their culture was respected by the publicly-funded medical institutions and professions that served them subject to the limits of practicality, reasonable cost, and clinical safety.¹⁹ This point was emphasised by the Waitangi Tribunal in *Ko Aotearoa Tenei* and was also picked up again in the *Hauora Report*.

Further, before any decisions are made by the Crown which may impinge upon the rangatiratanga of Māori over their taonga, it is essential that full discussion take place with Māori who have rangatiratanga over those taonga and that those Māori are able to give their fully informed views (and in certain instances consent) on those proposals.²⁰

¹⁴ Waitangi Tribunal, *Manukau Report* (Wai 8, 1985), p. 70.

¹⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 664.

¹⁶ *Ririnui v Landcorp Farming Limited*, [2016] NZSC 62, [2016] 1 NZLR 1056 at [51].

¹⁷ *Napier Hospital and Health Services Report*, pp. 53 – 54.

¹⁸ *Napier Hospital and Health Services Report*, p. 55.

¹⁹ *Napier Hospital and Health Services Report*, p. 57.

²⁰ *The Ngawha Geothermal Resources Report* p. 102; *Waitangi Tribunal He Kura Whenua Ka Rokohanga – Report on Claims about the Reform of Te Ture whenua Māori Act 1993* (Wai 2478, 2016) at 157.

The principle of equity

In considering the principle of equity, the Wairarapa ki Tararua Tribunal confirmed the view of previous Tribunals that the Treaty requires more than superficial equity in provision of healthcare. The Tribunal concluded that, historically, the healthcare provided should have been of a nature and extent that, as far as possible, protected Māori against the adverse effects of settlement, and fitted them physically and mentally for the colonial order. Whenever the general provision of services was not giving sufficient protection, additional resources needed to be devoted specifically to Māori communities.²¹

Equity requires effort beyond equitable access to services. It should focus on outcomes assessed against objective measures.

The right to development

The right to development has been described by the Tribunal as:

- a. The right to develop resources to which Māori had customary uses prior to the Treaty i.e utilisation of the resources (that being an existing resource as at 1840);
- b. The right to develop resources not known in 1840 i.e before the signing of te Tiriti (relating to newer property rights beyond those dealt with at the first level); and
- c. The right of Māori to develop their culture, language, and social and economic status using whatever means are available i.e development of Māori as a people (including, importantly, benefitting from newly discovered resources to enable them to develop as a people).

The Tribunal has found that taonga resources are protected, and a right to development exists under Article 2 of the Treaty in respect of those resources.²² A protected interest is not confined to traditional use or pre-Treaty technology or needs and includes a right to develop economically.²³

This was confirmed in the Radio Spectrum Management and Development Interim Report, where the Tribunal held that there was a Māori right to develop taonga – through technology that has subsequently become available.²⁴

²¹ Wairarapa ki Tararua Report, pp. 355 and 358.

²² Waitangi Tribunal Preliminary Report on the Te Arawa Representative Geothermal Resource Claims (Wai1153, 1993), at [2].

²³ Ibid, at [5.7].

²⁴ Waitangi Tribunal Radio Spectrum Management and Development Interim Report (Wai776, 1999), at [3.3.6].

The principle of options

The principle of options assures Māori of the right to choose their own social and cultural path in accordance with tikanga Māori. In the context of health services, the Tribunal has found that Māori have the right to access health services that provide traditional rongoā and/or are provided in a manner consistent with tikanga Māori that embraces Māori beliefs, tapu practices, and whānau support relevant to the care of Māori patients. In the Napier Hospital Report, the Tribunal considered that this principle requires, at minimum, respect for the most important facets of tikanga Māori within the public health system.²⁵

Axiomatically interlinked with the customary rights and interests of iwi and hapū protected under the Treaty is the exercise of tikanga in relation to lands, waters and other taonga – including health.

Consistent with Tribunal jurisprudence, courts at the highest level have come to recognise, and have made it clear, that tikanga is part of the fabric of New Zealand common law as will be discussed more fully below.²⁶ Certainly, in the context of the Crown's obligations under the Treaty – particularly where those obligations are recognised in statutes – the entitlement of iwi and hapū to exercise tikanga is necessarily an integrated and essential element.

The exercise of tikanga is as fundamental an expression of Māori culture as is Te Reo Māori, which was recognised as a taonga, and subject to the Crown's duty of active protection, in the Broadcasting Assets case:²⁷

It was not disputed either that the prime objective of the Treaty was to ensure a proper place in the land for the two peoples on whose behalf it was signed. Nothing could be further from that objective than the obliteration of the culture of one of them or its absorption into that of the other.

Are Treaty principles reflected in the current regulatory regime and legislative framework?

As discussed, the primary governing legislation for Weraroa is MODA. MODA does not refer to Te Tiriti o Waitangi or the principles of the Treaty of Waitangi or provide guidance on the extent that Te Tiriti should be applied. This is a clear weakness in a critical piece of legislation that controls taonga species as there is no explicit or direct requirement for the Crown to administer the Act in a way that is consistent with te Tiriti o Waitangi.

Notwithstanding this, there have been developments in the common law that speak to the relevance of Te Tiriti even when legislation is silent on it. For example:

- a. In the 1987 case of *Huakina Development Trust v Waikato Valley Authority*, the High Court first accepted that Te Tiriti

²⁵ Napier Hospital and Health Services Report, p. 65.

²⁶ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

²⁷ *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 at 587 per Hardie Boys J.

is an extrinsic aid to statutory interpretation on the basis that “there can be no doubt that the Treaty is part of the fabric of New Zealand society”.²⁸ In this case there was no mention of Te Tiriti in the relevant legislation (the Town and Country Planning Act 1977). Despite this omission, drawing on Te Tiriti, the Court went on to consider that Māori spiritual and cultural values were relevant to a consent to discharge treated effluent into the Kopuera Stream.

- b. In the 1997 case of *Barton-Prescott v Director-General of Social Welfare*, the High Court said that Te Tiriti was “designed to have general application” and therefore “must colour all matters to which it has relevance, whether public or private”.²⁹ This was in the context of family law legislation that also had no reference to Te Tiriti o Waitangi.
- c. In 2011, the Court of Appeal in *Takamore v Clarke* made the generic but powerful statement that “[i]t requires no leap of faith ... to suggest that in general the common law of New Zealand should as far as is reasonably possible be applied and developed consistently with the Treaty of Waitangi”.³⁰
- d. In 2021, the Supreme Court in the *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* case held that, although there was a relatively extensive Te Tiriti section in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 that referred to steps taken by the Crown in order “to recognise and respect” their responsibility to “give effect to the principles of the Treaty of Waitangi”, “an intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear”.³¹
- e. In 2022, the High Court in the *Ngāti Whātua Ōrākei Trust v Attorney-General* case said “whether the Treaty is incorporated into law by legislation makes little difference, due to the principles of statutory interpretation and administrative law”.³²

These cases indicate that, particularly in areas of concern to Māori, the Courts consider Te Tiriti (and associated tikanga considerations) as relevant even in instances where there is no legislative reference.

This issue was tangentially broached in the ACC case of *Stafford v Accident Compensation Corporation* [2020] NZCA 164. In this case, the Court of Appeal grappled with whether ACC were required to hold property to settle the Crown’s liabilities (of a fiduciary nature) in respect of Te Taihu iwi. The majority held they were not required to do so in part because the property could not be said to be subject to ministerial control sufficient to treat ACC as “an instrument of the Crown”. As per the Crown Entities Act 2004 (CE Act) ACC is a “statutory entity” that is defined as “a body corporate” and a separate legal entity from “the Crown”.³³

28 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

29 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 at 184.

30 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [249].

31 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801, [2021] NZSC 127 at [8] and [151].

32 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at [589]. Emphasis added.

33 *Crown Entities Act 2004*, ss7 and 15.

Justice Williams (now a member of the Supreme Court) in a dissenting judgement in *Stafford* held that the Treaty of Waitangi was relevant because the obligation upon which the proceeding was based is reflected, and to some extent sourced in, *te Tiriti* and that there is a constitutional dimension to the case. He went on to find that the CE Act ought to be interpreted so as to enable the Crown to discharge its obligations to *Te Taihū iwi* in a manner consistent with the Treaty partnership. He therefore held that “a Treaty-consistent construction ought to be adopted”. This Treaty-consistent language was picked up and adopted in the Supreme Court *Trans-Tasman Resources* decision.

The jurisprudence indicates that although *Te Tiriti o Waitangi* is not directly referenced in *MODA*, it may still be considered relevant to the exercise of functions under the Act and one could argue that in making decisions in relation to *taonga* species, *te Tiriti* must bear on those decisions. Having said that, an operative clause in *MODA* that directed the Act to be administered so as to give effect to *te Tiriti* would remove any ambiguity. Language similar to section 4 of the Conservation Act 1987 for instance would be helpful. The Conservation Act requires interpretation and implementation of its provisions of the legislation in accordance with *Te Tiriti*. This drafting would also be consistent with what the Tribunal recommended in its *Hauora* Report.

The relevance of Tikanga Māori

Tikanga is the first law of Aotearoa. It is a fundamentally self-regulated system of law that will continue to operate irrespective of its recognition by the state legal system.³⁴ However, a dialogue exists between tikanga and state law and the courts have recognised tikanga can have legal weight and effect in relevant cases.

Te Tiriti engages and imports tikanga considerations. In both *Huakina* and *Barton-Prescott* the reading of *Te Tiriti* into the legislative frameworks meant that tikanga principles and values were considered.³⁵ The Waitangi Tribunal has found that *He Whakaputanga*, and subsequently *Te Tiriti o Waitangi*, guaranteed Māori the power to make law³⁶ and that the principle of active protection extends to the Crown’s duty to actively protect tikanga.³⁷

In this context, principles of *Te Tiriti* are directly relevant to ascertain what is required to address Māori concerns.³⁸ It is clear that where *Te Tiriti* is used as an extrinsic aid to interpret a statute, it is a natural corollary that courts will draw on principles of tikanga to ascertain what is required to uphold *Te Tiriti o Waitangi*.³⁹

Tikanga as part of the common law

In addition to tikanga being relevant in this context through *Te Tiriti*, tikanga is also relevant because it is part of the common law of Aotearoa New Zealand.⁴⁰

34 Tikanga Māori is made by *iwi* and *hapū*, governing behaviour of *iwi* and *hapū*. See *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at [35]. Further, while judges must increasingly work with tikanga, they have neither the mandate nor the expertise to develop or authoritatively declare the content of tikanga. See *Ellis v R* [2022] NZSC 114 at [270] per Williams J.

35 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 223; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184-185.

36 Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty: The Report on Stage One of the Te Paparahi o Te Raki Inquiry (Part II)* (Wai 1040, 14 October 2014) at 521.

37 See *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at [603]. See *Ellis v R* [2022] NZSC 114 at [107] and [110] per Glazebrook J, [168], [169] and [172] per Winkelmann CJ and [272] per Williams J.

38 Trade Marks Act 2002, s 3.

39 *Gwyn J in Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942, [2022] 2 NZLR 148 considered tikanga is an integral part of considering and applying the principles of *Te Tiriti* at [99].

40 See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]-[95] per Elias CJ and at [150] and [163] per McGrath, Tipping and Blanchard JJ.

The Supreme Court in *Ellis v R* unanimously held that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa New Zealand in cases where it is relevant.⁴¹ The court majority found the relationship between tikanga and the common law will evolve contextually and as required on a case by case basis.⁴² The principles of mana, whanaungatanga, whakapapa, hara, utu and ea, for instance, were relevant in determining whether it was in the interests of justice for the appeal to continue despite the appellant's death.⁴³

Glazebrook J in *Ellis v R* observed that legislation should be consistent with tikanga to the extent possible, and modern legislative practice has been to incorporate tikanga principles into a wide range of statutes where relevant, citing ss 17 and 178 of the Act.⁴⁴

41 *Ellis v R* [2022] NZSC 114 at [110] per Glazebrook J; [172]-[174] per Winkelmann CJ; [256] per Williams J; [280] per O'Regan and Arnold JJ.

42 *Ellis v R* [2022] NZSC 114 at [116], [119] and [127] per Glazebrook J, [183] per Winkelmann CJ and [261] per Williams J.

43 *Ellis v R* [2022] NZSC 114 at [144] per Glazebrook J; [186]-[199] per Winkelmann CJ; [256] per Williams J.

44 *Ellis v R* [2022] NZSC 114 at [99] [100] per Glazebrook J.

Is tikanga protected in the current regulatory regime and legislative framework?

Tikanga is therefore arguably legally relevant, although not explicitly protected, in the regulation of taonga species through MODA by virtue of the presumption to interpret statutes consistently with tikanga. In particular, the subject matter supports the consideration and application of tikanga because the regulation of the use of Weraroa involves mātauranga Māori (Māori knowledge and traditional usage and the protection of a Māori word - which is the name of a taonga).

The legal status and/or tikanga-based rights and interests in a taonga species such as Weraroa have not yet been tested in Court. However, we consider that it could be legally relevant in a number of ways including:

- a. as part of a legal presumption to interpret statutes consistently with tikanga;
- b. as part of the implicit protection afforded to tikanga (through the Treaty);
- c. as a mandatory relevant consideration; and/or
- d. as a customary right that may be able to be enforced through the common law.

In particular, we consider the subject matter here supports the consideration and application of tikanga because the regulation of taonga species has implications for tikanga, particularly regarding traditional use. If tikanga can be relevant in the case of a non-Māori person who has passed away (as in the case of *Ellis*), tikanga is likely to be of some significance in the context where the iwi are seeking protection and respect for a taonga species and specific longstanding Māori customary practice.

What are the principal issues with the current regulatory regime?

The guarantee of tino rangatiratanga affords Māori, through their iwi, hapū, or other organisations of their choice, the right to decision-making power over their affairs.⁴⁵

In the Ngāpuhi Mandate Inquiry Report, the Tribunal noted ‘the capacity of Māori to exercise authority over their own affairs as far as practicable within the confines of the modern State’ is key to the active protection of tino rangatiratanga.

The nature of the current regulatory regime for taonga species, where they are controlled/regulated under MODA, has undermined the importance of shared governance arrangements with Māori at the local level. The ability for Māori (iwi and hapū) to participate in decision making governing the use and development of taonga species, particularly where those species are controlled under MODA (either as prohibited plant species or as controlled drugs), is limited.

The licensing regime that is established under MODA and MOD Regulations essentially delegates all decision-making power away from Māori to the Director-General of Health. While it is not impossible for iwi and hapū to cultivate, use and/or develop taonga species such as Weraroa, their ability to do so is entirely dictated by MODA and subject to the grant of licences for limited purposes.

⁴⁵ Waitangi Tribunal, Hauora Report: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry (Wai 2575, 2023), at [3.3].

Alternative Pathways: Designing A Tiriti- Compliant Regulatory Framework

What would a Tiriti-compliant legislative/ regulatory regime look like?

Arguably, the proper exercise of kāwanatanga by the Crown in the context of the regulatory regime for taonga species requires the Crown to ensure that:

- a. the rights of any decision-making bodies to make decisions which may affect these taonga are matched by the responsibilities of those same authorities to recognise the rights and values of iwi and hapū to those taonga, and to give effect to the Crown's Treaty obligations;⁴⁶
- b. there is adequate and effective Māori representation on any delegated authorities or bodies established by the Crown that will make decisions which may affect Māori taonga;
- c. Māori are properly consulted about decisions which may affect their taonga, or their relationship with taonga;⁴⁷
- d. to the extent the Crown develops systems, those systems or provisions accord sufficient priority to the iwi/hapū/Māori interest in the resource;⁴⁸
- e. Māori are afforded proper scope for the exercise of authority in relation to the management of their taonga species.⁴⁹

Reflecting on those key principles, we turn to some reform options that might better provide for te Tiriti and tikanga within a regulatory framework.

Option One: Deregulation and removal of taonga species from MODA

One reform option would be to seek to amend MODA to remove taonga species entirely from the regulatory framework – essentially de-regulate taonga species. Such an approach would allow for Māori to use taonga species as they have traditionally without regulations and State interference.

46 Tauranga Moana Report, p. 476.

47 The Ngawha Geothermal Resources Report, p.102.

48 Waitangi Tribunal, Preliminary Report on the Te Arawa Geothermal Resource Claims (Wai 153, 1993) p. 23.

49 Preliminary Report on the Te Arawa Geothermal Resource Claims, p. 23.

Although this option ostensibly prioritises the exercise of rangatiratanga, it raises a question as to what the scope of de-regulation would be, and whether it could accommodate modern use and/or development of taonga species in addition to customary usage.

There may be little appetite to amend MODA to completely de-regulate taonga species (that have previously been prohibited by MODA) if they are no-longer being used in a traditional way.

Option Two: Legislative reform (including secondary legislation)

Amend MODA and incorporate te Tiriti directly into the legislation

This approach envisages an overhaul of the current legislation and regulations and a repeal and re-write of MODA, that builds Te Tiriti and its principles into the legislation.

There are a growing number of references to the “Treaty” or “Treaty principles” in statutes. Almost all statutes with Treaty clauses are concerned with a regulatory regime of some kind.

Most references to the Treaty or Treaty principles are in statutes governing physical resources and the environment, where Māori have strong iwi and hapū relationships, often involving kaitiaki (guardian) relationships – including over land, water, important sites, wāhi tapu and other taonga. However (and perhaps increasingly so), references are made to Treaty principles in legislation governing other areas in which Māori have an interest, for example, taonga such as the language (te reo) and hauora (health) and Māori protocol.

Statutory provisions containing Treaty references place obligations on a range of parties, many of which are not the Crown, including local authorities, Crown entities (for instance District Health Boards), officers of Parliament and corporate bodies.

In recent years there appears to have been a trend towards the inclusion of more specific Treaty clauses, which specify the action to be taken in satisfaction of the Treaty principles, instead of expressing Treaty obligations in broad terms. For instance, the earlier, comprehensive (and emphatic) Treaty reference in section 4 of the Conservation Act 1987 may be compared with the more limited mechanism included in the later Local Government Act 2002 allowing for Māori participation in local government decision making processes:

- a. Section 4 of the Conservation Act 1987 provides: “This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi”.
- b. Section 4 of the Local Government Act 2002 provides: “In order to recognise and respect the Crown’s responsibility to take appropriate account of the principles of the Treaty of Waitangi

and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes”.

50 MODA, s 5AA.

Treaty provisions in legislation are generally divisible into two main types: those directed towards the decision-making process and those directed towards substantive decision outcomes. Most existing Treaty provisions are of the former, process-focused, type. They require a decision maker to take the Treaty principles genuinely into consideration when making certain decisions, but do not require that the decision outcome be consistent with or give effect to the Treaty principles. However, a limited number of statutory provisions do focus on the decision outcome.

Even if a standalone Treaty clause was built into the Act, this would not necessarily provide for direct Māori participation in decisions relating to taonga species. Therefore, it would also be necessary to operationalise te Tiriti in the legislation in other ways, for example, by:

- a. providing for Māori decision-making affecting of taonga species;
- b. explicitly recognising and protecting mātauranga Māori; and
- c. recognising the and protecting special relationship of hapū/iwi with taonga species.

Option Three: Partial legislative reform – establishment of separate Māori regulatory bodies governing taonga species

Māori expert on the Expert Advisory Committee

This pathway essentially adopts the status quo (in terms of the overall regulation of taonga species that are controlled under MODA) but amends MODA to include a Māori expert on the Expert Advisory Committee on Drugs.

Under MODA, the Minister must establish an Expert Advisory Committee on Drugs (**EACD**) to advise the Minister on drug classification matters.⁵⁰

The functions of the Committee are:

- a. to carry out medical and scientific evaluations of controlled drugs, and any other narcotic or psychotropic substances, preparations, mixtures, or articles; and
- b. to make recommendations to the Minister about:
 - (i) whether and how controlled drugs or other substances, preparations, mixtures, or articles should be classified; and

- (ii) the amount, level, or quantity at and over which any substance, preparation, mixture, or article that is a controlled drug (or is proposed to be classified as a controlled drug), and that is to be specified or described in clause 1 of Schedule 5, is to be presumed to be for supply; and
 - (iii) the level at and over which controlled drugs to which clause 2 of Schedule 5 applies are presumed to be for supply; and
- c. to increase public awareness of the Committee's work, by (for instance) the timely release of papers, reports, and recommendations.

Currently, the Act requires the EACD to consist of up to 11 members. The Committee must comprise up to:

- a. five people who, between them, have appropriate expertise in: pharmacology; toxicology; drug and alcohol treatment; psychology; and community medicine; and
- b. three people employed in the Public Service who between them have appropriate expertise in: public health; the appropriateness and safety of pharmaceuticals and their availability to the public; and border control; and
- c. Also required are:
 - (i) one Police employee;
 - (ii) one employee of the Ministry of Justice who has appropriate expertise in matters relating to the justice system; and
 - (iii) one person representing the views of consumers of drug treatment services.

There are currently no requirements for any of the experts on the advisory committee to be Māori or have knowledge and expertise in tikanga, mātauranga Māori, traditional therapeutic product uses or taonga species.

It could therefore be a requirement to appoint a Māori representative with knowledge and expertise in tikanga, mātauranga Māori and knowledge relating to rongoā, traditional therapeutic product uses and taonga species. They would be able to make recommendations to the Minister on the classifications of certain drugs and products in a more informed way.

The limitation to this approach is that the expert may not have much influence to advocate for or protect Māori rights within the current framework, as the role is essentially advisory.

Māori expert on the Expert Advisory Committee potential structure:



Establish a Māori advisory committee

This pathway essentially adopts the status quo (in terms of the overall regulation of taonga species that are controlled under MODA) but would include amending MODA to establish a separate Māori advisory committee. It would mean parties would still have to follow the ‘Medicinal Purposes Route’ for regulating products but the committee could specifically advise on taonga species and traditional therapeutic products that are included or prohibited in MODA.

This committee could also be empowered similarly to the Māori Plants Variety Committee where they can make binding decisions and recommendations regarding the classification and regulation of taonga species as they relate to or affect Māori.

Under the Plant Variety Rights Act 2022, the Māori Plant Varieties Committee may make binding decisions to nullify, cancel or impose conditions on any grants of plant variety rights⁵¹ for taonga species that may have adverse effects on kaitiaki relationships. The committee may:⁵²

- d. issue engagement guidelines and provide advice to applicants for a Plant Variety Right (PVR) and kaitiaki;
- e. consider PVR applications referred to it by the Commissioner and make decisions under this Part;

⁵¹ Plant Variety Rights grant the exclusive right to exploit propagating material of a plant variety.

⁵² Plant Variety Rights Act 2022, s 58.

- f. advise the Commissioner whether the use or approval of a proposed denomination is likely to be offensive to Māori;
- g. provide advice to the Commissioner on any information that may be relevant to application of the criteria listed in section 32 for granting a PVR.

Māori Advisory Committee potential structure:



Establish an independent Māori entity to regulate taonga species

A more progressive option would be to establish an independent Māori entity, potentially similar to entities such as Te Ohu Kai Moana and the (now disestablished) Māori Health Authority (see **Appendix B** for a fuller discussion of those entities), to undertake functions such as classifying, licensing and distributing rights to use of taonga species. This option would delegate the control/regulation of taonga species captured under MODA to a separate Māori authority.

The entity could be empowered with functions including:

- a. the allocation of licences for the use of taonga species by Māori;
- b. monitoring the use of taonga species;
- c. fostering, promoting, commissioning, or funding research into the management of taonga species;
- d. acting to protect and enhance the interests of iwi and Maori in relation to taonga species;
- e. approving other activities so long as the nature of the business activities don't deter too much from the control of taonga species.

This entity might take the shape of a national body made up of representatives from across Aotearoa. In this regard, this option raises a number of initial questions:

- a. Would there be an exhaustive list of taonga species regulated by the authority?
- b. Whose interests would be represented? Iwi? Hapū? Individual Māori? Māori entities such as trust, incorporations, PSGES? This raises the question as to where the tikanga-based right and interest in the taonga species sits.
- c. How would they be represented? I.e. what is the composition of the entity?
- d. Who would the entity be accountable to?
- e. Would the entity sit alongside the Crown (much like the Māori Health Authority) or it would it be entirely independent?
- f. How would such an entity be funded?

Independent Māori Entity potential structure:

MODA



**Expert Advisory
Committee on Drugs
(EACD)**

Advises on drug classifications



**Independent Māori
Entity - IME**

Classifying, licensing
and distributing rights for
taonga species



**Minister makes
decisions/
recommendations to
Parliament**



**IME makes decisions
relating to taonga
species**

Conclusion

The current regulatory framework for taonga species, particularly where those species are controlled under MODA and related regulations, fails to uphold the Crown's obligations to Māori under te Tiriti in respect of taonga by:

- a. criminalising taonga species and criminalising Māori in respect of the use of taonga species;
- b. removing the ability of Māori to freely interact with, possess, use, enjoy and develop taonga species;
- c. limiting the autonomy of Māori over taonga species that they have a long and enduring relationship with;
- d. preventing Māori from having any input in the decisions to grant licences and the terms and conditions of any licences;
- e. undermining the valuable role played by Māori in developing healthcare options;
- f. severely restricting economic opportunities for Māori from the development of these taonga;
- g. neglecting to protect these taonga from exploitation by non-Māori entities and actors by preventing Māori from having full rights and responsibilities for the protection of these taonga and full, undisturbed possession and control over how they are used; and
- h. limiting the ability of Māori to determine their own futures and health outcomes.

The developing body of jurisprudence on the Treaty and tikanga offers guidance on what a regulatory framework might look like in order to be Te Tiriti compliant.

As set out in this paper, there are a number of alternative regulatory pathways worth exploring to enable the use and development of taonga species. Each of these options arguably better upholds Te Tiriti o Waitangi and tikanga Māori than the current regime – some more so than others.

At one end of the scale, reform might simply look to increase the level of Māori input in decision making processes through avenues such as advisory committees. However, a more progressive, and in our view more Treaty-compliant option, would be for the direct delegation and/or sharing of decision making power with Māori in the regulation of taonga species. At this stage, no options have been discounted but it will be critical for any alternative regulatory framework to be designed with Māori to ensure that Māori rights and interests in taonga species are adequately provided for.

The options explored in this paper vary in terms of the level of intervention and/or amendment to the current regulatory regime. All would require some form of legislative change.

Appendix A:

Summary Of Legislation

Misuse of Drugs Act 1975 and Misuse of Drugs Regulations 1977

Classification

The Misuse of Drugs Act 1975 (**MODA**) is New Zealand's primary drug control law.

In MODA, substances are scheduled as Class A (very high risk), Class B (high risk) or Class C (moderate risk) depending on the risk of harm they pose to individuals and society.⁵³

Operation Ark was a high-profile case targeting the importation and supply of New Psychoactive Substances in New Zealand. It involved a vast quantity of drugs that did not meet the examples for a controlled drug analogue (**CDAs**) in Schedule 3, Part 7 of the MODA, and the suppliers argued they believed they were legal. The Court found that the examples listed in MODA were not exhaustive and that substances could still be considered as CDAs if they had a structure substantially similar to a listed controlled drug, which in this case they did.⁵⁴

"Restricted Substances", a category of drug below Class C, was briefly introduced in 2008, however was subsequently repealed by further legislation.⁵⁵ Restricted Substances were those considered to be 'less than moderately harmful' and were allowed to be sold subject to certain regulatory conditions.

Dealing with controlled drugs

Section 2 of the MODA includes the following as a prohibited plant:⁵⁶

"any fungus of the genera *Conocybe*, *Panaeolus*, or *Psilocybe* from which a controlled drug can be produced or which contains a controlled drug."

The chemical compound, Psilocybin, which is derived from *Psilocybe* species, is classed under MODA as a Class A drug,⁵⁷ posing a very high risk to individuals, or society, by its misuse.⁵⁸

The species *Wairuakohu* / *Randula Marginata* is classed as a Class B drug under MODA, posing a high risk to individuals, or society, by its misuse.⁵⁹

53 Misuse of Drugs Act 1975, schd 1.

54 Johnson, C., Shadfar, Z., Allison, J., Walsh, K., & Partington, H. (2022). Controlling new psychoactive substances in New Zealand. *Australian Journal of Forensic Sciences*, 55(5), 670–688. <https://doi.org/10.1080/00450618.2022.2067230>

55 Misuse of Drugs (Classification of BZP) Amendment Act 2008 (NZ) Amendment Bill at 146(2).

56 MODA, s 2.

57 MODA, sched 1.

58 MODA, s 3A.

59 MODA, s 3A.

Relevantly, s 6(1) of MODA provides that, excluding those exceptions set out at ss 8 or 35DD of MODA, or pursuant to a licence granted under MODA, it is prohibited to:

⁶⁰ MODA, s 6(2).

⁶¹ MODA, s 6(2A).

- a. import or export from New Zealand any controlled drug;
- b. produce or manufacture any controlled drug;
- c. supply or administer, or offer to supply or administer, any Class A or Class B controlled drug, or otherwise deal in any such controlled drug; or
- d. have any controlled drug in your possession for the purpose of supply or administration.

Every person who contravenes s 6(1) commits an offence under MODA and is liable on conviction to:⁶⁰

- a. imprisonment for life where a Class A controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed;
- b. imprisonment for a term not exceeding 14 years where paragraph (a) does not apply but a Class B controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed; or
- c. imprisonment for a term not exceeding 8 years in any other case.

Where a person conspires with any other person to commit an offence against s 6(1), they are liable on conviction to imprisonment for a term:⁶¹

- a. not exceeding 14 years where a Class A controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed;
- b. not exceeding 10 years where paragraph (a) does not apply but a Class B controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed; or
- c. not exceeding 7 years in any other case.

Other key provisions

Possession and use of controlled drugs

Section 7 of MODA provides that, excluding those exceptions set out at ss 8 or 35DD of MODA, or pursuant to a licence granted under MODA, it is prohibited to:

- a. procure or have in their possession, or consume, smoke, or otherwise use, any controlled drug; or
- b. supply or administer, or offer to supply or administer.

Exemptions from sections 6 and 7

Section 8 of the MODA sets out that despite ss 6 and 7:

- a. any medical practitioner, dentist, or veterinarian may prescribe, produce, manufacture, supply, or administer controlled drugs;
- b. any pharmacist or any person with the authority and under the immediate supervision of a pharmacist may produce, manufacture, or supply controlled drugs—
 - (i) listed in the pharmaceutical schedule within the meaning of the Pae Ora (Healthy Futures) Act 2022 for the purposes of a person eligible for a subsidy for the supply of controlled drugs; or
 - (ii) for the purposes of the hospital in which he or she is employed; or
 - (iii) pursuant to a prescription or order issued by a medical practitioner, dentist, nurse practitioner, optometrist, midwife, designated prescriber, or veterinarian:
- c. any person for whom a controlled drug is supplied by a medical practitioner or dentist, or prescribed by a medical practitioner or dentist and lawfully supplied, may administer that drug to himself or herself in accordance with the advice of the medical practitioner or dentist who supplied or prescribed it:
- d. any person having the care of a patient for whom a controlled drug is supplied by a medical practitioner or dentist, or prescribed by a medical practitioner or dentist and lawfully supplied, may administer that drug to that patient in accordance with the advice of the medical practitioner or dentist who supplied or prescribed it:
- e. any person having the care of an animal for which a controlled drug is supplied by a veterinarian, or prescribed by a veterinarian and lawfully supplied, may administer that drug to that animal in accordance with the advice of the veterinarian who supplied or prescribed it:
- f. Health New Zealand established by section 11 of the Pae Ora (Healthy Futures) Act 2022 or other corporate body, and any individual person who is the manager or person licensed to carry on a hospital or any other institution, that has the care of patients for whom controlled drugs are lawfully prescribed or supplied may possess those drugs for the purposes of the treatment of those patients:
- g. any person in the service of the Crown, or any Medical Officer of Health or any pharmacist approved by a Medical Officer of Health, may procure and possess a controlled drug for the purposes of and in connection with his or her official duties:

- h. any carrier may possess a controlled drug in the course of carriage to such extent as is necessary or incidental to the carrier's business:
- i. any person who is permitted by or under this Act to import, export, supply, or administer a controlled drug may procure that drug from a person lawfully entitled to supply it and may possess that drug in the manner and for the purposes expressed or implied in that authority:
- j. any person who is licensed or otherwise permitted under this Act to cultivate a prohibited plant may possess any controlled drug derived from that plant in the manner and for the purposes expressed or implied in that authority:
- k. any person who is permitted by or under this Act to possess a controlled drug may procure that drug from a person lawfully entitled to supply it, and may supply or use that drug in the manner and for the purposes expressed or implied in that authority:
- l. a person may, while entering or leaving New Zealand, possess a controlled drug required for treating the medical condition of the person or any other person in his or her care or control, if the quantity of drug is no greater than that required for treating the medical condition for 1 month, and the drug was lawfully supplied to the person by a medical practitioner, nurse practitioner, optometrist, midwife, designated prescriber, or dentist in New Zealand; or
- m. prescribed by a medical practitioner, nurse practitioner, optometrist, midwife, designated prescriber, or dentist, and lawfully supplied to the person in New Zealand; or
- n. lawfully supplied to the person overseas and supplied for the purpose of treating a medical condition:
 - (i) a designated prescriber, nurse practitioner, optometrist, or midwife who is authorised by regulations made under this Act to prescribe controlled drugs of any specified class or description may prescribe, supply, or administer such drugs:
 - (ii) a person who is authorised to issue a standing order may include in a standing order authority to supply and administer controlled drugs of any specified class or description, and a person who is authorised under a standing order to supply and administer any controlled drugs may supply and administer those drugs in accordance with that standing order.

Licensing Process

The licensing process is set out at Schedule 6 of MODA and Part 2 of the MOD Regulations.⁶²

The MOD Regulations state that:

- a. Except with the written approval of the Minister given in relation to a particular case, no licence may be granted to deal in a controlled drug named in Schedule 1 of the MODA.⁶³
- b. Every person who desires to obtain a licence under the Regulations must apply to the Director-General on a form to be provided by the Ministry of Health, or, with the approval of the Medical Officer of Health, otherwise in writing.⁶⁴
- c. The Director-General or the Medical Officer of Health may require any applicant for a licence to furnish information, by statutory declaration or otherwise, as to the nature of their business, the extent they wish to deal in or otherwise utilise controlled drugs, and any other matter that appears to the Director-General or the Medical Officer of Health to be relevant.⁶⁵
- d. If the Director-General is satisfied with the propriety of the application, or character of the applicant, and is satisfied that granting the licence will not conflict with any of New Zealand's international obligations, they shall grant a licence for the purposes stated in the application and in terms permitted by the Regulations.⁶⁶
- e. Particulars of every licence shall be entered in a register kept for the purpose in the Ministry of Health.⁶⁷
- f. Subject to these regulations, every licence shall be in such form as the Director-General may from time to time determine generally or in relation to any particular licence or class of licences.⁶⁸
- g. Every licence shall be subject to the condition that the licensee will not contravene any provision of regulations 22 to 28, 31 to 33, 38, 40, 42, and 47, and will comply with every such provision so far as it is applicable.⁶⁹

⁶² MODA, sched 6, cl 1.

⁶³ Misuse of Drugs Regulations 1977, Pt 2, s 3(1).

⁶⁴ Above at s 3(2).

⁶⁵ Above at s 3(3).

⁶⁶ Above at 3(4).

⁶⁷ Above at 3(5).

⁶⁸ Above at 3(6).

⁶⁹ Above at 3(7).

The Psychoactive Substances Act 2013

The Psychoactive Substances Act 2013 (PSA 2013) came into force on 18 July 2013. It regulates the availability of psychoactive substances in New Zealand.

A psychoactive substance in the PSA 2013 is defined as:⁷⁰

- a. a substance, mixture, preparation, article, device, or thing that is capable of inducing a psychoactive effect (by any means) in an individual who uses the psychoactive substance.
- b. And includes:⁷¹
 - (i) an approved product: and
 - (ii) a substance, mixture, preparation, article, device, or thing that is, or that is of a kind that is, or belongs to a class that is, declared by the Governor-General by Order in Council made under section 99 to be a psychoactive substance for the purposes of this Act.

This definition does not include a controlled drug specified or described in Schedule 1, 2, or 3 of MODA and therefore does not include Psilocybe mushrooms.

Currently, Psilocybe mushrooms are unable to be an approved product under the PSA 2013.

Further regulations

For products that do fall under the PSA the Act sets up a system of pre-market approval by requiring the applicant to demonstrate that they pose no more than a low risk of harm to the individuals who use them, and by placing restrictions on how and to who they can be sold.⁷²

The Act establishes the Psychoactive Substances Regulatory Authority (the Authority) within the Ministry of Health.⁷³ The Authority is responsible for ensuring products meet adequate safety requirements before they can be distributed in New Zealand, and also licenses importers, researchers, manufacturers, wholesalers, retailers and sellers of unapproved psychoactive substances.

Psychoactive substances are also regulated in accordance with the following:

- a. The Psychoactive Substances Regulations, including:
 - i. The Psychoactive Substances Regulations 2014 (the Regulations) – defines the full regulatory requirements for psychoactive substances;
 - ii. The Psychoactive Substances (Fees and Levies) Regulations 2014 (the Fees Regulations) - specifies the fees and levies associated with each type of licence under the Act;

70 Psychoactive Substances Act 2013, s 9.

71 PSA 2013, s9(2).

72 PSA 2013, ss 33-42.

73 PSA 2013, s10.

- iii. The Psychoactive Substances (Infringement Fees and Form of Notices) Regulations 2014 (the Infringement Regulations) - outlines the penalties for infringements under the Act;
- b. The Psychoactive Substances Licensing Scheme Guideline; and
- c. The Psychoactive Substances Product Approval Guideline.

There are also licencing and annual fees which are important to be aware of.⁷⁴

We note that because New Zealand currently takes a conservative approach to psychoactives, no psychoactive products are currently approved for use in New Zealand.⁷⁵

Therapeutic Products Act 2023

The most recent legislation change relevant is the Therapeutic Products Act 2023 (The Act), which replaces the Medicines Act 1981 and the Dietary Supplements Regulations 1985 in relation to therapeutic products.

The definition of a therapeutic product covers products that are intended for “use in, on, or in relation to humans for a therapeutic purpose, products that are intended for use as an active ingredient of a medicine, and any products that are specified in regulations”.⁷⁶

Therapeutic products are divided into four types: medicines, medical devices, active pharmaceutical ingredients (APIs) and natural health products (NHPs).

Section 30 of the Act, defines an NHP ingredient specifically as:

- a. a plant, plant material, an alga, a fungus, or non-human animal material:
- b. a substance or mixture of substances that:
 - (i) is obtained by expression, extraction, distillation, purification, or a traditional preparation of anything referred to in paragraph (a); and
 - (ii) is not subject to any other process involving chemical transformation other than hydrolysis, electrolysis, or a process specified in the rules.

The Act does not have a list of prohibited or restricted herbal ingredients in it. A list of recognised NHP ingredients is set to be developed as secondary legislation.⁷⁷

We do not know at this stage whether Psilocybe mushrooms and Wairuakohu/ Randula Marginata will be recognised (or prohibited) under secondary legislation, however it is likely they will be prohibited due to their inclusion in the MODA.

74 PSA 2013, s 99.

75 Manatū Hauora “Psychoactive Substances Regulation” (30 October 2019) <<https://www.health.govt.nz/our-work/regulation-health-and-disability-system/psychoactive-substances-regulation>>.

76 Therapeutic Products Act 2023, s 16.

77 Manatū Hauora “Therapeutic Products Regulatory Regime” (7 December 2023) <https://www.health.govt.nz/our-work/regulation-health-and-disability-system/therapeutic-products-regulatory-regime>.

Providing therapeutic products – market authorisation

Under the Act, therapeutic products (other than APIs) are regulated by means of market authorisations, issued by the Therapeutic Products Regulator.⁷⁸ The process for making an application to the Regulator is set out at Part 10, Subpart 2 of the Act.

A medicine or NHP cannot be imported, supplied, or exported unless it has a market authorisation, or a specific licence or permit.⁷⁹ If a product receives market authorisation, the person issued with the authorisation is responsible for ensuring the product conforms and meets the applicable product standards.

There are exceptions to the above, such as low-concentration NHPs which may be allowed to be imported, supplied, or exported without express market authorisation.⁸⁰

Controlled activities

The Act regulates who can carry out controlled activities. Relevant controlled activities include manufacturing; wholesale and non-wholesale supply; exporting; and conducting clinical trials.⁸¹

Those who are permitted to carry out those activities include pharmacists, health practitioners, veterinarians, product sponsors, people who manufacture custom-made devices and NHP practitioners.⁸²

Every person in the supply chain for therapeutic products must comply with an extensive set of rules which include:⁸³

- a. when, where, how, and by whom the activity is carried on;
- b. the equipment and materials used;
- c. suitable quality control and assurance processes; and
- d. having procedures in place to deal with expired or recalled items.

Repeal of Therapeutic Products Act

On 24 November 2023, a new coalition Government was formed following the general election. The Government has committed to repealing the Therapeutic Products Act 2023.

⁷⁸ Therapeutic Products Act 2023, s 9.

⁷⁹ Above s 9(2).

⁸⁰ Above s 9(6).

⁸¹ Above at s 10.

⁸² Above at s 11(1).

⁸³ Above at s 11(4).

Appendix B:

Examples of Maori Entities

Te Ohu Kaimoana

Te Ohu Kaimoana (TOKM) is constituted under the Māori Fisheries Act 2004 (the Act).^{84[1]} TOKM provide advice on a variety of fisheries management issues to iwi groups. They represent iwi on fisheries related issues, and are often the liaison between iwi and key stakeholders/sectors.

84[1] Māori Fisheries Act 2004, s 31.

Its functions are set out at s 35 of the Act and include to:

- a. foster, promote, commission, or fund research into the sustainable management of fisheries;
- b. act to protect and enhance the interests of iwi and Māori in fisheries related activities;
- c. approve other activities so long as the nature of the business activities don't deter too much from fisheries, fishing, or fisheries-related activities;
- d. require mandated iwi organisations to demonstrate their progress in meeting the criteria and requirements set out in the Act before granting assistance;
- e. acquire or dispose of income shares, settlement quota, and quota other than settlement quota;
- f. sell annual catch entitlement generated by settlement quota or by quota other than settlement quota;
- g. perform the functions of the voting shareholder of Aotearoa Fisheries Limited;
- h. apply funds, grant assistance and maintain reserve funds to the extent that it considers prudent; and
- i. perform any other functions permitted by the Act.

TOKM also provides advice on ways customary fishing can be efficiently and better managed. It keeps iwi informed of important legislative, regulatory and policy developments that affect the value of their investment and assets from the Māori Fisheries Settlement.

TOKM assists 58 mandated Iwi organisations (MIOs) to manage and protect their non-commercial and commercial fisheries rights, guaranteed in the Fisheries Deed of Settlement 1992 and the Maori Commercial Aquaculture Settlement.

Structure

Te Ohu Kaimoana is a Trust (Te Ohu Kai Moana Trust) governed by a corporate trustee – Te Ohu Kai Moana Trustee Limited. The term “Te Ohu Kaimoana” applies to both the Trust and the Corporate Trustee.

It is made up of a board of seven directors who are each appointed by Te Kawai Taumata (a committee of iwi representatives) for a four-year term and a maximum of two terms. Te Kawai Taumata is made up of 11 members, with 10 members appointed from 10 regional iwi clusters and 1 member appointed by a Representative Māori Organisation.

TOKM Group acts as the parent organisation, its subsidiaries are:

- a. Te Pūtea Whakatupu Trustee Limited – which promotes Māori education, training and research through a managed fund of \$20 million;
- b. Te Wai Māori Trustee Limited - which advances Māori interests in freshwater fisheries; and
- c. Aotearoa Fisheries Limited - the largest Māori-owned fisheries company in New Zealand which aims to maximise the value of Maori fisheries assets, including those of Ngāti Porou. Aotearoa Fisheries Limited owns 50% of Sealord Group Limited.

The TOKM directors are responsible for approving the strategic outlook of the organisation and ensuring any goals and objectives are implemented. They report back to iwi through quarterly and annual reports. The directors follow a Charter of Corporate Governance, Best Practice, and a Code of Ethics.

Te Aka Whai Ora – Māori Health Authority

Te Aka Whai Ora - Māori Health Authority was an independent statutory entity that was established on 1 July 2022 under the Pae Ora (Healthy Futures) Act 2022 (the **Pae Ora Act**).⁸⁵ The Pae Ora Act established Te Aka Whai Ora to drive improvement in hauora Māori.

The Pae Ora Act also established Iwi-Māori partnership boards to represent local Māori perspectives on the needs and aspirations of whānau Māori with respect to planning and decision-making for health services at the local level.⁸⁶

Te Aka Whai Ora worked in partnership with Te Manatū Hauora (Ministry of Health) and Te Whatu Ora - Health New Zealand. Te Aka Whai Ora were tasked with ensuring the health system worked well for Māori by:

- a. leading change in the way the entire health system understands and responds to Māori health needs;
- b. developing strategy and policy which will drive better health outcomes for Māori;
- c. commissioning kaupapa Māori services and other services targeting Māori communities;
- d. co-commissioning services alongside Health NZ;
- e. monitoring the overall performance of the system to reduce health inequities for Māori.

Structure

The board of the Māori Health Authority had to consist of between 5-8 members appointed by the Minister of Health.⁸⁷ The Minister had to appoint members that collectively had knowledge and experience in:⁸⁸

- a. te Tiriti o Waitangi (the Treaty of Waitangi), tikanga Māori, and mātauranga Māori; and
- b. kaupapa Māori services; and
- c. cultural safety and responsiveness of services; and
- d. the public funding and provision of services; and
- e. public sector governance and government processes; and
- f. financial management.

The Government disestablished the Authority on 28 February 2024 in line with the coalition Government's 100-day plan.⁸⁹

⁸⁵ Pae Ora (Healthy Futures) Act 2022, s 17.

⁸⁶ Above at s 29.

⁸⁷ Above at s 22(1).

⁸⁸ Above at s 22(2).

⁸⁹ <https://www.rnz.co.nz/news/political/510396/bill-to-disestablish-maori-health-authority-passes-third-reading>.



Taonga Tikanga Tiriti



Regulatory options for the
access and utilisation by
Māori of indigenous organisms
considered prohibited plants
and controlled drugs